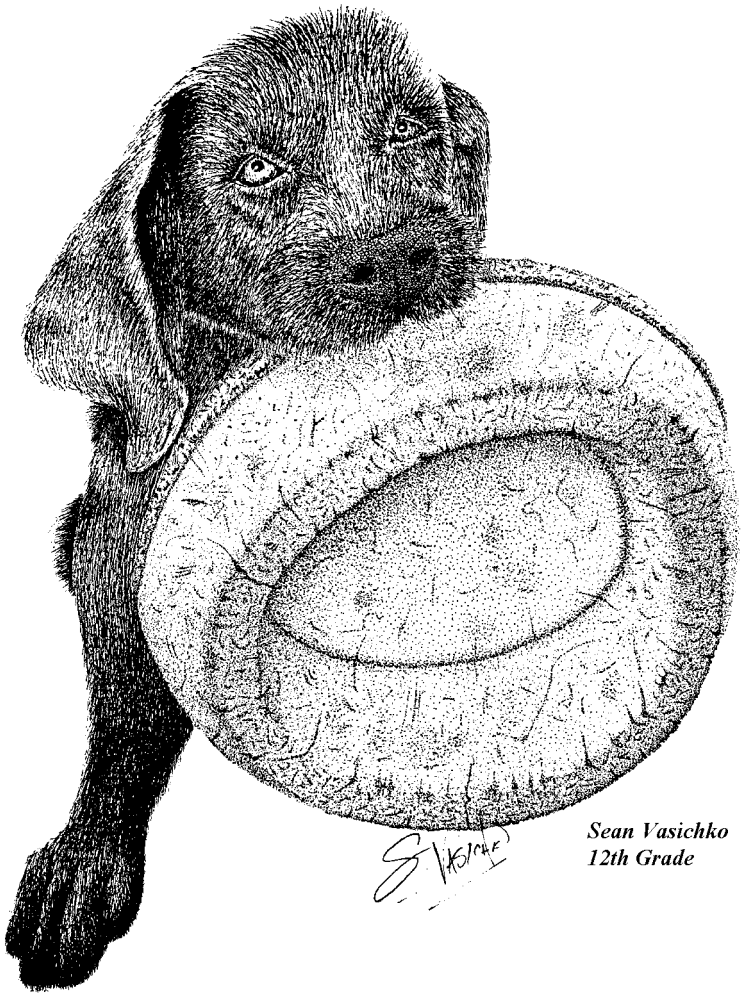
TEXAS REGISTER

Volume 28 Number 35 August 29, 2003 Pages 6999-7504



Sean Vasichko
12th 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
P.O. Box 13824
Austin, TX 78711-3824
(800) 226-7199
(512) 463-5561
FAX (512) 463-5569
http://www.sos.state.tx.us
subadmin@sos.state.tx.us

EMERGENCY RULES

TEXAS HEALTH AND HUMAN SERVICES COMMISSION

QUALITY ASSURANCE FEE FOR LONG-TERM CARE FACILITIES

1 TAC §§352.1 - 352.5 7009

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

GUIDELINES FOR MULTIFAMILY HOUSING REVENUE BOND

10 TAC §§33.1 - 33.13 7011

MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§33.1 - 33.10 7011

BOARD OF NURSE EXAMINERS

FEES

22 TAC §223.1 7019

TEXAS DEPARTMENT OF INSURANCE

LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES

28 TAC §3.3703 7019

HEALTH MAINTENANCE ORGANIZATIONS

28 TAC §11.901 7022

AGENTS' LICENSING

28 TAC §§19.1703, 19.1723, 19.1724 7024

TRADE PRACTICES

28 TAC §§21.2801 - 21.2809, 21.2811 - 21.2826 7030

28 TAC §§21.2804 - 21.2806, 21.2818 - 21.2820 7043

TEACHER RETIREMENT SYSTEM OF TEXAS

HEALTH CARE AND INSURANCE PROGRAMS

34 TAC §41.6 7043

34 TAC §41.53 7044

TEXAS COMMISSION FOR THE BLIND

BLIND CHILDREN'S VOCATIONAL DISCOVERY AND DEVELOPMENT PROGRAM

40 TAC §169.4 7046

40 TAC §169.33 7046

40 TAC §169.52 7046

PROPOSED RULES

OFFICE OF THE SECRETARY OF STATE

ELECTIONS

1 TAC §81.171 7049

TEXAS HEALTH AND HUMAN SERVICES COMMISSION

QUALITY ASSURANCE FEE FOR LONG-TERM CARE FACILITIES

1 TAC §§352.1 - 352.5 7050

FINANCE COMMISSION OF TEXAS

CONSUMER CREDIT REGULATION

7 TAC §1.505 7052

7 TAC §§1.703, 1.705, 1.708 7053

7 TAC §1.828, §1.830 7054

7 TAC §1.839 7055

7 TAC §§1.1301, 1.1306 - 1.1308 7055

7 TAC §§1.1301, 1.1306 - 1.1309 7056

7 TAC §1.1303 7065

STATE BANK REGULATION

7 TAC §§3.51 - 3.62 7066

TEXAS DEPARTMENT OF BANKING

CORPORATE ACTIVITIES

7 TAC §§15.1 - 15.5, 15.7, 15.8 7073

7 TAC §15.9 7075

7 TAC §15.24 7076

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

ADMINISTRATION

10 TAC §§1.31 - 1.33, 1.35, 1.36 7076

GUIDELINES FOR MULTIFAMILY HOUSING REVENUE BOND

10 TAC §§33.1 - 33.13 7088

MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§33.1 - 33.10 7089

TAXABLE MULTIFAMILY MORTGAGE REVENUE BOND PROGRAM

10 TAC §§35.1 - 35.15 7096

TAX-EXEMPT MULTIFAMILY MORTGAGE REVENUE BOND PROGRAM

10 TAC §§39.1 - 39.17 7097

2001 LOW INCOME HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§50.1 - 50.16 7097

2004 HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§50.1 - 50.24....7098
HOME INVESTMENT PARTNERSHIPS PROGRAM
10 TAC §§53.50 - 53.56, 53.58, 53.60 - 53.63....7138
10 TAC §53.59....7148
OFFICE OF RURAL COMMUNITY AFFAIRS
TEXAS COMMUNITY DEVELOPMENT PROGRAM
10 TAC §255.7....7149
TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS
APPLICATIONS AND EXAMINATIONS
22 TAC §463.13....7151
22 TAC §463.25....7152
RENEWALS
22 TAC §471.2....7152
22 TAC §471.2....7153
FEES
22 TAC §473.1....7153
22 TAC §473.3....7154
TEXAS REAL ESTATE COMMISSION
GENERAL PROVISIONS
22 TAC §535.1....7154
22 TAC §§535.12, 535.13, 535.16, 535.17, 535.21....7155
22 TAC §535.31....7156
22 TAC §535.41, §535.42....7156
22 TAC §535.51, §535.53....7157
22 TAC §§535.61 - 535.66....7158
22 TAC §§535.71 - 535.73....7160
22 TAC §535.91....7162
22 TAC §535.101....7163
22 TAC §535.113....7163
RULES RELATING TO THE PROVISIONS OF TEXAS OCCUPATIONS CODE, CHAPTER 53
22 TAC §541.1....7164
TEACHER RETIREMENT SYSTEM OF TEXAS
HEALTH CARE AND INSURANCE PROGRAMS
34 TAC §41.6....7165
34 TAC §41.53....7165
TEXAS DEPARTMENT OF HUMAN SERVICES
SPECIAL NUTRITION PROGRAMS
40 TAC §§12.1 - 12.26....7168
40 TAC §§12.101 - 12.123....7168
40 TAC §§12.201 - 12.214....7168
40 TAC §§12.301 - 12.315....7169
40 TAC §§12.401 - 12.415....7169
40 TAC §§12.1 - 12.4....7170
40 TAC §§12.11 - 12.37....7170
40 TAC §§12.61 - 12.68....7173
40 TAC §12.81 - 12.92....7173
40 TAC §§12.111 - 12.122....7174
40 TAC §§12.141 - 12.154....7175
40 TAC §§12.161 - 12.165....7176
40 TAC §§12.171 - 12.183....7176
40 TAC §§12.191 - 12.198....7178
40 TAC §§12.211 - 12.233....7179
40 TAC §§12.261 - 12.269....7180
40 TAC §§12.281 - 12.290....7181
40 TAC §§12.311 - 12.317....7182
40 TAC §§12.331 - 12.363....7182
40 TAC §§12.381 - 12.383....7184
40 TAC §§12.391 - 12.406....7184
40 TAC §§12.421 - 12.425....7185
40 TAC §12.441 - 12.472....7186
40 TAC §§12.491 - 12.497....7189
40 TAC §§12.511 - 12.520....7189
40 TAC §§12.601 - 12.603....7190
40 TAC §§12.611 - 12.618....7190
40 TAC §§12.641 - 12.643....7191
40 TAC §§12.651 - 12.662....7191
40 TAC §§12.681 - 12.684....7192
40 TAC §§12.691 - 12.693....7193
40 TAC §§12.701 - 12.703....7193
40 TAC §12.711, §12.712....7193
40 TAC §§12.721 - 12.735....7193
40 TAC §§12.751 - 12.753....7194
40 TAC §§12.761 - 12.764....7194
40 TAC §§12.771 - 12.784....7195
40 TAC §12.801....7196
40 TAC §§12.811 - 12.814....7196
40 TAC §§12.871 - 12.873....7196
40 TAC §12.881, §12.882....7197
40 TAC §§12.901 - 12.903....7197

40 TAC §§12.921 - 12.929.....7198
40 TAC §12.941, §12.942.....7198
40 TAC §§12.951 - 12.955.....7198
40 TAC §§12.971 - 12.985.....7199
40 TAC §12.991.....7200
40 TAC §12.1001, §12.1002.....7200
40 TAC §§12.1051 - 12.1053.....7201
40 TAC §12.1071, §12.1072.....7201
40 TAC §§12.1091 - 12.1094.....7201
40 TAC §§12.1101 - 12.1110.....7202
40 TAC §12.1121, §12.1122.....7202
40 TAC §§12.1131 - 12.1135.....7203
40 TAC §§12.1151 - 12.1165.....7203
40 TAC §12.1191.....7204
40 TAC §12.1201, §12.1202.....7204
40 TAC §§12.1251 - 12.1253.....7205
40 TAC §12.1261 - 12.1264.....7205
40 TAC §§12.1281 - 12.1284.....7206
40 TAC §§12.1301 - 12.1312.....7206
40 TAC §12.1331, §12.1332.....7207
40 TAC §§12.1341 - 12.1345.....7207
40 TAC §§12.1361 - 12.1375.....7208
40 TAC §12.1401.....7209
40 TAC §12.1411, §12.1412.....7209

TEXAS COMMISSION ON ALCOHOL AND DRUG ABUSE

GENERAL PROVISIONS

40 TAC §§141.11, 141.21, 141.31, 141.51 - 141.55, 141.61, 141.62, 141.71.....7210

GENERAL PROVISIONS

40 TAC §141.101.....7211
40 TAC §§141.201 - 141.205.....7217
40 TAC §141.301, §141.302.....7219
40 TAC §141.401.....7219
40 TAC §§141.501 - 141.503.....7220

INVESTIGATIONS AND HEARINGS

40 TAC §§142.11, 142.21, 142.31, 142.32.....7221

FUNDING

40 TAC §§143.1 - 143.3, 143.11 - 143.15, 143.17, 143.21, 143.22 7221

CONTRACT REQUIREMENTS

40 TAC §§144.1, 144.11, 144.21.....7223
40 TAC §§144.101, 144.103 - 144.109, 144.121, 144.123, 144.124, 144.131 - 144.134, 144.141, 144.142, 144.145.....7223
40 TAC §§144.201, 144.204, 144.211 - 144.216.....7223
40 TAC §§144.311, 144.313, 144.321 - 144.327.....7224
40 TAC §§144.401, 144.411 - 144.418, 144.441 - 144.447, 144.451 - 144.456, 144.458, 144.460, 144.462.....7224
40 TAC §§144.501, 144.511, 144.521 - 144.523, 144.525, 144.526, 144.532, 144.541 - 144.543, 144.545, 144.551 - 144.553.....7225

FAITH BASED CHEMICAL DEPENDENCY PROGRAMS

40 TAC §§145.11, 145.21 - 145.25.....7225

INTERAGENCY AGREEMENTS

40 TAC §146.21.....7226

CONTRACT PROGRAM REQUIREMENTS

40 TAC §§147.101 - 147.117.....7227
40 TAC §§147.201 - 147.204.....7231
40 TAC §§147.301 - 147.304.....7232
40 TAC §147.401, §147.402.....7233
40 TAC §147.501, §147.502.....7234
40 TAC §§147.601 - 147.604.....7234
40 TAC §147.701.....7236

FACILITY LICENSURE

40 TAC §148.1.....7237
40 TAC §§148.11, 148.21 - 148.28, 148.31.....7237
40 TAC §§148.101 - 148.103, 148.105, 148.106, 148.111 - 148.113, 148.115.....7237
40 TAC §§148.201 - 148.203, 148.205.....7238
40 TAC §§148.301 - 148.303, 148.311 - 148.313, 148.315, 148.316.....7238
40 TAC §§148.401, 148.403, 148.405, 148.406, 148.411 - 148.413, 148.421 - 148.424, 148.426.....7239
40 TAC §§148.501 - 148.504.....7239
40 TAC §§148.601 - 148.607.....7239

STANDARD OF CARE

40 TAC §§148.101 - 148.103.....7240
40 TAC §§148.201 - 148.218.....7241
40 TAC §148.301.....7243
40 TAC §§148.401 - 148.409.....7243
40 TAC §§148.501 - 148.510.....7246
40 TAC §§148.601 - 148.603.....7248
40 TAC §§148.701 - 148.708.....7250
40 TAC §§148.801 - 148.805.....7253
40 TAC §§148.901 - 148.911.....7255

40 TAC §§148.1001 - 148.1004....7260
40 TAC §§148.1101 - 148.1104....7261
40 TAC §§148.1201 - 148.1207....7262
40 TAC §148.1301....7263
40 TAC §148.1401....7264
40 TAC §§148.1501 - 148.1506....7264

COUNSELOR LICENSURE

40 TAC §§150.1, 150.11 - 150.14, 150.21 - 150.28, 150.31 - 150.34, 150.41 - 150.43, 150.51 - 150.56, 150.62....7266
40 TAC §§150.101 - 150.126....7266

OFFENDER EDUCATION PROGRAMS

40 TAC §§153.1 - 153.8....7278
40 TAC §§153.32 - 153.36, 153.41 - 153.44, 153.51 - 153.55....7278

TEXAS COMMISSION FOR THE BLIND

BLIND CHILDREN'S VOCATIONAL DISCOVERY AND DEVELOPMENT PROGRAM

40 TAC §169.4....7279
40 TAC §169.33....7280
40 TAC §169.52....7280

TEXAS COMMISSION FOR THE DEAF AND HARD OF HEARING

GENERAL RULES OF PRACTICE AND PROCEDURE

40 TAC §181.29....7280
40 TAC §181.830....7281

WITHDRAWN RULES

TEXAS HEALTH AND HUMAN SERVICES COMMISSION

MEDICAID REIMBURSEMENT RATES

1 TAC §355.773, §355.775....7283
1 TAC §355.8321....7283

FINANCE COMMISSION OF TEXAS

STATE BANK REGULATION

7 TAC §§3.51 - 3.61....7283

TEXAS YOUTH COMMISSION

YOUTH DISCIPLINE

37 TAC §95.3....7283

TEXAS DEPARTMENT OF HUMAN SERVICES

COMMUNITY CARE FOR AGED AND DISABLED

40 TAC §48.2925....7284

ADOPTED RULES

TEXAS HEALTH AND HUMAN SERVICES COMMISSION

MEDICAID HEALTH SERVICES

1 TAC §§354.1015, 354.1021, 354.1023....7285
1 TAC §354.1051, §354.1052....7286
1 TAC §354.1101, §354.1102....7287
1 TAC §§354.1231, 354.1233, 354.1235....7288
1 TAC §354.1281, §354.1282....7289
1 TAC §354.1381, §354.1382....7296

MEDICAID REIMBURSEMENT RATES

1 TAC §355.112....7301
1 TAC §355.201....7302
1 TAC §355.307, §355.308....7306
1 TAC §355.8063....7319
1 TAC §355.8065....7326
1 TAC §355.8067....7333
1 TAC §355.8081, §355.8085....7335
1 TAC §355.8600....7336
1 TAC §355.8610....7336

STATE CHILDREN'S HEALTH INSURANCE PROGRAM

1 TAC §370.4, §370.10....7339
1 TAC §§370.20 - 370.25....7340
1 TAC §370.30, §370.31....7340
1 TAC §370.40....7341
1 TAC §§370.43, 370.44, 370.46, 370.48, 370.49....7341
1 TAC §§370.51 - 370.54....7342
1 TAC §§370.301, 370.303, 370.305, 370.307, 370.309....7342
1 TAC §§370.321, 370.323, 370.325....7343

TEXAS DEPARTMENT OF AGRICULTURE

SEED ARBITRATION

4 TAC §6.4....7343

PESTICIDES

4 TAC §7.10....7345
4 TAC §7.20, §7.22....7345

SEED QUALITY

4 TAC §9.2, §9.3....7346
4 TAC §9.4, §9.5....7346

SEED CERTIFICATION STANDARDS

4 TAC §§10.2, 10.5, 10.10, 10.11....7347
4 TAC §10.13....7347

4 TAC §10.21, §10.22 7347

FINANCE COMMISSION OF TEXAS

STATE BANK REGULATION

7 TAC §3.36, §3.37 7348

TEXAS DEPARTMENT OF BANKING

TRUST COMPANY REGULATION

7 TAC §17.22 7348

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

MANUFACTURED HOUSING

10 TAC §80.54 7349

10 TAC §80.129 7352

10 TAC §80.133 7353

10 TAC §80.134 7355

10 TAC §80.137 7359

TEXAS DEPARTMENT OF ECONOMIC DEVELOPMENT

MEMORANDA OF UNDERSTANDING

10 TAC §§195.1, 195.2, 195.9 7360

10 TAC §§195.1 - 195.4, 195.8 - 195.11 7361

TEXAS DEPARTMENT OF LICENSING AND REGULATION

TEXAS COMMISSION OF LICENSING AND REGULATION

16 TAC §60.83 7361

CAREER COUNSELING SERVICES

16 TAC §62.80 7362

PERSONNEL EMPLOYMENT SERVICES

16 TAC §63.81 7362

TEMPORARY COMMON WORKER EMPLOYERS

16 TAC §64.80 7362

BOILER DIVISION

16 TAC §65.80 7363

REGISTRATION OF PROPERTY TAX CONSULTANTS

16 TAC §66.20, §66.80 7363

16 TAC §66.81, §66.84 7364

AUCTIONEERS

16 TAC §67.81 7364

ARCHITECTURAL BARRIERS

16 TAC §68.80 7364

WARRANTORS OF VEHICLE PROTECTION PRODUCTS

16 TAC §71.80 7365

STAFF LEASING SERVICES

16 TAC §72.81 7365

AIR CONDITIONING AND REFRIGERATION CONTRACTOR LICENSE LAW

16 TAC §75.80 7366

WATER WELL DRILLERS AND WATER WELL PUMP INSTALLERS

16 TAC §76.204 7366

SERVICE CONTRACT PROVIDERS

16 TAC §77.80 7366

TALENT AGENCIES

16 TAC §78.80 7367

WEATHER MODIFICATION

16 TAC §79.15 7367

LICENSED COURT INTERPRETERS

16 TAC §80.25, §80.80 7367

TEXAS RACING COMMISSION

GENERAL PROVISIONS

16 TAC §303.16 7368

16 TAC §303.93 7368

OFFICIALS AND RULES FOR GREYHOUND RACING

16 TAC §315.31 7369

TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

APPLICATIONS AND EXAMINATIONS

22 TAC §463.11 7369

22 TAC §463.20 7369

COMPLAINTS AND ENFORCEMENT

22 TAC §469.1 7370

22 TAC §469.3 7370

22 TAC §469.4 7370

22 TAC §469.5 7371

22 TAC §469.6 7371

22 TAC §469.7 7371

22 TAC §469.8 7372

22 TAC §469.13 7372

22 TAC §469.14 7372

22 TAC §469.15 7372

TEXAS DEPARTMENT OF HEALTH

END STAGE RENAL DISEASE FACILITIES

25 TAC §§117.1 - 117.3 7377

25 TAC §§117.11 - 117.18 7380

25 TAC §§117.31 - 117.34 7380

25 TAC §§117.41 - 117.46 7388

25 TAC §§117.61 - 117.65 7393

25 TAC §§117.81 - 117.86 7396

TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

STATE AUTHORITY RESPONSIBILITIES

25 TAC §§411.651 - 411.656 7398

25 TAC §§411.657 - 411.659 7399

25 TAC §411.660 7400

25 TAC §411.661, §411.662 7400

TEXAS CANCER COUNCIL

TEXANS CONQUER CANCER PROGRAM

25 TAC §704.7 7400

OFFICE OF THE FIRE FIGHTERS' PENSION COMMISSIONER

RULES OF THE TEXAS STATEWIDE EMERGENCY SERVICES RETIREMENT FUND

34 TAC §301.5, §301.6 7401

TEXAS COMMISSION ON FIRE PROTECTION

FIRE SUPPRESSION

37 TAC §423.3 7401

37 TAC §423.203 7402

FIRE INVESTIGATION

37 TAC §431.3 7402

37 TAC §431.203 7402

MINIMUM STANDARDS FOR DRIVER/OPERATOR-PUMPER

37 TAC §433.3 7403

EXAMINATIONS FOR CERTIFICATION

37 TAC §439.1, §439.5 7403

FIRE OFFICER

37 TAC §451.3 7403

37 TAC §451.203 7404

MINIMUM STANDARDS FOR HAZARDOUS MATERIALS TECHNICIAN

37 TAC §453.3 7404

TEXAS DEPARTMENT OF HUMAN SERVICES

MEDICALLY NEEDY AND CHILDREN AND PREGNANT WOMEN PROGRAMS

40 TAC §2.1 7405

40 TAC §§2.11 - 2.18 7406

40 TAC §§2.32 - 2.38 7406

MEDICALLY NEEDY PROGRAM

40 TAC §§2.1002, 2.1004, 2.1006, 2.1008, 2.1010, 2.1012, 2.1014, 2.1016 7407

MEDICALLY NEEDY AND CHILDREN AND PREGNANT WOMEN PROGRAMS

40 TAC §2.19 7407

40 TAC §2.31, §2.39 7408

TEXAS WORKS

40 TAC §3.301 7409

40 TAC §3.1104, §3.1105 7412

40 TAC §3.1801 7412

40 TAC §3.7609 7412

TEXAS WORKS

40 TAC §§3.2201 - 3.2207 7412

TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF)-LEVEL MEDICAL ASSISTANCE

40 TAC §§4.1 - 4.11 7413

MEDICAID PROGRAMS--CHILDREN AND PREGNANT WOMEN

40 TAC §§4.1002, 4.1004, 4.1006, 4.1008, 4.1010, 40.1012, 4.1014, 4.1016 7414

PRIMARY HOME CARE

40 TAC §47.1901, §47.1903 7415

40 TAC §§47.2901 - 47.2904, 47.2909, 47.2911 - 47.2914 7416

40 TAC §47.2909 7417

40 TAC §47.3906, §47.3908 7417

40 TAC §47.4902 7417

40 TAC §47.5902 7417

TEXAS COMMISSION FOR THE BLIND

BUSINESS ENTERPRISES OF TEXAS

40 TAC §§167.2 - 167.4, 167.6 - 167.15, 167.17 7419

RULE REVIEW

Proposed Rule Reviews

Texas Department of Banking 7423

Texas Department of Health 7423

Adopted Rule Reviews

Texas Department of Banking....7424

Texas Commission for the Blind....7424

Texas State Board of Examiners of Psychologists....7424

Railroad Commission of Texas....7424

TABLES AND GRAPHICS

....7427

IN ADDITION

Comptroller of Public Accounts

Notice of Request for Proposals....7473

Office of Consumer Credit Commissioner

Notice of Rate Ceilings....7473

Court Reporters Certification Board

Certification of Court Reporters....7473

Credit Union Department

Application for a Merger or Consolidation....7474

Applications to Expand Field of Membership....7474

Notice of Final Action Taken....7475

Texas Department of Criminal Justice

Award Notification....7475

Texas Education Agency

Notice of Cancellation of Request for Applications Concerning Adult Education Regional Training Coordination Centers....7475

Texas Commission on Environmental Quality

Enforcement Orders....7476

Notice of Application for Industrial Hazardous Waste Permits/Compliance Plans....7479

Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions....7479

Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions....7480

Notice of Water Quality Applications....7481

Notice of Water Quality Applications....7482

Notice of Water Quality Applications....7483

Office of the Governor

Request for Grant Applications (RFA) for Residential Substance Abuse Treatment (RSAT) Program....7484

Texas Department of Health

Extension of the Public Comment Period for a Radiation Rule Concerning Hearing and Enforcement Procedures....7485

Licensing Actions for Radioactive Materials....7485

Licensing Actions for Radioactive Materials....7488

Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation to Hereford Regional Medical Center 7492

Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation to Michael Margolies, D.C. 7492

Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation to Urology Specialists and Associates, P.A. 7492

Notice of Request for Proposals Number H25 0058.1 for Increasing Participation of Minorities with Human Immunodeficiency Virus (HIV) in the Texas HIV Medication Program in Harris County ...7492

Texas Health and Human Services Commission

Notice Under Section 2.151, H.B. 2292, 78th Legislature, Regular Session, Regarding Certain Advisory Committees....7493

Public Notice....7495

Texas Department of Insurance

Company Licensing....7495

Notice of Reconvening of 2002 Texas Title Insurance Biennial Hearing....7495

Third Party Administrator Applications....7496

Texas Commission on Jail Standards

Request for Proposals....7496

North Central Texas Council of Governments

Notice of Consultant Contract Award....7496

Public Utility Commission of Texas

Amendment to Published Notice Regarding Low-Income Residential Customer Rate Reduction Programs....7496

Notice of Application for Relinquishment of a Service Provider Certificate of Operating Authority....7497

Notice of Application for Service Provider Certificate of Operating Authority....7497

Public Notice of Interconnection Agreement....7497

Public Notice of Interconnection Agreement....7498

Public Notice of Interconnection Agreement....7498

Public Notice of Interconnection Agreement....7499

Public Notice of Interconnection Agreement....7499

Public Notice of Interconnection Agreement....7500

Public Notice of Interconnection Agreement....7500

Public Notice of Interconnection Agreement....7501

Public Notice of Interconnection Agreement....7501

Public Notice of Interconnection Agreement....7502

Public Notice of Interconnection Agreement....7502

Public Notice of Workshop on Development of the Filing Package for Fees and Rates of Independent Organizations....7503

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.
http://www.sos.state.tx.us/texreg

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

•••

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.

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 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 352. QUALITY ASSURANCE FEE FOR LONG-TERM CARE FACILITIES

1 TAC §§352.1 - 352.5

The Health and Human Services Commission (HHSC) adopts on an emergency basis amendments to §352.1, concerning the purpose and duration of chapter 352, §352.2, concerning definitions, §352.3, concerning quality assurance fee, §352.4, concerning required reports, and §352.5, concerning payment and collection of the quality assurance fee. In accordance with SB 1862, 78th Legislature, Regular Session, the amendments implement a statutorily required change that: makes the quality assurance fee applicable to facilities owned by the Texas Department of Mental Health and Mental Retardation (MHMR) beginning with the state fiscal year ending on August 31, 2003; requires payment by MHMR of fees for those facilities by that date; expands the possible uses of the funds; changes the definition of patient days; and, changes the time for facilities to file required reports from the 10th to the 20th day after the last day of a month. The amendments also increase the quality assurance fee from 5.5 to 6 percent beginning September 1, 2003, in accordance with projected revenues and related federal matching funds specified in the General Appropriations Act for the 2004-2005 biennium.

HHSC finds that in order to comply with state law (SB 1862, 78th Legislature, Regular Session, and also see HB 7, 78th Legislature, Regular Session), the amendments making the quality assurance fee applicable to MHMR facilities in the current state fiscal year, requiring MHMR to make payment by August 31, 2003, and changing the definition of patient days and the time for facilities to file required reports must be adopted on an emergency basis. HHSC also finds that failing to change the quality assurance fee from 5.5 to 6 percent on September 1, 2003, will result in an imminent peril to the public health, safety and welfare by jeopardizing the availability of care and services for persons with mental retardation funded by these revenues, and therefore, that the fee increase must be adopted on an emergency basis.

The amendments are simultaneously being proposed for permanent adoption in accordance with §2001.034 (c). The proposed amendments are published elsewhere in this issue of the *Texas Register*.

The emergency amendments are adopted pursuant to HHSC's authority under §531.033, Government Code and under §252.205 Health and Safety Code, and in accordance with §2001.034, Government Code.

The amendments affect Health & Safety Code §252.202 and House Bill 7, 78th Leg. §11.

§352.1. Purpose and Duration of Chapter.

(a) This chapter implements the determination, assessment, collection, and enforcement of the quality assurance fee authorized under chapter 252, Health and Safety Code, subchapter H.

(b) The purpose of the quality assurance fee established under this chapter is to improve the quality of care provided to persons with mental retardation as follows:

(1) The quality assurance fee is intended to support and/or maintain an increase in reimbursement to licensed intermediate care facilities for the mentally retarded and facilities operated according to the requirements of chapter 252, Health and Safety Code and owned and/or operated by a community mental health and mental retardation center as described in chapter 534, subchapter A, Health and Safety Code, and a facility owned by the Texas Department of Mental Health and Mental Retardation that participate in Medicaid program, subject to legislative appropriation for this purpose; and

~~[(2) If funds generated from the collection of quality assurance fees under this chapter are available following fulfillment of the purpose described in subsection (b)(1) of this section, such funds may be allocated to the Home and Community Based waiver program and the Mental Retardation Local Authority waiver program established pursuant to 42 U.S.C. §1396n(c).]~~

(2) [~~(3)~~] The Commission or its designee may also offset allowable expenses to administer the quality assurance fee program against revenues generated by the collection of the quality assurance fee.

(c) This chapter will expire on September 1, 2005, unless chapter 252, subchapter H, Health and Safety Code, is extended by the 79th Texas Legislature.

§352.2. Definitions.

As used in this chapter, the following terms shall have the meanings prescribed below, unless the context clearly indicates otherwise:

(1) "Facility" means:

(A) An intermediate care facility for the mentally retarded or the corporate parent of an intermediate care facility for the mentally retarded licensed under chapter 252, Health and Safety Code; or

(B) A facility operated according to the requirements of chapter 252, Health and Safety Code, and owned and/or operated by a community mental health and mental retardation center as described in chapter 534, subchapter A, Health and Safety Code; or [~~.~~]

(C) A facility owned by the Texas Department of Mental Health and Mental Retardation.

(2) "Gross receipts" means money paid to a facility as compensation for services provided to patients, including client participation, but does not include charitable contributions to a facility.

(3) "Total patient days" means the sum, computed on a monthly basis, of the following:

(A) The total number of patients occupying a facility bed immediately before midnight on each day of the month; and

[(B) The total number of facility beds that are on hold on each day of the month and that have been placed on hold for a period not to exceed three consecutive calendar days during which a patient is in a hospital during the month; and]

(B) [(C)] The total number of beds that are on hold on each day of the month and that have been placed on hold for a period not to exceed three consecutive calendar days during which a patient is on therapeutic [home] leave during the month.

(C) [(D)] The total number of days a patient is discharged from a facility are not counted in the calculation of the total patient days under this chapter.

§352.3. Quality Assurance Fee Determination Methodology.

(a) Quality [Interim quality] assurance fee on State facilities. As provided in section 1(b) [9.02] of the Act of June 20, 2003, 78th Leg. [May 28, 2001, 77th Leg.] R.S., (Senate Bill 1862 [1839]), not later than August 31, 2003, the Texas Department of Mental Health and Mental Retardation shall pay for each facility owned by the department the quality assurance fee for patient days occurring between September 1, 2002, and July 31, 2003. [the quality assurance fee for the month September 2001, and for each month thereafter until implementation of a final quality assurance fee under subsection (b) of this section is the total number of patient days reported by a facility under §352.4 of this chapter multiplied by $5.25.]

(b) Quality assurance fee. Beginning September 1, 2003, [November 1, 2001] the quality assurance fee for a facility is in the amount of six [5.5] percent of each reimbursement or payment rate received, including those received from the resident, for each resident in the facility during a calendar month, provided the amount of all such quality assurance fees assessed for the facility during the 12-month period following assessment of the quality assurance fee do not exceed six percent of the facility's total annual gross receipts in Texas.

(c) Not later than July 31, 2002, and every six months thereafter, the commission or its designee will review each individual facility's quality assurance fee calculation. A facility's liability for the quality assurance fee may be adjusted following this review to ensure that the quality assurance fee does not exceed six percent of annual revenue.

§352.4. Required reports.

(a) The following reports must be filed by a facility in accordance with the instructions of the Commission or its designee:

(1) The monthly patient day report required under subsection (c) of this section; and

(2) The semi-annual report of gross receipts required under subsection (d) of this section.

(b) Amended reports.

(1) A facility may amend a report required under subsections (c) or (d) of this section;

(2) An amended monthly patient day report must be filed no later than 10 calendar days following the filing of the report required under subsection (c) of this section.

(3) An amended report of gross receipts must be filed no later than 10 calendar days following the filing of the report required under subsection (d) of this section.

(c) Monthly patient day report.

(1) A facility must report, not later than the 20th [10th] calendar day after the last day of a month, the total number of patient days for the facility during the preceding month.

(2) A facility must file the report required by this subsection on forms or in the format and according to the instructions prescribed by the commission or its designee.

[(3) The first report required under this subsection is not due until the 10th day after the end of the month this chapter takes effect. This report will cover the months September 1, 2001 through the end of the month this chapter takes effect.]

(d) Reporting of gross receipts.

(1) A facility must report, not later than the 10th calendar day following the last day of the sixth month following the effective date of this chapter, the total gross receipts the facility received during the preceding 6-month period.

(2) A facility must file the report required by this subsection on forms or in the format and according to the instructions prescribed by the commission or its designee.

§352.5. Payment and Collection of Quality Assurance Fee.

A facility must:

(1) Pay the amount of the quality assurance fee in accordance with the instructions of the commission or its designee not later than the 30th day after the last day of the month for which the fee is assessed; or

(2) Pay the amount of the quality assurance fee in accordance with the instructions of the commission or its designee and request an informal review of the calculation of the quality assurance fee in accordance with §352.8 of this chapter.

(3) Not later than August 31, 2003, the Texas Department of Mental Health and Mental Retardation shall pay for each facility owned by the department the quality assurance fee imposed under §352.3(a) of this title for patient days occurring between September 1, 2002, and July 31, 2003.

[(3) The first payment required under this section is not due until the 30th day after the end of the month this chapter takes effect. That payment will cover all the months beginning September 1, 2001 through the end of the month this chapter takes effect.]

(4) The commission or its designee may review the calculation of the quality assurance fee to ensure its accuracy and instruct the facility to correct its calculation and payment.

This agency hereby certifies that the emergency adoption 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 August 13, 2003.

TRD-200305180
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective Date: August 13, 2003
Expiration Date: December 11, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 33. GUIDELINES FOR MULTIFAMILY HOUSING REVENUE BOND

10 TAC §§33.1 - 33.13

(Editor's note: The text of the following sections adopted for repeal on an emergency basis will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Housing and Community Affairs (the Department) adopts on an emergency basis the repeal of §§33.1 - 33.13, concerning the Guidelines for Multifamily Housing Revenue Bond rules.

The repeal is adopted on an emergency basis in order to implement new legislation enacted by the 78th Legislative Session, including particularly Section 4 of Senate Bill 1664, and Section 15 of Senate Bill 264.

The repeal is adopted on an emergency basis pursuant to the authority of the Texas Government Code, Chapter 2306.

§33.1. Introduction.

§33.2. Definitions.

§33.3. Application for Financing of a Housing Development.

§33.4. Market Study.

§33.5. Limitation on Loan Amounts.

§33.6. Bond Rating.

§33.7. Housing Development Occupancy.

§33.8. Amenities for Families with Children.

§33.9. Accessibility to Individuals with Physical Handicaps.

§33.10. Elderly Tenant Survey.

§33.11. Agency Review of Applications for Financing; Findings.

§33.12. Housing Development Cost Requisitions and Limits.

§33.13. Waiver of Rules.

This agency hereby certifies that the emergency adoption 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 August 20, 2003.

TRD-200305387
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Effective Date: August 20, 2003
Expiration Date: December 18, 2003
For further information, please call: (512) 475-3726

♦ ♦ ♦

CHAPTER 33. MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§33.1 - 33.10

The Texas Department of Housing and Community Affairs (the Department) adopts on an emergency basis new §§33.1 - 33.10, regarding Multifamily Housing Revenue Bond Rules. These new sections are simultaneously proposed for permanent adoption in the proposed section of this issue of the *Texas Register*.

The Department finds that new requirements of state law require adoption of new rules on fewer than 30 days' notice. The reasons for this finding are that statutes enacted by the 78th Legislature, including particularly Section 4 of Senate Bill 1664, and Section 15 of Senate Bill 264; the rules of the Bond Review Board; and the procedures and deadlines for Multifamily Housing Revenue Bonds require the immediate adoption of these new sections. Chapter 50 of this title and Chapter 1, Subchapter B of this title, referenced in this emergency adoption are also being proposed in this issue of the *Texas Register*. Chapter 60 of this title, referenced in the emergency adoption, has not yet been proposed by the Department.

The new sections are adopted on an emergency basis pursuant to Chapter 2306, Texas Government Code, which provides the Governing Board of the Department with the authority to adopt rules necessary for the efficient administration of the Department's Multifamily Housing Revenue Finance Production.

§33.1. Introduction.

The purpose of this chapter is to state the Texas Department of Housing and Community Affairs (the "Department") requirements for issuing Bonds, the procedures for applying for multifamily housing revenue Bond financing, and the regulatory and land use restrictions imposed upon Housing Developments financed with the issuance of Bonds. The rules and provisions contained in this chapter are separate from the rules relating to the Department's administration of the Housing Tax Credit Program. Applicants seeking a tax credit allocation should consult the Department's 2004 Qualified Allocation Plan and Rules ("QAP"), Chapter 50 of this title, as proposed, relating to the Housing Tax Credit Program.

§33.2. Authority.

The Department receives its authority to issue Bonds from Chapter 2306 of the Texas Government Code (the "Act"). All Bonds issued by the Department must conform to the requirements of the Act. Notwithstanding anything herein to the contrary, tax-exempt Bonds which are issued to finance the Housing Development of multifamily rental housing are specifically subject to the requirements of the laws of the State of Texas, including but not limited to the Act, Chapter 1372 of the Texas Government Code relating to Private Activity Bonds, and to the requirements of the Code (as defined in this chapter).

§33.3. Definitions.

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

(1) Applicant--means any Person or Affiliate of a Person who files a Pre-Application or an Application with the Department requesting the Department issue Bonds to finance a Housing Development.

(2) Application--means an Application, in the form prescribed by the Department, filed with the Department by an Applicant, including any exhibits or other supporting material.

(3) Board--means the governing Board of the Department.

(4) Bond--means an evidence of indebtedness or other obligation, regardless of the sources of payment, issued by the Department under the Act, including a bond, note, or bond or revenue anticipation

note, regardless of whether the obligation is general or special, negotiable, or nonnegotiable, in bearer or registered form, in certified or book entry form, in temporary or permanent form, or with or without interest coupons.

(5) Code--means the Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued by the United States Department of the Treasury or the Internal Revenue Service.

(6) Development--means property or work or a development, building, structure, facility, or undertaking, whether existing, new construction, remodeling, improvement, or rehabilitation, that meets or is designed to meet minimum property standards required by the Department for the primary purpose of providing sanitary, decent, and safe dwelling accommodations for rent, lease, or use by individuals and families of Low Income and Very Low Income and Families of Moderate Income in need of housing. The term includes:

(A) buildings, structures, land, equipment, facilities, or other real or personal properties that are necessary, convenient, or desirable appurtenances, including streets, water, sewers, utilities, parks, site preparation, landscaping, stores, offices, and other non-housing facilities, such as administrative, community, and recreational facilities the Department determines to be necessary, convenient, or desirable appurtenances; and

(B) multifamily dwellings in rural and urban areas.

(7) Development Owner--means an Applicant that is approved by the Department as qualified to own, construct, acquire, rehabilitate, operate, manage, or maintain a Housing Development subject to the regulatory powers of the Department and other terms and conditions required by the Department and the Act.

(8) Eligible Tenants--means

(A) individuals and families of Extremely Low, Low and Very Low Income,

(B) Families of Moderate Income (in each case in the foregoing subparagraphs (A) and (B) of this paragraph as such terms are defined by the Issuer under the Act), and

(C) Persons with Special Needs, in each case, with an Anticipated Annual Income not in excess of 140% of the area median income for a four-person household in the applicable standard metropolitan statistical area; provided that all Low-Income Tenants shall count as Eligible Tenants.

(9) Extremely Low Income--means the income received by an individual or family whose income does not exceed thirty percent (30%) of the area median income or applicable federal poverty line, as determined by the Act.

(10) Family of Moderate Income--means a family

(A) that is determined by the Board to require assistance taking into account

(i) the amount of total income available for the housing needs of the individuals and family,

(ii) the size of the family,

(iii) the cost and condition of available housing facilities,

(iv) the ability of the individuals and family to compete successfully in the private housing market and to pay the amounts required by private enterprise for sanitary, decent, and safe housing, and

(v) standards established for various federal programs determining eligibility based on income; and

(B) that does not qualify as a family of Low Income.

(11) Housing Development--means property or work or a development, building, structure, facility, or undertaking, whether existing, new construction, remodeling, improvement, or rehabilitation, that meets or is designed to meet minimum property standards required by the Department for the primary purpose of providing sanitary, decent, and safe dwelling accommodations for rent, lease, or use by individuals and families of Low Income and Very Low Income and Families of Moderate Income in need of housing. The term includes:

(A) buildings, structures, land, equipment, facilities, or other real or personal properties that are necessary, convenient, or desirable appurtenances, including streets, water, sewers, utilities, parks, site preparation, landscaping, stores, offices, and other non-housing facilities, such as administrative, community, and recreational facilities the Department determines to be necessary, convenient, or desirable appurtenances; and

(B) multifamily dwellings in rural and urban areas.

(12) Institutional Buyer--means

(A) an accredited investor as defined in Regulation D promulgated under the Securities Act of 1933, as amended (17 CFR §230.501(a)), but excluding any natural person or any director or executive officer of the Department (17 CFR §230.501(a)(4) - (6)) or

(B) a qualified institutional buyer as defined by Rule 144A promulgated under the Securities Act of 1933, as amended (17 CFR §230.144A).

(13) Low Income--means the income received by an individual or family whose income does not exceed eighty percent (80%) of the area median income or applicable federal poverty line, as determined by the Act.

(14) Land Use Restriction Agreement (LURA)--means an agreement between the Department and the Housing Development Owner which is binding upon the Housing Development Owner's successors in interest that encumbers the Housing Development with respect to the requirements of law, including this title, the Act and §42 of the Code.

(15) Owner--means an Applicant that is approved by the Department as qualified to own, construct, acquire, rehabilitate, operate, manage, or maintain a Housing Development subject to the regulatory powers of the Department and other terms and conditions required by the Department and the Act.

(16) Persons with Special Needs--means persons who

(A) are considered to be disabled under a state or federal law,

(B) are elderly, meaning 60 years of age or older or of an age specified by an applicable federal program,

(C) are designated by the Board as experiencing a unique need for decent, safe housing that is not being met adequately by private enterprise, or

(D) are legally responsible for caring for an individual described by subparagraph (A), (B) or (C) of this paragraph and meet the income guidelines established by the Board.

(17) Private Activity Bonds--means any Bonds described by §141(a) of the Code.

(18) Private Activity Bond Program Scoring Criteria--means the scoring criteria established by the Department for the Department's Multifamily Housing Revenue Bond Program, §33.6(b) of this title. The Scoring Criteria are also available on the Department website.

(19) Private Activity Bond Program Threshold Requirements--means the threshold requirements established by the Department for the Department's Multifamily Housing Revenue Bond Program, §33.6(b) of this title. The Threshold Requirements are also available on the Department's website.

(20) Program--means the Department's Multifamily Housing Revenue Bond Program.

(21) Property--means the real estate and all improvements thereon, whether currently existing or proposed to be built thereon in connection with the Housing Development, and including all items of personal property affixed or related thereto.

(22) Qualified 501(c)(3) Bonds--means any Bonds described by §145(a) of the Code.

(23) Tenant Income Certification--means a certification as to income and other matters executed by the household members of each tenant in the Housing Development, in such form as reasonably may be required by the Department in satisfaction of the criteria prescribed the Secretary of Housing and Urban Development under §8(f)(3) of the Housing Act of 1937 ("the Housing Act") (42 U.S.C. §1437f) for purposes of determining whether a family is a lower income family within the meaning of the §8(f)(1) of the Housing Act.

(24) Tenant Services--means social services, including child care, transportation, and basic adult education, that are provided to individuals residing in low income housing under Title IV-A, Social Security Act (42 U.S.C. §601 et seq.), and other similar services.

(25) Tenant Services Program Plan--means the plan, subject to approval by the Department, which describes the Tenant Services to be provided by the Development Owner in a Housing Development.

(26) Trustee--means a national banking association organized and existing under the laws of the United States, as trustee (together with its successors and assigns and any successor trustee).

(27) Unit--means any residential rental unit in a Housing Development consisting of an accommodation, including a single room used as an accommodation on a non-transient basis, that contains complete physical facilities and fixtures for living, sleeping, eating, cooking and sanitation.

(28) Very Low Income--means the income received by an individual or family whose income does not exceed sixty percent (60%) of the area median income or applicable federal poverty line as determined under the Act.

§33.4. Policy Objectives and Eligible Housing Developments.

The Department will issue Bonds to finance the preservation or construction of decent, safe and affordable housing throughout the State of Texas. Eligible Housing Developments may include those which are constructed, acquired, or rehabilitated and which provide housing for individuals and families of Low Income, Very Low Income, or Extremely Low Income, and Families of Moderate Income.

§33.5. Bond Rating and Investment Letter.

(a) Bond Ratings. All publicly offered Bonds issued by the Department to finance Housing Developments shall have and be required to maintain a debt rating the equivalent of at least an "A" rating assigned to long-term obligations by Standard & Poor's Ratings Services, a division of The McGraw-Hill Companies, Inc. or Moody's Investors Service, Inc. If such rating is based upon credit enhancement provided by an institution other than the Applicant or Development Owner, the form and substance of such credit enhancement shall be subject to approval by the Board, which approval shall be evidenced by adoption by the Board of a resolution authorizing the issuance of the credit-enhanced Bonds. Remedies relating to failure to maintain appropriate credit ratings shall be provided in the financing documents relating to the Housing Development.

(b) Investment Letters. Bonds rated less than "A," or Bonds which are unrated must be placed with one or more Institutional Buyers and must be accompanied by an investment letter acceptable to the Department. Subsequent purchasers of such Bonds shall also be qualified as Institutional Buyers and shall sign and deliver to the Department an investment letter in a form acceptable to the Department. Bonds rated less than "A," and Bonds which are unrated shall be issued in physical form, in minimum denominations of one hundred thousand dollars ($100,000), and shall carry a legend requiring any purchasers of the Bonds to sign and deliver to the Department an investment letter in a form acceptable to the Department.

§33.6. Application Procedures, Evaluation and Approval.

(a) Application Costs, Costs of Issuance, Responsibility and Disclaimer. The Applicant shall pay all costs associated with the preparation and submission of the Application--including costs associated with the publication and posting of required public notices--and all costs and expenses associated with the issuance of the Bonds, regardless of whether the Application is ultimately approved or whether Bonds are ultimately issued. At any stage during the Application process, the Applicant is solely responsible for determining whether to proceed with the Application, and the Department disclaims any and all responsibility and liability in this regard.

(b) Pre-application. An Applicant who requests financing from the Department for a Housing Development shall submit a pre-application in a format prescribed by the Department. Within fourteen (14) days of the Department's receipt of the pre-application, the Department will be responsible for federal, state, and local community notifications of the proposed Housing Development. Upon review of the pre-application, if the Housing Development is determined to be ineligible for Bond financing by the Department, the Department will send a letter to the Applicant explaining the reason for the ineligibility. If the Housing Development is determined to be eligible for Bond financing by the Department, the Department will score and rank the pre-application based on the Private Activity Bond Program Scoring Criteria as set out in Figure 1 of this subsection. The Department will score and rank with higher scores ranking higher within each priority defined by §1372.0321, Texas Government Code. All Priority 1 Applications will be ranked above all Priority 2 Application which will be ranked above all Priority 3 Applications, regardless of score. This ranking will be used throughout the calendar year. In the event two or more Applications receive the same score, the Department will use, as a tie-breaking mechanism, the number of points awarded for Quality and Amenities for the Housing Development. If a tie still exists, the Department will consider the number of net rentable square feet per bond amount requested. Pre-Applications must meet the threshold requirements as stated in The Private Activity Bond Program Threshold Requirements as set out in Figure 2 of this subsection. The Private Activity Bond Program Threshold Requirements will be posted on the Department's website. After scoring, the Housing Development and the proposed financing structure will be presented to the Department's Board for consideration of a resolution declaring the Department's intent to issue Bonds (the "inducement resolution") with respect to the Housing Development. After Board approval

of the inducement resolution, the scored and ranked Applications will be submitted to the Texas Bond Review Board for its lottery processing. The Texas Bond Review Board will draw the number of lottery numbers that equates to the number of eligible Applications submitted by the Department. The lottery numbers drawn will not equate to a specific Housing Development. The Texas Bond Review Board will thereafter assign the lowest lottery number drawn to the highest scored and ranked Application as previously submitted by the Department. The criteria by which a Housing Development may be deemed to be eligible or ineligible are explained below in subsection (e) of this section, Evaluation Criteria. Private Activity Bond Program Scoring Criteria form will be posted on the Department's website. The pre-application shall consist of the following information:
Figure 1: 10 TAC §33.6(b)
Figure 2: 10 TAC §33.6(b)

(1) Completed Uniform Application forms in the format required by the Department;

(2) Texas Bond Review Board's Residential Rental Attachment;

(3) Relevant Development Information (form on website);

(4) Public Notification Information (form on website);

(5) Certification and agreement to comply with the Department's rules;

(6) Agreement of responsibility of all cost incurred;

(7) An organizational chart showing the structure of the Applicant and the ownership structure of any principals of the Applicant;

(8) Evidence that the Applicant and principals are registered with the Texas Secretary of State, or if the Applicant has not yet been formed, evidence that the name of the Applicant is reserved with the Secretary of State;

(9) Organizational documents such as partnership agreements and articles of incorporation, as applicable, for the Applicant and its principals;

(10) Documentation of non-profit status if applicable;

(11) Evidence of good standing from the Comptroller of Public Accounts of the State of Texas for the Applicant and its principals;

(12) Corporate resumes and individual resumes of the Applicant and any principals;

(13) A copy of an executed earnest money contract between the Applicant and the seller of the Property. This earnest money contract must be in effect at the time of submission of the application and expire no earlier than December 1 of the year preceding the applicable program year. The earnest money contract must stipulate and provide for the Applicant's option to extend the contract expiration date through March 1 of the program year, subject only to the seller's receipt of additional earnest money or extension fees, so that the Applicant will have site control at the time a reservation is granted. If the Applicant owns the Property, a copy of the recorded warranty deed is required;

(14) Evidence of zoning appropriate for the proposed use or application for the appropriate zoning or statement that no zoning is required;

(15) A local map showing the location of the Property;

(16) A boundary survey or subdivision plat which clearly identifies the location and boundaries of the subject Property;

(17) Name, address and telephone number of the Seller of the Property;

(18) Construction draw and lease-up proforma for Housing Developments involving new construction;

(19) Past two years' operating statements for existing Housing Developments;

(20) Current market information which includes rental comparisons;

(21) Documentation of local Section 8 utility allowances;

(22) Verification/Evidence of delivery of federal, state, and local community notifications;

(23) Self-Scoring Criteria; and

(24) Such other items deemed necessary by the Department per individual application.

(c) Financing Commitments. After approval by the Board of the inducement resolution, and before submission of a final application, the Applicant will be solely responsible for making appropriate arrangements with financial institutions which are to be involved with the issuance of the Bonds or the financing of the Housing Development, and to begin the process of obtaining firm commitments for financing from each of the financial institutions involved.

(d) Final Application. An Applicant who elects to proceed with submitting a final Application to the Department must provide a final Application and such supporting material as is required by the Department at least sixty (60) days prior to the scheduled meeting of the Board at which the Housing Development and the Bond issuance are to be considered, unless the Department directs the Applicant otherwise in writing. The Department may determine that supporting materials listed in paragraphs (1) - (42) of this subsection shall be provided subsequent to the final Application deadline in accordance with a schedule approved by the Department. Failure to provide any supporting materials in accordance with the approved schedule may be grounds for terminating the Application and returning the reservation to the Texas Bond Review Board. The final application and supporting material shall consist of the following information:

(1) A Public Notification Sign shall be installed on the Housing Development site no later than fourteen (14) days after the submission of Volume I and II of the Tax Credit Application to the Department (pictures and invoice receipts must be submitted as evidence of installation within fourteen (14) days of the submission). For minimum signage requirements and language, as set out in the Figure in this paragraph. As an alternative to installing a Public Notification Sign and at the same required time, the Applicant may instead, at the Applicant's Option, mail written notification to all addresses located within the footage distance required by the local municipality zoning ordinance or 1,000 feet, if there is no local zoning ordinance or if the zoning ordinance does not require notification, of any part of the proposed Development site. This written notification must include the information otherwise required for the sign, as set out in the Figure in this paragraph. If the Applicant chooses to provide this mailed notice in lieu of signage, the final Application must include a map of the proposed Development site and mark the 1,000 foot or local ordinance area showing street names and addresses; a list of all addresses the notice was mailed to; an exact copy of the notice that was mailed; and a certification that the notice was mailed through the U.S. Postal Service and stating the date of mailing.
Figure: 10 TAC §33.6(d)(1)

(2) Completed Uniform Application forms in the format required by the Department;

(3) Certification of no changes from the pre-application to the final application. If there are changes to the Application that have an adverse affect on the score and ranking order and that would have resulted in the application being placed below another application in the ranking, the Department will terminate the Application and return the reservation to the Texas Bond Review Board (with the exception of changes to deferred developer's fees and support or opposition points) ;

(4) Certification and agreement to comply with the Department's rules;

(5) A narrative description of the Housing Development;

(6) A narrative description of the proposed financing;

(7) Firm letters of commitment from any lenders, credit providers, and equity providers involved in the transaction;

(8) Documentation of local Section 8 utility allowances;

(9) Site plan;

(10) Unit and building floor plans and elevations;

(11) Complete construction plans and specifications;

(12) General contractor's contract;

(13) Completion schedule;

(14) Copy of a recorded warranty deed if the Applicant already owns the Property, or a copy of an executed earnest money contract between the Applicant and the seller of the Property if the Property is to be purchased, or other form of site control acceptable to the Department;

(15) A local map showing the location of the Property;

(16) Photographs of the Site;

(17) Survey with legal description;

(18) Flood plain map;

(19) Evidence of zoning appropriate for the proposed use from the appropriate local municipality that satisfies one of these subparagraphs (A) - (C) of this paragraph:

(A) no later than fourteen (14) days before the Board meets to consider the transaction, the Applicant must submit to the Department written evidence that the local entity responsible for initial approval of zoning has approved the appropriate zoning and that they will recommend approval of the appropriate zoning to the entity responsible for final approval of zoning decisions;

(B) provide a letter the chief executive officer of the political subdivision or another local official with appropriate jurisdiction stating that the Development is located within the boundaries of a political subdivision which does not have a zoning ordinance;

(C) a letter from the chief executive officer of the political subdivision or another local official with appropriate jurisdiction stating the Development is permitted under the provision of the zoning ordinance that apply to the location of the Development or that there is not a zoning requirement.

(20) Evidence of the availability of utilities;

(21) Copies of any deed restrictions which may encumber the Property;

(22) A Phase I Environmental Site Assessment performed in accordance with the Department's Environmental Site Assessment Rules and Guidelines (§1.35 of this title, as proposed);

(23) Title search or title commitment;

(24) Current tax assessor's valuation or tax bill;

(25) For existing Housing Developments, current insurance bills;

(26) For existing Housing Developments, past two (2) fiscal year end development operating statements;

(27) For existing Housing Developments, current rent rolls;

(28) For existing Housing Developments, substantiation that income-based tenancy requirements will be met prior to closing;

(29) Study performed in accordance with the Department's Market Analysis Rules and Guidelines (§1.33 of this title, as proposed);

(30) Appraisal of the existing or proposed Housing Development performed in accordance with the Department's Underwriting Rules and Guidelines (§1.32 of this title, as proposed);

(31) Statement that the Development Owner will accept tenants with Section 8 or other government housing assistance;

(32) An organizational chart showing the structure of the Applicant and the ownership structure of any principals of the Applicant;

(33) Evidence that the Applicant and principals are registered with the Texas Secretary of State, as applicable;

(34) Organizational documents such as partnership agreements and articles of incorporation, as applicable, for the Applicant and its principals;

(35) Documentation of non-profit status if applicable;

(36) Evidence of good standing from the Comptroller of Public Accounts of the State of Texas for the Applicant and its principals;

(37) Corporate resumes and individual resumes of the Applicant and any principals;

(38) Latest two (2) annual financial statements and current interim financial statement for the Applicant and its principals;

(39) Latest income tax filings for the Applicant and its principals;

(40) Resolutions or other documentation indicating that the transaction has been approved by the general partner;

(41) Resumes of the general contractor's and the property manager's experience; and

(42) Such other items deemed necessary by the Department per individual application.

(e) Evaluation Criteria. The Department will evaluate the Housing Development for eligibility at the time of pre-application, and at the time of final Application. If there are changes to the Application that have an adverse affect on the score and ranking order and that would have resulted in the Application being placed below another Application in the ranking, the Department will terminate the Application and return the reservation to the Texas Bond Review Board. The Housing Development and the Applicant must satisfy the conditions set out in paragraphs (1) - (6) of this subsection in order for a Housing Development to be considered eligible:

(1) The proposed Housing Development must further the public purposes of the Department as identified in the Act.

(2) The proposed Housing Development and the Applicant and its principals must satisfy the Department's Underwriting Rules and Guidelines (§1.32 of this title, as proposed). The pre-application must include sufficient information for the Department to establish that the Underwriting Guidelines can be satisfied. The final Application will be thoroughly underwritten according to the Underwriting Rules and Guidelines (§1.32 of this title, as proposed).

(3) The Housing Development must not be located on a site determined to be unacceptable for the intended use by the Department.

(4) Any Housing Development in which the Applicant or principals of the Applicant have an ownership interest must be found not to be in Material Non-Compliance under the compliance rules in effect at the time of Application submission.

(5) Neither the Applicant nor any principals of the Applicant is, at the time of Application

(A) barred, suspended, or terminated from procurement in a state or federal program or listed in the List of Parties Excluded from Federal Procurement or Non-Procurement Programs;

(B) or has been convicted of a state or federal crime involving fraud, bribery, theft, misrepresentation, misappropriation of funds, or other similar criminal offenses within fifteen (15) years;

(C) or is subject to enforcement action under state or federal securities law, subject to a federal tax lien, or the subject of an enforcement proceeding with any governmental entity; or

(D) otherwise disqualified or debarred from participation in any of the Department's programs.

(6) Neither the Applicant nor any of its principals may have provided any fraudulent information, knowingly false documentation or other intentional or negligent misrepresentation in the Application or other information submitted to the Department.

(f) Bond Documents. After receipt of the final Application, bond counsel for the Department shall draft Bond documents which conform to the state and federal laws and regulations which apply to the transaction.

(g) Public Hearings; Board Decisions. For every Bond issuance, the Department will hold a public hearing in accordance with §2306.0661, Texas Government Code and §147(f) of the Code, in order to receive comments from the public pertaining to the Housing Development and the issuance of the Bonds. Publication of all notices required for the public hearing shall be at the sole expense of the Applicant. The Board's decisions on approvals of proposed Housing Developments will consider all relevant matters. Any topics or matters, alone or in combination, may or may not determine the Board's decision. The Department's Board will consider the following topics in relation to the approval of a proposed Housing Development:

(1) The Development Owner market study;

(2) The location, including supporting broad geographic dispersion;

(3) The compliance history of the Development Owner;

(4) The financial feasibility;

(5) The Housing Development's proposed size and configuration;

(6) The housing needs of the community in which the Housing Development is located and the needs of the area, region and state;

(7) The Housing Development's proximity to other low income Housing Developments including avoiding over concentration;

(8) The availability of adequate public facilities and services;

(9) The anticipated impact on local school districts, giving due consideration to the authorized land use;

(10) Fair Housing law;

(11) Any matter considered by the Board to be relevant to the approval decision and in furtherance of the Department's purposes and the policies of Chapter 2306, Texas Government Code.

(h) Approval of the Bonds. Subject to the timely receipt and approval of commitments for financing, an acceptable evaluation for eligibility, the satisfactory negotiation of Bond documents, and the completion of a public hearing, the Board, upon presentation by the Department's staff, will consider the approval of the Bond issuance, final Bond documents and, in the instance of privately placed Bonds, the pricing of the Bonds. The process for appeals and grounds for appeals may be found under §1.7 and §1.8 of this title. The Department's conduit housing transactions, will be processed in accordance with the Texas Bond Review Board rules Title 34, Part 9, Chapter 181, Subchapter A. The Bond issuance must receive an approving opinion from the Department's bond counsel with respect to the legality and validity of the Bonds and the security therefore, and in the case of tax-exempt Bonds, with respect to the excludability from gross income for federal income tax purposes of interest on the Bonds.

(i) Local Permits. Prior to the closing of the Bonds, all necessary approvals, including building permits, from local municipalities, counties, or other jurisdictions with authority over the Housing Development must have been obtained or evidence that the permits are obtainable subject only to payment of certain fees must be provided to the Department.

(j) Closing. Once all approvals have been obtained and Bond documents have been finalized to the respective parties' satisfaction, the Bond transaction will close. Upon satisfaction of all conditions precedent to closing, the Department will issue Bonds in exchange for payment therefor. The Department will then loan the proceeds of the Bonds to the Applicant and disbursements of the proceeds may begin.

§33.7. Regulatory and Land Use Restrictions.

(a) Filing and Term of LURA. A Regulatory and Land Use Restriction Agreement or other similar instrument (the "LURA"), will be filed in the property records of the county in which the Housing Development is located for each Housing Development financed from the proceeds of Bonds issued by the Department. For Housing Developments involving new construction, the term of the LURA will be the longer of 30 years, or the period for which Bonds are outstanding. For the financing of an existing Housing Development, the term of the LURA will be the longer of the longest period which is economically feasible in accordance with the Act, or the period for which Bonds are outstanding.

(b) Housing Development Occupancy. The LURA will specify occupancy restrictions for each Housing Development based on the income of its tenants, and will restrict the rents that may be charged for Units occupied by tenants who satisfy the specified income requirements. Pursuant to §2306.269, Texas Government Code, the LURA will prohibit a Development Owner from excluding an individual or

family from admission to the Housing Development because the individual or family participates in the housing choice voucher program under Section 8, United States Housing Act of 1937 (the "Housing Act"), and from using a financial or minimum income standard for an individual or family participating in the voucher program that requires the individual or family to have a monthly income of more than two and one half (2.5) times the individual's or family's share of the total monthly rent payable to the Development Owner of the Housing Development. Housing Development occupancy requirements must be met on or prior to the date on which Bonds are issued unless the Housing Development is under construction. Adequate substantiation that the occupancy requirements have been met, in the sole discretion of the Department, must be provided prior to closing. Occupancy requirements exclude units for managers and maintenance personnel that are reasonably required by the Housing Development.

(c) Set-Asides.

(1) Housing Developments which are financed from the proceeds of Private Activity Bonds or from the proceeds of Qualified 501(c)(3) Bonds must be restricted under one of the following two set-asides:

(A) at least twenty percent (20%) of the Units within the Housing Development that are available for occupancy shall be occupied or held vacant and available for occupancy at all times by persons or families whose income does not exceed fifty percent (50%) of the area median income, or

(B) at least forty percent (40%) of the Units within the Housing Development that are available for occupancy shall be occupied or held vacant and available for occupancy at all times by persons or families whose income does not exceed sixty percent (60%) of the area median income.

(2) The Development Owner must designate at the time of Application which of the two set-asides will apply to the Housing Development and must also designate the selected priority for the Housing Development in accordance with §1372.0321, Texas Government Code. Units intended to satisfy set-aside requirements must be distributed evenly throughout the Housing Development, and must include a reasonably proportionate amount of each type of unit available in the Housing Development.

(3) No tenant qualifying under either of the set-asides shall be denied continued occupancy of a Unit in the Housing Development because, after commencement of such occupancy, such tenant's income increases to exceed the qualifying limit; provided, however, that, should a tenant's income, as of the most recent determination thereof, exceed 140% of the then applicable income limit and such tenant constitutes a portion of the set-aside requirement of this section, then such tenant shall only continue to qualify for so long as no Unit of comparable or smaller size is rented to a tenant that does not qualify as a Low-Income Tenant. (These are the federal set-aside requirements)

(d) Global Income Requirement. All of the Units that are available for occupancy in Housing Developments financed from the proceeds of Private Activity Bonds or from the proceeds of Qualified 501(c)(3) Bonds shall be occupied or held vacant (in the case of new construction) and available for occupancy at all times by persons or families whose income does not exceed one hundred and forty percent (140%) of the area median income for a four-person household.

(e) Qualified 501(c)(3) Bonds. Housing Developments which are financed from the proceeds of Qualified 501(c)(3) Bonds are further subject to the restriction that at least seventy-five percent (75%) of the Units within the Housing Development that are available for occupancy shall be occupied (or, in the case of new construction, held vacant and available for occupancy until such time as initial lease-up is complete) at all times by individuals and families of Low Income.

(f) Taxable Bonds. The requirements for Housing Developments financed from the issuance of taxable Bonds will be negotiated and considered on a case by case basis.

(g) Special Needs. At least five percent (5%) of the Units within each Housing Development must be designed to be accessible to Persons with Special Needs and hardware and cabinetry must be stored on site or provided to be installed on an as needed basis in such Units. The Development Owner will use its best efforts (including giving preference to Persons with Special Needs) to:

(1) make at least five percent (5%) of the Units within the Housing Development available for occupancy by Persons with Special Needs;

(2) make reasonable accommodations for such persons; and

(3) allow reasonable modifications at the tenant's sole expense pursuant to the Housing Act. During the term of the LURA, the Development Owner shall maintain written policies regarding the Development Owner's outreach and marketing program to Persons with Special Needs.

(h) Fair Housing. All Housing Developments financed by the Department must comply with the Fair Housing Act which prohibits discrimination in the sale, rental, and financing of dwellings based on race, color, religion, sex, national origin, familial status, and disability. The Fair Housing Act also mandates specific design and construction requirements for multifamily housing built for first occupancy after March 13, 1991, in order to provide accessible housing for individuals with disabilities.

(i) Tenant Services. The LURA will require that the Development Owner offer a variety of services for residents of the Housing Development through a Tenant Services Program Plan which is subject to annual approval by the Department.

(j) The LURA will require the Development Owner:

(1) To obtain, complete and maintain on file Tenant Income Certifications from each Eligible Tenant, including:

(A) a Tenant Income Certification dated immediately prior to the initial occupancy of each new Eligible Tenant in the Housing Development and

(B) thereafter, annual Tenant Income Certifications which must be obtained on or before the anniversary of such Eligible Tenant's occupancy of the Unit, and in no event less than once in every 12-month period following each Eligible Tenant's occupancy of a Unit in the Housing Development. For administrative convenience, the Development Owner may establish the first date that a Tenant Income Certification for the Housing Development is received as the annual recertification date for all tenants. The Development Owner will obtain such additional information as may be required in the future by §142(d) of the Code, as the same may be amended from time to time, or in such other form and manner as may be required by applicable rules, rulings, policies, procedures, Regulations or other official statements now or hereafter promulgated, proposed or made by the Department of the Treasury or the Internal Revenue Service with respect to obligations which are tax-exempt private activity bonds described in §142(d) of the Code. The Development Owner shall make a diligent and good-faith effort to determine that the income information provided by an applicant in a Tenant Income Certification is accurate by taking steps required under §142(d) of the Code pursuant to provisions of the Housing Act.

(2) As part of the verification, such steps may include the following, provided such action meets the requirements of §142(d) of the Code:

(A) obtain pay stubs for the most recent one-month period;

(B) obtain income tax returns for the most recent two tax years;

(C) conduct a consumer credit search;

(D) obtain an income verification from the applicant's current employer;

(E) obtain an income verification from the Social Security Administration, or

(F) if the applicant is self-employed, unemployed, does not have income tax returns or is otherwise not reasonably able to provide other forms of verification as required above, obtain another form of independent verification as would, in the Development Owner's reasonable commercial judgment, enable the Development Owner to determine the accuracy of the applicant's income information. The Development Owner shall retain all Tenant Income Certifications obtained in compliance with this subsection (b) of this section until the date that is six years after the last Bond is retired;

(3) To obtain from each tenant in the Housing Development, at the time of execution of the lease pertaining to the Unit occupied by such tenant, a written certification, acknowledgment and acceptance in such form as provided by the Department to the Development Owner from time to time that

(A) such lease is subordinate to the Mortgage and the LURA;

(B) all statements made in the Tenant Income Certification submitted by such tenant are accurate;

(C) the family income and eligibility requirements of the LURA and the Loan Agreement are substantial and material obligations of tenancy in the Housing Development;

(D) such tenant will comply promptly with all requests for information with respect to such requirements from the Development Owner, the Trustee and the Department; and

(E) failure to provide accurate information in the Tenant Income Certification or refusal to comply with a request for information with respect thereto will constitute a violation of a substantial obligation of the tenancy of such tenant in the Housing Development;

(4) To maintain complete and accurate records pertaining to the Low-Income Units and to permit, at all reasonable times during normal business hours and upon reasonable notice, any duly authorized representative of the Department, the Trustee, the Department of the Treasury or the Internal Revenue Service to enter upon the Housing Development Site to examine and inspect the Housing Development and to inspect the books and records of the Development Owner pertaining to the Housing Development, including those records pertaining to the occupancy of the Low-Income Units;

(5) On or before each February 15 during the qualified development period, to submit to the Department (to the attention of the Portfolio Management and Compliance Division) a draft of the completed Internal Revenue Service Form 8703 or such other annual certification required by the Code to be submitted to the Secretary of the Treasury as to whether the Housing Development continues to meet the requirements of §142(d) of the Code and on or before each March 31 during the qualified development period, to submit such completed form to the Secretary of the Treasury and the Department;

(6) To prepare and submit the compliance monitoring report. To cause to be prepared and submitted to the Department and the Trustee on the first day of the state restrictive period, and thereafter by the tenth calendar day of each March, June, September, and December, or other quarterly schedule as determined by the Department with written notice to the Development Owner, a certified compliance monitoring report and Development Owner's certification in such form as provided by the Department to the Development Owner from time to time; and

(7) To provide regular maintenance to keep the Housing Development sanitary, decent and safe.

(8) To establish a reserve account consistent with the requirements of §2306.186, Texas Government Code.

§33.8. Fees.

(a) Application and Issuance Fees. The Department shall set fees to be paid by the Applicant in order to cover the costs of pre-application review, Application and Development review, the Department's expenses in connection with providing financing for a Housing Development, and as required by law. (§1372.006(a), Texas Government Code)

(b) Administration and Portfolio Management and Compliance Fees. The Department shall set ongoing fees to be paid by Development Owners to cover the Department's costs of administering the Bonds and portfolio management and compliance with the program requirements applicable to each Housing Development.

§33.9. Waiver of Rules.

Provided all requirements of the Act, the Code, and any other applicable law are met, the Board may waive any one or more of the rules set forth in §§33.3 - 33.8 of this title relating to the Multifamily Housing Revenue Bond Program in order to further the purposes and the policies of Chapter 2306, Texas Government Code; to encourage the acquisition, construction, reconstruction, or rehabilitation of a Housing Development that would provide decent, safe, and sanitary housing, including, but not limited to, providing such housing in economically depressed or blighted areas, or providing housing designed and equipped for Persons with Special Needs; or for other good cause, as determined by the Board.

§33.10. No Discrimination.

The Department and its staff or agents, Applicants, Development Owners, and any participants in the Program shall not discriminate under this Program against any person or family on the basis of race, creed, national origin, age, religion, handicap, family status, or sex, or against persons or families on the basis of their having minor children, except that nothing herein shall be deemed to preclude a Development Owner from selecting tenants with Special Needs, or to preclude a Development Owner from selecting tenants based on income in renting Units to comply with the set asides under the provisions of this chapter.

This agency hereby certifies that the emergency adoption 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 August 18, 2003.

TRD-200305305

Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Effective Date: August 20, 2003
Expiration Date: December 18, 2003
For further information, please call: (512) 475-3726

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 11. BOARD OF NURSE EXAMINERS

CHAPTER 223. FEES

22 TAC §223.1

The Board of Nurse Examiners adopts amendments to §223.1, concerning Fees, on an emergency basis. The BNE has proposed the adoption of an amendment on a permanent basis. The emergency adoption is necessary to allow the Board to collect the necessary fees by the requisite dates imposed by legislative mandate and to help defray incurred costs that fund the Board's newsletter, *RN Update*. The substantial portion of increased fees are due to House Bills 3126 (Workforce Data Center) and 2208 (FBI Background Checks) passed by the 78th Regular Session.

House Bill 3126 was passed for the purpose of addressing the nursing shortage and encouraging individuals to enter the nursing field by authorizing larger Texas Grants to nursing students. This grant money is to come from the Tobacco Lawsuit Fund. The Board is required to increase the RNs' renewal fees by $3.00 to fund a nursing resource section of a workforce data center which will be managed by the Statewide Health Coordinating Council. The fee specifically will fund a nursing resource section within the center for the collection and analysis of educational and employment trends for nurses in this state. The Board is to receive an analysis of these funds in an annual accounting. The effective date of this bill was June 20, 2003.

House Bill 2208 allows the Board to request and receive the Department of Public Safety's (DPS) and the Federal Bureau of Investigation's (FBI) criminal history information of applicants for licensure as a registered nurse and of currently licensed registered nurses seeking to renew their licenses. The Board was granted the authority to require these nurses to submit a complete and legible set of fingerprints to the Board so the necessary information can be obtained from DPS and the FBI. The appropriated funds for this procedure, however, were only for nurses on initial licensure due to the overwhelming burden on this agency's administrative overhead. The fee increase, therefore, will be applicable only to initial applicants and not to nurses seeking renewal. The costs incurred by DPS and the FBI total $39 which will be passed on to the nursing candidates seeking licensure or endorsement, so the initial licensure cost will increase from $65 to a one time fee of $104, and the endorsement cost will increase from $125 to a one time fee of $164. The Board is to start collecting the fees effective September 1, 2003.

In addition to the legislatively required fee increases, the renewal fee will increase by one dollar ($1) to help defray the costs of the *RN Update*. The *RN Update* was originally funded by legislative action effective September 1993. The fee for the newsletter has not been increased since that time in spite of escalating costs. The fee increase is needed to help offset these additional costs. The increased fees will allow the BNE to meet the funding goals necessary for appropriations required to support the legislative requisites. The additional funding will enable the Board to better fulfill its mission of protecting the public (criminal background checks), facilitating a viable nurse force for the future (workforce data center), and keeping professional nurses informed of events that affect their practice (*RN Update*).

The amendments are adopted on an emergency basis under §301.151 of the Texas Occupations Code which provides the Board of Nurse Examiners with the authority and power to make and enforce all rules and regulations necessary for the performance of its duties and the conducting of proceedings before it.

§223.1. Fees.

(a) The Board of Nurse Examiners has established reasonable and necessary fees for the administration of its functions.

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

(6) licensure (each biennium)--$51 [~~$47~~]; (5/02)

(7)-(22) (No change.)

(23) Federal Bureau of Investigations (FBI) and Department of Public Safety (DPS) criminal background check for initial licensure applicants and endorsement applicants--$39.

(b) (No change.)

This agency hereby certifies that the emergency adoption 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 August 14, 2003.

TRD-200305211
Katherine Thomas
Executive Director
Board of Nurse Examiners
Effective Date: September 1, 2003
Expiration Date: December 30, 2003
For further information, please call: (512) 305-6823

♦ ♦ ♦

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES

SUBCHAPTER X. PREFERRED PROVIDER PLANS

28 TAC §3.3703

The Commissioner of Insurance adopts on an emergency basis, to take effect on August 16, 2003, amendments to §3.3703, concerning required contracting provisions for preferred provider plans. The emergency adoption is necessary to comply with and implement the provisions and the intent of Senate Bill 418 (SB 418) (78th regular legislative session) within the statutory timetable prescribed by SB 418. The amendments to §3.3703 relate to the coding guidelines and other claims payment information that a preferred provider carrier must supply upon request

from a preferred provider pursuant to a preferred provider contract subject to Texas Insurance Code Art. 3.70-3C. Pursuant to SB 418, several provisions become effective 60 days after the effective date of the statute, June 17, 2003, rendering these provisions effective on August 16, 2003. SB 418 further provides that the Commissioner of Insurance may adopt emergency rules to implement this Act without making the finding in subsection (a), Section 2001.034, Government Code. An emergency adoption is warranted so that rules are in place on the effective date of certain provisions of the statute, to facilitate the uniform implementation of these amendments and to guide affected parties' compliance with the new statutory requirements. SB 418 requires the commissioner, not later than 90 days after the Act's effective date, to adopt rules to implement the Act. It also requires that the commissioner appoint a "technical advisory committee on claims processing" (TACCP) and to consult with the TACCP with respect to, among other things, "the implementation of the standardized coding and bundling edits and logic" before adopting any rule related to such subjects. Following consultation with the TACCP, as well as with the Clean Claims Working Group, TDI on July 4, 2003 proposed for public comment rules to implement most of the requirements of SB 418, and held a public hearing on the rules on August 7, 2003. More than 150 comments were received on the proposal. While the department intends to adopt final rules in the near future, the usual process of rule adoption and its associated notice and comment periods, as well as the need to respond to comments, would have required a timeframe that could not be completed prior to the date affected entities must begin complying with certain provisions of the new statute. Considering these facts, it is necessary to adopt these amendments on an emergency basis to ensure that physicians and providers are paid timely for their services and to promote regulatory compliance.

The amendments to §3.3703, subsection (a)(20) and (a)(20)(F) delete outdated compliance language. The amendments to subsection (a)(20)(A) require that disclosed bundling processes be consistent with nationally recognized and generally accepted bundling edits and logic; they also add the publisher, product name and version of any software the insurer uses to determine bundling and unbundling of claims to the list of information to be disclosed. The amendments to subsection (a)(20)(D) require the insurer to give 90 calendar days written notice of any changes to claims payment procedures, and provide that an insurer may not make retroactive changes to claims payment procedures or any of the information required to be provided by paragraph (20). Subsection (a)(20)(G) adds "other business operations" and "communications with a governmental agency involved in the regulation of health care or insurance" to the list of acceptable uses of disclosed information. The amendments to that paragraph also replace the term "verification" with "representation" to avoid confusion with the verification provisions established pursuant to SB 418. Subsection (a)(20)(H) allows a preferred provider that receives information under the disclosure requirements to terminate its contract with an insurer, on or before the 30th day after the date the preferred provider receives the information, without penalty or discrimination in participation in other products or plans so long as proper notice is given to insureds in compliance with existing law. Subsection (a)(20)(I) provides that the provisions of this paragraph may not be waived, voided, or nullified by contract. Subsection (a)(21) provides that an insurer may require a preferred provider to retain in that provider's records updated information concerning a patient's other health benefit plan coverage.

The sections are adopted on an emergency basis under SB 418, Government Code §2001.034, and Insurance Code Article 3.70-3C and §36.001. SB 418 provides that the commissioner shall adopt rules as necessary to implement that Act, including emergency adoption of rules pursuant to §2001.034 of the Government Code without a finding described in subsection (a) of that provision. Government Code §2001.034 provides for the adoption of administrative rules on an emergency basis without notice and comment. Article 3.70-3C, Section 3A(p) gives the Commissioner the authority to adopt rules as necessary to implement Article 3.70-3C, Section 3A. Article 3.70-3C, Section 3A(m) states that an insurer's claims payment processes shall be consistent with nationally recognized, generally accepted bundling edits and logic. Article 3.70-3C, Section 3F provides in part that an insurer may require a physician or provider to retain in the physician's or provider's records updated information concerning other health benefit plan coverage. Article 3.70-3C, Section 3H contains requirements and procedures by which coding, bundling, or other payment processes and fee schedules may be requested, and must be provided, pursuant to a contract between an insurer and a physician or provider. Article 3.70-3C, Section 6(e)(2) provides that a preferred provider that voluntarily terminates the preferred provider's relationship with the insurer shall provide notice to insureds of the termination, with the assistance of the insurer. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§3.3703. Contracting Requirements.

(a) An insurer marketing a preferred provider benefit plan must contract with physicians and health care providers to assure that all medical and health care services and items contained in the package of benefits for which coverage is provided, including treatment of illnesses and injuries, will be provided under the plan in a manner that assures both availability and accessibility of adequate personnel, specialty care, and facilities. Each contract must meet the following requirements:

(1) - (19) (No change.)

(20) A contract between a preferred provider and an insurer must include provisions that will entitle the preferred provider upon request to all information necessary to determine that the preferred provider is being compensated in accordance with the contract. A preferred provider may make the request for information by any reasonable and verifiable means. The information must include a level of detail sufficient to enable a reasonable person with sufficient training, experience and competence in claims processing to determine the payment to be made according to the terms of the contract for covered services that are rendered to insureds. The insurer may provide the required information by any reasonable method through which the preferred provider can access the information, including e-mail, computer disks, paper or access to an electronic database. Amendments, revisions or substitutions of any information provided pursuant to this paragraph must be made in accordance with subparagraph (D) of this paragraph. The insurer shall provide the fee schedules and other required information by the 30th day after the date the insurer receives the preferred provider's request.

(A) This information must include a preferred provider specific summary and explanation of all payment and reimbursement methodologies that will be used to pay claims submitted by the preferred provider. At a minimum, the information must include:

(i) a fee schedule, including, if applicable, CPT, HCPCS, ICD-9-CM codes and modifiers:

(I) by which all claims for covered services submitted by or on behalf of the preferred provider will be calculated and paid; or

(II) that pertains to the range of health care services reasonably expected to be delivered under the contract by that preferred provider on a routine basis along with a toll-free number or electronic address through which the preferred provider may request the fee schedules applicable to any covered services that the preferred provider intends to provide to an insured and any other information required by this paragraph that pertains to the service for which the fee schedule is being requested if that information has not previously been provided to the preferred provider;

(ii) all applicable coding methodologies;

(iii) all applicable bundling processes, which must be consistent with nationally recognized and generally accepted bundling edits and logic;

(iv) all applicable downcoding policies;

(v) a description of any other applicable policy or procedure the insurer may use that affects the payment of specific claims submitted by or on behalf of the preferred provider, including recoupment;

(vi) any addenda, schedules, exhibits or policies used by the insurer in carrying out the payment of claims submitted by or on behalf of the preferred provider that are necessary to provide a reasonable understanding of the information provided pursuant to this paragraph; and

(vii) the publisher, product name and version of any software the insurer uses to determine bundling and unbundling of claims.

(B) In the case of a reference to source information as the basis for fee computation that is outside the control of the insurer, such as state Medicaid or federal Medicare fee schedules, the information provided by the insurer shall clearly identify the source and explain the procedure by which the preferred provider may readily access the source electronically, telephonically, or as otherwise agreed to by the parties.

(C) Nothing in this paragraph shall be construed to require an insurer to provide specific information that would violate any applicable copyright law or licensing agreement. However, the insurer must supply, in lieu of any information withheld on the basis of copyright law or licensing agreement, a summary of the information that will allow a reasonable person with sufficient training, experience and competence in claims processing to determine the payment to be made according to the terms of the contract for covered services that are rendered to insureds as required by subparagraph (A) of this paragraph.

(D) No amendment, revision, or substitution of claims payment procedures or any of the information required to be provided by this paragraph shall be effective as to the preferred provider, unless the insurer provides at least 90 calendar days written notice to the preferred provider identifying with specificity the amendment, revision or substitution. An insurer may not make retroactive changes to claims payment procedures or any of the information required to be provided by this paragraph. Where a contract specifies mutual agreement of the parties as the sole mechanism for requiring amendment, revision or substitution of the information required by this paragraph, the written notice specified in this section does not supersede the requirement for mutual agreement.

(E) Failure to comply with this paragraph constitutes a violation as set forth in subsection (b) of this section.

(F) This paragraph applies to all contracts entered into or renewed on or after the effective date of this paragraph. Upon receipt of a request, the insurer must provide the information required by subparagraphs (A)-(D) of this paragraph to the preferred provider by the 30th day after the date the insurer receives the preferred provider's request.

(G) A preferred provider that receives information under this paragraph:

(i) may not use or disclose the information for any purpose other than:

(I) the preferred provider's practice management,

(II) billing activities,

(III) other business operations, or

(IV) communications with a governmental agency involved in the regulation of health care or insurance; and

(ii) may not use this information to knowingly submit a claim for payment that does not accurately represent the level, type or amount of services that were actually provided to an insured or to misrepresent any aspect of the services; and

(iii) may not rely upon information provided pursuant to this paragraph about a service as a representation that an insured is covered for that service under the terms of the insured's policy or certificate.

(H) A preferred provider that receives information under this paragraph may terminate the contract on or before the 30th day after the date the preferred provider receives the requested information without penalty or discrimination in participation in other health care products or plans. If a preferred provider chooses to terminate the contract, the insurer shall assist the preferred provider in providing the notice required by paragraph (18) of this subsection.

(I) The provisions of this paragraph may not be waived, voided, or nullified by contract.

(21) An insurer may require a preferred provider to retain in the preferred provider's records updated information concerning a patient's other health benefit plan coverage.

(b) In addition to all other contract rights, violations of these rules shall be treated for purposes of complaint and action in accordance with Insurance Code Article 21.21-2, and the provisions of that article shall be utilized insofar as practicable, as it relates to the power of the department, hearings, orders, enforcement, and penalties.

(c) An insurer may enter into an agreement with a preferred provider organization for the purpose of offering a network of preferred providers, provided that it remains the insurer's responsibility to:

(1) meet the requirements of Insurance Code Article 3.70-3C (Preferred Provider Benefit Plans) and this subchapter; or

(2) ensure that the requirements of Insurance Code Article 3.70-3C (Preferred Provider Benefit Plans) and this subchapter are met.

This agency hereby certifies that the emergency adoption 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 August 15, 2003.

TRD-200305224
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective Date: August 16, 2003
Expiration Date: December 14, 2003
For further information, please call: (512) 463-6327

♦ ♦ ♦

CHAPTER 11. HEALTH MAINTENANCE ORGANIZATIONS

SUBCHAPTER J. PHYSICIAN AND PROVIDER CONTRACTS AND ARRANGEMENTS

28 TAC §11.901

The Commissioner of Insurance adopts on an emergency basis, to take effect on August 16, 2003, amendments to §11.901 concerning required contracting provisions for health maintenance organizations (HMOs). The emergency adoption is necessary to comply with and implement the provisions and intent of Senate Bill 418 (SB 418) (78th regular legislative session) within the statutory timetable prescribed by SB 418. The amendments to §11.901 relate to the coding guidelines and other claims payment information that an HMO must supply upon request from a physician or provider pursuant to an HMO contract subject to Texas Insurance Code Chapter 843, Subchapter J.

Pursuant to SB 418, several provisions become effective 60 days after the effective date of the statute, June 17, 2003, rendering these provisions effective on August 16, 2003. SB 418 further provides that the Commissioner of Insurance may adopt emergency rules to implement this Act without making the finding in subsection (a), Section 2001.034, Government Code. An emergency adoption is warranted so that rules are in place on the effective date of certain provisions of the statute, to facilitate the uniform implementation of these amendments, and to guide affected parties' compliance with the new statutory requirements. SB 418 requires the commissioner, not later than 90 days after the Act's effective date, to adopt rules to implement the Act. It also requires that the commissioner appoint a "technical advisory committee on claims processing" (TACCP) and to consult with the TACCP with respect to, among other things, "the implementation of the standardized coding and bundling edits and logic" before adopting any rule related to such subjects. Following consultation with the TACCP, as well as with the Clean Claims Working Group, the Texas Department of Insurance on July 4, 2003 proposed for public comment rules to implement most of the requirements of SB 418, and held a public hearing on the rules on August 7, 2003. More than 150 comments were received on the proposal. While the department intends to adopt final rules in the near future, the usual process of rule adoption and its associated notice and comment periods, as well as the need to respond to comments, would have required a timeframe that could not be completed prior to the date affected entities must begin complying with certain provisions of the new statute. Considering these facts, it is necessary to adopt these amendments on an emergency basis to ensure that physicians and providers are paid timely for their services and to promote regulatory compliance.

The amendments to §11.901, paragraphs (10) and (10)(F) delete outdated compliance language. The amendments to paragraph (10)(A)(iii) and (iv) require that disclosed bundling processes be consistent with nationally recognized and generally accepted bundling edits and logic and add the publisher, product name and version of any software the HMO uses to determine bundling and unbundling of claims to the list of information to be disclosed. The amendments to paragraph (10)(D) require the HMO to give 90 calendar days written notice of any changes to claims payment procedures, and provide that an HMO may not make retroactive changes to claims payment procedures or any of the information required to be provided by paragraph (10). Paragraph (10)(G) adds "other business operations" and "communications with a governmental agency involved in the regulation of health care or insurance" to the list of acceptable uses of disclosed information. The amendments to that paragraph also replace the term "verification" with "representation" to avoid confusion with the verification provisions established pursuant to SB 418.

Paragraph (10)(H) allows a physician or provider that receives information under the disclosure requirements to terminate its contract with an HMO, on or before the 30th day after the date the physician or provider receives the information, without penalty or discrimination in participation in other products or plans so long as proper notice is given to enrollees in compliance with existing law. Paragraph (10)(I) provides that the provisions of this paragraph may not be waived, voided, or nullified by contract. Paragraph (11) provides that an HMO may require a contracting physician or provider to retain in that physician's or provider's records updated information concerning a patient's other health benefit plan coverage.

STATUTORY AUTHORITY. The sections are adopted on an emergency basis under SB 418, Government Code §2001.034, and Insurance Code §§843.309, 843.319, 843.341, 843.349 and 36.001. SB 418 provides that the commissioner shall adopt rules as necessary to implement that Act, including emergency adoption of rules pursuant to §2001.034 of the Government Code without a finding described in subsection (a) of that provision. Government Code §2001.034 provides for the adoption of administrative rules on an emergency basis without notice and comment. Section 843.341(b) states that an HMO's claims payment processes shall be consistent with nationally recognized, generally accepted bundling edits and logic. Section 843.349(a) provides in part that an HMO may require a physician or provider to retain in the physician's or provider's records updated information concerning other health benefit plan coverage. Section 843.319 contains requirements and procedures by which coding, bundling, or other payment processes and fee schedules may be requested, and must be provided, pursuant to a contract between an HMO and a physician or provider. Section 843.309 requires an HMO's contract with a physician or provider to provide for reasonable advance notice to enrollees of termination of a physician or provider from the HMO's network. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§11.901. Required Provisions.

Physician and provider contracts and arrangements shall include the following provisions:

(1) - (9) (No change.)

(10) entitling the physician or provider upon request to all information necessary to determine that the physician or provider is being compensated in accordance with the contract. A physician or provider may make the request for information by any reasonable and verifiable means. The information must include a level of detail sufficient to enable a reasonable person with sufficient training, experience and competence in claims processing to determine the payment to be made according to the terms of the contract for covered services that are rendered to enrollees. The HMO may provide the required information by any reasonable method through which the physician or provider can access the information, including e-mail, computer disks, paper or access to an electronic database. Amendments, revisions or substitutions of any information provided pursuant to this paragraph must be made in accordance with subparagraph (D) of this paragraph. The HMO shall provide the fee schedules and other required information by the 30th day after the date the HMO receives the physician's or provider's request.

(A) This information must include a physician-specific or provider-specific summary and explanation of all payment and reimbursement methodologies that will be used to pay claims submitted by a physician or provider. At a minimum, the information must include:

(i) a fee schedule, including, if applicable, CPT, HCPCS, ICD-9-CM codes and modifiers:

(I) by which all claims for covered services submitted by or on behalf of the contracting physician or provider will be calculated and paid; or

(II) that pertains to the range of health care services reasonably expected to be delivered under the contract by that contracting physician or provider on a routine basis along with a toll-free number or electronic address through which the contracting physician or provider may request the fee schedules applicable to any covered services that the physician or provider intends to provide to an enrollee and any other information required by this paragraph, that pertains to the service for which the fee schedule is being requested if that information has not previously been provided to the physician or provider;

(ii) all applicable coding methodologies;

(iii) all applicable bundling processes, which must be consistent with nationally recognized and generally accepted bundling edits and logic;

(iv) all applicable downcoding policies;

(v) a description of any other applicable policy or procedure the HMO may use that affects the payment of specific claims submitted by or on behalf of the contracting physician or provider, including recoupment;

(vi) any addenda, schedules, exhibits or policies used by the HMO in carrying out the payment of claims submitted by or on behalf of the contracting physician or provider that are necessary to provide a reasonable understanding of the information provided pursuant to this paragraph; and

(vii) the publisher, product name and version of any software the HMO uses to determine bundling and unbundling of claims.

(B) In the case of a reference to source information as the basis for fee computation that is outside the control of the HMO, such as state Medicaid or federal Medicare fee schedules, the information provided by the HMO shall clearly identify the source and explain the procedure by which the physician or provider may readily access the source electronically, telephonically, or as otherwise agreed to by the parties.

(C) Nothing in this paragraph shall be construed to require an HMO to provide specific information that would violate any applicable copyright law or licensing agreement. However, the HMO must supply, in lieu of any information withheld on the basis of copyright law or licensing agreement, a summary of the information that will allow a reasonable person with sufficient training, experience and competence in claims processing to determine the payment to be made according to the terms of the contract for covered services that are rendered to enrollees as required by subparagraph (A) of this paragraph.

(D) No amendment, revision, or substitution of any of the claims payment procedures or any of the information required to be provided by this paragraph shall be effective as to the contracting physician or provider, unless the HMO provides at least 90 calendar days written notice to the contracting physician or provider identifying with specificity the amendment, revision or substitution. An HMO may not make retroactive changes to claims payment procedures or any of the information required to be provided by this paragraph. Where a contract specifies mutual agreement of the parties as the sole mechanism for requiring amendment, revision or substitution of the information required by this paragraph, the written notice specified in this section does not supersede the requirement for mutual agreement.

(E) Failure to comply with this paragraph constitutes a violation of Insurance Code Chapter 20A (Texas Health Maintenance Organization Act).

(F) This paragraph applies to all contracts entered into or renewed on or after the effective date of this paragraph. Upon receipt of a request, the HMO must provide the information required by subparagraphs (A)-(D) of this paragraph to the contracting physician or provider by the 30th day after the date the HMO receives the contracting physician's or provider's request.

(G) A physician or provider that receives information under this paragraph:

(i) may not use or disclose the information for any purpose other than:

(I) the physician's or provider's practice management,

(II) billing activities,

(III) other business operations, or

(IV) communications with a governmental agency involved in the regulation of health care or insurance;

(ii) may not use this information to knowingly submit a claim for payment that does not accurately represent the level, type or amount of services that were actually provided to an enrollee or to misrepresent any aspect of the services; and

(iii) may not rely upon information provided pursuant to this paragraph about a service as a representation that an enrollee is covered for that service under the terms of the enrollee's evidence of coverage.

(H) A physician or provider that receives information under this paragraph may terminate the contract on or before the 30th day after the date the physician or provider receives the requested information without penalty or discrimination in participation in other health care products or plans. The contract between the HMO and physician or provider shall provide for reasonable advance notice to enrollees being treated by the physician or provider prior to the termination consistent with Insurance Code §843.309.

(I) The provisions of this paragraph may not be waived, voided, or nullified by contract.

(11) An HMO may require a contracting physician or provider to retain in the contracting physician or provider's records updated information concerning a patient's other health benefit plan coverage.

This agency hereby certifies that the emergency adoption 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 August 15, 2003.

TRD-200305226
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective Date: August 16, 2003
Expiration Date: December 14, 2003
For further information, please call: (512) 463-6327

♦ ♦ ♦

CHAPTER 19. AGENTS' LICENSING
SUBCHAPTER R. UTILIZATION REVIEW AGENTS

28 TAC §§19.1703, 19.1723, 19.1724

The Commissioner of Insurance adopts, on an emergency basis, to take effect on August 16, 2003, amendments to §19.1703 and new §19.1723 and §19.1724 concerning procedures by which preferred providers that contract with an insurer or health maintenance organization (hereinafter referred to as "physicians and providers") may request, and insurers that issue preferred provider benefit plans and health maintenance organizations (hereinafter collectively "carriers") may provide, preauthorization and verification of medical care or health care services. The emergency adoption is necessary to comply with and implement the provisions and the intent of Senate Bill 418 (SB 418) (78th regular legislative session) by amending Texas Insurance Code Art. 3.70-3C, concerning preferred provider benefit plans, and the HMO Act, Insurance Code Chapter 843, to ensure that the procedures and requirements governing the processing and payment of clean claims submitted by physicians and providers are streamlined, standardized, and efficient. Among other things, SB 418 sets forth the concepts of preauthorization, where the medical necessity and appropriateness of services are determined, and verification, which is a reliable representation by a carrier that it will pay a physician or provider for proposed medical services, if those services are rendered to the patient for whom the services are proposed. SB 418 also provides that if a carrier has issued a verification for proposed medical or health care services, it may not deny or reduce payment to the physician or provider for those services if they are provided on or before the expiration date of the verification, which shall not be less than 30 days. The only exception to this guarantee of payment is if the physician or provider materially misrepresents or substantially fails to perform the services. SB 418 contains similar requirements for preauthorization, stating that a carrier that preauthorizes may not deny or reduce payment based on medical necessity or appropriateness of care, except for the reasons, as previously stated. SB 418 also contains provisions regarding the prompt payment of claims and the availability of coding guidelines and other information through contracts with preferred provider carriers and HMOs. These provisions are addressed in emergency rules published elsewhere in this issue of the Texas Register. Pursuant to SB 418, several provisions became applicable to contracts entered into or renewed, or certain services provided, on or after the 60th day after the effective date of the statute, June 17, 2003, rendering those provisions effective on August 16, 2003. SB 418 further provides that the Commissioner of Insurance may adopt emergency rules to implement this Act without making the finding in subsection (a), Section 2001.034, Government Code. An emergency adoption is warranted so that rules are in place on the effective date of certain provisions of the statute, to facilitate the uniform implementation of these sections and to guide affected parties' compliance with the new statutory requirements. SB 418 requires the commissioner, not later than 90 days after the Act's effective date, to adopt rules to implement the Act. It also requires that the commissioner appoint a "technical advisory committee on claims processing" (TACCP) and to consult with the TACCP with respect to, among other things, "claims development, submission, processing, adjudication, and payment" before adopting any rule related to such subjects. Following consultation with the TACCP, as well as with the Clean Claims Working Group, TDI on July 4, 2003 proposed for public comment rules to implement most of the requirements of SB 418, and held a public hearing on the rules on August 7, 2003. More than 150 comments were received on the proposal. While the department intends to adopt final rules in the near future, the usual process of rule adoption and its associated notice and comment periods, as well as the need to respond to comments, would have required a timeframe that could not be completed prior to the date affected entities must begin complying with certain provisions of the new statute. Considering these facts, it is necessary to adopt these amendments on an emergency basis to ensure that physicians and providers are paid timely for their services and to promote regulatory compliance.

The amendments to §19.1703 add new definitions for the terms declination, preauthorization, preferred provider, and verification. "Declination" is defined as a response to a request for verification in which a carrier does not issue a verification for proposed medical care or health care services; however, the definition makes clear that a declination is not a determination that a claim resulting from the proposed services may not ultimately be paid. While the department anticipates carriers will make a good faith effort to respond to requests for verification, it acknowledges that there may be some instances where a carrier will not have sufficient information to make a binding determination in accordance with the terms of the insurance contract or evidence of coverage. In these instances, the carrier may need to make use of the entire claims adjudication process provided by SB 418. Under those circumstances, the department anticipates that carriers will continue to process clean claims in compliance with all statutory and regulatory requirements, including timely payment. Accordingly, it is important for physicians and providers, as well as enrollees and insureds, to understand that a declination of verification should not in any way hinder the provision of medical or health care services or the timely payment of claims. In addition, prior to enactment of SB 418, it was customary for physicians and providers to request and receive patient eligibility information from carriers. While an eligibility determination from a carrier was not a guarantee of payment, it still may be a useful option for physicians, providers and carriers, and nothing in this rule

prohibits these parties from continuing to utilize those processes that are already in place.

Because the existing rule does not contain a definition for "preferred provider," the adopted amendments to §19.1703 add a definition that applies to providers that are contracted with HMOs and preferred provider carriers. They define "preauthorization" as a determination by a carrier that medical or health care services proposed to be provided are medically necessary and appropriate.

The adoption defines "verification" as a guarantee by a carrier that it will pay for proposed medical care or health care services if the services are rendered within the required timeframe to the patient for whom the services are proposed. The term includes pre-certification, certification, re-certification and any other term that would be a reliable representation by a carrier to a physician or provider, if those requests include the information required by §19.1724(c).

Adopted §19.1723 requires that a carrier that uses a preauthorization process shall provide to each contracted preferred provider, not later than the 10th business day after a request is made, a list of medical care and health care services that require preauthorization, along with information concerning the preauthorization process. If the proposed services involve inpatient care, a carrier that approves a request must issue a length of stay for admission into a health care facility based on the recommendation of the preferred provider and the carrier's written medically accepted screening criteria and review procedures.

The adopted section sets forth timeframes in which a carrier must respond to preauthorization requests for those services requiring preauthorization: concurrent hospitalization, within 24 hours of receipt; services involving post-stabilization treatment or life-threatening condition, within the time appropriate to the circumstances and the condition of the patient, but in no case to exceed one hour of receipt; and for all other services, not later than the third calendar day after receipt. A carrier that issues an adverse determination in response to a post-stabilization or life-threatening condition treatment must provide the independent review organization notification required by current §19.1721(c). A carrier that issues any other adverse determination must comply with current §19.1710 concerning notice of determinations by utilization review agents.

A carrier must have appropriate personnel reasonably available at a toll-free telephone number to provide the preauthorization determination during the hours and days prescribed in the adopted rule. The carrier must also be able to receive and record calls at other times than the hours specified in the adopted rule, and respond to those calls within 24 hours. The carrier must provide a written notification within three days of receipt of request.

A carrier that has preauthorized care or services may not deny or reduce payment for those services, based on medical necessity or appropriateness of care, unless the physician or provider has materially misrepresented or failed to perform the services. The adopted section states that it applies to an agent or other person with whom a carrier contracts, and provides that the provisions of the section may not be waived, voided, or nullified by contract.

Adopted §19.1724 requires carriers to be able to receive requests for verification by telephone, in writing, and by other means, including the internet, as agreed to by the preferred provider and the HMO or preferred provider carrier, so long as the agreement does not limit the preferred provider's option to request a verification by telephone call. It requires carriers to have appropriate personnel reasonably available at a toll-free telephone number to accept telephone requests and to provide determinations of previously requested verifications at the days and hours prescribed in the rule, and to receive and record calls at all other times and respond not later than two calendar days after the call is received. The section contains a list of items of information that must be contained in a request for verification. The department believes this amount of information is necessary for two reasons. First, because a carrier that verifies may not deny or reduce payment for a service, verification will essentially constitute the adjudication of a claim. For that reason, it is important that the carrier have all necessary information in order to make this binding determination. Second, the department anticipates that giving more information to carriers up front will result in more requests for services receiving verification. The section also allows a carrier, within one day of a receipt of a request for verification, to make one request to the preferred provider for additional information that is specific to the request, relevant and necessary to resolution of the request, and that is in or being incorporated into the enrollee's medical or billing record.

Adopted §19.1724 contains the following timeframes by which carriers must respond to a request for verification: for concurrent hospitalizations, without delay but not later than 24 hours after the request; for post-stabilization care or life-threatening conditions, without delay but not later than one hour after the request; for all other requests, without delay, and as appropriate to the circumstances of the request, but not later than five days after receipt of the request. The department believes this is consistent with SB 418, which provides that a carrier must inform a preferred provider "without delay" whether the service(s) for which verification has been requested will be paid. Because verification could be requested for a wide variety of services and product types, some requests will require more processing time than others. As an example, an HMO claim will be more easily adjudicated than an individual preferred provider carrier product that has pre-existing condition exclusions. As noted earlier, access to information will be important in order to allow a carrier to essentially adjudicate the claim before services are actually rendered. However, for more easily adjudicated services, the department expects that a carrier will use only the amount of time necessary to process the request "without delay" rather than the maximum time frames allowed by the rule.

The rules states that a verification or declination may be delivered by the carrier via telephone or in writing. If it is delivered via telephone, the carrier must, within three days of providing a verbal response, provide a written response that includes the minimum information listed in the rule, including a statement that the proposed services are being verified or declined pursuant to this rule. The department believes this procedure is important because a verification represents a carrier's guarantee that it will not deny or reduce payment for the services verified; for that reason, it is extremely important that both the carrier and the physician or provider have a clear understanding as to what services have been verified. Absence of a means of confirming what has been requested and verified could result in misunderstandings and disputes between the parties, which is a situation SB 418 sought to minimize or eliminate. In addition, the statement identifying the response as a verification or declination, as defined herein, will distinguish carrier responses pursuant to this

process, versus instances where a carrier may only be providing an eligibility determination.

In addition to preferred providers, HMOs and preferred provider carriers, new §19.1724 also applies to a noncontracted physician or provider that provides care on an emergency basis or on a referral basis where services are not reasonably available from a network provider. In addition, it states that the new section's provisions may not be waived, voided, or nullified by contract.

The amendments and new sections are adopted on an emergency basis under SB 418, Government Code §2001.034, and Insurance Code Article 3.70-3C, and §§843.347, 843.348 and 36.001. SB 418 provides that the commissioner shall adopt rules as necessary to implement that Act, including emergency adoption of rules pursuant to §2001.034 of the Government Code without a finding described in subsection (a) of that provision. Government Code §2001.034 provides for the adoption of administrative rules on an emergency basis without notice and comment. Article 3.70-3C provides for the processes of preauthorization and verification for preferred provider benefit plans. Sections 843.347 and 843.348 provide for the processes of verification and preauthorization, respectively, for HMOs. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§19.1703. Definitions.

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

(1) Act--Insurance Code, Article 21.58A, entitled "Health Care Utilization Review Agents."

(2) Administrative Procedure Act--Government Code, Chapter 2001.

(3) Administrator--A person holding a certificate of authority under the Insurance Code, Article 21.07-6.

(4) Adverse determination--A determination by a utilization review agent that the health care services furnished or proposed to be furnished to a patient are not medically necessary or not appropriate.

(5) Appeal process--The formal process by which a utilization review agent offers a mechanism to address adverse determinations.

(6) Certificate--A certificate of registration granted by the commissioner to a utilization review agent.

(7) Commissioner--The commissioner of insurance.

(8) Complaint--An oral or written expression of dissatisfaction with a utilization review agent concerning the utilization review agent's process. A complaint is not a misunderstanding or misinformation that is resolved promptly by supplying the appropriate information or clearing up the misunderstanding to the satisfaction of the enrollee.

(9) Declination--A response to a request for verification in which an HMO or preferred provider carrier does not issue a verification for proposed medical care or health care services. A declination is not a determination that a claim resulting from the proposed services will not ultimately be paid.

(10) Department--Texas Department of Insurance.

(11) Dental plan--An insurance policy or health benefit plan, including a policy written by a company subject to the Insurance Code, Chapter 20, that provides coverage for expenses for dental services.

(12) Dentist--A licensed doctor of dentistry, holding either a D.D.S. or a D.M.D. degree.

(13) Emergency care--Health care services provided in a hospital emergency facility or comparable facility to evaluate and stabilize medical conditions of a recent onset and severity, including but not limited to severe pain, that would lead a prudent layperson possessing an average knowledge of medicine and health to believe that his or her condition, sickness, or injury is of such a nature that failure to get immediate medical care could result in:

(A) placing the patient's health in serious jeopardy;

(B) serious impairment to bodily functions;

(C) serious dysfunction of any bodily organ or part;

(D) serious disfigurement; or

(E) in the case of a pregnant woman, serious jeopardy to the health of the fetus.

(14) Enrollee--A person covered by a health insurance policy or health benefit plan. This term includes a person who is covered as an eligible dependent of another person.

(15) Health benefit plan--A plan of benefits that defines the coverage provisions for health care for enrollees offered or provided by any organization, public or private, other than health insurance.

(16) Health care provider--Any person, corporation, facility, or institution licensed by a state to provide or otherwise lawfully providing health care services that is eligible for independent reimbursement for those services.

(17) Health insurance policy--An insurance policy, including a policy written by a company subject to the Insurance Code, Chapter 20, that provides coverage for medical or surgical expenses incurred as a result of accident or sickness.

(18) Inquiry--A request for information or assistance from a utilization review agent.

(19) Life-threatening--A disease or condition for which the likelihood of death is probable unless the course of the disease or condition is interrupted.

(20) Mental health medical record summary--A summary of process or progress notes relevant to understanding the patient's need for treatment of a mental or emotional condition or disorder such as:

(A) identifying information; and

(B) a treatment plan that includes:

(i) diagnosis;

(ii) treatment intervention;

(iii) general characterization of patient behaviors or thought processes that affect level of care needs; and

(iv) discharge plan.

(21) Mental health therapist--Any of the following persons who, in the ordinary course of business or professional practice, diagnose, evaluate, or treat any mental or emotional condition or disorder:

(A) a person licensed by the Texas State Board of Medical Examiners to practice medicine in this state;

(B) a person licensed as a psychologist by the Texas State Board of Examiners of Psychologists;

(C) a person licensed as a psychological associate by the Texas State Board of Examiners of Psychologists;

(D) a person licensed as a specialist in school psychology by the Texas State Board of Examiners of Psychologists;

(E) a person licensed as a marriage and family therapist by the Texas State Board of Examiners of Marriage and Family Therapists;

(F) a person licensed as a professional counselor by the Texas State Board of Examiners of Professional Counselors;

(G) a person licensed as a chemical dependency counselor by the Texas Commission on Alcohol and Drug Abuse;

(H) a person licensed as an advanced clinical practitioner by the Texas State Board of Social Worker Examiners;

(I) a person licensed as a master social worker by the Texas State Board of Social Worker Examiners;

(J) a person licensed as a social worker by the Texas State Board of Social Worker Examiners;

(K) a person licensed as a physician assistant by the Texas State Board of Physician Assistant Examiners;

(L) a person licensed as a registered professional nurse by the Texas Board of Nurse Examiners;

(M) a person licensed as a vocational nurse by the Texas Board of Vocational Nurse Examiners;

(N) any other person who is licensed or certified by a state licensing board in the State of Texas to diagnose, evaluate, or treat any mental or emotional condition or disorder.

(22) Mental or emotional condition or disorder--A mental or emotional illness as detailed in the most current revision of the Diagnostic and Statistical Manual of Mental Disorders.

(23) Nurse--A registered professional nurse, a licensed vocational nurse, or a licensed practical nurse.

(24) Open records law--Government Code, Chapter 552.

(25) Patient--An enrollee or an eligible dependent of the enrollee under a health benefit plan or health insurance plan.

(26) Payor--An insurer writing health insurance policies; any preferred provider organization, health maintenance organization, self-insurance plan; or any other person or entity which provides, offers to provide, or administers hospital, outpatient, medical, or other health benefits to persons treated by a health care provider in this state pursuant to any policy, plan or contract.

(27) Person--An individual, a corporation, a partnership, an association, a joint stock company, a trust, an unincorporated organization, any similar entity or any combination of the foregoing acting in concert.

(28) Physician--A licensed doctor of medicine or a doctor of osteopathy.

(29) Preauthorization--A determination by an HMO or preferred provider carrier that medical care or health care services proposed to be provided to an enrollee are medically necessary and appropriate.

(30) Preferred provider--

(A) with regard to a preferred provider carrier, a preferred provider as defined by Insurance Code Article 3.70-3C, §1(10) (Preferred Provider Benefit Plans) or Article 3.70-3C, §1(1) (Use of Advanced Practice Nurses and Physician Assistants by Preferred Provider Plans).

(B) with regard to an HMO,

(i) a physician, as defined by Insurance Code Section 843.002(22), who is a member of that HMO's delivery network; or

(ii) a provider, as defined by Insurance Code Section 843.002(24), who is a member of that HMO's delivery network.

(31) Provider of record--The physician or other health care provider that has primary responsibility for the care, treatment, and services rendered to the enrollee or the physician or health care provider that is requesting or proposing to provide the care, treatment and services to the enrollee and includes any health care facility when treatment is rendered on an inpatient or outpatient basis.

(32) Retrospective review--A system in which review of the medical necessity and appropriateness of health care services provided to an enrollee is performed for the first time subsequent to the completion of such health care services. Retrospective review does not include subsequent review of services for which prospective or concurrent reviews for medical necessity and appropriateness were previously conducted.

(33) Screening criteria--The written policies, decision rules, medical protocols, or guides used by the utilization review agent as part of the utilization review process (e.g., appropriateness evaluation protocol (AEP) and intensity of service, severity of illness, discharge, and appropriateness screens (ISD-A)).

(34) Utilization review--A system for prospective or concurrent review of the medical necessity and appropriateness of health care services being provided or proposed to be provided to an individual within the state. Utilization review shall not include elective requests for clarification of coverage.

(35) Utilization review agent--An entity that conducts utilization review, for an employer with employees in this state who are covered under a health benefit plan or health insurance policy, a payor, or an administrator.

(36) Utilization review plan--The screening criteria and utilization review procedures of a utilization review agent.

(37) Verification--A guarantee by an HMO or preferred provider carrier that the HMO or preferred provider carrier will pay for proposed medical care or health care services if the services are rendered within the required timeframe to the patient for whom the services are proposed. The term includes pre-certification, certification, re-certification and any other term that would be a reliable representation by an HMO or preferred provider carrier to a physician or provider if the request for the pre-certification, certification, re-certification, or representation includes the requirements of §19.1724(c) of this title (relating to Verification).

(38) Working day--A weekday, excluding New Years Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day.

§19.1723. Preauthorization.

(a) An HMO or preferred provider carrier that requires preauthorization as a condition of payment to a preferred provider shall comply with the procedures of this section for determinations of medical necessity for those services the HMO or preferred provider carrier identifies in accordance with subsection (b) of this section.

(b) An HMO or preferred provider carrier that uses a preauthorization process for medical care and health care services shall provide

to each contracted preferred provider, not later than the 10th business day after the date a request is made, a list of medical care and health care services that allows a preferred provider to determine which services require preauthorization and information concerning the preauthorization process.

(c) If the proposed medical care or health care services involve inpatient care, the HMO or preferred provider carrier shall review the request and, if approved, issue a length of stay for the admission into a health care facility based on the recommendation of the patient's preferred provider and the HMO or preferred provider carrier's written medically accepted screening criteria and review procedures.

(d) On receipt of a preauthorization request from a preferred provider for proposed services that require preauthorization, the HMO or preferred provider carrier shall issue and transmit a determination indicating whether the proposed medical or health care services are preauthorized. An HMO or preferred provider carrier shall respond to a request for preauthorization within the following time periods:

(1) For services not included under paragraphs (2) and (3) of this subsection, the determination must be issued and transmitted not later than the third calendar day after the date the request is received by the HMO or preferred provider carrier.

(2) If the proposed medical or health care services are for concurrent hospitalization care, the HMO or preferred provider carrier shall issue and transmit a determination indicating whether proposed services are preauthorized within 24 hours of receipt of the request.

(3) If the proposed medical care or health care services involve post-stabilization treatment, or a life-threatening condition as defined in §19.1703 of this title (relating to Definitions), the HMO or preferred provider carrier shall issue and transmit a determination indicating whether proposed services are preauthorized within the time appropriate to the circumstances relating to the delivery of the services and the condition of the patient, but in no case to exceed one hour from receipt of the request. In such circumstances, the determination shall be provided to the treating physician or health care provider. If the HMO or preferred provider carrier issues an adverse determination in response to a request for post-stabilization treatment or a request for treatment involving a life-threatening condition, the HMO or preferred provider carrier shall provide to the enrollee or person acting on behalf of the enrollee, and the enrollee's provider of record, the notification required by §19.1721(c) of this title (relating to Independent Review of Adverse Determinations).

(e) A preferred provider may inquire via telephone as to the HMO or preferred provider carrier's preauthorization determination. An HMO or preferred provider carrier shall have appropriate personnel as described in §19.1706 of this title (relating to Personnel) reasonably available at a toll-free telephone number to provide the determination between 6:00 a.m. and 6:00 p.m. central time Monday through Friday on each day that is not a legal holiday and between 9:00 a.m. and noon central time on Saturday, Sunday, and legal holidays. An HMO or preferred provider carrier must have a telephone system capable of accepting or recording incoming inquiries after 6:00 p.m. central time Monday through Friday and after noon central time on Saturday, Sunday, and legal holidays and responding to each of those calls not later than 24 hours after the call is received. An HMO or preferred provider carrier providing a determination under this subsection shall, within three calendar days of receipt of the request, provide a written notification to the preferred provider.

(f) If an HMO or preferred provider carrier has preauthorized medical care or health care services, the HMO or preferred provider carrier may not deny or reduce payment to the physician or provider for those services based on medical necessity or appropriateness of care unless the physician or provider has materially misrepresented the proposed medical or health care services or has substantially failed to perform the preauthorized medical or health care services.

(g) If an HMO or preferred provider carrier issues an adverse determination in response to a request made under subsection (d) of this section, a notice consistent with the provisions of §19.1710(c) of this title (relating to Notice of Determinations Made by Utilization Review Agents) shall be provided to the enrollee, a person acting on behalf of the enrollee, or the enrollee's provider of record. An enrollee may appeal any adverse determination in accordance with §19.1712 of this title (relating to Appeal of Adverse Determination of Utilization Review Agents).

(h) This section applies to an agent or other person with whom an HMO or preferred provider carrier contracts to perform, or to whom the HMO or preferred provider carrier delegates the performance of preauthorization of proposed medical or health care services. Delegation of preauthorization services does not limit in any way the HMO or preferred provider carrier's responsibility to comply with all statutory and regulatory requirements.

(i) The provisions of this section may not be waived, voided, or nullified by contract.

§19.1724. Verification.

(a) The provisions of this section apply to

(1) HMOs;

(2) preferred provider carriers;

(3) preferred providers; and

(4) physicians or healthcare providers that provide to an enrollee of an HMO or preferred provider carrier:

(A) care related to an emergency or its attendant episode of care as required by state or federal law; or

(B) specialty or other medical care or health care services at the request of the HMO, preferred provider carrier, or a preferred provider because the services are not reasonably available from a preferred provider who is included in the HMO or preferred provider carrier's network.

(b) An HMO or preferred provider carrier must be able to receive a request for verification of proposed medical care or health care services:

(1) by telephone call;

(2) in writing; and

(3) by other means, including the internet, as agreed to by the preferred provider and the HMO or preferred provider carrier, provided that such agreement may not limit the preferred provider's option to request a verification by telephone call.

(c) An HMO or preferred provider carrier shall have appropriate personnel reasonably available at a toll-free telephone number to accept telephone requests for verification and to provide determinations of previously requested verifications between 6:00 a.m. and 6:00 p.m. central time Monday through Friday on each day that is not a legal holiday and between 9:00 a.m. and noon central time on Saturday, Sunday, and legal holidays. An HMO or preferred provider carrier must have a telephone system capable of accepting or recording incoming inquiries after 6:00 p.m. central time Monday through Friday and after noon central time on Saturday, Sunday, and legal holidays and responding to each of those calls not later than two calendar days after the call is received.

(d) Any request for verification shall contain the following information:

(1) patient name;

(2) patient ID number, if included on an identification card issued by the HMO or preferred provider carrier;

(3) patient date of birth;

(4) name of enrollee or subscriber, if included on an identification card issued by the HMO or preferred provider carrier;

(5) patient relationship to enrollee or subscriber;

(6) presumptive diagnosis, if known, otherwise presenting symptoms;

(7) description of proposed procedure(s) or procedure code(s);

(8) place of service code where services will be provided and if place of service is other than provider's office or provider's location, name of hospital or facility where proposed service will be provided;

(9) proposed date of service;

(10) group number, if included on an identification card issued by the HMO or preferred provider carrier;

(11) if known to the provider, name and contact information of any other carrier, including the name, address and telephone number, name of enrollee, plan or ID number, group number (if applicable), and group name (if applicable);

(12) name of provider providing the proposed services; and

(13) provider's federal tax ID number.

(e) Receipt of a written request or a written response to a request for verification under this section is subject to the provisions of §21.2816 of this title (relating to Date of Receipt).

(f) If necessary to verify proposed medical care or health care services, an HMO or preferred provider carrier may, within one day of receipt of the request for verification, request information from the preferred provider in addition to the information provided in the request for verification. An HMO or preferred provider carrier may make only one request for additional information from the requesting preferred provider under this section.

(g) A request for information under subsection (e) of this section must:

(1) be specific to the verification request;

(2) describe with specificity the clinical and other information to be included in the response;

(3) be relevant and necessary for the resolution of the request; and

(4) be for information contained in or in the process of being incorporated into the enrollee's medical or billing record maintained by the preferred provider.

(h) On receipt of a request for verification from a preferred provider, the HMO or preferred provider carrier shall issue a verification or declination. An HMO or preferred provider carrier shall respond to requests for verification within the following time periods.

(1) Except as provided in paragraph (2) of this subsection, an HMO or preferred provider carrier shall provide a verification or declination in response to a request for verification without delay, and as appropriate to the circumstances the particular request, but not later than five days after the date of receipt of the request for verification.

(2) If the request is related to a concurrent hospitalization, the response must be sent to the preferred provider without delay but not later than 24 hours after the HMO or preferred provider carrier received the request.

(3) If the request is related to post-stabilization care or a life-threatening condition, the response must be sent to the preferred provider without delay but not later than one hour after the HMO or preferred provider carrier received the request.

(i) A verification or declination may be delivered via telephone call or in writing. If the verification or declination is delivered via telephone call, the HMO or preferred provider carrier shall, within three calendar days of providing a verbal response, provide a written response which must include, at a minimum:

(1) enrollee name;

(2) enrollee ID number;

(3) requesting provider's name;

(4) hospital or other facility name, if applicable;

(5) a specific description, including relevant procedure codes, of the services that are verified or declined;

(6) if the services are verified, the effective period for the verification, which shall not be less than 30 days from the date of verification;

(7) if the services are verified, any applicable deductibles, copayments, or coinsurance for which the enrollee is responsible;

(8) if the verification is declined, the specific reason for the declination;

(9) if the request involved services for which preauthorization is required, a decision as to whether the proposed services are medically necessary and appropriate, as required in §19.1723 of this title (relating to Preauthorization);

(10) a unique verification number that allows the HMO or preferred provider carrier to match the verification and subsequent claims related to the proposed service; and

(11) a statement that the proposed services are being verified or declined pursuant to Title 28 Texas Administrative Code §19.1724.

(j) An HMO or preferred provider carrier that issues a verification may not deny or otherwise reduce payment to the preferred provider for those medical care or health care services if provided on or before the expiration date for the verification, which shall not be less than 30 days, unless the preferred provider has materially misrepresented the proposed medical or health care services or has substantially failed to perform the medical or health care services as verified.

(k) The provisions of this section may not be waived, voided, or nullified by contract.

This agency hereby certifies that the emergency adoption 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 August 15, 2003.

TRD-200305225

Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective Date: August 16, 2003
Expiration Date: December 14, 2003
For further information, please call: (512) 463-6327

♦ ♦ ♦

CHAPTER 21. TRADE PRACTICES
SUBCHAPTER T. SUBMISSION OF CLEAN CLAIMS

28 TAC §§21.2801 - 21.2809, 21.2811 - 21.2826

The Commissioner of Insurance adopts on an emergency basis, to take effect on August 16, 2003, amendments to §§21.2801 - 21.2803, 21.2807 - 21.2809, and 21.2811 - 21.2817, and new §§21.2804 - 21.2806 and 21.2818 - 21.2826 concerning the submission of clean claims to health maintenance organizations and insurers who issue preferred provider benefit plans (hereinafter collectively referred to as carriers). The emergency adoption is necessary to comply with and implement the provisions and the intent of SB 418 (78th regular legislative session) by ensuring that the clean claims filing and payment processes are streamlined, standardized, and efficient.

SB 418 also contains provisions regarding preauthorization and verification procedures and the availability of coding guidelines and other information through contracts with preferred provider carriers and HMOs. These provisions are addressed in emergency rules published elsewhere in this issue of the *Texas Register.*

Pursuant to SB 418, several provisions became applicable to contracts entered into or renewed, or certain services provided, on or after the 60th day after the effective date of the statute, June 17, 2003, rendering those provisions effective on August 16, 2003. SB 418 further provides that the Commissioner of Insurance may adopt emergency rules to implement this Act without making the finding in subsection (a), Section 2001.034, Government Code. An emergency adoption is warranted so that rules are in place on the effective date of certain provisions of the statute, to facilitate the uniform implementation of these amendments, and to guide affected parties' compliance with the new statutory requirements. SB 418 requires the commissioner, not later than 90 days after the Act's effective date, to adopt rules to implement the Act. It also requires that the commissioner appoint a "technical advisory committee on claims processing" (TACCP) and to consult with the TACCP with respect to, among other things, "claims development, submission, processing, adjudication, and payment" before adopting any rule related to such subjects. Following consultation with the TACCP, as well as with the Clean Claims Working Group, TDI on July 4, 2003 proposed for public comment rules to implement most of the requirements of SB 418, and held a public hearing on the rules on August 7, 2003. More than 150 comments were received on the proposal. While the department intends to adopt final rules in the near future, the usual process of rule adoption and its associated notice and comment periods, as well as the need to respond to comments, would have required a timeframe that could not be completed prior to the date affected entities must begin complying with certain provisions of the new statute. Considering these facts, it is necessary to adopt these amendments on an emergency basis to ensure that physicians and providers are paid timely for their services and to promote regulatory compliance. New §21.2820 and §21.2826 will be proposed for public comment in the near future.

The amendments to §21.2801 provide that Subchapter T, in addition to applying to claims submitted by contracted physicians and providers, has limited applicability to noncontracted physicians and providers. Amendments to §21.2802 revise definitions of certain terms including audit, diagnosis code, procedure code, and statutory claims payment period. They also define "billed charges" as "the charges for medical or health care services included on a claim submitted by a physician or provider," and state that billed charges must comply with all applicable provisions of law, including the requirement that providers may not submit a bill for treatment that is improper, unreasonable, or medically or clinically unnecessary. In addition, the amendments re-define the term "clean claim" with regard to both non-electronic and electronic claims, and add definitions for terms such as catastrophic event, corrected claim, duplicate claim, preferred provider, and provider.

Amendments to §21.2803 specify the elements of a clean claim for non-electronic claims and for electronic claims, which are those that comply with regulations of the U.S. Department of Health and Human Services which implement the Health Insurance Portability and Accountability Act (HIPAA), and adopt standard transactions and data elements for the electronic exchange of information. For non-electronic claims, the amendments list the required data elements with reference to the appropriate fields on the claim forms prescribed by the Centers for Medicare and Medicaid Services for both institutional and noninstitutional or physician providers (UB-92 and CMS-1500, respectively). The amendments state that a physician or provider submits an electronic clean claim by using the ASC X12N 837 format that complies with all applicable federal laws related to electronic healthcare claims, including applicable implementation guides, companion guides, and trading partner agreements. The amendments also provide that if a physician or provider submits an electronic clean claim that requires coordination of benefits, the carrier processing the claim as a secondary payor shall rely on the primary payor information submitted on the claim, and that primary payor information may be submitted electronically to the secondary payor in compliance with applicable federal law, including applicable implementation guides, companion guides, and trading partner agreements.

Section 21.2804 details the procedures by which a carrier, upon receipt of a clean claim, may request additional information from a treating preferred provider, including the timeframes for making a request, and paying, denying, or auditing a claim. It also provides that the period for determining whether a clean claim is payable is tolled, and does not resume, pending receipt of the additional information or a response indicating that the preferred provider does not possess the requested information. It states that the carrier shall require the preferred provider to either attach a copy of the request to its response, or provide certain identifying information, and says that if a request was submitted electronically in accordance with federal requirements, the response must also be submitted in accordance with those requirements.

Section 21.2805 contains the procedures by which a carrier may request additional information from a source other than the preferred provider who submitted the claim, and provides that the applicable 21 (for pharmacy claims), 30 (for electronic claims) or

45 (for non-electronic claims) day statutory claims payment period is not extended pending receipt of the information. It states that the carrier shall request that the responding entity attach a copy of the request to the response, and contains the same federal electronic request and response requirements of §21.2804, if applicable. It also provides that if, upon receipt of information, the carrier determines that there was an error in payment of a claim, the carrier may recover any overpayment pursuant to the provisions of this rule.

Section 21.2806 lists the methods by which a claim may be transmitted and requires a physician or provider to submit a claim no later than the 95th day after the medical or health care services were rendered, or forfeit the right to payment unless the failure to timely submit was the result of a catastrophic event. However, the parties may agree by contract to extend the period for submitting a claim. For a claim for which coordination of benefits applies, the 95 day period does not begin for submission of the claim to the secondary payor until the physician or provider receives notice of the payment or denial from the primary payor. For a claim submitted by an institutional provider, the 95-day period begins on the date of discharge. A carrier shall accept as proof of timely filing a claim filed in compliance with this subsection or information from another carrier showing that the physician or provider submitted the claim to the carrier in compliance with this subsection. The adoption also says that a duplicate claim may not be submitted prior to the applicable 21, 30 or 45 day claims payment period, and a carrier that receives a duplicate claim within that time is not subject to penalties on the duplicate claim.

Amendments to §21.2807 contain changes to ensure consistency with the requirements of SB 418, including provisions relating to the adjudication of pharmacy claims. Amendments to §§21.2808, 21.2811 - 21.2812, 21.2814, and 21.2817 are also made for consistency. Amendments to §21.2809 provide that a carrier that intends to audit a clean claim must, within the applicable claims payment period, notify the preferred provider clearly and prominently on the explanation of payment that the claim is being audited and pay 100% of the applicable contracted rate. A carrier that fails to notify and pay 100% within the claims payment period--or, if applicable, the extended period allowed by adopted §21.2804--may not use the audit procedures. A preferred provider that receives less than 100% of the applicable contracted rate has received an underpayment and must so notify the carrier within 180 days in accordance with §21.2815(c) to receive a penalty. If a physician or provider fails to timely provide additional information requested by the carrier during the audit, the carrier may recover the amount paid pursuant to the procedures contained in the statute. Prior to seeking a refund for an audit payment a carrier must give the physician or provider an opportunity to appeal pursuant to §21.2818 (relating to overpayments).

Amendments to §21.2813 provide that all statutory and regulatory requirements applicable to a carrier also apply to contracted entities that process or pay claims, obtain the services of physicians or providers, or issue verifications or preauthorizations. Amendments to §21.2815 set out the new graduated penalty requirements applicable to carriers that do not pay a preferred provider's clean claim within the applicable 21, 30 or 45 day claims payment period, including the method for calculating the penalty on the unpaid balance of a partially paid claim. The amendments also clarify statutory language by stating that the penalty for a claim paid later than 90 days after the expiration of the statutory claims payment period includes 18% interest on the penalty amount, and they provide an example of how the interest is to be calculated. The amendments also provide that a carrier is not liable for a penalty if the failure to pay the claim timely was a result of a catastrophic event, or if the preferred provider notifies the carrier of an underpaid claim after the 180th day after the underpayment was received and the carrier pays the balance on or before the 45th day after the notice. The amendments require a carrier to clearly and prominently indicate on the explanation of payment the amount of the contracted rate paid and the amount paid as a penalty.

Amendments to §21.2816 expand the current provisions concerning date of receipt to include any written communication, including a claim, referenced under Subchapter T. In order to provide proof of submission and establish date of receipt, the section also allows any entity submitting a communication to choose to maintain a mail log that identifies each separate claim, request, or response in a batch and says that a copy of the mail log, if used, shall be transmitted to the receiving entity.

Section 21.2818 establishes a procedure by which a carrier can recover a refund due to overpayment or completion of audit, including deadlines and notice requirements for refund requests and for recovery. It requires the carrier to give the physician or provider notice, not later than 180 days after receipt of the overpayment, or upon completion of audit, of the specific claims and amounts overpaid and reasons therefor. The notice must also include notification of appeal rights and describe the methods by which the carrier intends to recover. The section gives a physician or provider 45 days to appeal a request for refund, and says that upon receipt of such written appeal the carrier must begin the appeal process provided in the carrier's contract with the provider. It provides that a carrier may not recover a refund until the later of the 45th or 30th day after notification (for overpayments and audits, respectively) or exhaustion of appeal rights, if the provider has not made arrangements for payment. It also provides that a secondary payor that pays a portion of a claim that should have been paid by the primary payor may only recover the overpayment from the carrier responsible for that amount, unless the overpaid portion was paid by both payors, in which case the secondary payor may recover from the physician or provider. Finally, it specifies that a carrier's ability to recover amounts fraudulently billed is not affected.

Section 21.2819 requires physicians, providers and carriers to notify the department within five days if, due to a catastrophic event, they are unable to meet the statutory deadlines for claims filing or claims payment. The section also requires an entity, within ten days after returning to normal operations, to certify to the department, by sworn affidavit, the specific nature and dates of the catastrophic event and the length of time the event caused an interruption in activity, and provides that a valid certification tolls the applicable statutory deadlines for the number of days the entity certifies that activity was interrupted.

Section 21.2820 specifies certain requirements for identification cards or similar documents issued by HMOs or preferred provider carriers that allow enrollees and insureds to access services or coverage under an HMO evidence of coverage or a preferred provider benefit plan. This section will be proposed for public comment prior to its permanent adoption.

Section 21.2821 requires quarterly reporting by HMOs and preferred provider carriers of information and data regarding claims processing and payment and business interruption data due to catastrophic events, with the first report due on February 15, 2004, for the preceding months of September through

December. This information, much of which is currently being collected by the department upon request, is necessary to assist the TACCP in gathering information for the biennial report to the legislature required by SB 418. It is also necessary in order to provide data to determine compliance with SB 418's additional penalty provisions for carriers that fail to comply with the claims payment requirements for more than two percent of clean claims. Because of the new verification provision of SB 418, the department will also need to obtain data concerning verifications and declinations in order to monitor how this provision is working. The adoption requires reporting of verification and declination data to be done annually, on or before July 31st. Because the final disposition of claims associated with verifications and declinations may take several months (due to the 95-day claims filing deadline and the applicable statutory claims payment periods), the department has required the reporting of this information to be on an annual rather than quarterly basis. Consistent with the quarterly reporting requirements regarding claims payment, §21.2822, concerning administrative penalties, states that a carrier's compliance percentage shall be determined on a quarterly basis, separately for noninstitutional preferred provider claims and institutional preferred provider claims, and not including claims paid pursuant to audit.

Section 21.2823 states that §§19.1724 (relating to Verification) and 21.2807 apply to a physician or provider that provides emergency services or specialty or referral services not reasonably available in the carrier's network. Section 21.2824 contains an effective date of August 16, 2003 for contracts between carriers and physicians and providers as well as for certain physicians and providers that do not have a contract with an HMO or preferred provider carrier. Section 21.2825 contains a severability provision. Section 21.2826 waives application of the provisions of this subchapter and §§3.3703(20), 11.901(10), 19.1723, and 19.1724 to Medicaid and Children's Health Insurance Program (CHIP) plans provided by an HMO or preferred provider carrier, as requested by the Texas Department of Health and Human Services pursuant to new Insurance Code Article 21.30. This section will also be proposed for public comment prior to its permanent adoption.

SB 418 also contains new provisions regarding verification and preauthorization of medical or health care services and availability of coding guidelines through contracts with preferred provider carriers and HMOs. These provisions are addressed in emergency rules published elsewhere in this issue of the *Texas Register.* In addition, contemporaneously with these amendments and new sections, the emergency adoption of the repeal of §§21.2804-21.2806 and 21.2819-21.2820 is also published elsewhere in this issue of the *Texas Register.*

The sections are adopted on an emergency basis under SB 418, Government Code §2001.034, and Insurance Code Articles 3.70-3C and 21.30 and §§843.209, 843.336-843.353, 843.3385, 843.3405, and 36.001. SB 418 provides that the commissioner shall adopt rules as necessary to implement that Act, including emergency adoption of rules pursuant to §2001.034 of the Government Code without a finding described in subsection (a) of that provision. Government Code §2001.034 provides for the adoption of administrative rules on an emergency basis without notice and comment. Article 3.70-3C provides a mechanism for the prompt and efficient resolution of claims by preferred provider carriers and provides that the commissioner may adopt rules to implement the article as it relates to the prompt payment of claims. Article 21.30 grants the commissioner the authority to waive application of certain sections of the Insurance Code to services and benefits provided under the state Medicaid and Children's Health Insurance Program, as requested by the Texas Department of Health and Human Services. Article 3.70-3C §11 and section 843.209 imposes requirements on any identification card issued by a carrier. Sections 843.336-843.353, 843.3385, and 843.3405, collectively provide a mechanism for the prompt and efficient resolution of claims by HMOs and provides that the commissioner may adopt rules to implement the article as it relates to the prompt payment of claims. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§21.2801. Scope.

The purpose of this subchapter is to specify the definitions and procedures necessary to implement Article 3.70-3C (Preferred Provider Benefit Plans) and Chapter 843 of the Insurance Code relating to clean claims and prompt payment of physician and provider claims. This subchapter applies to all non-electronic and electronic claims submitted by contracted physicians or providers for services or benefits provided to insureds of preferred provider carriers and enrollees of health maintenance organizations. The subchapter also has limited applicability to noncontracted physicians and providers.

§21.2802. Definitions.

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

(1) Audit--A procedure authorized and described in §21.2809 of this title (relating to Audit Procedures) under which an HMO or preferred provider carrier may investigate a claim beyond the statutory claims payment period without incurring penalties under §21.2815 of this title (relating to Failure to Meet the Statutory Claims Payment Period).

(2) Billed charges--The charges for medical care or health care services included on a claim submitted by a physician or provider. For purposes of this subchapter, billed charges must comply with all other applicable requirements of law, including Texas Health and Safety Code Sec. 311.0025, Texas Occupations Code Sec. 105.002, and Texas Insurance Code Art. 21.79F.

(3) CMS--The Centers for Medicare and Medicaid Services of the U.S. Department of Health and Human Services.

(4) Catastrophic Event--An event, including acts of God, civil or military authority, acts of public enemy, war, accidents, fires, explosions, earthquake, windstorm, flood or organized labor stoppages, that cannot reasonably be controlled or avoided and that causes an interruption in the claims submission or processing activities of an entity for more than two consecutive business days.

(5) Clean claim--

(A) For non-electronic claims, a claim submitted by a physician or provider for medical care or health care services rendered to an enrollee under a health care plan or to an insured under a health insurance policy that includes:

(i) the required data elements set forth in §21.2803(b) of this title (relating to Elements of a Clean Claim); and

(ii) if applicable, the amount paid by the primary plan or other valid coverage pursuant to §21.2803(c) of this title (relating to Elements of a Clean Claim);

(B) For electronic claims, a claim submitted by a physician or provider for medical care or health care services rendered to an

enrollee under a health care plan or to an insured under a health insurance policy using the ASC X12N 837 format and in compliance with all applicable federal laws related to electronic healthcare claims, including applicable implementation guides, companion guides and trading partner agreements.

(6) Condition code--The code utilized by CMS to identify conditions that may affect processing of the claim.

(7) Contracted rate--Fee or reimbursement amount for a preferred provider's services, treatments, or supplies as established by agreement between the preferred provider and the HMO or preferred provider carrier.

(8) Corrected claim--A claim containing clarifying or additional information necessary to correct a previously submitted claim.

(9) Deficient claim--A submitted claim that does not comply with the requirements of §21.2803(b) or (d) of this title.

(10) Diagnosis code--Numeric or alphanumeric codes from the International Classification of Diseases (ICD-9-CM), Diagnostic and Statistical Manual (DSM-IV), or their successors, valid at the time of service.

(11) Duplicate Claim--Any claim submitted by a physician or provider for the same health care service provided to a particular individual on a particular date of service that was included in a previously submitted claim. The term does not include corrected claims.

(12) HMO--A health maintenance organization as defined by Insurance Code Section 843.002(14).

(13) HMO delivery network--As defined by Insurance Code Section 843.002(15).

(14) Institutional provider--An institution providing health care services, including but not limited to hospitals, other licensed inpatient centers, ambulatory surgical centers, skilled nursing centers and residential treatment centers.

(15) Occurrence span code--The code utilized by CMS to define a specific event relating to the billing period.

(16) Patient control number--A unique alphanumeric identifier assigned by the institutional provider to facilitate retrieval of individual financial records and posting of payment.

(17) Patient-status-at-discharge code--The code utilized by CMS to indicate the patient's status at time of discharge or billing.

(18) Physician--Anyone licensed to practice medicine in this state.

(19) Place of service code--The codes utilized by CMS that identify the place at which the service was rendered.

(20) Preferred provider--

(A) with regard to a preferred provider carrier, a preferred provider as defined by Insurance Code Article 3.70-3C, §1(10) (Preferred Provider Benefit Plans) or Article 3.70-3C, §1(1) (Use of Advanced Practice Nurses and Physician Assistants by Preferred Provider Plans).

(B) with regard to an HMO,

(i) a physician, as defined by Insurance Code Section 843.002(22), who is a member of that HMO's delivery network; or

(ii) a provider, as defined by Insurance Code Section 843.002(24), who is a member of that HMO's delivery network.

(21) Preferred provider carrier--An insurer that issues a preferred provider benefit plan as provided by Insurance Code Article 3.70-3C, Section 2 (Preferred Provider Benefit Plans).

(22) Primary plan--As defined in §3.3506 of this title (relating to Use of the Terms "Plan," "Primary Plan," "Secondary Plan," and "This Plan" in Policies, Certificates and Contracts).

(23) Procedure code--Any alphanumeric code representing a service or treatment that is part of a medical code set that is adopted by CMS as required by federal statute and valid at the time of service. In the absence of an existing federal code, and for non-electronic claims only, this definition may also include local codes developed specifically by Medicaid, Medicare, an HMO, or a preferred provider carrier to describe a specific service or procedure.

(24) Provider--Any practitioner, institutional provider, or other person or organization that furnishes health care services and that is licensed or otherwise authorized to practice in this state, other than a physician.

(25) Revenue code--The code assigned by CMS to each cost center for which a separate charge is billed.

(26) Secondary plan--As defined in §3.3506 of this title.

(27) Source of admission code--The code utilized by CMS to indicate the source of an inpatient admission.

(28) Statutory claims payment period--

(A) the 45-calendar-day period in which an HMO or preferred provider carrier shall make claim payment or denial, in whole or in part, after receipt of a non-electronic clean claim pursuant to Insurance Code Article 3.70-3C, §3A (Preferred Provider Benefit Plans) and Chapter 843;

(B) the 30-calendar-day period in which an HMO or preferred provider carrier shall make claim payment or denial, in whole or in part, after receipt of an electronically submitted clean claim pursuant to Insurance Code Article 3.70-3C, §3A (Preferred Provider Benefit Plans) and Chapter 843; or

(C) the 21-calendar-day period in which an HMO or preferred provider carrier shall make claim payment after affirmative adjudication of an electronically submitted clean claim for a prescription benefit pursuant to Insurance Code Article 3.70-3C, §3A(f) (Preferred Provider Benefit Plans) and Section 843.339, and §21.2814 of this title (relating to Electronic Adjudication of Prescription Benefits).

(29) Subscriber--If individual coverage, the individual who is the contract holder and is responsible for payment of premiums to the HMO or preferred provider carrier; or if group coverage, the individual who is the certificate holder and whose employment or other membership status, except for family dependency, is the basis for eligibility for enrollment in a group health benefit plan issued by the HMO or the preferred provider carrier.

(30) Type of bill code--The three-digit alphanumeric code utilized by CMS to identify the type of facility, the type of care, and the sequence of the bill in a particular episode of care.

§21.2803. Elements of a Clean Claim.

(a) Filing a Clean Claim. A physician or provider submits a clean claim by providing to an HMO, preferred provider carrier, or any other entity designated for receipt of claims pursuant to §21.2811 of this title (related to Disclosure of Processing Procedures):

(1) for non-electronic claims, the required data elements specified in subsection (b) of this section;

(2) for electronic claims, the required data elements specified in subsections (d) and (e) of this section; and

(3) if applicable, any coordination of benefits or non-duplication of benefits information pursuant to subsection (c) of this section.

(b) Required data elements. CMS has developed claim forms which provide much of the information needed to process claims. Two of these forms, HCFA 1500 and UB-82/HCFA, and their successor forms, have been identified by Insurance Code Article 21.52C as required for the submission of certain claims. The terms in paragraphs (1) and (2) of this subsection are based upon the terms used by CMS on successor forms CMS-1500 and UB-92 CMS-1450 claim forms. The parenthetical information following each term refers to the applicable CMS claim form, and the field number to which that term corresponds on the CMS claim form.

(1) Required data elements for physicians or noninstitutional providers. The data elements described in this paragraph are required as indicated and must be completed in accordance with the special instructions applicable to the data element for clean claims filed by physicians and noninstitutional providers.

(A) subscriber's/patient's plan ID number (CMS 1500, field 1a) is required;

(B) patient's name (CMS 1500, field 2) is required;

(C) patient's date of birth and gender (CMS 1500, field 3) is required;

(D) subscriber's name (CMS 1500, field 4) is required;

(E) patient's address (street or P.O. Box, city, state, zip) (CMS 1500, field 5) is required;

(F) patient's relationship to subscriber (CMS 1500, field 6) is required;

(G) subscriber's address (street or P.O. Box, city, state, zip) (CMS 1500, field 7) is required, but physician or provider may enter "same" if the subscriber's address is the same as the patient's address required by subparagraph (E) of this paragraph;

(H) other insured's or enrollee's name (CMS 1500, field 9), is required if patient is covered by more than one health benefit plan, generally in situations described in subsection (c) of this section. If the required data element specified in paragraph (1)(P) of this subsection, "disclosure of any other health benefit plans," is answered "yes," this element is required unless the physician or provider submits with the claim documented proof to the HMO or preferred provider carrier that the physician or provider has made a good faith but unsuccessful attempt to obtain from the enrollee or insured any of the information needed to complete this data element;

(I) other insured's or enrollee's policy/group number (CMS 1500, field 9a), is required if patient is covered by more than one health benefit plan, generally in situations described in subsection (c) of this section. If the required data element specified in paragraph (1)(P) of this subsection, "disclosure of any other health benefit plans," is answered "yes," this element is required unless the physician or provider submits with the claim documented proof to the HMO or preferred provider carrier that the physician or provider has made a good faith but unsuccessful attempt to obtain from the enrollee or insured any of the information needed to complete this data element;

(J) other insured's or enrollee's date of birth (CMS 1500, field 9b), is required if patient is covered by more than one health benefit plan, generally in situations described in subsection (c) of this section. If the required data element specified in paragraph (1)(P) of this subsection, "disclosure of any other health benefit plans," is answered "yes," this element is required unless the physician or provider submits with the claim documented proof to the HMO or preferred provider carrier that the physician or provider has made a good faith but unsuccessful attempt to obtain from the enrollee or insured any of the information needed to complete this data element;

(K) other insured's or enrollee's plan name (employer, school, etc.) (CMS 1500, field 9c), is required if patient is covered by more than one health benefit plan, generally in situations described in subsection (c) of this section. If the required data element specified in paragraph (1)(P) of this subsection, "disclosure of any other health benefit plans," is answered "yes," this element is required unless the physician or provider submits with the claim documented proof to the HMO or preferred provider carrier that the physician or provider has made a good faith but unsuccessful attempt to obtain from the enrollee or insured any of the information needed to complete this data element. If the field is required and the physician or provider is a facility based radiologist, pathologist or anesthesiologist with no direct patient contact, the physician or provider must either enter the information or enter NA (not available) if the information is unknown;

(L) other insured's or enrollee's HMO or insurer name (CMS 1500, field 9d), is required if patient is covered by more than one health benefit plan, generally in situations described in subsection (c) of this section. If the required data element specified in paragraph (1)(P) of this subsection, "disclosure of any other health benefit plans," is answered "yes," this element is required unless the physician or provider submits with the claim documented proof to the HMO or preferred provider carrier that the physician or provider has made a good faith but unsuccessful attempt to obtain from the enrollee or insured any of the information needed to complete this data element;

(M) whether patient's condition is related to employment, auto accident, or other accident (CMS 1500, field 10) is required, but facility based radiologists, pathologists, or anesthesiologists shall enter "N" if the answer is "No" or if the information is not available;

(N) if the claim is a duplicate claim, a "D" is required, if the claim is a corrected claim, a "C" is required (CMS 1500, field 10d);

(O) subscriber's policy number (CMS 1500, field 11) is required;

(P) HMO or insurance company name (CMS 1500, field 11c) is required;

(Q) disclosure of any other health benefit plans (CMS 1500, field 11d) is required;

(i) if respond "yes", then

(I) data elements specified in paragraph (1)(H)-(L) of this subsection are required unless the physician or provider submits with the claim documented proof to the HMO or preferred provider carrier that the physician or provider has made a good faith but unsuccessful attempt to obtain from the enrollee or insured any of the information needed to complete the data elements in paragraph (1)(H)-(L) of this subsection;

(II) the data element specified in paragraph (1)(II) of this subsection is required when submitting claims to secondary payor HMOs or preferred provider carriers;

(ii) if respond "no," the data elements specified in paragraph (1)(H)-(L) of this subsection are not required if the physician or provider has on file a document signed within the past 12 months by the patient or authorized person stating that there is no other health care coverage; although the submission of the signed document is not a

required data element, a copy of the signed document shall be provided to the HMO or preferred provider carrier upon request.

(R) patient's or authorized person's signature or notation that the signature is on file with the physician or provider (CMS 1500, field 12) is required;

(S) subscriber's or authorized person's signature or notation that the signature is on file with the physician or provider (CMS 1500, field 13) is required;

(T) date of injury (HCFA 1500, field 14) is required, if due to an accident;

(U) name of referring physician or other source (CMS 1500, field 17) is required for primary care physicians, specialty physicians and hospitals; however, if there is no referral, the physician or provider shall enter "Self-referral" or "None";

(V) I.D. Number of referring physician (CMS 1500, field 17a) is required for primary care physicians, specialty physicians and hospitals; however, if there is no referral, the physician or provider shall enter "Self-referral" or "None";

(W) narrative description of procedure (CMS 1500, field 19) is required when a physician or provider uses an unlisted or not classified procedure code or an NDC code for unlisted drugs;

(X) for diagnosis codes or nature of illness or injury, (CMS 1500, field 21) up to four diagnosis codes may be entered, but at least one is required (primary diagnosis must be entered first);

(Y) verification number (CMS 1500, field 23) is required if services have been verified pursuant to §19.1724 of this title (relating to Verification). If no verification has been provided, a prior authorization number (CMS 1500, field 23), is required when prior authorization is required;

(Z) date(s) of service (CMS 1500, field 24A) is required;

(AA) place of service codes (CMS 1500, field 24B) is required;

(BB) procedure/modifier code (CMS 1500, field 24D) is required;

(CC) diagnosis code by specific service (CMS 1500, field 24E) is required with the first code linked to the applicable diagnosis code for that service in field 21;

(DD) charge for each listed service (CMS 1500, field 24F) is required;

(EE) number of days or units (CMS 1500, field 24G) is required;

(FF) physician's or provider's federal tax ID number (CMS 1500, field 25) is required;

(GG) whether assignment was accepted (CMS 1500, field 27), is required if assignment under Medicare has been accepted;

(HH) total charge (CMS 1500, field 28) is required;

(II) amount paid (CMS 1500, field 29), is required if an amount has been paid to the physician or provider submitting the claim by the patient or subscriber, or on behalf of the patient or subscriber or by a primary plan in accordance with paragraph (1)(P) of this subsection and as required by subsection (c) of this section;

(JJ) signature of physician or provider or notation that the signature is on file with the HMO or preferred provider carrier (CMS 1500, field 31) is required;

(KK) name and address of facility where services rendered (if other than home or office) (CMS 1500, field 32) is required; and

(LL) physician's or provider's billing name, address and telephone number is required, and the provider number (CMS 1500, field 33) is required if the HMO or preferred provider carrier required provider numbers and gave notice of that requirement to physicians and providers prior to June 17, 2003.

(2) Required data elements for institutional providers. The data elements described in this paragraph are required as indicated and must be completed in accordance with the special instructions applicable to the data element for clean claims filed by institutional providers.

(A) provider's name, address and telephone number (UB-92, field 1) is required;

(B) patient control number (UB-92, field 3) is required;

(C) type of bill code (UB-92, field 4) is required and shall include a "7" in the third position if the claim is a duplicate;

(D) provider's federal tax ID number (UB-92, field 5) is required;

(E) statement period (beginning and ending date of claim period) (UB-92, field 6) is required;

(F) covered days (UB-92, field 7), is required if Medicare is a primary or secondary payor;

(G) noncovered days (UB-92, field 8), is required if Medicare is a primary or secondary payor;

(H) coinsurance days (UB-92, field 9), is required if Medicare is a primary or secondary payor;

(I) lifetime reserve days (UB-92, field 10), is required if Medicare is a primary or secondary payor, and the patient was an inpatient;

(J) patient's name (UB-92, field 12) is required;

(K) patient's address (UB-92, field 13) is required;

(L) patient's date of birth (UB-92, field 14) is required;

(M) patient's gender (UB-92, field 15) is required;

(N) patient's marital status (UB-92, field 16) is required;

(O) date of admission (UB-92, field 17) is required for inpatient admissions, observation stays, and emergency room care;

(P) admission hour (UB-92, field 18) is required for inpatient admissions, observation stays, and emergency room care;

(Q) type of admission (e.g., emergency, urgent, elective, newborn) (UB-92, field 19) is required for inpatient admissions;

(R) source of admission code (UB-92, field 20) is required for inpatient admissions;

(S) discharge hour (UB-92, field 21), is required for inpatient admissions, outpatient surgeries or observation stays;

(T) patient-status-at-discharge code (UB-92, field 22) is required for inpatient admissions, observation stays, and emergency room care;

(U) condition codes (UB-92, fields 24-30), are required if the CMS UB-92 manual contains a condition code appropriate to the patient's condition;

(V) occurrence codes and dates (UB-92, fields 32-35), are required if the CMS UB-92 manual contains an occurrence code appropriate to the patient's condition;

(W) occurrence span code, from and through dates (UB-92, field 36), are required if the CMS UB-92 manual contains an occurrence span code appropriate to the patient's condition;

(X) value code and amounts (UB-92, fields 39-41) are required for inpatient admissions. If no value codes are applicable to the inpatient admission, the provider may enter value code 01;

(Y) revenue code (UB-92, field 42) is required;

(Z) revenue description (UB-92, field 43) is required;

(AA) HCPCS/Rates (UB-92, field 44), are required if Medicare is a primary or secondary payor;

(BB) Service date (UB-92, field 45) is required if the claim is for outpatient services;

(CC) units of service (UB-92, field 46) are required;

(DD) total charge (UB-92, field 47) is required;

(EE) HMO or preferred provider carrier name (UB-92, field 50) is required;

(FF) provider number (UB-92, field 51), is required if the HMO or preferred provider carrier, prior to June 17, 2003, required provider numbers and gave notice of that requirement to physicians and providers.

(GG) prior payments - payor and patient (UB-92, field 54), are required if payments have been made to the physician or provider by the patient or another payor or subscriber, on behalf of the patient or subscriber, or by a primary plan as required by subsection (c) of this section;

(HH) subscriber's name (UB-92, field 58) is required, if shown on the patient's ID card;

(II) patient's relationship to subscriber (UB-92, field 59) is required;

(JJ) patient's/subscriber's certificate number, health claim number, ID number (UB-92, field 60) is required;

(KK) insurance group number (UB-92, field 62) is required, if a group number is shown on the patient's ID card;

(LL) verification codes (UB-92, field 63) are required if services have been verified pursuant to §19.1724 of this title (relating to Verification). If no verification has been provided, treatment authorization codes (UB-92, field 63) are required when authorization is required;

(MM) principal diagnosis code (UB-92, field 67) is required;

(NN) diagnoses codes other than principal diagnosis code (UB-92, fields 68-75), are required if there are diagnoses other than the principal diagnosis;

(OO) admitting diagnosis code (UB-92, field 76) is required;

(PP) procedure coding methods used (UB-92, field 79), is required if the CMS UB-92 manual indicates a procedural coding method appropriate to the patient's condition;

(QQ) principal procedure code (UB-92, field 80), is required if the patient has undergone an inpatient or outpatient surgical procedure;

(RR) other procedure codes (UB-92, field 81), are required as an extension of subparagraph (QQ) of this paragraph if additional surgical procedures were performed;

(SS) attending physician ID (UB-92, field 82) is required;

(TT) signature of provider representative, electronic signature or notation that the signature is on file with the HMO or preferred provider carrier (UB-92, field 85) is required; and

(UU) date bill submitted (UB-92, field 86) is required.

(c) Coordination of benefits or non-duplication of benefits. If a claim is submitted for covered services or benefits in which coordination of benefits pursuant to §§3.3501 - 3.3511 of this title (relating to Group Coordination of Benefits) and §11.511(1) of this title (relating to Optional Provisions) is necessary, the amount paid as a covered claim by the primary plan is a required element of a clean claim for purposes of the secondary plan's processing of the claim and CMS 1500, field 29 or UB-92, field 54 must be completed pursuant to subsection (b)(1)(II) and (b)(2)(GG) of this section. If a claim is submitted for covered services or benefits in which non-duplication of benefits pursuant to §3.3053 of this title (relating to Non-duplication of Benefits Provision) is an issue, the amounts paid as a covered claim by all other valid coverage is a required element of a clean claim and CMS 1500, field 29 or UB-92, field 54 must be completed pursuant to subsection (b)(1)(II) and (b)(2)(GG) of this section. If a claim is submitted for covered services or benefits and the policy contains a variable deductible provision as set forth in §3.3074(a)(4) of this title (relating to Minimum Standards for Major Medical Expense Coverage) the amount paid as a covered claim by all other health insurance coverages, except for amounts paid by individually underwritten and issued hospital confinement indemnity, specified disease, or limited benefit plans of coverage, is a required element of a clean claim and CMS 1500, field 29 or UB-92, field 54 must be completed pursuant to subsection (b)(1)(II) and (b)(2)(GG) of this section. Notwithstanding these requirements, an HMO or preferred provider carrier may not require a physician or provider to investigate coordination of other health benefit plan coverage.

(d) A physician or provider submits an electronic clean claim by submitting a claim using the ASC X12N 837 format that complies with all applicable federal laws related to electronic healthcare claims, including applicable implementation guides, companion guides and trading partner agreements.

(e) If a physician or provider submits an electronic clean claim that requires coordination of benefits pursuant to §§3.3501-3.3511 of this title (relating to Group Coordination of Benefits) or §11.511(1) of this title (relating to Optional Provisions), the HMO or preferred provider carrier processing the claim as a secondary payor shall rely on the primary payor information submitted on the claim by the physician or provider. The primary payor may submit primary payor information electronically to the secondary payor using the ASC X12N 837 format and in compliance with federal laws related to electronic healthcare claims, including applicable implementation guides, companion guides and trading partner agreements.

(f) Format of elements. The elements of a clean claim set forth in subsections (b), (c), (d) and (e), if applicable, of this section must be complete, legible and accurate.

(g) Additional data elements or information. The submission of data elements or information on a claim form by a physician or provider in addition to those required for a clean claim under this section shall not render such claim deficient.

§21.2804. Requests for Additional Information from Treating Preferred Provider.

(a) If necessary to determine whether a claim is payable, an HMO or preferred provider carrier may, within 30 days of receipt of a clean claim, request additional information from the treating preferred provider. An HMO or preferred provider carrier may make only one request to the submitting preferred provider for information under this section.

(b) A request for information under this section must:

(1) be in writing;

(2) be specific to the claim or the claim's related episode of care;

(3) describe with specificity the clinical and other information to be included in the response;

(4) be relevant and necessary for the resolution of the claim; and

(5) be for information that is contained in or in the process of being incorporated into the patient's medical or billing record maintained by the preferred provider.

(c) An HMO or preferred provider carrier that requests information under this section shall determine whether the claim is payable and pay or deny the claim, or audit the claim in accordance with §21.2809 of this title (relating to Audit Procedures), on or before the later of:

(1) the 15th day after the date the HMO or preferred provider carrier receives the requested information as required under subsection (e) of this section;

(2) the 15th day after the date the HMO or preferred provider carrier receives a response under subsection (d) of this section; or

(3) the latest date for determining whether the claim is payable under §21.2807 of this title (relating to Effect of Filing a Clean Claim).

(d) If a preferred provider does not possess the requested information, the preferred provider must submit a written response indicating that the preferred provider does not possess the requested information in order to resume the claims payment period as described in subsection (c).

(e) An HMO or preferred provider carrier shall require the preferred provider responding to a request made under this section to either attach a copy of the request to the response or include with the response, the name of the patient, the patient identification number, the claim number as provided by the HMO or preferred provider carrier, the date of service, and the name of the treating preferred provider. If the HMO or preferred provider carrier submitted the request for additional information electronically in accordance with federal requirements concerning electronic transactions, the preferred provider must submit the response in accordance with those requirements. To resume the claims payment period as described in subsection (c) of this section, the preferred provider must deliver the requested information in compliance with this subsection.

(f) Receipt of a request or a response to a request under this section is subject to the provisions of §21.2816 of this title (relating to Date of Receipt).

§21.2805. Requests for Additional Information from Other Sources.

(a) If an HMO or preferred provider carrier requests additional information from a person other than the preferred provider who submitted the claim, the HMO or preferred provider carrier shall provide, to the preferred provider who submitted the claim, a notice containing the name of the physician, provider or other entity from whom the HMO or preferred provider carrier is requesting information. The HMO or preferred provider carrier may not withhold payment beyond the applicable 21, 30 or 45 day statutory claims payment period pending receipt of information requested under subsection (b) of this section. If on receiving information requested under this subsection the HMO or preferred provider carrier determines that there was an error in payment of the claim, the HMO or preferred provider carrier may recover any overpayment under §21.2818 of this title (relating to Overpayment of Claims).

(b) An HMO or preferred provider carrier shall request the entity responding to a request made under this section to attach a copy of the request to the response. If the request for additional information was submitted electronically in accordance with applicable federal requirements concerning electronic transactions, the response shall be submitted in accordance with those requirements, if applicable.

(c) Receipt of a request or a response to a request under this section is subject to the provisions of §21.2816 of this title (relating to Date of Receipt).

§21.2806. Claims Filing Deadline.

(a) A physician or provider must submit a claim to an HMO or preferred provider carrier not later than the 95th day after the date the physician or provider provides the medical care or health care services for which the claim is made. An HMO or preferred provider carrier and a physician or provider may agree, by contract, to extend the period for submitting a claim. For a claim submitted by an institutional provider, the 95-day period does not begin until the date of discharge. For a claim for which coordination of benefits applies, the 95-day period does not begin for submission of the claim to the secondary payor until the physician or provider receives notice of the payment or denial from the primary payor.

(b) If a physician or provider fails to submit a claim in compliance with this section, the physician or provider forfeits the right to payment unless the physician or provider has certified that the failure to timely submit the claim is a result of a catastrophic event in accordance with §21.2819 of this title (relating to Catastrophic Event).

(c) A physician or provider may submit claims via United States mail, first class, overnight delivery service, electronic transmission, hand delivery, facsimile, if the HMO or preferred provider carrier accepts claims submitted by facsimile, or as otherwise agreed to by the physician or provider and the HMO or preferred provider carrier. An HMO or preferred provider carrier shall accept as proof of timely filing a claim filed in compliance with this subsection or information from another HMO or preferred provider carrier showing that the physician or provider submitted the claim to the HMO or preferred provider carrier in compliance with this subsection.

(d) §21.2816 of this title (relating to Date of Receipt) determines the date an HMO or preferred provider carrier receives a claim.

(e) A physician or provider may not submit a duplicate claim prior to the 46th day, the 31st day if filed electronically, or the 22nd day if a claim for prescription benefits, after the date the original claim is presumed to be received according to the provisions of §21.2816 of this title. An HMO or preferred provider carrier that receives a duplicate claim prior to the 46th day after receipt of the original claim, a duplicate electronic claim prior to the 31st day after receipt of the original claim, or a duplicate claim for prescription benefits prior to the 22nd day after receipt of the original claim is not subject to the provisions of §§21.2807 of this title (relating to Effect of Filing a Clean Claim) or 21.2815 of this title (relating to Failure to Meet the Statutory Claims Payment Period) with respect to the duplicate claim.

§21.2807. Effect of Filing a Clean Claim.

(a) The statutory claims payment period begins to run upon receipt of a clean claim, including a corrected claim that is a clean claim, from a preferred provider, pursuant to §21.2816 of this title (relating to Date of Receipt), at the address designated by the HMO or preferred provider carrier, in accordance with §21.2811 of this title (relating to Disclosure of Processing Procedures), whether it be the address of the HMO, preferred provider carrier, or any other entity, including a clearinghouse or a repricing company, designated by the HMO or preferred provider carrier to receive claims. The date of claim payment is as determined in §21.2810 of this title (relating to Date of Claim Payment).

(b) After receipt of a clean claim, prior to the expiration of the applicable statutory claims payment period specified in §21.2802(28) of this title (relating to Definitions), an HMO or preferred provider carrier shall:

(1) pay the total amount of the clean claim in accordance with the contract between the preferred provider and the HMO or preferred provider carrier;

(2) deny the clean claim in its entirety after a determination that the HMO or preferred provider carrier is not liable for the clean claim and notify the preferred provider in writing why the clean claim will not be paid;

(3) notify the preferred provider in writing that the entire clean claim will be audited and pay 100% of the contracted rate on the claim to the preferred provider; or

(4) pay the portion of the clean claim for which the HMO or preferred provider carrier acknowledges liability in accordance with the contract between the preferred provider and the HMO or preferred provider carrier, and:

(A) deny the remainder of the clean claim after a determination that the HMO or preferred provider carrier is not liable for the remainder of the clean claim and notify the preferred provider in writing why the remainder of the clean claim will not be paid; or

(B) notify the preferred provider in writing that the remainder of the clean claim will be audited and pay 100% of the contracted rate on the unpaid portion of the clean claim to the preferred provider.

(c) With regard to a clean claim for a prescription benefit subject to the statutory claims payment period specified in §21.2802(25)(C) of this title (relating to Definitions), an HMO or preferred provider carrier shall, after receipt of an electronically submitted clean claim for a prescription benefit that is affirmatively adjudicated pursuant to Insurance Code Article 3.70-3C, §3A(f) (Preferred Provider Benefit Plans) and Insurance Code §843.339, pay the prescription benefit claim within 21 calendar days after the clean claim is adjudicated.

§21.2808. Effect of Filing Deficient Claim.

If an HMO or preferred provider carrier determines a submitted claim to be deficient, the HMO or preferred provider carrier shall notify the preferred provider submitting the claim that the claim is deficient within 45 calendar days of the HMO's or preferred provider carrier's receipt of the claim, or within 30 days of receipt of an electronic claim. If an HMO or preferred provider carrier determines an electronically submitted claim for a prescription benefit to be deficient, the HMO or preferred provider carrier shall notify the provider within 21 calendar days of the HMO's or preferred provider carrier's receipt of the claim.

§21.2809. Audit Procedures.

(a) If an HMO or preferred provider carrier is unable to pay or deny a clean claim, in whole or in part, within the applicable statutory claims payment period specified in §21.2802(25)(B) of this title (relating to Definitions) and intends to audit the claim to determine whether the claim is payable, the HMO or preferred provider carrier shall notify the preferred provider that the claim is being audited and pay 100% of the contracted rate within the applicable statutory claims payment period. An HMO or preferred provider carrier that fails to provide notification of the decision to audit the claim and pay 100% of the applicable contracted rate subject to copayments and deductibles within the applicable statutory claims payment period, or, if applicable, the extended period allowed for by §21.2804(c) of this title (relating to Requests for Additional Information), may not make use of the audit procedures set forth in this section. A preferred provider that receives less than 100% of the contracted rate in conjunction with a notice of intent to audit has received an underpayment and must notify the HMO or preferred provider carrier within 180 days in accordance with the provisions of §21.2815(c) of this title (relating to Failure to Meet the Statutory Claims Payment Period) to qualify to receive a penalty for the underpaid amount.

(b) The HMO or preferred provider carrier shall clearly indicate on the explanation of payment that the claim is being audited and the preferred provider is being paid 100% of the contracted rate, subject to completion of the audit. A paper explanation of payment complies with this requirement if the notice of the audit is clearly and prominently identified.

(c) The HMO or preferred provider carrier shall complete the audit within 180 calendar days from receipt of the clean claim. The HMO or preferred provider carrier shall provide written notification of the results of the audit. The notice shall include a listing of the specific claims paid and not paid pursuant to the audit, as well as a listing of specific claims and amounts for which a refund is due and for each claim, the basis and specific reasons for requesting a refund. An HMO or preferred provider carrier seeking recovery of any refund under this section shall comply with the procedures set forth in §21.2818 of this title (relating to Overpayment of Claims).

(d) An HMO or preferred provider carrier may recover the total amount paid on the claim under subsection (a) of this section if a physician or provider fails to timely provide additional information requested pursuant to the requirements of Insurance Code Article 3.70-3C §3A(g) or Section 843.340(c). Section 21.2816 of this title (relating to Date of Receipt) applies to the submission and receipt of a request for information under this subsection.

(e) Prior to seeking a refund for a payment made under this section, an HMO or preferred provider carrier must provide a preferred provider with the opportunity to appeal the request for a refund in accordance with §21.2818 of this title. An HMO or preferred provider carrier may not seek to recover the refund until all of the preferred provider's internal appeal rights under §21.2818 of this title have been exhausted.

(f) Payments made pursuant to this section on a clean claim are not an admission that the HMO or preferred provider carrier acknowledges liability on that claim.

§21.2811. Disclosure of Processing Procedures.

(a) In contracts with preferred providers, or in the physician or provider manual or other document that sets forth the procedure for filing claims, or by any other method mutually agreed upon by the contracting parties, an HMO or preferred provider carrier must disclose to its preferred providers:

(1) the address, including a physical address, where claims are to be sent for processing;

(2) the telephone number at which preferred providers' questions and concerns regarding claims may be directed;

(3) any entity along with its address, including physical address and telephone number, to which the HMO or preferred provider carrier has delegated claim payment functions, if applicable;

(4) the address and physical address and telephone number of any separate claims processing centers for specific types of services, if applicable.

(b) An HMO or preferred provider carrier shall provide no less than 60 calendar days prior written notice of any changes of address for submission of claims, and of any changes of delegation of claims payment functions, to all affected preferred providers with whom the HMO or preferred provider carrier has contracts.

§21.2812. Denial of Clean Claim Prohibited for Change of Address.

After a change of claims payment address or a change in delegation of claims payment functions, an HMO or preferred provider carrier may not premise the denial of a clean claim upon a preferred provider's failure to file a clean claim within the claims filing deadline set forth in §21.2806 of this title (relating to Claims Filing Deadline), unless timely written notice as required by §21.2811(b) of this title (relating to Disclosure of Processing Procedures) has been given.

§21.2813. Requirements Applicable to Other Contracting Entities.

Any contract or delegation agreement between an HMO or preferred provider carrier and an entity that processes or pays claims, obtains the services of physicians and providers to provide health care services, or issues verifications or preauthorizations may not be construed to limit the HMO's or preferred provider carrier's authority or responsibility to comply with all applicable statutory and regulatory requirements.

§21.2814. Electronic Adjudication of Prescription Benefits.

If a prescription benefit does not require authorization by an HMO or preferred provider carrier, the statutory claims payment period shall begin on the date of affirmative adjudication of a claim for a prescription benefit that is electronically transmitted.

§21.2815. Failure to Meet the Statutory Claims Payment Period.

(a) An HMO or preferred provider carrier that determines under §21.2807 of this title (relating to Effect of Filing a Clean Claim) that a claim is payable shall:

(1) if the claim is paid on or before the 45th day after the end of the applicable 21, 30 or 45 day statutory claims payment period, pay to the preferred provider, in addition to the contracted rate owed on the claim, a penalty in the amount of the lesser of:

(A) 50% of the difference between the billed charges and the contracted rate; or

(B) $100,000.

(2) If the claim is paid on or after the 46th day and before the 91st day after the end of the applicable 21, 30 or 45 day statutory claims payment period, pay to the preferred provider, in addition to the contracted rate owed on the claim, a penalty in the amount of the lesser of:

(A) 100% of the difference between the billed charges and the contracted rate; or

(B) $200,000.

(3) If the claim is paid on or after the 91st day after the end of the applicable 21, 30 or 45 day statutory claims payment period, pay to the preferred provider, in addition to the contracted rate owed on the claim, a penalty computed under paragraph (2) of this subsection plus 18% annual interest on the penalty amount. Interest under this subsection accrues beginning on the date the HMO or preferred provider carrier was required to pay the claim and ending on the date the claim and the penalty are paid in full.

(b) The following examples demonstrate how to calculate penalty amounts under subsection (a) of this section:

(1) If the contracted rate owed by the HMO or preferred provider carrier is $10,000 and the billed charges are $15,000, and the claim is paid on or before the 45th day after the end of the applicable statutory claims payment period, the HMO or preferred provider carrier shall pay, in addition to the contracted rate owed on the claim, 50% of the difference between the billed charges ($15,000) and the contracted rate ($10,000) or $2,500;

(2) if the claim is paid on or after the 46th day and before the 91st day after the end of the applicable statutory claims payment period, the HMO or preferred provider carrier shall pay, in addition to the contracted rate owed on the claim, 100% of the difference between the billed charges and the contracted rate or $5,000; and

(3) if the claim is paid on or after the 91st day after the end of the applicable statutory claims payment period, the HMO or preferred provider carrier shall pay, in addition to the contracted rate owed on the claim, $5,000, plus 18% annual interest on the $5,000 penalty amount accruing from the statutory claim payment deadline.

(c) Except as provided by this section, an HMO or preferred provider carrier that determines under §21.2807 of this title that a claim is payable, pays only a portion of the amount of the claim on or before the end of the applicable 21, 30 or 45 day statutory claims payment period, and pays the balance of the contracted rate owed for the claim after that date shall:

(1) If the balance of the claim is paid on or before the 45th day after the applicable 21, 30 or 45 day statutory claims payment period, pay to the preferred provider, in addition to the contracted amount owed, a penalty on the amount not timely paid in the amount of the lesser of:

(A) 50% of the underpaid amount; or

(B) $100,000.

(2) If the balance of the claim is paid on or after the 46th day and before the 91st day after the end of the applicable 21, 30 or 45 day statutory claims payment period, pay to the preferred provider, in addition to the contracted amount owed, a penalty in the amount of the lesser of:

(A) 100% of the underpaid amount; or

(B) $200,000.

(3) If the balance of the claim is paid on or after the 91st day after the end of the applicable 21, 30 or 45 day statutory claims payment period, pay to the preferred provider, in addition to the contracted amount owed, a penalty computed under paragraph (2) of this subsection plus 18% annual interest on the penalty amount. Interest under this subsection accrues beginning on the date the HMO or preferred provider carrier was required to pay the claim and ending on the date the claim and the penalty are paid in full.

(d) For the purposes of subsection (c) of this section, the underpaid amount is calculated on the ratio of the amount underpaid on the contracted rate to the contracted rate as applied to the billed charges. For example, a claim for a contracted rate of $1,000.00 and billed charges of $1,500.00 is initially underpaid at $800.00 and the $200.00 balance is paid on the 30th day after the end of the applicable statutory claims payment period. The amount underpaid, $200.00, is 20% of the

contracted rate. In order to determine the penalty, the HMO or preferred provider carrier must calculate 20% of the billed charges, which is $300.00. This amount represents the underpaid amount for subsection (c)(1) of this section. Therefore, the HMO or preferred provider carrier must pay, as a penalty, 50% of $300.00, or $150.00.

(e) An HMO or preferred provider carrier is not liable for a penalty under this section:

(1) if the failure to pay the claim in accordance with the applicable statutory claims payment period is a result of a catastrophic event that the HMO or preferred provider carrier certified according to the provisions of §21.2831 of this title (relating to Catastrophic Events); or

(2) if the claim was paid in accordance with §21.2807 of this title, but for less than the contracted rate, and:

(A) the preferred provider notifies the HMO or preferred provider carrier of the underpayment after the 180th day after the date the underpayment was received; and

(B) the HMO or preferred provider carrier pays the balance of the claim on or before the 45th day after the date the insurer receives the notice of underpayment.

(f) Subsection (e) of this section does not relieve the HMO or preferred provider carrier of the obligation to pay the remaining unpaid contracted rate owed the preferred provider.

(g) An HMO or preferred provider carrier that pays a penalty under this section shall clearly indicate on the explanation of payment the amount of the contracted rate paid, the amount of the billed charges as compared to the amount submitted by the physician or provider and the amount paid as a penalty. A non-electronic explanation of payment complies with this requirement if it clearly and prominently identifies the notice of the penalty amount.

§21.2816. Date of Receipt.

(a) A written communication, including a claim, referenced under this subchapter is subject to and shall comply with this section unless otherwise stated in this subchapter.

(b) An entity subject to these rules may deliver written communications as follows:

(1) submit the communication by United States mail, first class, by United States mail return receipt requested or by overnight delivery;

(2) submit the communication electronically and maintain proof of the electronically submitted communication;

(3) if the entity accepts facsimile transmissions for the type of communication being sent, fax the communication and maintain proof of facsimile transmission; or

(4) hand deliver the communication and maintain a copy of the signed receipt acknowledging the hand delivery.

(c) If a communication is submitted by United States mail, first class, the communication is presumed to have been received on the fifth day after the date the communication is submitted, or, if the communication is submitted using overnight delivery service or United States mail return receipt requested, on the date the delivery receipt is signed.

(d) If a communication other than a claim is submitted electronically, the communication is presumed received on the date of submission. Communications electronically submitted after the receiving entity's normal business hours are presumed received the following business day.

(e) If a claim is submitted electronically, the claim is presumed received on the date of the electronic verification of receipt by the HMO or preferred provider carrier or the HMO's or preferred provider carrier's clearinghouse. If the HMO's or the preferred provider carrier's clearinghouse does not provide a confirmation of receipt of the claim or a rejection of the claim within 24 hours of submission by the physician or provider or the physician's or provider's clearinghouse, the physician's or provider's clearinghouse shall provide the confirmation. The physician's or provider's clearinghouse must be able to verify that the claim contained the correct payor identification of the entity to receive the claim.

(f) If a communication is faxed, the communication is presumed to have been received on the date of the transmission acknowledgment. Communications faxed after the receiving entity's normal business hours are presumed received the following business day.

(g) If a communication is hand delivered, the communication is presumed to have been received on the date the delivery receipt is signed.

(h) Any entity submitting a communication under subsection (b)(1)-(4) of this section may choose to maintain a mail log to provide proof of submission and establish date of receipt. The entity shall fax or electronically transmit a copy of the mail log, if used, to the receiving entity at the time of the submission of a communication and include another copy with the relevant communication. The log shall identify each separate claim, request for information or response included in a batch communication. The mail log shall include the following information: name of claimant; address of claimant; telephone number of claimant; claimant's federal tax identification number; name of addressee; name of HMO or preferred provider carrier; designated address, date of mailing or hand delivery; subscriber name; subscriber ID number; patient name; date(s) of service/occurrence, delivery method, and claim number, if applicable.

§21.2817. Terms of Contracts.

Unless otherwise provided in this subchapter, contracts between HMOs or preferred provider carriers and preferred providers shall not include terms which:

(1) extend the statutory or regulatory time frames;

(2) waive the preferred provider's right to recover reasonable attorney fees and court costs pursuant to Insurance Code Article 3.70-3C §3A(n) and Section 843.343.

§21.2818. Overpayment of Claims.

(a) An HMO or preferred provider carrier may recover a refund due to overpayment or completion of audit if:

(1) the HMO or preferred provider carrier notifies the physician or provider of the overpayment not later than the 180th day after the date of receipt of the overpayment; or

(2) the HMO or preferred provider carrier notifies the physician or provider of the completion of an audit under §21.2809 of the subchapter (relating to Audits).

(b) Notification under subsection (a) of this section shall:

(1) be in written form and include the specific claims and amounts for which a refund is due and for each claim, the basis and specific reasons for the request for refund;

(2) include notice of the physician's or provider's right to appeal; and

(3) describe the methods by which the HMO or preferred provider carrier intends to recover the refund.

(c) A physician or provider may appeal a request for refund by providing written notice of disagreement with the refund request not later than 45 days after receipt of notice described in subsection (a) of this section. Upon receipt of written notice under this subsection, the HMO or preferred provider carrier shall begin the appeal process provided for in the HMO or preferred provider carrier's contract with the provider.

(d) An HMO or preferred provider carrier may not recover a refund under this section until:

(1) for overpayments, the later of the 45th day after notification under subsection (a)(1) of this section or the exhaustion of any physician or provider appeal rights under subsection (c) of this section, where the physician or provider has not made arrangements for payment with an HMO or preferred provider carrier; or

(2) for audits, the later of the 30th day after notification under subsection (a)(2) of this section or the exhaustion of any physician or provider appeal rights under subsection (c) of this section, where the physician or provider has not made arrangements for payment with an HMO or preferred provider carrier.

(e) If an HMO or preferred provider carrier is a secondary payor and pays a portion of a claim that should have been paid by the HMO or preferred provider carrier that is the primary payor, the secondary payor may only recover overpayment from the HMO or preferred provider carrier that is primarily responsible for that amount. If the portion of the claim overpaid by the secondary payor was also paid by the primary payor, the secondary payor may recover the amount of overpayment from the physician or provider that received the payment under the procedures set forth in this section.

(f) Subsections (a) through (e) of this section do not affect a carrier's ability to recover an overpayment in the case of fraud or a material misrepresentation by a physician or provider.

§21.2819. Catastrophic Event.

(a) An HMO, preferred provider carrier, physician or provider must notify the department if, due to a catastrophic event, it is unable to meet the deadlines in §§21.2815 of this title (relating to Failure to Meet the Statutory Claims Payment Period) or 21.2829 (relating to Filing of Claims), as applicable. The entity must send the notification required under this subsection to the department within five days of the catastrophic event.

(b) Within ten days after the entity returns to normal business operations, the entity must send a certification of the catastrophic event to the department, to the Life/Health/HMO Filings Intake Division, Texas Department of Insurance, P.O. Box 149104, Mail Code 106-1E. The certification must:

(1) be in the form of a sworn affidavit from:

(A) for a physician or provider, the physician, provider, office manager, administrators or their designees; or

(B) for an HMO or preferred provider carrier, a corporate officer or the corporate officer's designee.

(2) identify the specific nature and date of the catastrophic event; and

(3) identify the length of time the catastrophic event caused an interruption in the claims submission or processing activities of the physician, provider, HMO or preferred provider carrier.

(c) A valid certification to the occurrence of a catastrophic event under this section tolls the applicable deadlines in §§21.2804, 21.2806, 21.2809 and 21.2815 of this title for the number of days identified in subparagraph (b)(3) of this section as of the date of the catastrophic event.

§21.2820. Identification Cards.

(a) An identification card, or other similar document that includes information necessary to allow enrollees and insureds to access services or coverage under an HMO evidence of coverage or a preferred provider benefit plan, that is issued by an HMO or preferred provider carrier subject to this subchapter pursuant to §21.2801 of this title (relating to Scope) shall comply with the requirements of this section.

(b) An identification card or other similar document issued to enrollees or insureds shall include the following information:

(1) the name of the enrollee or insured;

(2) the first date on which the enrollee or insured became eligible for benefits under the plan or a notification of a toll-free number that a preferred provider may use to obtain that information; and

(3) the symbol identified in subsection (c) of this section.

(c) The symbol required by subsection (b)(3) of this section shall be displayed prominently on the front of the identification card as follows:
Figure: 28 TAC §21.2820(c)

(d) The requirements of this section apply to an HMO evidence of coverage or a preferred provider benefit plan issued or renewed on or after January 1, 2004.

§21.2821. Reporting Requirements.

(a) An HMO or preferred provider carrier shall submit to the department quarterly claims payment information in accordance with the requirements of this section.

(b) The HMO or preferred provider carrier shall submit the report required by subsection (a) of this section to the department on or before:

(1) May 15th for the months of January, February and March of each year;

(2) August 15th for the months of April, May and June of each year;

(3) November 15th for the months of July, August and September of each year; and

(4) February 15th for the months of October, November and December of each preceding calendar year.

(c) The HMO or preferred provider carrier shall submit the first report required by this section to the department on or before February 15, 2004 and shall include information for the months of September, October, November and December of the prior calendar year.

(d) The report required by subsection (a) of this section shall include, at a minimum, the following information:

(1) number of claims received from non-institutional preferred providers;

(2) number of claims received from institutional preferred providers;

(3) number of clean claims received from non-institutional preferred providers;

(4) number of clean claims received from institutional preferred providers;

(5) number of clean claims from non-institutional preferred providers paid within the applicable statutory claims payment period;

(6) number of clean claims from non-institutional preferred providers paid on or before the 45th day after the end of the applicable statutory claims payment period;

(7) number of clean claims from institutional preferred providers paid on or before the 45th day after the end of the applicable statutory claims payment period;

(8) number of clean claims from non-institutional preferred providers paid on or after the 46th day and before the 91st day after the end of the applicable statutory claims payment period;

(9) number of clean claims from institutional preferred providers paid on or after the 46th day and before the 91st day after the end of the applicable statutory claims payment period;

(10) number of clean claims from non-institutional preferred providers paid on or after the 91st day after the end of the applicable statutory claims payment period;

(11) number of clean claims from institutional preferred providers paid on or after the 91st day after the end of the applicable statutory claims payment period;

(12) number of clean claims from institutional preferred providers paid within the applicable statutory claims payment period;

(13) number of claims paid pursuant to the provisions of §21.2809 of this title (relating to Audit Procedures);

(14) number of requests for verification received pursuant to §19.1724 of this title (relating to Verification);

(15) number of verifications issued pursuant to §19.1724 of this title;

(16) number of declinations, pursuant to §19.1724 of this title.

(17) number of certifications of catastrophic events sent to the department; and

(18) number of days business was interrupted for each corresponding catastrophic event.

(e) An HMO or preferred provider carrier shall annually submit to the department, on or before July 31, information related to the number of declinations in the following categories:

(1) policy or contract limitations:

(A) premium payment timeframes that prevent verifying eligibility for 30-day period,

(B) policy deductible, specific benefit limitations or annual benefit maximum,

(C) benefit exclusions,

(D) no coverage or change in membership eligibility, including individuals not eligible, not yet effective or membership cancelled, and

(E) pre-existing condition limitations;

(2) declinations in which the claim was subsequently paid when submitted;

(3) declinations in which claim was subsequently denied when submitted;

(4) declinations due to inability to obtain necessary information in order to verify requested services from the following persons:

(A) the requesting physician or provider,

(B) any other physician or provider,

(C) any other person.

§21.2822. Administrative Penalties.

(a) An HMO or preferred provider carrier that fails to comply with §21.2807 of this title (relating to Effect of Filing a Clean Claim) for more than two percent of clean claims submitted to the HMO or preferred provider carrier is subject to an administrative penalty pursuant to the Insurance Code, §843.342(k) or Article 3.70-3C section 3I(k), as applicable.

(b) The percentage of the HMO or preferred provider carrier's compliance with §21.2807 of this title shall be determined on a quarterly basis and shall be separated into a compliance percentage for noninstitutional preferred provider claims and institutional preferred provider claims. Claims paid in compliance with §21.2809 of this title (relating to Audit Procedures) are not included in calculating the compliance percentage under this section.

§21.2823. Applicability to Certain Non-Contracting Physicians and Providers.

The provisions of §§19.1724 and 21.2807 of this title (relating to Verification and Effect of Filing a Clean Claim) apply to a physician or provider that provides to an enrollee or insured of an HMO or preferred provider carrier:

(1) care related to an emergency or its attendant episode of care as required by state or federal law; or

(2) specialty or other medical care or health care services at the request of the HMO, preferred provider carrier, physician, or provider because the services are not reasonably available from a physician or provider who is included in the HMO's or preferred provider carrier's network.

§21.2824. Applicability.

The amendments to §§21.2801 - 21.2803, 21.2807 - 21.2809 and 21.2811 - 21.2817 of this title (relating to Scope, Definitions, Elements of a Clean Claim, Effect of Filing a Clean Claim, Effect of Filing Deficient Claim, Audit Procedures, Disclosure of Processing Procedures, Denial of Clean Claim Prohibited for Change of Address, Requirements Applicable to Other Contracting Entities, Electronic Adjudication of Prescription Benefits. Failure to Meet the Statutory Claims Payment Period, Date of Receipt, and Terms of Contracts), and new §§21.2804 - 21.2806, §§21.2818, 21.2819 and 21.2821 - 21.2825 of this title (relating to Requests for Additional Information from Treating Preferred Provider, Requests for Additional Information from Other Sources, Claims Filing Deadline, Overpayment of Claims, Catastrophic Event, Identification Cards, Reporting Requirements, Administrative Penalties, Applicability to Certain Non-Contracting Physicians and Providers, Applicability, and Severability) apply to contracts entered into or renewed between an HMO or preferred provider carrier and a preferred provider on or after August 16, 2003 and to services provided or hospital confinements beginning on or after August 16, 2003 by physicians and providers that do not have a contract with an HMO or preferred provider carrier.

§21.2825. Severability.

If a court of competent jurisdiction holds that any provision of this subchapter is inconsistent with any statutes of this state, is unconstitutional, or is invalid for any reason, the remaining provisions of this subchapter shall remain in full effect.

§21.2826. Waiver.

The provisions of Texas Insurance Code Articles 3.70-3C Sections 3A, 3C-3J, and 10-12; 21.52Z; Chapter 843, Subchapter J and Sections

843.209 and 843.319; as well as this subchapter and §§3.3703(20), 11.901(10), 19.1723, and 19.1724 of this title (relating to Contracting Requirements, Required Provisions, Preauthorization and Verification, respectively) are not applicable to Medicaid and Children's Health Insurance Program (CHIP) plans provided by an HMO or preferred provider carrier to persons enrolled in the medical assistance program established under Chapter 32, Human Resources Code, or the child health plan established under Chapter 62, Health and Safety Code.

This agency hereby certifies that the emergency adoption 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 August 15, 2003.

TRD-200305228
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective Date: August 16, 2003
Expiration Date: December 14, 2003
For further information, please call: (512) 463-6327

♦ ♦ ♦

28 TAC §§21.2804 - 21.2806, 21.2818 - 21.2820

The Commissioner of Insurance adopts on an emergency basis, to take effect on August 16, 2003, the repeal of §§21.2804 - 21.2806 and 21.2818 - 21.2820 concerning submission of clean claims. Contemporaneously with this emergency adopted repeal, emergency adopted amendments to §§21.2801 - 21.2803, 21.2807 - 21.2809, and 21.2811 - 2817, and emergency adopted new §§21.2804 - 21.2806, 21.2818, 21.2819 and 21.2821 - 21.2825 are published elsewhere in this issue of the *Texas Register.* This repeal is necessary so that new §§21.2804 - 21.2806 and 21.2818 - 21.2820 may be adopted which will implement the provisions of Senate Bill 418 (SB 418) 78th Legislative Session. The provisions of repealed §21.2819 and §21.2820 have been adopted as new §21.2824 and §21.2825. The provisions of SB 418, which require standardization of clean claim requirements, are inconsistent with §§21.2804 - 21.2806 and 21.2818, which allowed for carrier-specific clean claim elements and attachments after proper disclosure.

Pursuant to SB 418, several provisions become effective 60 days after the effective date of the statute. Governor Rick Perry signed SB 418 into law on June 17, 2003, rendering certain provisions effective on August 16, 2003. SB 418 further provides that the Commissioner of Insurance may adopt emergency rules to implement this Act absent the finding in subsection (a), Section 2001.034, Government Code. An emergency adoption is also warranted so that rules are in place on the effective date of certain provisions of the statute, to facilitate the uniform implementation of these amendments, and to guide affected parties' efforts to comply with the new statutory requirements. SB 418 promotes the timely payment of physicians and providers for their services, and carriers' compliance in meeting their contractual and regulatory obligations. SB 418 also requires that the commissioner appoint a "technical advisory committee on claims processing" (TACCP) and to consult with the TACCP with respect to, among other things, "the implementation of the standardized coding and bundling edits and logic" before adopting any rule related to such subjects. Upon the governor's signing of SB 418, the commissioner appointed the TACCP, which has since met and provided input regarding these rule amendments. However, the requirement of appointing and consulting with the TACCP regarding proposed rules, combined with the normal process of rule adoption and its associated notice and comment periods, would have required a timeframe that could not be completed prior to the date affected entities must begin complying with certain provisions of the new statute. Considering these facts, it is necessary to adopt this repeal on an emergency basis to ensure that physicians and providers are paid timely for their services and to promote regulatory compliance.

The repeal of these sections is adopted on an emergency basis under SB 418, Government Code §2001.034, and Insurance Code Article 3.70-3C and §§843.336, 843.3385 and 36.001. SB 418 provides that the commissioner shall adopt rules as necessary to implement that Act, including emergency adoption of rules pursuant to §2001.034 of the Government Code without a finding described in subsection (a) of that provision. Government Code §2001.034 provides for the adoption of administrative rules on an emergency basis without notice and comment. Article 3.70-3C provides that the commissioner may adopt rules to implement the article as it relates to the prompt payment of claims by a preferred provider carrier, provides a standard format for the filing of clean claims with no required attachments, and allows insurers, in lieu of requiring attachments with clean claims, to request additional information after receiving a clean claim. Section 843.336 provides the standardized format for a clean claim in the HMO Act and does not allow for attachments. Section 843.3385 allows an HMO to request additional information after receiving a clean claim in lieu of the prior statute's provisions for requiring attachments as part of a clean claim. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the emergency adoption 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 August 15, 2003.

TRD-200305227
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective Date: August 16, 2003
Expiration Date: December 14, 2003
For further information, please call: (512) 463-6327

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 41. HEALTH CARE AND INSURANCE PROGRAMS

SUBCHAPTER A. RETIREE HEALTH CARE BENEFITS (TRS-CARE)

34 TAC §41.6

The Teacher Retirement System of Texas (TRS) adopts on an emergency basis new §41.6 concerning required contributions from public schools to the Retired School Employees Insurance Fund. The new section is adopted on an emergency basis pursuant to §2001.034 of the Government Code, which allows a state agency to adopt an emergency rule if a requirement of state or federal law requires adoption of the rule on less than 30 days notice. The new section is also adopted on an emergency basis in accordance with §2001.006 of the Government Code, which allows a state agency to adopt rules and take other administrative action in preparation for the implementation of legislation that has become law but has not taken effect. The new section is being simultaneously proposed for permanent adoption in this issue of the *Texas Register*.

In accordance with House Bill 3459, 78th Legislature, Regular Session, and House Bill 1, 78th Legislature, Regular Session, the new §41.6 sets forth the requirement that public schools shall contribute 0.4% of the salaries of active employees in the same manner that the public schools make their pension contributions. The new section defines active employee and public school for the purposes of administering the new section. In addition, the new section provides that TRS may take corrective action against a public school that fails to make the required contribution in accordance with the requirements set forth in the section.

This emergency adoption is necessary because TRS and affected employers are required to comply with timelines under House Bill 3459, 78th Legislature, Regular Session, and Insurance Code, Chapter 1575, §1575.204, including modification of reporting procedures. TRS finds that the requirements of state law require the adoption of the new section on fewer than 30 days notice. The agency has determined that this section is necessary and appropriate in accordance with Government Code §2001.006, which allows the agency to adopt rules and take other administrative action in preparation for the implementation of legislation that has become law but has not taken effect.

The new section is adopted on an emergency basis 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 and under Insurance Code, Chapter 1575, §1575.052, which authorizes the board of trustees to adopt rules reasonably necessary to implement the chapter including procedures for contributions and deductions. The new section is also adopted under House Bill 3459, 78th Legislature, Regular Session, Section 54, and House Bill 1, 78th Legislature, Regular Session. As described above, the sections are also adopted under Government Code §§2001.006 and 2001.034.

Other codes affected include Government Code, Chapter 825, §825.408; Insurance Code, Chapters 1551, 1575, and 1601; and Education Code, Chapter 8 and Chapter 12, Subchapter D.

§41.6. Required Contributions from Public Schools.

(a) On a monthly basis, each public school shall contribute 0.4% of the salary of each active employee to TRS for deposit in the Retired School Employees Insurance Fund. The public school shall make the contribution at the same time and in the same manner in which the public school delivers retirement contributions. Any waiver granted to a public school under Government Code §825.408(a) does not apply to the contribution under this section.

(b) For purposes of this section, "active employee" means a contributing member of TRS who is employed by a public school and is not entitled to coverage under a plan provided under Chapter 1551 or Chapter 1601, Insurance Code.

(c) For purposes of this section, "public school" means a school district; another educational district whose employees are TRS members; a regional education service center established under Chapter 8, Education Code; or an open-enrollment charter school established under Subchapter D, Chapter 12, Education Code.

(d) TRS may take corrective action against a public school that fails to make the required contribution in accordance with the requirements of this section, including but not limited to placement of a warrant hold with the Comptroller of Public Accounts.

This agency hereby certifies that the emergency adoption 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 August 18, 2003.

TRD-200305332
Charles L. Dunlap
Executive Director
Teacher Retirement System of Texas
Effective Date: September 1, 2003
Expiration Date: December 30, 2003
For further information, please call: (512) 542-6115

SUBCHAPTER C. TEXAS SCHOOL EMPLOYEES GROUP HEALTH (TRS-ACTIVECARE)

34 TAC §41.53

The Teacher Retirement System of Texas (TRS) adopts on an emergency basis new §41.53 concerning the 90-day waiting period for supplemental compensation payment to eligible active public school employees. The new section implements a 90-day waiting period for the supplemental compensation offered to eligible employees of school districts, participating charter schools, other educational districts whose employees are members of TRS, and regional educational services who are hired on or after September 1, 2003, when the employee is not already a TRS member on the date of employment. The new section is adopted on an emergency basis pursuant to §2001.034 of the Government Code, which allows a state agency to adopt an emergency rule if a requirement of state or federal law requires adoption of the rule on less than 30 days notice. The new section is also adopted in accordance with §2001.006 of the Government Code, which allows a state agency to adopt rules and take other administrative action in preparation for the implementation of legislation that has become law but has not taken effect. The new section is simultaneously proposed for permanent adoption in this issue of the *Texas Register*.

In accordance with House Bill 3459, 78th Legislature, Regular Session, the new section sets forth the requirement of a 90-day waiting period for an individual who begins employment on or after September 1, 2003, and is not a member of TRS (including through withdrawal of contributions) as of the date of employment, with an entity eligible to receive and hold in trust supplemental compensation. The new section provides that the date of eligibility for the supplemental compensation shall be determined by the process set forth in rule 34 TAC §25.34(c) (relating to Administration of Membership Waiting Period) and it describes the

date of employment for the purpose of administering the section. In addition, the new section requires an entity to correct any report on which the entity has erroneously included an individual who was not eligible or on which the entity has failed to report an individual eligible for supplemental compensation.

This emergency adoption is necessary because TRS and affected employers are required to comply with the relevant provisions of House Bill 3459, 78th Legislature, Regular Session, including preparation of communication for affected employees, modification of procedures and programming of payroll systems to implement the new waiting period. TRS finds that the requirements of state law require the adoption of the new section on fewer than 30 days notice. The agency has determined that this section is necessary and appropriate in accordance with Government Code §2001.006, which allows the agency to adopt rules and take other administrative action in preparation for the implementation of legislation that has become law but has not taken effect.

The amendments are adopted on an emergency basis 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 and under Insurance Code, article 3.50-8, section 4, which authorizes TRS to adopt rules to implement the article. The new section is also adopted under House Bill 3459, 78th Legislature, Regular Session, section 57. As described above, the section is also adopted under Government Code §2001.034.

Insurance Code, article 3.50-8 or Insurance Code, Chapter 1580 is affective by the proposal.

§41.53. Waiting Period for Supplemental Compensation.

(a) For an individual who begins employment on or after September 1, 2003, with an entity eligible to receive and to hold in trust supplemental compensation under Insurance Code Article 3.50-8 or Insurance Code Chapter 1580 ("entity" or "entities") and that individual is not a member of TRS as of the date of employment, eligibility for supplemental compensation begins on the first calendar day after the end of a 90 calendar day waiting period.

(b) For purposes of this section, an individual who is not considered to be a TRS member includes an individual who previously terminated membership in the retirement system through withdrawal of contributions and did not resume membership prior to a date of employment that is on or after September 1, 2003.

(c) In determining the date of eligibility for supplemental compensation for an individual who is subject to the waiting period, an entity shall follow the process set out in §25.34(c) of this title (Relating to Administration of Membership Waiting Period).

(d) For the purpose of administering this section, the date of employment means the date on which an employee begins to perform service for an entity and the service is of a type that would otherwise qualify the individual for membership in the TRS pension plan, as provided under Chapter 25, Subchapter A, of this title, if the individual were not subject to the waiting period described in this section.

(e) On the 91st calendar day of employment, an individual who is otherwise qualified to receive supplemental compensation is eligible to receive the full monthly supplemental compensation distribution, starting with the first day of the calendar month in which the 91st day falls.

(f) An entity shall correct any report on which the entity has erroneously included an individual who was not eligible for supplemental compensation or has failed to report an individual who was eligible for supplemental compensation as required by §41.42(g) of this title (Relating to Payment of Supplemental Compensation). The entity may be subject to a change in funding as set out in §41.42(g) of this title (Relating to Supplemental Compensation).

(g) Upon request by TRS, an entity or an individual subject to this section shall provide copies of, or otherwise make available any information that TRS determines us necessary to administer this section.

This agency hereby certifies that the emergency adoption 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 August 18, 2003.

TRD-200305333
Charles L. Dunlap
Executive Director
Teacher Retirement System of Texas
Effective Date: September 1, 2003
Expiration Date: December 30, 2003
For further information, please call: (512) 542-6115

♦ ♦ ♦

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 4. TEXAS COMMISSION FOR THE BLIND

CHAPTER 169. BLIND CHILDREN'S VOCATIONAL DISCOVERY AND DEVELOPMENT PROGRAM

The Texas Commission for the Blind adopts on an emergency basis the amendment of §169.4, pertaining to Definitions, and §169.52, pertaining to Order of Selection Expenditure Categories. The Commission also adopts on an emergency basis the repeal of §169.33, pertaining to Respite Care Services. These rules are within Chapter 169, Blind Children's Vocational Discovery and Development Program.

The state's appropriation bill for fiscal year 2004-2005, House Bill 1 (78th Legislature), reflects a substantial reduction in general revenue appropriated to the Commission for providing services to children with visual impairments. The Commission must take immediate steps to reduce expenditures and to ensure that children who are blind receive priority during the expenditure of program funds. Therefore, the adoption on an emergency basis is being made under the authority of Government Code, §2001.034, which allows agencies to adopt an emergency rule without prior notice or hearing if a requirement of state or federal law requires adoption of a rule on fewer than 30 days' notice.

Section 169.4 as adopted has been amended to remove the definition of respite care services. Section 169.33, pertaining to respite care services, has been repealed. Respite care services will no longer be available to parents of severely disabled blind children. Section 169.52 as adopted has been amended to create eight priority categories rather than five within the Commission's order of selection criteria. The amended order of selection provides clearer notice to families where their children fall within the agency's priorities. Because funds will be inadequate to serve all eligible children with visual impairments, the Commission is implementing the order of selection immediately to

ensure that blind children and children who are severely visually impaired receive a full range of services. The agency will be operating at category C, priority 4 within §169.52 effective September 1 on an emergency basis and will continue operating at this level for the foreseeable future upon adoption of permanent rules proposed in this same issue of the *Texas Register*. At this level, expenditure of case service funds will be limited to planned, necessary program services of children who meet the definition of being blind, children who are blind in one eye and who have a severe visual loss in the other eye, children who have a corrected visual acuity of 20/70 or worse in the better eye, and children who are certified as visually impaired by a local education agency.

SUBCHAPTER A. GENERAL INFORMATION

40 TAC §169.4

The amended rules are adopted on an emergency basis under the authority of the Human Resources Code, Chapter 91, §91.011 and §91.028 (relating to Services for Visually Handicapped Children), which authorize the Commission to adopt rules for the administration of its programs, and Government Code, §2001.034, which allows agencies to adopt an emergency rule.

The adoption affects no other statutes.

§169.4. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise. The use of the singular or plural case is not meant to be limiting unless the context clearly indicates otherwise.

(1)-(12) (No change.)

~~[(13) Respite care services--Services provided to the parent of a child as a period of temporary relief from their responsibilities as primary caregiver.]~~

(13) [~~(14)~~] Restoration services--Services to eliminate or reduce limitations imposed by a visual impairment on the functioning of a child and cosmetic services necessary to improve the physical appearance of the child's eyes when the eyes are abnormal to the extent that they negatively impact the child's social and emotional well-being.

(14) [~~(15)~~] Severe visual loss--A loss of vision such that the best corrected visual acuity is between 20/70 and 20/200 in the better eye; or a visual loss such that the visual field is 30 degrees or less but greater than 20 degrees with best correction.

(15) [~~(16)~~] Severely visually impaired child--A child with a visual impairment that has resulted in a permanent condition of blindness or severe visual loss; or a child who has been certified as blind or severely visually impaired by a local education agency; or a child who has been determined to be functioning as a person who is blind or who has a severe visual loss.

(16) [~~(17)~~] Technology services--Services to provide a child access to an item, piece of equipment, or product system that maintains or improves the child's communication, independent living, social, or prevocational skills.

(17) [~~(18)~~] Visual impairment--An injury, disease, or other disorder that reduces, or if not treated will probably result in reducing, visual functioning; or a visual condition requiring cosmetic treatment, psychological assistance, counseling, or other assistance that the commission can render.

This agency hereby certifies that the emergency adoption 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 August 12, 2003.

TRD-200305080
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective Date: August 12, 2003
Expiration Date: December 10, 2003
For further information, please call: (512) 377-0611

♦ ♦ ♦

SUBCHAPTER C. SERVICES

40 TAC §169.33

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

The repeal is adopted on an emergency basis under the authority of the Human Resources Code, Chapter 91, §91.011 and §91.028 (relating to Services for Visually Handicapped Children), which authorize the Commission to adopt rules for the administration of its programs, and Government Code, §2001.034, which allows agencies to adopt an emergency rule.

The adoption affects no other statutes.

§169.33. Respite Care Services.

This agency hereby certifies that the emergency adoption 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 August 12, 2003.

TRD-200305081
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective Date: August 12, 2003
Expiration Date: December 10, 2003
For further information, please call: (512) 377-0611

♦ ♦ ♦

SUBCHAPTER E. ORDER OF SELECTION FOR PAYMENT OF SERVICES

40 TAC §169.52

The amended rule is adopted on an emergency basis under the authority of the Human Resources Code, Chapter 91, §91.011 and §91.028 (relating to Services for Visually Handicapped Children), which authorize the Commission to adopt rules for the administration of its programs, and Government Code, §2001.034, which allows agencies to adopt an emergency rule.

The adoption affects no other statutes.

§169.52. Order of Selection Expenditure Categories.

Order of Selection expenditure categories, from most restrictive to least restrictive, are:

(1) Category A--No expenditure of case service funds.

(2) Category B--Expenditure of case service funds only for diagnostics.

(3) Category C--Expenditure of case service funds authorized for any planned, necessary BCVDD Program services according to the following priorities:

(A) Priority 1--Children who meet the definition of being blind.

(B) Priority 2--Children who are blind in one eye and who have a severe visual loss in the other eye.

(C) Priority 3--Children who have a corrected visual acuity of 20/70 or worse in the better eye.

(D) Priority 4--Children who are certified as visually impaired by a local education agency.

(E) Priority 5--Children who have a nonsevere visual loss and a degenerative eye condition that will result in further visual loss;

(F) Priority 6--Children who need a prosthesis.

(G) Priority 7--Children with nonsevere visual losses that affect visual acuity who are in need of services other than correction of a refractive error.

(H) Priority 8--Children with treatable visual impairments that may or may not affect visual acuity and children with an uncorrected visual acuity of 20/70 or worse in both eyes who need no services other than correction of a refractive error.

~~[(C) Priority 3--Children who fall in one or more of the following categories:]~~

~~*[(i)* Children who have a corrected visual acuity of 20/70 or worse in the better eye;]~~

~~*[(ii)* Children who have a nonsevere visual loss and a degenerative eye condition that will result in further visual loss;]~~

~~*[(iii)* Children who need a prosthesis; and]~~

~~*[(iv)* Children who are certified as visually impaired by a local education agency.]~~

~~[(D) Priority 4--Children with nonsevere visual losses that affect visual acuity who are in need of services other than correction of a refractive error.]~~

~~[(E) Priority 5--Children with treatable visual impairments that may or may not affect visual acuity and children with an uncorrected visual acuity of 20/70 or worse in both eyes who need no services other than correction of a refractive error.]~~

This agency hereby certifies that the emergency adoption 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 August 12, 2003.

TRD-200305082
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective Date: August 12, 2003
Expiration Date: December 10, 2003
For further information, please call: (512) 377-0611

♦ ♦ ♦

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 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 81. ELECTIONS

SUBCHAPTER I. IMPLEMENTATION OF THE HELP AMERICA VOTE ACT OF 2002

1 TAC §81.171

The Office of the Secretary of State, Elections Division, proposes a new rule, §81.171, concerning creation of an administrative complaint procedure to comply with §402 of the federal Help America Vote Act of 2002 ("HAVA").

Ann McGeehan, Director of Elections, has determined that for the first five-year period that this rule is in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the rule.

Ms. McGeehan has also determined that for each year of the first five years that the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be: (1) for the Secretary of State to provide citizens with a grievance process for violations of HAVA and (2) for the state to comply with §402 of HAVA as necessary to receive federal requirements payments. There will be no effect on small or micro-businesses. There are no anticipated economic costs to persons who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Ann McGeehan, Director of Elections, Office of the Secretary of State, P.O. Box 12060, Austin, Texas 78711-2060.

The new rule is proposed pursuant to §13, House Bill 1549, 78th Legislative Session, 2003, which requires the Secretary of State to adopt rules establishing an administrative complaint procedure to remedy grievances. The rule must comply with §402 of HAVA.

No other article, statute, or code is affected by this proposed new rule.

§81.171. Administrative Complaint Procedures for Violations of Title III of the Help America Vote Act of 2002.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) HAVA--The federal Help America Vote Act.

(2) Party or parties--The person making the complaint and any political subdivisions, office-holders, or individuals against whom the complaint is being alleged.

(3) Secretary of State--The currently appointed Secretary of State or his or her designee.

(b) A person who believes that a violation of Title III of the Help America Vote Act of 2002 has occurred may file a complaint with the secretary of state. Violations of Title III include but are not limited to:

(1) failure to comply with federal voting system standards, as set out in §301(a) of HAVA, including standards for accessibility for individuals with disabilities and alternate language accessibility;

(2) failure to comply with provisional voting procedures in an election as required by §302(a) of HAVA;

(3) failure to create statewide voter registration system in the manner set out in HAVA; and

(4) failure to post required voter information at the polling place as required by §302(b).

(c) All complaints must:

(1) be in writing, signed and notarized by the complainant.

(2) include the full name, telephone number, and mailing address of the complainant.

(3) include a description of the alleged violation of Title III sufficient to apprise the Secretary of State of the nature and specifics of the complaint.

(4) include a statement requesting a hearing on the record if desired.

(d) The complaint shall be reviewed by an employee of the Secretary of State to determine if the complaint meets the requirements as to form and content and identifies a violation of Title III of HAVA. The complaint shall also be reviewed to determine whether it alleges a Title III violation that falls within the direct authority of the Secretary of State or a Title III violation that falls within the authority of another jurisdiction. If the complaint does not meet the requirements as to form and content, it shall be returned to the complainant with an explanation as to its insufficiency. If the complaint meets the requirements, it shall be assigned a unique number and receipt date. Notice that the complaint has been accepted shall be mailed to all parties.

(e) Within 60 days of the receipt of the complaint by the Secretary of State, the Secretary of State shall review the alleged violation and make an initial determination as to whether there is a violation of Title III of HAVA.

(f) If the Secretary of State determines that there is a violation of a provision of Title III of HAVA, the Secretary of State shall inform the complainant in writing and provide the appropriate remedy. The remedy may not include any award of monetary damages, costs or attorney fees, and may not include the invalidation of any election or a determination of the validity of any ballot or vote.

(g) If the Secretary of State determines that no violation of a provision of Title III of HAVA has occurred, the Secretary of State shall inform the complainant in writing. The notice to the complainant shall inform the complainant of his or her right to a hearing.

(h) Upon the initial determination of the Secretary of State, the complainant may make a written request for a hearing on the record, which shall be held at the Secretary of State's offices in Austin, unless otherwise determined by the Secretary of State. If the nature of the complaint concerns a matter over which the Secretary of State has direct authority, the hearing shall be conducted by the Secretary of State. The hearing shall proceed as follows:

(1) The hearing shall be tape recorded, and the tape shall constitute the official record of the hearing.

(2) Written notice of the hearing shall be given to all parties including the date, time, and place of the hearing, and notice shall be sent to the mailing addresses set out in the complaint. Notice must be sent at least seven (7) days prior to the date of the hearing.

(3) If, in the discretion of the Secretary of State, the hearing is held via conference telephone call or video teleconferencing, the notice shall so state and further provide for the mechanics of the teleconference.

(4) The hearing may only be continued to a new date upon a determination of the Secretary of State that finds good cause, and in no event may it be continued more than once, or in no event may it be continued so as to make it difficult to issue a final determination within ninety (90) days of the filing of the complaint.

(5) At the hearing, each party shall be given an opportunity to explain their positions, and present evidence to support their position. At the sole discretion of the Secretary of State, this presentation may include documents, witnesses, oral argument, and tangible items relevant to the determination of the complaint. The record of the hearing shall consist of the written complaint, the written response(s), the tape of the hearing, and any documents/exhibits introduced at the hearing.

(6) If the Secretary of State permits witnesses to testify, they must be sworn in prior to their testimony being given.

(7) If a complainant fails to appear at the hearing, the complaint shall be dismissed with prejudice.

(i) If the Secretary of State fails to make a final determination within 90 days after the original receipt of the complaint, or an extended period if the Secretary of State determines that more time is required to resolve the issue and the complainant agrees to the extension, the complainant may request resolution of the complaint under an alternative dispute resolution process as agreed upon by the Secretary of State and the parties to the dispute.

(j) The Secretary of State may consolidate complaints filed under this rule if the Secretary of State determines that the complaints concern the same violation.

(k) Complaints, information filed with the Secretary of State in connection with complaints, and the Secretary of State's response to the complaint are public records.

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 August 18, 2003.

TRD-200305357

Geoffrey S. Connor
Assistant Secretary of State
Office of the Secretary of State
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 463-5650

♦ ♦ ♦

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 352. QUALITY ASSURANCE FEE FOR LONG-TERM CARE FACILITIES

1 TAC §§352.1 - 352.5

The Health and Human Services Commission (HHSC) proposes amendments to §352.1 concerning the purpose and duration of chapter 352, §352.2 concerning definitions, §352.3, concerning quality assurance fee, §352.4, concerning required reports, and §352.5, concerning payment and collection of the quality assurance fee. In accordance with SB 1862, 78th Legislature, Regular Session, the amendments implement a statutorily required change that: makes the quality assurance fee applicable to facilities owned by the Texas Department of Mental Health and Mental Retardation (MHMR) beginning with the state fiscal year ending on August 31, 2003; requires payment by MHMR of fees for those facilities by that date; expands the possible uses of the funds; changes the definition of patient days; and, changes the time for facilities to file required reports from the 10th to the 20th day after the last day of a month. The amendments also increase the quality assurance fee from 5.5 to 6 percent beginning September 1, 2003, in accordance with projected revenues and related federal matching funds specified in the General Appropriations Act for the 2004-2005 biennium.

The quality assurance fee was originally established in 2001 as a result of the enactment of SB 1839 by the 77th Legislature which added subchapter H to chapter 252, Health and Safety Code. On June 20, 2003, amendments to chapter 252 became effective (SB 1862, 78th Legislature, Regular Session) which require proposed rule amendments making the quality assurance fee applicable to MHMR facilities from the current state fiscal year, requiring MHMR to make payment by August 31, 2003, and changing the definition of patient days and the time for facilities to file required reports. In addition, projected revenues and related federal matching funds specified in the 2004-2005 General Appropriations Act make necessary a proposed rule amendment changing the quality assurance fee from 5.5 to 6 percent beginning on September 1, 2003. These rule amendments are proposed pursuant to HHSC's authority under §531.033, Government Code and under §252.205 Health and Safety Code. HHSC is simultaneously adopting these amendments on an emergency basis elsewhere in this issue of the *Texas Register*.

Thomas Suehs, Deputy Commissioner for Financial Services, has determined that for each year of the first five years the amendments are in effect, the public will benefit from adoption of the amendments. The anticipated public benefit as a result of the amendments will be a greater level of services to persons with mental retardation than would be possible if the amendments were not adopted.

Mr. Suehs has also determined that for state fiscal year 2003 there will be an estimated $17,375,199 in additional federal matching funds available as a result of the application of the fee

to MHMR facilities, and for the next four years there will be an estimated $67,053,076 additional federal funds available. For the first five years that the fee is increased from 5.5 to 6 percent there will be an estimated additional $21,345,820 in total funds available consisting of an additional $13,083,015 federal funds and $8,262,805 state funds. No additional costs will be borne by local governments as a result of the amendments. The proposed amendments will not result in additional costs to persons required to comply with them, nor do they have any adverse impact on small or micro-businesses. The amendments will not affect local employment.

HHSC has determined that none of the proposed amendments is a "major environmental rule" as defined by §2001.0225, Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. None of the proposed amendments is specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Health and Human Services Commission has determined that the proposed rules do not restrict or limit an owner's right to their property that would otherwise exist in the absence of governmental action and therefore do not constitute a taking under Texas Government Code, §2007.043. The following is a summary of that assessment. The proposed rules are reasonably taken to fulfill requirements of state law.

A hearing to accept oral and written testimony from members of the public concerning the proposal has been scheduled for 8:30 A.M., Friday, August 29, 2003, in the Public Hearing Conference Room of the Riata Building at 12555 Riata Vista Circle, Bldg.3, in Austin, Texas. Persons wishing to attend must enter through 12545 Riata Vista Circle, Austin, Texas, and obtain a pass from Security for the Public Hearing Conference Room. Persons requiring accommodations for a disability should notify Tony Arreola, at least 72 hours prior to the hearing at (512) 685-3124.

Public comment may be submitted in writing to Steve Lorenzen, Director, Rate Analysis, Health and Human Services Commission, by mail addressed to P.O. Box 13247, Austin, Texas 78711, or by facsimile to (512) 424-6586. Comments must be submitted within 30 days after the date of this publication. Further information may be obtained by calling Mr. Lorenzen at (512) 794-6845.

The amendments are proposed pursuant to HHSC's authority under §531.033, Government Code and under §252.205 Health and Safety Code.

The amendments affect Health & Safety Code §252.202 and House Bill 7, 78th Leg. §11.

§352.1. Purpose and Duration of Chapter.

(a) This chapter implements the determination, assessment, collection, and enforcement of the quality assurance fee authorized under chapter 252, Health and Safety Code, subchapter H.

(b) The purpose of the quality assurance fee established under this chapter is to improve the quality of care provided to persons with mental retardation as follows:

(1) The quality assurance fee is intended to support and/or maintain an increase in reimbursement to licensed intermediate care facilities for the mentally retarded and facilities operated according to the requirements of chapter 252, Health and Safety Code and owned and/or operated by a community mental health and mental retardation center as described in chapter 534, subchapter A, Health and Safety Code, and a facility owned by the Texas Department of Mental Health and Mental Retardation that participate in Medicaid program, subject to legislative appropriation for this purpose; and

~~[(2) If funds generated from the collection of quality assurance fees under this chapter are available following fulfillment of the purpose described in subsection (b)(1) of this section, such funds may be allocated to the Home and Community Based waiver program and the Mental Retardation Local Authority waiver program established pursuant to 42 U.S.C. §1396n(c).]~~

(2) [~~(3)~~] The Commission or its designee may also offset allowable expenses to administer the quality assurance fee program against revenues generated by the collection of the quality assurance fee.

(c) This chapter will expire on September 1, 2005, unless chapter 252, subchapter H, Health and Safety Code, is extended by the 79th Texas Legislature.

§352.2. Definitions.

As used in this chapter, the following terms shall have the meanings prescribed below, unless the context clearly indicates otherwise:

(1) "Facility" means:

(A) An intermediate care facility for the mentally retarded or the corporate parent of an intermediate care facility for the mentally retarded licensed under chapter 252, Health and Safety Code; or

(B) A facility operated according to the requirements of chapter 252, Health and Safety Code, and owned and/or operated by a community mental health and mental retardation center as described in chapter 534, subchapter A, Health and Safety Code; or [.]

(C) A facility owned by the Texas Department of Mental Health and Mental Retardation.

(2) "Gross receipts" means money paid to a facility as compensation for services provided to patients, including client participation, but does not include charitable contributions to a facility.

(3) "Total patient days" means the sum, computed on a monthly basis, of the following:

(A) The total number of patients occupying a facility bed immediately before midnight on each day of the month; and

~~[(B) The total number of facility beds that are on hold on each day of the month and that have been placed on hold for a period not to exceed three consecutive calendar days during which a patient is in a hospital during the month; and]~~

(B) [~~(C)~~] The total number of beds that are on hold on each day of the month and that have been placed on hold for a period not to exceed three consecutive calendar days during which a patient is on therapeutic [~~home~~] leave during the month.

(C) [~~(D)~~] The total number of days a patient is discharged from a facility are not counted in the calculation of the total patient days under this chapter.

§352.3. Quality Assurance Fee Determination Methodology.

(a) Quality [~~Interim quality~~] assurance fee on State facilities. As provided in section 1(b) [~~9.02~~] of the Act of June 20, 2003, 78th Leg. [~~May 28, 2001, 77th Leg.~~] R.S., (Senate Bill 1862 [~~1839~~]), not later than August 31, 2003, the Texas Department of Mental Health and

Mental Retardation shall pay for each facility owned by the department the quality assurance fee for patient days occurring between September 1, 2002, and July 31, 2003. [~~the quality assurance fee for the month September 2001, and for each month thereafter until implementation of a final quality assurance fee under subsection (b) of this section is the total number of patient days reported by a facility under §352.4 of this chapter multiplied by $5.25.~~]

(b) Quality assurance fee. Beginning September 1, 2003, [~~November 1, 2001~~] the quality assurance fee for a facility is in the amount of six [~~5.5~~] percent of each reimbursement or payment rate received, including those received from the resident, for each resident in the facility during a calendar month, provided the amount of all such quality assurance fees assessed for the facility during the 12-month period following assessment of the quality assurance fee do not exceed six percent of the facility's total annual gross receipts in Texas.

(c) Not later than July 31, 2002, and every six months thereafter, the commission or its designee will review each individual facility's quality assurance fee calculation. A facility's liability for the quality assurance fee may be adjusted following this review to ensure that the quality assurance fee does not exceed six percent of annual revenue.

§352.4. Required reports.

(a) The following reports must be filed by a facility in accordance with the instructions of the Commission or its designee:

(1) The monthly patient day report required under subsection (c) of this section; and

(2) The semi-annual report of gross receipts required under subsection (d) of this section.

(b) Amended reports.

(1) A facility may amend a report required under subsections (c) or (d) of this section;

(2) An amended monthly patient day report must be filed no later than 10 calendar days following the filing of the report required under subsection (c) of this section.

(3) An amended report of gross receipts must be filed no later than 10 calendar days following the filing of the report required under subsection (d) of this section.

(c) Monthly patient day report.

(1) A facility must report, not later than the 20th [~~10th~~] calendar day after the last day of a month, the total number of patient days for the facility during the preceding month.

(2) A facility must file the report required by this subsection on forms or in the format and according to the instructions prescribed by the commission or its designee.

[~~(3) The first report required under this subsection is not due until the 10th day after the end of the month this chapter takes effect. This report will cover the months September 1, 2001 through the end of the month this chapter takes effect.~~]

(d) Reporting of gross receipts.

(1) A facility must report, not later than the 10th calendar day following the last day of the sixth month following the effective date of this chapter, the total gross receipts the facility received during the preceding 6-month period.

(2) A facility must file the report required by this subsection on forms or in the format and according to the instructions prescribed by the commission or its designee.

§352.5. Payment and Collection of Quality Assurance Fee.

A facility must:

(1) Pay the amount of the quality assurance fee in accordance with the instructions of the commission or its designee not later than the 30th day after the last day of the month for which the fee is assessed; or

(2) Pay the amount of the quality assurance fee in accordance with the instructions of the commission or its designee and request an informal review of the calculation of the quality assurance fee in accordance with §352.8 of this chapter.

(3) Not later than August 31, 2003, the Texas Department of Mental Health and Mental Retardation shall pay for each facility owned by the department the quality assurance fee imposed under §352.3(a) of this title for patient days occurring between September 1, 2002, and July 31, 2003.

[~~(3) The first payment required under this section is not due until the 30th day after the end of the month this chapter takes effect. That payment will cover all the months beginning September 1, 2001 through the end of the month this chapter takes effect.~~]

(4) The commission or its designee may review the calculation of the quality assurance fee to ensure its accuracy and instruct the facility to correct its calculation and payment.

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 August 13, 2003.

TRD-200305181
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

TITLE 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 1. CONSUMER CREDIT REGULATION

SUBCHAPTER E. INTEREST CHARGES ON LOANS

7 TAC §1.505

The Finance Commission of Texas (the commission) proposes an amendment to 7 TAC §1.505, concerning deferment. The purpose of the proposed amendment is to make technical changes to the precomputed example in this rule for consumer loans under Subchapter E. The changes simply correct the date of the example to most accurately reflect the rates in effect for the time period covered in the example.

Leslie L. Pettijohn, Consumer Credit Commissioner has determined that for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of administering the rule.

Commissioner Pettijohn also has determined that for each year of the first five years the amendment as proposed is in effect, the public benefit anticipated as a result of the proposed amendment will be the proper year referenced in the example. There is no anticipated cost to persons who are required to comply with the amendment as proposed. There will be no adverse economic effect on small or micro businesses.

Comments on the proposed amendment may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to leslie.pettijohn@occc.state.tx.us.

The amendment is proposed under Texas Finance Code §11.304, which authorizes the finance commission to propose rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code §342.551 authorizes the finance commission to propose rules for the enforcement of the consumer loan chapter.

The statutory provision (as currently in effect) affected by the proposed amendment is Texas Finance Code §342.302.

§1.505. Deferment.

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

(e) Computation of deferment charge for a regular transaction. Each deferment charge on a regular loan transaction shall be computed in accordance with the method prescribed by the loan contract. If the loan contract does not provide for a deferment charge, then no deferment charge may be assessed or collected. A lender may employ any of the prescribed computational methods described herein so long as the computational method employed is consistently utilized throughout the term of the loan.

(1) (No change.)

(2) If any installment subsequent to the first installment is deferred, the deferred installment period will be determined by dividing the remaining precomputed balance owed on the account by the regular scheduled installment amount. The dollar amount associated with the deferred installment period must be rounded down to the nearest whole integer. Additionally, no deferred installment period may have a default charge assessed against the deferred installment period. After the determination of the deferred installment period, the additional interest for the deferment may not exceed the difference between the refund that would be required for prepayment in full for the determined deferred installment and the refund that would be required for the prepayment in full of the next succeeding installment. The resulting difference shall be multiplied by the number of months in the deferment period. For example, the terms of a precomputed §342.201(e), Texas Finance Code loan are as follows (with no administrative loan fee): Date of loan: 09/01/2001 [~~1999~~]; First payment due date: 10/01/2001 [~~1999~~]; Cash Advance: $2,356.21; Finance Charge: $1,243.79; Total of Payments: $3,600.00; Term: 36 months; Monthly Installment: $100; Refunding method: Scheduled Installment Earnings Method; Annual Percentage Rate: 30.00%. Assume a deferment is agreed to roughly six months into the contract, and at that time the remaining precomputed balance owed on the account was $3,095.00 and the regular scheduled installment amount was $100.00. The nearest whole integer for the dollar amount associated with the deferred time period would be 30 ($3,095.00 divided by $100 = 30.95; rounded down to the nearest whole integer = 30). If a default charge had already been assessed on the 30th remaining installment, the nearest whole integer would be 29. Assuming no default charge had been assessed on the 30th remaining installment, the additional interest charge for the deferment would be the difference between the interest refund of the 30th and the 29th installments. This difference would be $53.28.

(3) (No change.)

(f)-(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 August 15, 2003.

TRD-200305236
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 936-7640

♦ ♦ ♦

SUBCHAPTER G. INTEREST AND OTHER CHARGES ON SECONDARY MORTGAGE LOANS

7 TAC §§1.703, 1.705, 1.708

The Finance Commission of Texas (the commission) proposes amendments to 7 TAC §§1.703, 1.705, and 1.708, concerning default charges, amounts authorized to be charged after consummation, and balloon payments.

The purpose of the proposed amendments is to make technical changes to allow additional interest for default on interest-bearing Subchapter G loans as a result of the passage of Senate Bill 1430 which became effective May 12, 2003. The amendments also correct citation references that have changed as a result of legislative action. Additionally, the amendments clarify instances when balloon payments are not authorized on secondary mortgage loans by adding a reference to the high cost home loan statutory prohibition on balloon payments.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of administering the rule.

Commissioner Pettijohn also has determined that for each year of the first five years the amendment as proposed is in effect, the public benefit anticipated as a result of the proposed amendments will be ensuring that existing rules conform to legislative changes and accurate citations to prevent confusion among individuals who use the rules. There is no anticipated cost to persons who are required to comply with the amendments as proposed. There will be no adverse economic effect on small or microbusinesses.

Comments on the proposed amendment may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to leslie.pettijohn@occc.state.tx.us.

The amendments are proposed under Texas Finance Code §11.304, which authorizes the Finance Commission to propose rules to enforce Title 4 of the Texas Finance Code. Additionally,

Texas Finance Code §342.551 authorizes the Finance Commission to propose rules for the enforcement of the consumer loan chapter.

The statutory provision (as currently in effect) affected by the proposed amendments is Texas Finance Code §342.302.

§1.703. Default Charges.

(a) (No change.)

(b) Interest-bearing loan. Additional interest for default may be charged on an interest-bearing Subchapter G loan as authorized under §342.302, Texas Finance Code. [~~No additional interest for default may be charged on an interest-bearing secondary mortgage loan except for a loan contracted for on the scheduled installment earnings method.~~]

(c)-(f) (No change.)

§1.705. Amounts Authorized To Be Charged after Consummation.

(a) (No change.)

(b) Check return fee. An authorized lender may contract for, assess, or collect the fee authorized by Texas Business and Commerce Code, §3.506, [~~Tex. Rev. Civ. Stat., Art. 9022~~] in a secondary mortgage loan.

§1.708. Balloon Payments.

Balloon payments are authorized in a secondary mortgage loan unless prohibited by §303.202 Texas Finance Code, or other applicable law (for example, the high cost mortgage rules of Truth in Lending, Regulation Z, 12 C.F.R. §226.32(d)(1)).

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 August 15, 2003.

TRD-200305232
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 936-7640

♦ ♦ ♦

SUBCHAPTER J. AUTHORIZED LENDER'S DUTIES AND AUTHORITY

7 TAC §1.828, §1.830

The Finance Commission of Texas (the commission) proposes amendments to 7 TAC §1.828 and §1.830, concerning return of instruments to borrower and files and records required (Subchapter E and F Lenders).

The purpose of the amendments is to make technical changes to: 1) conform the existing rule with the Texas Transportation Code concerning the permissible timeframe for the release of a lien on a motor vehicle and 2) include the explanation of calculation of surplus or deficiency after the disposition of collateral as required by amendments to Article 9, Business and Commerce Code.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of administering the rule.

Commissioner Pettijohn also has determined that for each year of the first five years the amendment as proposed is in effect, the public benefit anticipated as a result of the proposed amendments will be more responsive releases of liens on property after satisfaction of the debt and proper citation reference in the rules resulting in clarification and easier use. There is no anticipated cost to persons who are required to comply with the amendment as proposed. There will be no adverse economic effect on small or microbusinesses.

Comments on the proposed amendment may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to leslie.pettijohn@occc.state.tx.us.

The amendment is proposed under Texas Finance Code §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code §342.551 authorizes the Finance Commission to adopt rules for the enforcement of the consumer loan chapter.

The statutory provision (as currently in effect) affected by the proposed amendment is Texas Finance Code §342.302.

§1.828. Return of Instruments to Borrower.

Upon discharge of an indebtedness by payment, renewal, or refinancing, a lender shall return an original or true and correct copy of the instrument creating the indebtedness marked "PAID" or, in lieu of a marked original or copy, provide a discharge and release of all obligations under the loan to satisfy the requirements of §342.454, Texas Finance Code. In addition, if a loan has been paid off, a lender shall give the borrower, in a recordable form, a release of the lien, including a lien on a motor vehicle [~~an automobile~~] title or real estate, or shall provide documentation for the release to the borrower, at the option of the lender whose loan has been paid a copy of an endorsement, with or without recourse, representation or warranty, and assignment of the lien to a lender that is refinancing the loan. A lender shall comply with the requirements of this section within a reasonable time not to exceed 30 days after receipt of collected funds by the lender. An authorized lender must discharge or release a lien to a motor vehicle not later than the 10th day after the date of receipt of the collected funds by the lender pursuant to Texas Transportation Code, §501.115.

§1.830. Files and Records Required (Subchapter E and F Lenders).

Each licensee must maintain records with respect to each loan made under Chapter 342, Subchapter E and F of the Texas Finance Code and make those records available for examination.

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

(7) Record of loans in litigation and repossession.

(A) (No change.)

(B) All loan records, account cards, correspondence, and any other pertinent information must be maintained in the borrower's account folders or files. The file must include the following applicable items:

(i)-(v) (No change.)

(vi) When the licensee, acting as a secured party, takes possession of the collateral and disposes of it at a public or private sale as provided under the Uniform Commercial Code, and the sale is not a judicial sale, written evidence substantiating the commercial reasonableness of all aspects of the sale of the collateral, and of its preparation for sale, if any. These documents should include copies of

any invoices or receipts, condition reports indicating the condition of the collateral, notice of intended disposition sent to the borrower and any other obligor or the waiver of the notice signed after default by the borrower and other obligors, and evidence of fair sale of the collateral. One means of providing evidence of fair sale or the commercial reasonableness of sale is the taking of not less than three bona fide bids. Bids must disclose the names and addresses of the bidders.

(vii) (No change.)

(viii) After the disposition of the collateral, a licensee must maintain a copy of any explanation of calculation of surplus or deficiency sent to the borrower.

(8)-(10) (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 August 15, 2003.

TRD-200305233
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 936-7640

♦ ♦ ♦

7 TAC §1.839

The Finance Commission of Texas (the commission) proposes amendments to 7 TAC §1.839, concerning examination fees.

The purpose of the amendment is to increase the time limit for follow-up examinations after a written deficiency report and to decrease the amount assessed for the return examination.

The agency has determined that on occasion a longer timeframe is necessary to allow licensees to prepare for a follow-up examination. The modification recognizes this longer timeframe, while reducing the cost required for the follow-up examination.

Leslie L. Pettijohn, Consumer Credit Commissioner has determined that for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of administering the rule.

Follow-up examinations are those examinations that require a fairly immediate return examination to ensure that directives and corrections ordered as a result of the initial examination have been completed. Normally these are accomplished administratively through correspondence, but certain levels of noncompliance require onsite return examinations.

Commissioner Pettijohn also has determined that for each year of the first five years the amendment as proposed is in effect, the public benefit anticipated as a result of the proposed amendments will be more efficient regulatory oversight and proper cite reference in the rules. There is no anticipated cost to persons who are required to comply with the amendment as proposed. There will be no adverse economic effect on small or micro businesses.

Comments on the proposed amendment may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to leslie.pettijohn@occc.state.tx.us.

The amendment is proposed under Texas Finance Code §11.304, which authorizes the finance commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code §342.551 authorizes the finance commission to adopt rules for the enforcement of the consumer loan chapter.

The statutory provision (as currently in effect) affected by the proposed amendment is Texas Finance Code §342.557.

§1.839. Examination Fees.

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

(d) Return examinations. If a follow-up examination visit is required within 180 [~~ninety~~] days after a written deficiency report given as a result of a failure to comply with Chapter 342 of the Texas Finance Code, this chapter, or the special instruction section of the examination report, the return examination will be assessed at [~~two times~~] the rates provided in subsection (a)(3) of 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 August 15, 2003.

TRD-200305234
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 936-7640

♦ ♦ ♦

SUBCHAPTER R. MOTOR VEHICLE INSTALLMENT SALES CONTRACT PROVISIONS

7 TAC §§1.1301, 1.1306 - 1.1308

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

The Finance Commission of Texas proposes the repeal of 7 TAC §§1.1301 and 1.1306-1.1308. The purpose of the repeal is to remove sections of the rule that relate to contract provisions. Similar sections have been drafted in connection with the plain language contract process and will be proposed for adoption simultaneously with the repeal.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period of the repeal as proposed will be in effect, there will be no fiscal implications for state or local government as a result of administering or enforcing the repeal.

Commissioner Pettijohn also has determined that for each year of the first five-year period the repeal as proposed will be in effect, the public benefit anticipated as a result of the repeal is the removal of sections will allow for new sections to be proposed in connection with the plain language contract process. There is no anticipated cost to persons who are required to comply with the repeal as proposed. There will be no adverse economic effect on small or micro businesses.

Comments on the proposed repeal may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to leslie.pettijohn@occc.state.tx.us.

The repeal is proposed under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 authorizes the Finance Commission to adopt rules for the enforcement of the consumer loan chapter.

The statutory provisions (as currently in effect) affected by the proposed repeal are Chapter 348, Texas Finance Code.

§1.1301. Purpose.

§1.1306. Other Contract Provisions.

§1.1307. Model Clauses.

§1.1308. Permissible Changes.

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 August 15, 2003.

TRD-200305229
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 936-7640

♦ ♦ ♦

7 TAC §§1.1301, 1.1306 - 1.1309

The Finance Commission of Texas (the commission) proposes new 7 TAC §§1.1301 and 1.1306-1.1309, concerning a plain language model contract for motor vehicle retail installment sales contracts. Section 1.1301 sets forth the purpose clause and discusses the benefits of plain language contracts. Sections 1.1306-1.1308 include proposed clauses, disclosures, layout, and font type for Chapter 348 motor vehicle retail installment sales transactions. Section 1.1309 discusses permissible changes to model contracts and model clause provisions.

The new rules implement the provisions of Texas Finance Code §341.502, which requires contracts under Chapter 342 or 348, whether in English or in Spanish, to be written in plain language. The proposed rule provides model contract provisions for use by creditors who are licensed by the Office of Consumer Credit Commissioner. Use of the model contact is optional; however, should a licensee choose not to use the model contract, or a contract comprised of model clauses, then the licensee's non-standard contract must be submitted to the agency in accordance with the provisions of 7 TAC §1.841.

Section 1.1301 explains the motor vehicle model contract provisions and states the intention that the provisions should constitute a complete plain language motor vehicle retail sales installment contract. Established model contract provisions will encourage uniformity and provide benefits to consumers by making contracts easier to understand. A creditor is not limited to the contract provisions contained in these rules and retains flexibility to design contract forms suitable for the creditor's use. These multi- purpose contract provisions are intended for use by franchised dealers, independent dealers, holders of motor vehicle retail installment sales contracts, and individuals who sell less than 5 motor vehicles per year.

Section 1.1306 details the required format, typeface, and font for model plain language motor vehicle retail installment contracts. The rule attempts to establish minimum allowable type sizes and type faces. The rule also permits flexibility for labeling contracts through the use of titles and headings. The creditor has considerable flexibility in the formatting and arrangement of the information contained in the model clauses. The requirements are necessary to ensure that the contract will be easy for consumers to read and understand.

Section 1.1307 identifies types of provisions that are typically included in a Chapter 348 motor vehicle retail installment sales contract. Creditors may determine which provisions are most applicable for their transactions. Creditors may omit provisions that are not applicable to a particular transaction. If a creditor desires to assess certain charges or exercise certain rights under the provisions, the creditor must contract for that fee or right. For example, if a creditor desires to assess a late charge, the creditor must provide for a late charge provision. Also, if a creditor desires to purchase collateral protection insurance because the buyer failed to keep required insurance, the creditor must include a contractual provision permitting the creditor to purchase the required insurance.

Section 1.1308 contains the model clauses. These clauses are the administrative interpretation of a plain language version of typical contract provisions. Some model clauses are required by state and federal statute and regulations depending on the circumstances of a particular transaction. Further commentary on particular model clauses is offered in the preamble for explanatory value. The figures representing the itemization of amount financed contains options for itemizing taxes. At the creditor's option, taxes can be itemized within the cash price or shown as an itemized charge. Additionally, the model provisions include an itemization of the amount financed for two methods of collecting and paying sales tax. The two methods are "sales tax advance" and "sales tax deferred." Under the sales tax advance method, the seller collects and pays the sales tax at or near the inception of the transaction. Under the sales tax deferred method, the seller collects and pays the sales tax over the term of the contract in compliance with the provisions of the Texas Tax Code.

The model clause for deferred downpayments provides the creditor considerable flexibility in disclosing deferred downpayments so long as the creditor maintains compliance with the law. The model provision discloses the deferred downpayments by placing the information in a separate box segregated from the other disclosures so as to be conspicuous and allow the buyer to clearly understand the obligation to pay deferred downpayments when due. This format was chosen because independent dealers often have multiple deferred downpayments payable prior to the second regularly scheduled installment.

The rule provides model provisions to conform to the three available methods for earning and accruing and refunding the Finance Charge under Chapter 348. The creditor must choose the contractual provision that corresponds to the method employed by the creditor.

The model clause for the buyer's acknowledgment of contract receipt provides four options for acknowledging that the buyer has received a copy of the contract in compliance with §348.112. The clause provides a provision acknowledging the acceptance of the contract by the parties. This provision is designed to give

the buyer the warning that the contract is not complete until it is signed by the seller. Unsigned contracts may not enforceable.

The model clause for the application of payments details the manner in which payments received by the creditor will be applied. The creditor has considerable flexibility to modify this provision so long as the modification does not violate the law. The creditor may omit the application of payments provision if the creditor elects to apply payments in accordance with the common law method. Common law sets forth a rule for application of payments which applies in the absence of any agreement.

The model clause for interest on matured amount specifies the language to contract for after maturity interest. This clause is not required for true daily earnings transactions if the after maturity interest rate is the same as the pre-maturity contract rate. This omission is supported by the Texas Supreme Court in *Petroscience Corp. v. Diamond Geophysical, Inc.*, 684 S.W.2d 668 (Tex. 1984) and *Ford Motor Credit Co. v. B. L. Long.*, 608 S.W.2d 293 (Tex. App - Beaumont 1980, ref. n.r.e.).

The model clauses provide alternatives for contracts that contain balloon payments. A franchised dealer who chooses to sell a motor vehicle using the provisions of §348.123(b)(5) must draft a repurchase provision that clearly discloses the conditions under which the seller will repurchase the motor vehicle. The balloon payment provisions are intended for contracts in which the balloon payment is the final scheduled payment.

The model clauses regarding the use and transfer of the vehicle contain provisions that allow the buyer to transfer the vehicle to another party with the seller's permission. Section 348.413 limits the fee a seller may charge a buyer when the buyer wants to transfer the vehicle and the debt to another party. As long as the contract is in force, the buyer and the seller are bound by the provisions of Chapter 348 and the terms of the contract including the transfer fee limitations. Upon transfer of the motor vehicle, if the original contract is terminated through satisfaction and a new contract is consummated, the new contract may be subject to the laws of another state if the parties have an appropriate nexus to that state.

The model clause for the care of the motor vehicle provides that the buyer will keep the motor vehicle free from liens and claims. Situations may arise in which the buyer allows a lien or claim to be placed against the motor vehicle. This model clause is not intended to describe all of the situations that may arise. The model provision acknowledges that the creditor may choose to expend funds to protect the motor vehicle. The model clause provides a mechanism for the creditor to be reimbursed for these expenses from the buyer. For example, if taxes or fines are due on the motor vehicle and the buyer does not pay them, the creditor may pay them without forcing the city or state to seize the motor vehicle. Under no circumstances is this provision intended to permit sellers to finance repairs or advance funds in violation of §348.403 of the Texas Finance Code.

The model clauses set out provisions regarding default and repossession rights. The contract cannot possibly set out all rights that may arise under unique situations. Many rights arise automatically as a matter of law even though they may not be set forth in the contract (Tex. Bus. & Comm. Code §9.601(a)). Other rights arise as a matter of common law, for example, the right to bring suit for breach of contract. Rights under the Probate Code, the United States Bankruptcy Code, or other rights of sequestration and replevin under the Texas Civil Practices & Remedies Code would arise under other statutes. Furthermore, if the retail buyer relocates to another state and is subject to that state's laws, some remedies may arise under the laws of that state. The model clauses provide typical default and repossession provisions for motor vehicle retail sales installment contract.

The model provision for the used car buyer's guide is derived directly from the Federal Trade Commission's Used Car Regulation. In this regulation, the word "you" means the buyer. A legend to that effect should be placed immediately preceding the disclosure.

Section 1.1309 outlines permissible changes that licensees can make to a contract and still comply with the model provisions. This section provides licensees with flexibility in using the model clauses. Licensees may use additional documents in connection with the model documents contained in this rule. If a licensee incorporates additional documents, these additions may need to be submitted as non-standard forms if they do not employ the model clauses. Certain documents like the odometer statement, buyer's order, title application documents, notices to co-signer, buyer's guides, and similar documents do not need to be submitted as non-standard forms. Additional documents such as arbitration agreements, conditional delivery agreements, and guarantor agreements will need to be submitted for a readability review in accordance with 7 TAC §1.841.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of administering the rules.

Commissioner Pettijohn has also determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of the new rules will be enhanced compliance with the credit laws, simpler credit contracts, and increased uniformity and consistency in credit contracts. Additional economic costs will be incurred by a person required to comply with this proposal. Because a licensee fully complies with the proposal by using the model forms, the additional costs imposed by the proposal are limited to costs associated with copying a contract and costs attributable to loss of obsolete forms inventory. Additional copy costs are estimated to be approximately $0.30-$0.40 per contract. There will be no adverse effect on small businesses as compared to the effect on large businesses. Some licensees who use or lease specialized computer software programs for their loan business may experience some additional costs. These costs are impossible to predict. The agency has attempted to lessen these costs by providing the software programmers with the text of the contracts. Whether programmers will use the adopted form or submit non-standard contracts for review is not predictable. Whether the programmers will charge an additional fee for a contract they do not have to draft is also not predictable.

Comments on the proposed new rules may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas, 78705-4207 or by email to leslie.pettijohn@occc.state.tx.us.

The new sections are proposed under Texas Finance Code §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally Texas Finance Code §341.502 grants the Finance Commission the authority to adopt rules to govern the form of Chapter 348

motor vehicle installment sales contracts and to adopt model plain language contracts.

These rules affect Texas Finance Code Chapter 348.

§1.1301. Purpose.

(a) The purpose of this subchapter is to provide a model plain language contract in English for Texas Finance Code Chapter 348 motor vehicle installment sales contract provisions. The establishment of model provisions for these transactions will encourage use of simplified wording that will ultimately benefit consumers by making these contracts easier to understand. Use of the "plain language" model contract by a seller is not mandatory. The seller, however, may not use a contract other than a model contract unless the seller has submitted the contract to the commissioner in compliance with 7 TAC §1.841. The commissioner shall issue an order disapproving the contract if the commissioner determines the contract does not comply with this section or rules adopted under this section. A seller may not claim the commissioner's failure to disapprove a contract constitutes approval.

(b) These provisions are intended to constitute a complete plain language motor vehicle installment sales contract, however, a seller is not limited to the contract provisions contained in these rules.

§1.1306. Format, Typeface, and Font.

(a) Plain language contracts must be printed in an easily readable font and type size pursuant to Texas Finance Code §341.502(a). If other state or federal law requires a different type size for specific disclosure or contractual provision, the type size specified by the other law should be used.

(b) The text of the document must be set in a readable typeface. Typefaces considered to be readable include Times, Scala, Caslon, Century Schoolbook, Helvetica, Arial, and Garamond.

(c) Titles, headings, subheadings, numbering, captions, and illustrative or explanatory tables or sidebars may be used to distinguish between different levels of information or provide emphasis.

(d) Typeface size is referred to in points (pt). Because different typefaces in the same point size are not of equal size, typeface is not strictly defined but is expressed as a minimum size in the Times typeface for visual comparative purposes. Use of a larger typeface is encouraged. The typeface for the federal disclosure box or other disclosures required under federal law must be legible, but no minimum typeface is required. Generally, the typeface for the remainder of the contract must be at least as large as 8pt in the Times typeface. A point is generally viewed as 1/72 of an inch.

(e) The model clauses may be arranged in any order. Additionally, the seller has considerable flexibility in the formatting and arrangement of the information contained in the model clauses.

§1.1307. Contract Provisions.

A Chapter 348 motor vehicle installment sales contract may include, the following contract provisions to the extent not prohibited by law or regulation. If the seller desires to assess certain charges or exercise certain rights under one of the following provisions, except provisions relating to default, repossessions, acceleration, and assignment of the contract, the seller must include the provision in the contract. A seller may delete inapplicable provisions. A seller who does not desire to apply a provision is not required to include it in the contract. For example, the seller may omit the balloon payment provisions if there is no balloon payment. A seller may also exclude non-relevant portions of a model clause. For example, a seller who does not routinely finance certain insurance coverages may omit those non-applicable portions of the model clause. A Chapter 348 motor vehicle installment sales contract provisions may contain the following provisions:

(1) Identification of the parties, including the name and address of each party and specifying the pronouns that designate the buyer and the seller.

(2) An assignment of contract provision.

(3) A buyer's affirmation and promise to pay provision.

(4) An inspection acknowledgement provision.

(5) An identification of the motor vehicle.

(6) A description of the trade-in vehicle.

(7) A Truth-in-Lending Act (TILA) disclosure box.

(8) An Itemization of Amount Financed box.

(9) A documentary fee notice provision.

(10) A deferred downpayments provision.

(11) A required physical damage insurance provision.

(12) Optional insurance coverages provision.

(13) Optional credit life and accident and health insurance provision.

(14) A liability insurance provision.

(15) A provision prohibiting oral modification of the contract.

(16) A provision stating the finance charge earnings method.

(17) A consumer warning provision.

(18) A buyer's acknowledgment of receipt of the retail installment contract as permitted under Texas Finance Code, §348.112.

(19) Consumer credit commissioner notice.

(20) A provision stating the finance charge refund method.

(21) A provision describing the application of payments.

(22) A provision describing the effect of early and late payments.

(23) A provision providing for interest on any matured amount at any rate permitted by law.

(24) Balloon payment provisions.

(25) An agreement to keep motor vehicle insured.

(26) An agreement authorizing the creditor to purchase required insurance if the buyer fails to keep the motor vehicle insured.

(27) Physical damage insurance proceeds provision.

(28) Returned insurance premiums and service contract charges provision.

(29) An application of credits provision.

(30) A transfer of rights provisions.

(31) An agreement granting a security interest in collateral.

(32) Agreements regarding the use and transfer of the motor vehicle, including prohibiting unauthorized transfer and transfer of equity fee limitations.

(33) Agreements regarding the care of the motor vehicle, including keeping the motor vehicle in good working order and repair, keeping the vehicle free from liens and encumbrances, not to exposing

the motor vehicle to seizure, confiscation, or other involuntary transfer, and repaying the creditor for any amounts paid to satisfy liens or encumbrances.

(34) Default rights and repossession provisions, including consequences of default, collection costs, late charges, buyer's right to redeem, disposition of the motor vehicle, cancellation of optional contracts, and acceleration.

(35) A waiver of any right to receive notice of the intent to accelerate or notice of acceleration.

(36) A provision describing a refund of unearned finance charge upon acceleration.

(37) An integration provision and severability clause.

(38) Provision expressing no waiver and limitations on creditor's rights and usury savings clause.

(39) A provision stating Texas and federal law will apply to the contract.

(40) Disclaimer of express or implied warranties.

(41) Preservation of consumers' claims and defenses provision.

(42) Used car buyer's guide provision.

(43) A guarantee provision.

(44) An arbitration provision.

(45) A negotiation and assignment provision.

§1.1308. Model Clauses.

(a) Identification of parties. This information identifies the parties to the contract.

(1) The model identification clause lists the account or contract number, the name and address of the creditor, the date of the contract, and the name and address of the buyer. The model clause reads:
Figure: 7 TAC §1.1308(a)(1)

(2) The Buyer is referred to as "I" or "me." The Seller is referred to as "you" or "your."

(b) Assignment of Contract. The model clause regarding Assignment of Contract reads: "This contract may be transferred by the Seller."

(c) Buyer's Affirmation and Promise to Pay. The model clause regarding Buyer's Affirmation and Promise to Pay reads: "The credit price is shown below as the "Total Sales Price." The "Cash Price" is also shown below. By signing this contract, I choose to purchase the motor vehicle on credit according to the terms of this contract. I agree to pay you the Amount Financed, Finance Charge, and any other charges in this contract. I agree to make payments according to the Payment Schedule in this contract. If more than one person signs as a buyer, I agree to keep all the promises in this agreement even if the others do not."

(d) Inspection Acknowledgement. The model clause regarding Inspection Acknowledgement reads: "I have thoroughly inspected, accepted, and approved the motor vehicle in all respects."

(e) Identification of the Motor Vehicle. The motor vehicle identification information provision should contain the following information about the motor vehicle: the seller's stock number; the manufacturer's year model; the manufacturer's make; the manufacturer's model type or number; the vehicle identification number; the license plate number (if applicable); a new/used designation; and the primary purpose designation. The seller's stock number and the license number are both optional; the omission will not make a contract non-standard. The motor vehicle identification information provision may include additional information about the vehicle including, but not limited to, odometer reading, color, and key code. If the creditor includes this additional information about the motor vehicle, the change will not make the provision a non-standard provision. The model clause regarding Identification of the Motor Vehicle reads:
Figure: 7 TAC §1.1308(e)

(f) Trade-in Vehicle Description. The model clause regarding Trade-in Vehicle Description reads:
Figure: 7 TAC §1.1308(f)

(g) Truth-in-Lending Act Disclosure. The model clause regarding Truth-in-Lending Act Disclosure reads:
Figure: 7 TAC §1.1308(g)

(h) Itemization of Amount Financed. The creditor drafting the contract is given considerable flexibility regarding the Itemization of Amount Financed disclosure so long as the Itemization of Amount Financed disclosure complies with the Truth in Lending Act. As an example, a creditor may disclose the manufacturer's rebate either as: a component of the downpayment; or a deduction from the cash price of the motor vehicle. The model contract provision for the Itemization of the Amount Financed discloses the manufacturer's rebate as a component of the downpayment. If the creditor elected to disclose the manufacturer's rebate as a deduction from the cash price of the motor vehicle, the cash price component of the Itemization of Amount Financed would be amended to reflect the dollar amount of the manufacturer's rebate being deducted from the cash price of the motor vehicle.

(1) The model clause regarding Itemization of Amount Financed-Sales Tax Advance reads:
Figure: 7 TAC §1.1308(h)(1)

(2) The model clause regarding Itemization of Amount Financed-Sales Tax Deferred reads:
Figure: 7 TAC §1.1308(h)(2)

(i) Documentary Fee.

(1) The following notice satisfies the requirements of Texas Finance Code §348.006 if printed in a size equal to at least ten-point type that is boldfaced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous and within reasonable proximity to the place at which the fee is disclosed. The bracketed insert may be inserted at the dealer's option or the disclosure may be made without the bracketed portion if the dealer does not charge an amount in excess of $50 for either ordinary motor vehicles or heavy commercial vehicles or if the contract form is not used for heavy commercial vehicles. The model clause is contained in the Itemization of Amount Financed. The documentary fee clause reads: "A documentary fee is not an official fee. A documentary fee is not required by law, but may be charged to buyers for handling documents and performing services relating to the closing of a sale. A documentary fee may not exceed $50 (for a motor vehicle contract or a reasonable amount agreed to by the parties for a heavy commercial vehicle contract). This notice is required by law."

(2) The following notice is a sufficient Spanish translation of the documentary fee disclosure required by Texas Finance Code §348.006. The bracketed insert may be inserted at the dealer's option or the disclosure may be made without the bracketed portion if the dealer does not charge an amount in excess of $50 for either ordinary motor vehicles or heavy commercial vehicles or if the contract form is not used for heavy commercial vehicles. The Spanish translation may read: "Un honorario de documentación no es un honorario official. Un

honorario de documentación no es requerido por la ley, pero puede ser cargada al comparador como gastos de manojo de documentos y para realizar servicios relacionados con el cierre de una venta. Un honorario de documentación no puede exceder $50 (un contrato de vehículo automotor o una cantidad razonable acordada por las partes para un contrato de vehiculo comercial pesado). Esta notificación es requerida por la ley." Or "Un cargo documental no es un cargo oficial. La ley no exige que se imponga un cargo documental. Pero éste podría cobrarse a los compradores por el manejo de la documentación y la prestación de servicios en relación con el cierre de una venta. Un cargo documental no puede exceder de $50 para (un contrato de vehículo automotor o una cantidad razonable acordada por las partes para un contrato de vehículo comercial pesado). Esta notificación se exige por ley."

(j) Deferred Downpayments. The creditor has considerable flexibility in disclosing the deferred downpayments. The model provision discloses the deferred downpayments by placing the information, the due date and dollar amount of the deferred downpayments, in several boxes. If a creditor uses the model provision, the creditor would enter the due date and dollar amount of each deferred downpayment in the appropriate boxes. In lieu of the model provision, a creditor could disclose the deferred downpayments in the Itemization of the Amount Financed. If a creditor elects this option, the due date and the dollar amount of the deferred downpayment must be shown. If the total amount of the deferred downpayment is not satisfied by the date of the second regularly scheduled installment, the deferred downpayment must be included in the Payment Schedule. This provision may be deleted if there is no deferred downpayment or if the deferred downpayment amounts are included in the Payment Schedule. The model clause regarding Deferred Downpayments reads:
Figure: 7 TAC §1.1308(j)

(k) Required Physical Damage Insurance. The model clause regarding Required Physical Damage Insurance reads:
Figure: 7 TAC §1.1308(k)

(l) Optional Insurance Coverages. The model clause regarding Optional Insurance Coverages reads:
Figure: 7 TAC §1.1308(l)

(m) Optional Credit Life and Accident and Health Insurance. The model clause regarding Optional Credit Life and Accident and Health Insurance reads:
Figure: 7 TAC §1.1308(m)

(n) Liability Insurance. If liability insurance coverage is not included in the contract, either of the following notices are sufficient to satisfy the requirements of Texas Finance Code §348.205 if printed in a size equal to at least ten-point type that is boldfaced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous:

(1) "THIS CONTRACT DOES NOT INCLUDE INSURANCE COVERAGE FOR PERSONAL LIABILITY AND PROPERTY DAMAGE CAUSED TO OTHERS."

(2) "UNLESS A CHARGE FOR LIABILITY INSURANCE IS INCLUDED IN THE ITEMIZATION OF AMOUNT FINANCED, LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED IN THIS CONTRACT."

(3) "UNLESS A CHARGE FOR LIABILITY INSURANCE IS INCLUDED IN THE ITEMIZATION OF AMOUNT FINANCED, ANY INSURANCE REFERRED TO IN THIS CONTRACT DOES NOT INCLUDE COVERAGE FOR PERSONAL LIABILITY AND PROPERTY DAMAGE CAUSED TO OTHERS."

(o) Prohibition Against Oral Modifications. The contract may include a provision barring oral modifications of the contract. A unilateral change to a contract may nevertheless occur as prescribed by the procedures in Subchapter C of Chapter 349. The model clause regarding Prohibition Against Oral Modifications reads:
Figure: 7 TAC §1.1308(o)

(p) Finance Charge Earnings Methods.

(1) Regular Transaction using sum of the periodic balances method.

(A) Sales Tax Advance. At the creditor's option a creditor may choose one of the following model clauses regarding Sales Tax Advance.

(i) "You figure the Finance Charge using the add-on method as defined by the Texas Finance Commission Rule. Add-on Finance Charge is calculated on the full amount of the unpaid principal balance and added as a lump sum to the unpaid principal balance for the full term of the contract."

(ii) "The Finance Charge will be calculated by using the add-on method. Add-on Finance Charge is calculated on the full amount of the unpaid principal balance and added as a lump sum to the unpaid principal balance for the full term of the contract. The add-on Finance Charge is calculated at a rate of $____ per $100.00."

(B) Deferred Sales Tax. The model clause regarding Deferred Sales Tax reads: "The Finance Charge will be calculated by using the add-on method. Add-on Finance Charge is calculated on the full amount of the unpaid principal balance subject to a finance charge and added as a lump sum to the unpaid principal balance subject to a finance charge for the full term of the contract. The add-on Finance Charge is calculated at a rate of $____ per $100.00."

(2) True Daily Earnings Method.

(A) Sales Tax Advance. At the creditor's option a creditor may choose one of the following model clauses regarding Sales Tax Advance.

(i) "You figure the Finance Charge using the true daily earnings method as defined by the Texas Finance Code. Under the true daily earnings method, the Finance Charge will be figured by applying the daily rate to the unpaid portion of the Amount Financed for the number of days the unpaid portion of the Amount Financed is outstanding. The daily rate is 1/365th of the Annual Percentage Rate. The unpaid portion of the Amount Financed does not include late charges or return check charges."

(ii) If a retail seller requires a retail buyer to purchase credit life or credit accident and health insurance and the sales tax is not deferred, the contract rate disclosure should read: "The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You will figure the Finance Charge by applying the true daily earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance. The daily rate is 1/365th of the contract rate. The unpaid principal balance does not include the late charges or returned check charges."

(B) Deferred Sales Tax: If a retail seller requires a retail buyer to purchase credit life or credit accident and health insurance and the sales tax is deferred, the contract rate disclosure should read: "The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You will figure the Finance Charge by applying the true daily earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance subject to a Finance Charge. The daily rate is 1/365th of the contract rate. The

unpaid principal balance subject to a finance charge does not include the late charges, sales tax, or returned check charges."

(3) Scheduled Installment Earnings Method:

(A) Sales Tax Advance: At the creditor's option a creditor may choose one of the following model clauses regarding Sales Tax Advance.

(i) "You figure the Finance Charge using the scheduled installment earnings method as defined by the Texas Finance Code. Under the scheduled installment earnings method, the Finance Charge is figured by applying the daily rate to the unpaid portion of the Amount Financed as if each payment will be made on its scheduled payment date. The daily rate is 1/365th of the Annual Percentage Rate. The unpaid portion of the Amount Financed does not include late charges or return check charges."

(ii) If a retail seller requires a retail buyer to purchase credit life or credit accident and health insurance and the sales tax is not deferred, the contract rate disclosure should read: "The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You will figure the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance. You based the Finance Charge, Total of Payments, and Total Sale Price as if all payments were made as scheduled. The unpaid principal balance does not include the late charges or returned check charges."

(B) Deferred Sales Tax: If a retail seller requires a retail buyer to purchase credit life or credit accident and health insurance and the sales tax is deferred, the contract rate disclosure should read: "The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You figured the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance subject to a Finance Charge. You based the Finance Charge, Total of Payments, and Total Sale Price as if all payments were made as scheduled. The unpaid principal balance subject to a Finance Charge does not include the late charges, sales tax, or returned check charges."

(q) Consumer Warning. The following notices satisfy the requirements of Texas Finance Code §348.102(d) if printed in at least ten-point type that is boldfaced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous.

(1) For contracts using the sum of the periodic balances (Rule of 78s) or the scheduled installment earnings method. The notice may read: "NOTICE TO THE BUYER - I WILL NOT SIGN THIS CONTRACT BEFORE I READ IT OR IF IT CONTAINS ANY BLANK SPACES. I AM ENTITLED TO A COPY OF THE CONTRACT I SIGN. UNDER THE LAW, I HAVE THE RIGHT TO PAY OFF IN ADVANCE ALL THAT I OWE AND UNDER CERTAIN CONDITIONS MAY OBTAIN A PARTIAL REFUND OF THE FINANCE CHARGE. I WILL KEEP THIS CONTRACT TO PROTECT MY LEGAL RIGHTS."

(2) For contracts using the true daily earnings method. The bracketed portion of the notice may be included at the creditor's option. The notice may read: "NOTICE TO THE BUYER - I WILL NOT SIGN THIS CONTRACT BEFORE I READ IT OR IF IT CONTAINS ANY BLANK SPACES. I AM ENTITLED TO A COPY OF THE CONTRACT I SIGN. UNDER THE LAW, I HAVE THE RIGHT TO PAY OFF IN ADVANCE ALL THAT I OWE AND UNDER CERTAIN CONDITIONS MAY SAVE A PORTION OF THE FINANCE CHARGE. I WILL KEEP THIS CONTRACT TO PROTECT MY LEGAL RIGHTS."

(r) Buyer's Acknowledgment of Contract Receipt.

(1) The following acknowledgments conform to the requirements of Texas Finance Code §348.112 if they appear directly above the place for the buyer's signature in at least ten-point type that is boldfaced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous. A creditor may close the most appropriate option:

(A) If the buyer's signature is dated. If this clause is chosen, the copy must be mailed within a reasonable period of time. A reasonable period of time would ordinarily be three days, excluding Sundays and holidays. The model clause reads: "I AGREE TO THE TERMS OF THIS CONTRACT. WHEN I SIGN THE CONTRACT, I WILL RECEIVE THE COMPLETED CONTRACT. IF NOT, I UNDERSTAND THAT A COPY WILL BE MAILED TO ME WITHIN A REASONABLE TIME."

(B) If the buyer's signature is not dated. If this clause is chosen, the copy must be mailed within a reasonable period of time. The model acknowledgment may read: "I AGREE TO THE TERMS OF THIS CONTRACT. I CONFIRM THAT BEFORE I SIGNED THIS CONTRACT, YOU GAVE IT TO ME, AND I WAS FREE TO TAKE IT AND REVIEW IT. I RECEIVED THE COMPLETED CONTRACT ON _____ (MO.) (DAY) (YR.)."

(C) If the buyer's signature is not dated. If this clause is chosen, the copy must be mailed within a reasonable period of time. The model acknowledgment may read: "I SIGNED THIS CONTRACT ON _____ AND A COPY WILL BE MAILED TO ME WITHIN A REASONABLE TIME."

(D) If the buyer's signature is not dated but the contract contains the date of the transaction. This option is acceptable and reads: "I AGREE TO THE TERMS OF THIS CONTRACT AND ACKNOWLEDGE RECEIPT OF A COMPLETED COPY OF IT. I CONFIRM THAT BEFORE I SIGNED THIS CONTRACT, YOU GAVE IT TO ME, AND I WAS FREE TO TAKE IT AND REVIEW IT."

(2) Acceptance of Contract Receipt. The model clauses regarding Acceptance of Contract Receipt reads:
Figure: 7 TAC §1.1308(r)(2)

(s) Consumer Credit Commissioner Notice. The following notice satisfies the requirements of Texas Finance Code §14.104 and §1.901 of this title relating to Consumer Notifications. The telephone number of the retail seller, creditor, or holder may be printed in conjunction with the name and address of the retail seller, creditor, or holder elsewhere on the contract or agreement provided the notice required by Texas Finance Code §14.104 is amended to direct the reader's attention to the area of the contract where the telephone number may be found. The consumer credit commissioner notice reads: "To contact (insert authorized business name of retail seller, creditor or holder as appropriate) about this account, call (insert telephone number of retail seller, creditor, or holder as appropriate). This contract is subject in whole or in part to Texas law which is enforced by the Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207. Phone 800-538-1579; 512-936-7600, and can be contacted relative to any inquiries or complaints."

(t) Finance Charge Refund Method. If a contract uses the finance charge refunding method of the sum of the periodic balances or the scheduled installment earnings method, the Finance Charge Refund provision reads: "If I prepay in full, I may be entitled to a refund of part of the Finance Charge." On contracts using the true daily earnings method, this Finance Charge Refund provision should not be disclosed because it is not applicable.

(1) Contracts using the sum of the periodic balances method.

(A) Name of the method. The model clause to identify the method of refunding finance charge reads: "You will figure the Finance Charge refund by using the sum of the periodic balances method as defined by the Texas Finance Commission rule."

(B) Optional description of the method. The creditor may include the following additional description of the method. The model clause reads: "You will figure the Finance Charge refund using the sum of the periodic balances method as defined by the Texas Finance Commission rule. The Finance Charge Refund will be computed upon the entire Finance Charge minus the Acquisition Cost. I will not get a refund if it is less than $1.00."

(C) At the creditor's option, a contract for a heavy commercial vehicle, as defined in the Texas Finance Code, may include the following description of the method. The model clause reads: "You will figure the Finance Charge refund using the sum of the periodic balances method as defined by the Texas Finance Commission rule. The Finance Charge refund will be computed based upon the entire Finance Charge calculated using the sum of the periodic balances method. Then you will subtract the Acquisition Cost from that amount. I will not get a refund if it is less than $1.00."

(2) Contracts using the scheduled installment earnings method.

(A) Name of the method. The model clause to identify the method of refunding finance charge reads: "You will figure the Finance Charge refund by the scheduled installment earnings method as defined by the Texas Finance Commission rule."

(B) Optional description of the method. The creditor may include the following additional description of the method: "You will figure my refund by deducting earned finance charges from the Finance Charge. You will figure earned finance charges by applying a daily rate to the unpaid principal balance as if I paid all my payments on the date due. If I prepay between payment due dates, you will figure earned finance charges for the partial payment period. You do this by counting the number of days from the due date of the prior payment through the date I prepay. You then multiply that number of days times the daily rate. The daily rate is 1/365th of the Annual Percentage Rate. You will also add the acquisition cost of $25 (or $150 for a heavy commercial vehicle) to the earned finance charge. I will not get a refund if it is less than $1.00."

(3) Flexible contract forms designed to accommodate alternative methods. Creditors may use a flexible contract form with alternative earnings methods, so long as the method used on a particular contract is permissible for that contract. The following illustrates one way that this may be done: "You will figure the Finance Charge refund using the sum of the periodic balances method as defined by the Texas Finance Commission rule if: this contract is a Regular Payment Contract as defined by the Texas Finance Commission rule, and this contract does not have a term greater than 61 months. If this contract is not a Regular Payment Contract or if it has a term greater than 61 months, you will figure the Finance Charge refund using the scheduled installment earnings method as defined by the Texas Finance Commission rule. I will not get a refund if it is less than $1.00."

(u) Application of Payments. In this provision, the term "finance charge" does not refer to the finance charge as defined by the Truth-in-Lending Act. A default or late charge is considered to be a finance charge under Texas law; therefore, a default or late charge can be charged and collected as part of the earned finance charge. The model clause reads:
Figure: 7 TAC §1.1308(u)

(v) Effect of Early and Late Payments. True daily earnings method: The model clause reads: "You based the Finance Charge, Total of Payments, and Total Sale Price as if all payments were made as scheduled. If I do not timely make all my payments in at least the correct amount, I will have to pay more Finance Charge and my last payment will be more than my final scheduled payment. If I make scheduled payments early, my Finance Charge will be reduced (less). If I make my scheduled payments late, my Finance Charge will increase."

(w) Interest on Matured Amount. The model provision for interest on any matured amount at any rate permitted by law reads: "If I don't pay all I owe when the final payment becomes due, or I do not pay all I owe if you demand payment in full under this contract, I will pay an interest charge on the amount that is still unpaid. That interest charge will be the higher rate of 18% per year or the maximum rate allowed by law, if that rate is higher. The interest charge for this amount will begin the day after the final payment becomes due." In this provision, the maximum rate allowed by law refers to the rate found in Chapter 303 of the Texas Finance Code.

(x) Balloon Payments. If the contract has a balloon payment, the creditor must include a provision in the contract that allows the buyer to refinance the balloon payment over time. The provision must comply with Section 348.123 of the Texas Finance Code. The model provision for defining the balloon payment reads: "A balloon payment is a scheduled payment more than twice the amount of the average of my scheduled payments, other than the downpayment, that are due before the balloon payment."

(1) Paying the balloon payment. If a retail installment contract contains a balloon payment that is the final payment, the contract must also provide the right for the retail buyer to pay the balloon payment. The model provision for paying the amount of the final scheduled balloon payment reads: "I can pay all I owe when the balloon payment is due and keep my motor vehicle."

(2) Balloon payment alternatives. If the retail installment contract contains the right for a retail buyer to refinance a balloon installment, the contract provision to refinance the installment must comply with either subparagraph (A) or (B) of this paragraph. A contract under subparagraph (B) of this paragraph must also contain the right of the retail buyer to sell the motor vehicle back to holder or retail seller.

(A) The model clause to describe a buyer's right to refinance a balloon installment under Texas Finance Code §348.123(a), when applicable reads: "If I buy the motor vehicle primarily for personal, family, or household use, I can enter into a new written agreement to refinance the balloon payment when due without a refinancing fee. If I refinance the balloon payment, my periodic payments will not be larger or more often than the payments in this contract. The annual percentage rate in the new agreement will not be more than the Annual Percentage Rate in this contract. This provision does not apply if my Payment Schedule has been adjusted to my seasonal or irregular income."

(B) If the contract contains a balloon payment and the seller intends Texas Finance Code §348.123(b)(5) to apply to the contract:

(i) Special right to refinance balloon payment under Texas Finance Code §348.123(b)(5)(B)(iii). "I can refinance my last installment if I am not in default. I can refinance at an annual percentage rate up to 5 points greater than the Annual Percentage Rate shown in this contract. The rate will not be more than applicable law allows. I can refinance the last installment for at least 24 months with equal monthly payments. You and I can refinance the last installment over another time period or on a different payment schedule."

(ii) If the contract includes a balloon payment, the creditor must draft a provision addressing the repurchase option.

(y) Agreement to Keep the Motor Vehicle Insured. The model clause regarding Agreement to Keep the Motor Vehicle Insured reads: "I agree to have physical damage insurance covering loss or damage to the motor vehicle for the term of this contract. The insurance must cover your interest in the motor vehicle." The creditor may include the following optional provision: "The insurance must include collision coverage and either comprehensive or fire, theft, and combined additional coverage."

(z) Agreement to Allow Creditor to Purchase Required Insurance if Buyer Fails to Keep the Motor Vehicle Insured. The model clause regarding Agreement to Allow Creditor to Purchase Required Insurance if Buyer Fails to Keep the Motor Vehicle Insured reads: "If I fail to give you proof that I have insurance, you may buy physical damage insurance. You may buy insurance that covers my interest and your interest in the motor vehicle, or you may buy insurance that covers your interest only. I will pay the premium for the insurance and a finance charge at the contract rate. If you obtain collateral protection insurance, you will mail notice to my last known address shown in your file."

(aa) Physical Damage Insurance Proceeds. The model clause regarding Physical Damage Insurance Proceeds reads: "I must use physical damage insurance proceeds to repair the motor vehicle, unless you agree otherwise in writing. However, if the motor vehicle is a total loss, I must use the insurance proceeds to pay what I owe you. I agree that you can use any proceeds from insurance to repair the motor vehicle, or you may reduce what I owe under this contract. If you apply insurance proceeds to the amount I owe, they will be applied to my payments in the reverse order of when they are due. If my insurance on the motor vehicle or credit insurance doesn't pay all I owe, I must pay what is still owed. Once all amounts owed under this contract are paid, any remaining proceeds will be paid to me."

(bb) Returned Insurance Premiums and Service Contract Charges. The contract may authorize a creditor to apply charges returned to the creditor for canceled insurance, service contract, and extended warranty charges to the buyer's obligation under the agreement as permitted by law, regardless of whether or not the buyer is in default under the contract.

(1) The model clause for contracts using the true daily earnings method reads: "If you get a refund on insurance or service contracts, or other contracts included in the cash price you will subtract it from what I owe. Once all amounts owed under this contract are paid, any remaining refunds will be paid to me."

(2) For contracts using the scheduled installment earnings or sum of the periodic balances method, the creditor may substitute the following: "If you get a refund of insurance or service contract charges, you will apply it and the unearned finance charges on it in the reverse order of the payments to as many of my payments as it will cover. Once all amounts owed under this contract are paid, any remaining refunds will be paid to me."

(cc) Application of Credits. The model clause regarding Application of Credits reads: "Any credit that reduces my debt will apply to my payments in the reverse order of when they are due, unless you decide to apply it to another part of my debt. The amount of the credit and all finance charge or interest charged on the credit will be applied to my payments in the reverse order of my payments."

(dd) Transfer of Rights. The seller does not have a duty to disclose the terms on which a contract or a balance under a contract is acquired, including any discount or difference between the rates, charges, or balance under the contract and the rates, charges, or balance acquired as provided by Texas Finance Code, §348.301. The model clause regarding Transfer of Rights reads: "You may transfer this contract to another person. That person will then have all your rights, privileges, and remedies."

(ee) Grant of a Security Interest in Collateral. The model clause regarding a description of a security interest granted in a typical motor vehicle installment sale reads.
Figure: 7 TAC §1.1308 (ee)

(ff) Agreements Regarding the Use and Transfer of the Motor Vehicle. The contract may contain a provision prohibiting a buyer from transferring any interest in the motor vehicle without the creditor's written permission, requiring the buyer to notify the seller of change of address, or prohibiting the removal of the motor vehicle from Texas. The transfer fee limitation establishes the maximum fee that a creditor could contract for, charge, or collect for transferring the buyer's equity in the motor vehicle to another party. If desired, a creditor could amend the model provision to reflect a lower transfer fee amount. The model clause regarding agreements regarding the use and transfer of the motor vehicle reads: "I will not sell or transfer the motor vehicle without your written permission. If I do sell or transfer the motor vehicle, this will not release me from my obligations under this contract, and you may charge me a transfer of equity fee of $25.00 ($50 for a heavy commercial vehicle). I will promptly tell you in writing if I change my address or the address where I keep the motor vehicle. I will not remove the motor vehicle (Optional: motor vehicle or other collateral) from Texas for more than 30 days unless I first get your written permission."

(gg) Care of the Motor Vehicle. The contract may obligate the buyer to keep the motor vehicle free of liens and encumbrances, require the buyer to keep the motor vehicle in good working order and repair, or prohibit the buyer from allowing the motor vehicle to be exposed to seizure, confiscation, or other involuntary transfer. The model clause regarding care of the motor vehicle reads: "I agree to keep the motor vehicle free from all liens, and claims except those that secure this contract. I will timely pay all taxes, fines, or charges pertaining to the motor vehicle. I will keep the motor vehicle in good repair. I will not allow the motor vehicle to be seized or placed in jeopardy or use it illegally. I must pay all I owe even if the motor vehicle is lost, damaged or destroyed. If a third party takes a lien or claim against or possession of the motor vehicle, you may pay the third party any cost required to free the motor vehicle from all liens or claims. You may immediately demand that I pay you the amount paid to the third party for the motor vehicle. If I do not pay this amount, you may repossess the motor vehicle and add that amount to the amount I owe. If you do not repossess the motor vehicle, you may still demand that I pay you, but you cannot add the amount to my account."

(hh) Default Rights and Repossession Provisions. This subsection details agreements allowing acceleration of the buyer's obligation upon the buyer's default or upon the creditor's determination of insecurity as permitted by Business and Commerce Code, §1.208. The following provisions are samples of model clauses of some of the default rights and remedies of a creditor in a typical motor vehicle installment sale transaction:

(1) Acceleration and Default. The model clause regarding Acceleration and Default reads:
Figure: 7 TAC §1.1308(hh)(1)

(2) Late Charge. The model clause regarding Late Charge reads: "I will pay you a late charge as agreed to in this contract when it accrues."

(3) Repossession. At the creditor's option a creditor may choose one of the following model provision pertaining to repossessions reads:

(A) "If I default, you may repossess the motor vehicle from me if you do so peacefully. If any personal items are in the motor vehicle, you can store them for me and give me written notice at my last address shown on your records within 15 days of discovering that you have my personal items. If I do not ask for these items back within 31 days from the day you mail or deliver the notice to me, you may dispose of them as applicable law allows. Any accessory, equipment, or replacement part stays with the motor vehicle." In this provision, the term "peacefully" is intended to have the same meaning as "breach of peace," as determined by the Texas courts.

(B) "If I default, you may repossess the motor vehicle from me if you do so without breaching the peace. Any accessory, equipment, or replacement part stays with the motor vehicle. If any personal items are in the motor vehicle, you can store them for me and give me written notice at my last address shown on your records within 15 days of discovering that you have my personal items. If I do not ask for these items back within 31 days from the day you mail or deliver the notice to me, you may dispose of them as applicable law allows. Any accessory, equipment, or replacement part stays with the motor vehicle."

(4) Buyer's right to redeem. The model clause regarding buyer's right to redeem reads: "If you take my motor vehicle, you will tell me how much I have to pay to get it back. If I do not pay you to get the motor vehicle back, you can sell it or take other action allowed by law. My right to redeem ends when the motor vehicle is sold."

(5) Disposition of motor vehicle. The model clause regarding disposition of motor vehicle reads: "If I don't pay you to get the motor vehicle back, you can sell it or take other action allowed by law. You will send me notice at least 10 days before you sell it. You can use the money you get from selling it to pay allowed expenses and to reduce the amount I owe. Allowed expenses are expenses you pay as a direct result of taking the motor vehicle, holding it, preparing it for sale, and selling it. If any money is left, you will pay it to me unless you must pay it to someone else. If the money from the sale is not enough to pay all I owe, I must pay the rest of what I owe you plus interest. If you take or sell the motor vehicle, I will give you the certificate of title and any other document required by state law to record transfer of title."

(6) Collection costs. The model clause regarding collection costs reads: "If you hire an attorney who is not your employee to enforce this contract, I will pay reasonable attorney's fees and court costs as the applicable law allows."

(7) Cancellation of optional insurance or service contracts. The model clause regarding cancellation of optional insurance or service contracts reads: "This contract may contain charges for insurance or service contracts or for services included in the cash price. If I default, I agree that you can claim benefits under these contracts to the extent allowable, and terminate them to obtain refunds of unearned charges to reduce what I owe or repair the motor vehicle."

(ii) Acceleration, Waiver of Notice of Intent to Accelerate, and Notice of Acceleration. A model clause regarding the holder's right to accelerate maturity of the contract and to waive the buyer's or co-buyer's common law right to notice of intent to accelerate, notice of acceleration, or both reads: "If I default, or you believe in good faith that I am not going to keep any of my promises, you can demand that I immediately pay all that I owe. You don't have to give me notice that you are demanding or intend to demand immediate payment of all that I owe."

(jj) Refund Upon Acceleration. Sum of the periodic balances method or scheduled installment earnings method: The model clause regarding the buyer's right to a finance charge refund upon acceleration of the contract reads: "If you demand that I pay you all that I owe, you will give me a credit of part of the Finance Charge as if I had prepaid in full."

(kk) Integration and Severability. The contract may include an integration clause indicating that the parties to the contract intend it to be final written expression their agreement, such as: "This contract contains the entire agreement between you and me relating to the sale and financing of the motor vehicle." The contract may also include a severability clause providing that the invalidity of any portion of the contract does not render invalid other parts of the contract that would otherwise be valid. The model clause regarding severability reads: "If any part of this contract is not valid, all other parts stay valid."

(ll) No Waiver and Limitations on Creditor's Rights and Usury Savings.

(1) A model clause to prevent a creditor's delay in enforcing rights under the contract from affecting a waiver of those rights reads: "If you don't enforce your rights every time, you can still enforce them later."

(2) A provision establishing limitations on the creditor's rights reads: "You will exercise all of your rights in a lawful way. This provision prevails over all other parts of this contract."

(3) The model clause regarding usury savings reads: "I don't have to pay finance charge or other amounts that are more than the law allows."

(mm) Applicable Law. A model clause to establish the law that will apply to the contract reads: "Federal and Texas law apply to this contract."

(nn) Warranty Disclaimer. The disclaimer of express and implied warranties should be set out from the surrounding text so that the disclosure is conspicuous. A disclaimer of express and implied warranties, such as the following, is permitted by Article 2, Section 3 of the Business and Commerce Code reads : "Unless the seller makes a written warranty, or enters into a service contract within 90 days from the date of this contract, the seller makes no warranties, express or implied, on the motor vehicle, and there will be no implied warranties of merchantability or of fitness for a particular purpose. This provision does not affect any warranties covering the motor vehicle that the motor vehicle manufacturer may provide."

(oo) Preservation of Consumer's Claims and Defenses Notice. This notice only applies in the motor vehicle financed in the contract was purchased for personal, family, or household use. The preservation of consumer's claims and defenses notice disclosure should be set out from the surrounding text so that the disclosure is in all capitals, bold faced and in at least 10 point type. The preservation of consumer's claims and defenses notice disclosure, as required by the Federal Trade Commission's Preservation of consumer's claims and defenses notice, 16 C.F.R.§433.1 et seq., reads: "NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS AND SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER."

(pp) Used Car Buyers Guide. The Used Car Buyers Guide disclosure should be set out from the surrounding text so that the disclosure is conspicuous. The disclosure should be prefaced by the words

"In this box only, the word "you" refers to the Buyer." The Used Car Buyers Guide disclosure, as required by the Federal Trade Commission's Used Car Regulation, 16 C.F.R.§455.1 et seq., reads:

(1) "Used Car Buyer's Guide. The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale."

(2) Spanish Translation: "Guía para compradors de vehículos usados. La información que ve en el formulario de la ventanilla para este vehículo forma parte del presente contrato. La información del formulario de la ventanilla deja sin efecto toda disposición en contrario contenida en el contrato de venta."

§1.1309. Permissible Changes.

Creditors may make the following types of changes to the model clauses and may still be eligible for the defenses provided by Texas Finance Code, §349.101:

(1) The deletion of inapplicable disclosures.

(2) Using a line for the consumer to initial, rather than a checkbox.

(3) Adding a signature line to the insurance disclosures to reflect joint policies.

(4) Substituting another term for "buyer", "seller" or "creditor" that has the same meaning, or use of pronouns such as "you", "we" and "us" or "it."

(5) The model clauses may be presented in any order, and may be combined or further segregated at the creditor's option.

(6) Inserting descriptive headings or number provisions.

(7) Changing the case of a word if otherwise permitted by the Texas Finance Code.

(8) References to different provisions for heavy commercial vehicles may be omitted where the creditor elects to treat buyers of heavy commercial vehicles under the rules applicable to other vehicles.

(9) Moving provisions from one side of the form to the other and directing the buyer to see the other side or placing all of the provisions on the same side of the form.

(10) A sample model motor vehicle retail installment contract.
Figure: 7 TAC §1.1309(10)

(11) Nothing in this regulation prohibits a contract from including provisions that provide more favorable results for the buyer than those that would result from the use of a model clause.

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 August 15, 2003.

TRD-200305230
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 936-7640

♦ ♦ ♦

7 TAC §1.1303

The Finance Commission of Texas (the commission) proposes amendments to 7 TAC §1.1303, concerning motor vehicle installments sales contract provision definitions.

The purpose of the proposed amendments is to add two additional definitions, add-on method and vehicle to the rule. The definitions are necessary because these terms are used on the plain language motor vehicle retail installment sales contract. This regulation creates the legal definition for those terms.

Leslie L. Pettijohn, Consumer Credit Commissioner has determined that for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of administering the rule.

Commissioner Pettijohn also has determined that for each year of the first five years the amendment as proposed is in effect, the public benefit anticipated as a result of the proposed amendments will be the addition and clarification of definitions used on the plain language motor vehicle retail installment sales contracts. There is no anticipated cost to persons who are required to comply with the amendments as proposed. There will be no adverse economic effect on small or micro businesses.

Comments on the proposed amendment may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to leslie.pettijohn@occc.state.tx.us.

The amendments are proposed under Texas Finance Code §11.304, which authorizes the finance commission to propose rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code §342.551 authorizes the finance commission to propose rules for the enforcement of the consumer loan chapter.

The statutory provision (as currently in effect) affected by the proposed amendments is Texas Finance Code §348.001.

§1.1303. Definitions.

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

(1) Accrual method--A [~~means a~~] method to compute a finance charge and apply the finance charge to the unpaid principal balance. Both the true daily earnings method and the scheduled installment earnings method are accrual methods.

(2) Add-on method--A method for calculating a precomputed time price differential charge in which the retail buyer agrees to pay the total of payments. The total of payments includes both principal balance of the contract and the time price differential charge. The add-on time price differential charge is calculated at the inception of the contract on the principal balance for the full term, as if the principal balance of the contract did not decline over the term of the contract.

(3) [~~(2)~~] Creditor--The seller or any subsequent holder or assignee of the retail installment contract.

(4) [~~(3)~~] Daily Rate--The rate authorized under Texas Finance Code §§303.201 or 303.202 or the simple rate equivalent of the rate applicable to the contract under Texas Finance Code §348.104, computed on a daily basis using a 365 day calendar year.

(5) [~~(4)~~] Irregular Payment Contract--A contract:

(A) That is payable in installments that are not consecutive, monthly, and substantially equal in amount; or

(B) The first scheduled installment of which is due later than 1 month and 15 days after the date of the contract.

(6) [~~(5)~~] Regular Payment Contract--Any contract that is not an irregular payment contract.

(7) [~~(6)~~] Scheduled installment earnings method--The scheduled installment earnings method is a method to compute a finance charge by applying a daily rate to the unpaid principal balance as if each payment will be made on its scheduled installment date. A payment received before or after the due date does not affect the amount of the scheduled reduction in the unpaid principal balance. Under this method, a finance charge refund is calculated by deducting the earned finance charges from the total finance charges. If prepayment in full or demand for payment in full occurs between payment due dates, a daily rate equal to 1/365th of the annual rate is multiplied by the unpaid principal balance. The result is then multiplied by the actual number of days from the date of the previous scheduled installment through the date of prepayment or demand for payment in full to determine earned finance charges for the abbreviated period. In addition to the earned finance charges calculated in this subsection, the creditor may also earn a $150 acquisition fee for a heavy commercial vehicle, or a $25 fee for other vehicles, so long as the total of the earned finance charges and the acquisition fee do not exceed the finance charge disclosed in the contract. The creditor is not required to refund unearned finance charges if the refund is less than $1.00. The scheduled installment earnings method may be used with either an Irregular Payment Contract or a Regular Payment Contract. The computation of finance charges must comply with the U.S. rule as defined in Appendix J of 12 C.F.R. Part 226 (Regulation Z).

(8) [~~(7)~~] Seller--The seller of the motor vehicle.

(9) [~~(8)~~] Sum of periodic balances method (Rule of 78s)--

(A) Under this method, the finance charge refund is calculated as follows:

(i) Subtract an acquisition fee not greater than $150 for a heavy commercial vehicle, or $25 for other vehicles, from the total finance charge.

(ii) Multiply the amount computed in clause (i) of this subparagraph by the refund percentage computed below. The result is the finance charge refund.

(iii) Compute the refund percentage by:

(I) Computing the sum of the unpaid monthly balances under the contract's schedule of payments beginning:

(-a-) On the first day, after the date of the prepayment or demand for payment in full, that is the date of a month that corresponds to the date of the month that the first installment is due under the contract, or;

(-b-) If the prepayment or demand for payment in full is made before the first installment date under the contract, one month after the date of the second scheduled payment of the contract occurring after the prepayment or demand;

(II) Dividing the result in subclause (I) of this clause by the sum of all of the monthly balances under the contract's schedule of payments.

(B) As an alternative for heavy commercial vehicles, as defined in the Texas Finance Code, the sum of the periodic balances method may be computed as follows:

(i) Multiply the total finance charge by a refund percentage determined as follows:

(I) Compute the sum of the unpaid monthly balances under the contract's schedule of payments beginning:

(-a-) On the first day, after the date of the prepayment or demand for payment in full, that is the date of a month that corresponds to the date of the month that the first installment is due under the contract, or;

(-b-) If the prepayment or demand for payment in full is made before the first installment date under the contract, one month after the date of the second scheduled payment of the contract occurring after the prepayment or demand;

(II) Divide the result in subclause (I) of this clause by the sum of all of the monthly balances under the contract's schedule of payments.

(ii) From the result derived in clause (i) of this subparagraph, deduct an acquisition fee not to exceed $150.

(C) The creditor is not required to give a finance charge refund if it would be less than $1.00.

(D) These methods may not be used with an irregular payment contract.

(10) [~~(9)~~] True daily earnings method--The truly daily earnings method is a method to compute the finance charge by applying a daily rate to the unpaid principal balance. The daily rate is 1/365th of the equivalent contract rate. The earned finance charge is computed by multiplying the daily rate of the finance charge by the number of days the actual unpaid principal balance is outstanding. Payments are credited as of the time received; therefore, payments received prior to the scheduled installment date result in a greater reduction of the unpaid principal balance than the scheduled reduction, and payments received after the scheduled installment date result in less than the scheduled reduction of the unpaid principal balance. The computation of finance charges must comply with the U.S. rule as defined in Appendix J of 12 C.F.R. Part 226 (Regulation Z).

(11) Vehicle--A motor vehicle as defined by §348.001(4).

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 August 15, 2003.

TRD-200305231
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 936-7640

♦ ♦ ♦

CHAPTER 3. STATE BANK REGULATION
SUBCHAPTER D. PLEDGE AND MAINTENANCE OF ASSETS BY FOREIGN BANK LICENSED TO MAINTAIN TEXAS STATE BRANCH OR AGENCY

7 TAC §§3.51 - 3.62

The Finance Commission of Texas (commission) proposes new sections relating to the asset pledge and maintenance requirements a foreign bank that maintains and operates a Texas state branch or Texas state agency licensed by the Texas

Department of Banking (department) must satisfy. The proposed new sections are §3.51, concerning authority, purpose and scope; §3.52, concerning definitions; §3.53, concerning asset pledge requirement applicable to a branch or agency with nonrelated deposit liabilities; §3.54, concerning asset pledge requirement applicable to a branch or agency with only nonrelated other liabilities; §3.55, concerning calculation of liabilities; §3.56, concerning asset pledge report and additional deposits; §3.57, concerning excluded liabilities; §3.58, concerning eligible assets and conditions; §3.59, concerning deposit agreement and conditions; §3.60, concerning record of deposited and withdrawn assets; §3.61, concerning record of assets and liabilities; and §3.62, concerning asset maintenance. The sections are proposed to be in new Subchapter D, entitled Pledge and Maintenance of Assets by Foreign Bank Licensed to Maintain Texas State Branch or Agency.

The commission is simultaneously withdrawing a prior proposal concerning the pledge and maintenance of assets by a foreign bank that was previously published in the July 4, 2003, issue of the *Texas Register* (28 TexReg 5021) in this issue of the *Texas Register.*

The prior proposal established the amount of assets a foreign bank that maintained a Texas state branch or agency was required to pledge to the Texas Banking Commissioner (banking commissioner) and conditions related to the pledge. Under the proposal, the pledge requirement applied to a foreign bank that carried third-party liabilities on the books of its Texas branch or agency. The commission received comments in response to the proposal from two foreign banks that have maintained Texas state agencies for a number of years. Neither bank's Texas agency accepts deposits, but each carries other third-party liabilities. The banks asked the commission to clarify whether the proposed reporting and pledge requirements applied to a foreign bank branch or agency that did not carry third-party deposit liabilities. The banks distinguished deposit-related liabilities, which generally arise out of consumer transactions, and liabilities arising out of transactions between financial institutions that deal with one another on an arm's length basis after a full analysis of related risks. The banks suggested that the term "third-party liabilities" include deposit liabilities only and that, accordingly, only branches and agencies that carried deposit liabilities be subject to the asset pledge requirement.

The commission has considered the comments received in response to the prior proposal, and has decided to revise the sections to differentiate between deposit and non-deposit liabilities and to impose a mandatory pledge requirement only on a foreign bank that carries nonrelated, or third-party, deposit liabilities. The changes the commission has determined to make regulate no new parties, affect no new subjects of regulation, and are the result of public comment. However, the commission wishes to add a new section to the prior proposal to help clarify when and to whom the pledge and reporting requirements apply. Under *Texas Register* rules, the commission may not adopt a new section that has not been previously proposed. For that reason, the commission has withdrawn the prior proposal in its entirety and is proposing a new Subchapter D.

The proposed sections implement Finance Code, Title 3, Subtitle G, Chapter 204, Subchapter B, particularly §204.113 and §204.114. Finance Code, Chapter 204 (Chapter 204), which regulates foreign banks that do business in Texas through offices in this state, was enacted in 1999. Unlike prior law, Chapter 204 authorizes a foreign bank to maintain a Texas state branch, upon application and approval by the banking commissioner, and grants a foreign bank limited authority to accept deposits at its Texas state branch or agency. Chapter 204 also authorizes the commission to adopt rules requiring a foreign bank that operates a Texas state branch or agency to pledge assets to the banking commissioner and maintain a required ratio of assets to liabilities. Specifically, under Finance Code, §204.113, the banking commissioner may require a foreign bank to deposit and pledge assets in Texas in an amount and subject to such conditions as authorized by rule. Finance Code, §204.114, similarly authorizes the banking commissioner to require a foreign bank to satisfy the ratio of Texas state branch or agency assets to liabilities as authorized by rule.

Finance Code, §204.113 and §204.114, are safety and soundness provisions. They are intended to ensure the financial soundness of a foreign bank's Texas state branch or agency, protect its depositors, creditors and the public interest, and support public confidence in the business of the branch or agency. In addition to providing a capital-like cushion for a foreign bank's Texas state branch or agency, Finance Code, §204.113 and §204.114, ensure that the banking commissioner has ready access to a source of funds in the event a liquidation of a foreign bank's Texas state branch or agency under Finance Code, §204.120, becomes necessary. In such event, the banking commissioner may use the pledged assets to pay administrative expenses incurred in connection with the liquidation and depositor and other creditor claims as set out in Finance Code, Chapter 36.

Foreign bank operations in Texas have been relatively limited. At present, no foreign bank maintains a Texas state branch. Eight foreign banks are licensed to maintain Texas state agencies and eighteen maintain registered representative offices. Many of the agency offices are operated essentially as representative offices, and engage only in the limited activities authorized for such offices. Until recently, no Texas state agency accepted deposits. However, because a foreign bank's Texas state agency now accepts foreign deposits, and because the department anticipates that foreign banks are likely to expand the business conducted through their licensed offices, the commission has determined to exercise the rulemaking authority granted under Finance Code, §204.113 and §204.114.

In developing the proposed sections, the department reviewed the asset pledge and maintenance rules adopted by other states in which foreign banks maintain significant state branch or agency operations under statutes similar to Chapter 204. The department paid particular attention to recent amendments to the asset pledge and maintenance rules of the states of New York and Connecticut. The department reviewed the text of these amendments, as well as the reasons articulated for their adoption and the state banking regulators' summaries of and responses to comments made during the adoption process by foreign banks and others affected by the rules. The department also received input from the industry that will be most impacted by the proposed sections. The department notes the trend, favored both by regulators and foreign banks, toward a risk-based approach that relieves foreign banks from excessive pledge requirements and burdensome reporting regulations, but adequately addresses safety and soundness and other supervisory concerns and provides bank regulators the flexibility they need to address problems on a case-by-case basis. The proposed sections adopt this approach.

Proposed §3.51 sets forth the authority, purpose and scope of the proposed sections. As explained in this preamble, the commission proposes the sections under the authority of Finance Code, §204.113 and §204.114, for the purpose of establishing the amount of assets a foreign bank that operates a Texas state branch or agency must pledge and other terms and conditions related to the pledge, and authorizing the banking commissioner to require a foreign bank to maintain a specific ratio of assets to third-party liabilities in appropriate circumstances. The proposed sections apply to a foreign bank that is licensed under Chapter 204 to establish and maintain a Texas state branch or agency and that carries nonrelated liabilities on the books and records of its branch or agency as liabilities of the branch or agency. However, as proposed §3.53 and §3.54 make clear, the mandatory pledge requirement applies only to a foreign bank that carries nonrelated deposit liabilities.

Proposed §3.52 defines terms used in the proposed new sections. The proposed section includes definitions of "Call Report", "nonrelated deposit liabilities", and "nonrelated other liabilities." These terms are defined because the proposed sections require a foreign bank to report and calculate its nonrelated liabilities in accordance with the quarterly Call Report a foreign bank with a United States branch or agency must submit to the appropriate Federal Reserve Board. Additionally, under the proposed sections, a foreign bank's obligation to pledge assets generally depends upon whether the bank carries nonrelated deposit liabilities on the books of its Texas state branch or agency. These proposed definitions use Call Report terminology, incorporate Call Report instructions, and reflect the substance of the information reported on the Call Report. The utilization of Call Report terminology and reported information in the proposed new subchapter is intended to eliminate reporting burdens and uncertainty regarding the proper characterization of liabilities and pledging and reporting requirements.

Proposed §3.53 establishes the asset pledge requirement applicable to a foreign bank that carries nonrelated deposit liabilities on the books of its Texas state branch or agency as liabilities of such branch or agency. The requirement is expressed as a percentage of total nonrelated liabilities, which consist of both nonrelated deposit liabilities and nonrelated other liabilities. The proposed section sets the pledge at an amount equal to the lesser of $100 million or 1% of the average total nonrelated liabilities of the branch or agency for the previous calendar quarter, subject to a minimum pledge of $100,000. The proposed section also authorizes the banking commissioner to require higher asset pledge levels if necessary or desirable.

Proposed §3.54 sets out the asset pledge requirement applicable to a foreign bank that carries only nonrelated other liabilities on the books of its Texas state branch or agency. A bank that carries only nonrelated other liabilities, and does not carry nonrelated deposit liabilities, is not, as a general matter, required to pledge assets. However, proposed §3.54 authorizes the banking commissioner to require such a bank to pledge assets in accordance with proposed Subchapter D if regulatory concerns warrant.

Proposed §3.55 establishes the manner in which a foreign bank must calculate the liabilities of its Texas state branch or agency and the corresponding asset pledge. To minimize the administrative burden and facilitate compliance with the asset pledge requirement, the proposed section provides for backward looking, quarterly average calculations made in accordance with Call Report instructions and on the same basis on which quarterly averages are calculated for Call Report purposes. The proposed section also requires a foreign bank that maintains more than one Texas state branch or agency to calculate its asset pledge on a consolidated basis.

Proposed §3.56 requires each foreign bank that maintains a Texas state branch or agency that carries nonrelated liabilities on the books of its Texas branch or agency to prepare and submit quarterly reports to the banking commissioner. The quarterly report must state the average nonrelated liabilities of the bank's Texas state branch or agency for the previous quarter and, if applicable, the assets deposited to satisfy the asset pledge and the value of those assets. Proposed §3.56 provides that the report must be submitted no later than the date the foreign bank is required to submit its Call Report to the appropriate Federal Reserve Bank. According to current Call Report instructions, the submission date is 30 days after the end of the quarter to which the Call Report relates. If the quarterly calculations show that additional assets are needed to satisfy the pledge requirement, the additional assets must be deposited within that same time period.

Proposed §3.57 identifies liabilities a foreign bank should exclude for purposes of calculating the amount of the asset pledge. The proposed section authorizes the banking commissioner to exclude other liabilities in addition to those specifically listed.

Proposed §3.58 identifies the assets that are eligible to satisfy the asset pledge. The proposed section specifies certain types of assets in addition to those enumerated in Finance Code, §204.113, but authorizes the banking commissioner to allow additional assets on a case by case basis upon a foreign bank's written application. Proposed §3.58 further requires the pledged assets to be readily marketable and capable of being valued, and that they be payable in the United States and in United States dollars. Finally, proposed §3.58 authorizes the banking commissioner to otherwise condition the terms upon which assets may be pledged.

Proposed §3.59 requires a foreign bank and a depository to execute a deposit agreement approved by the banking commissioner prior to the deposit of assets for purposes of the asset pledge. The proposed section sets out the terms and conditions that must be included in the deposit agreement. Proposed §3.59 also authorizes the banking commissioner to impose additional terms and conditions and terminate the deposit agreement in certain circumstances.

Proposed §3.60 and §3.61 impose recordkeeping requirements. Under proposed §3.60, a foreign bank must retain records relating to the deposit into and withdrawal of assets from the pledge account. Proposed §3.61 requires a foreign bank to maintain a record of its liabilities and an itemized record of pledged assets. The records must support the calculations and asset lists and valuations contained in the quarterly asset pledge report required under proposed §3.56.

Proposed §3.62 addresses asset maintenance. The proposed section does not require a foreign bank to maintain a specific ratio of assets to liabilities appearing on the books and records of its licensed Texas branch or agency, but authorizes the banking commissioner to impose a specific ratio based upon supervisory concerns.

Gayle Griffin, Deputy Commissioner, Texas Department of Banking, has determined that, for each year of the first five years that the proposed new sections are in effect, there will be no fiscal

implications for state or local government as a result of enforcing or administering the sections.

Mr. Griffin has also determined that, for each of the first five years the proposed new sections are in effect, the proposed new sections will benefit the public by helping ensure the sound financial condition of a foreign bank's Texas state branch or agency, protecting the depositors and creditors of the state branch or agency's business in Texas, and promoting public confidence in the state branch or agency. Additionally, the asset pledge requirement ensures that funds are readily available to the banking commissioner to pay administration expenses and other claims in the event a liquidation of a foreign bank's Texas state branch or agency under Finance Code, §204.120, becomes necessary.

Mr. Griffin has further determined that, for each of the first five years the proposed new sections are in effect, there will be no probable economic cost to persons required to comply with the sections. The proposed sections do not require a foreign bank to pledge assets unless the bank carries nonrelated deposit liabilities on the books of its Texas state branch or agency. A foreign bank that carries only nonrelated other liabilities is not required to pledge assets unless the banking commissioner determines that the pledge is necessary based on regulatory concerns. Additionally, the proposed sections do not contemplate that a foreign bank subject to the pledge requirement will purchase "new" assets, but, rather, will pledge existing assets. Moreover, a foreign bank may earn income on the assets depending upon the bank's agreement with the depository. Finally, Mr. Griffin has determined that the proposed sections will have no adverse affect upon small businesses or microbusinesses.

To be considered, comments on the proposed new sections must be submitted not later than 30 days after the date of publication of this notice. Comments should be addressed to Sarah Shirley, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294, or by e-mail to: sarah.shirley@banking.state.tx.us.

The new sections are proposed under Finance Code, §201.003, which authorizes the commission to adopt rules necessary or reasonable to implement and clarify Finance Code, Title 3, Subtitle G, and Finance Code, §204.113 and §204.114, which authorize the commission to adopt rules concerning asset pledge and maintenance requirements applicable to a foreign bank that maintains a Texas state branch or agency.

Finance Code, §204.113 and §204.114, are affected by the proposed sections.

§3.51. Authority, Purpose and Scope.

(a) Authority. This subchapter is adopted under the authority of Finance Code, Title 3, Subtitle G, Chapter 204, Subchapter B, particularly Finance Code, §§204.113 and 204.114. Subchapter B authorizes a foreign bank to establish and maintain a Texas state branch or agency upon receiving a license from the Texas Banking Commissioner. Section 204.113 authorizes the banking commissioner to require a foreign bank so licensed to deposit and pledge to the banking commissioner assets in Texas in an amount and subject to such conditions as may be determined or authorized by rule. Section 204.114 authorizes the banking commissioner to require a foreign bank to satisfy the ratio of Texas state branch or agency assets to liabilities as may be determined or authorized by rule.

(b) Purpose. This subchapter implements Finance Code, §§204.113 and 204.114. It establishes the amount of assets that a foreign bank subject to its provisions must deposit and pledge and the conditions related to the pledge. The subchapter also authorizes the banking commissioner to require a foreign bank to maintain a specific ratio of assets to liabilities as the banking commissioner deems necessary or desirable to address supervisory concerns.

(c) Scope. This subchapter applies to a foreign bank that is licensed to establish and maintain one or more Texas state branches or Texas state agencies under Finance Code, Title 3, Subtitle G, Chapter 204, Subchapter B, and that carries nonrelated liabilities on the books, accounts and records of such branch, branches, agency or agencies.

§3.52. General Definitions.

Unless defined otherwise in this section, words and terms used in this subchapter that are defined in Finance Code, §31.002, have the same meanings as defined in the Finance Code. The following words and terms, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise:

(1) Asset pledge--The total amount of assets a foreign bank must deposit and pledge to the banking commissioner and maintain on deposit at all times.

(2) Call Report--The FFEIC quarterly, consolidated report of assets and liabilities of United States branches and agencies of foreign banks, currently reported on FFIEC 002.

(3) Depository--An unaffiliated, FDIC-insured state or national bank in Texas, or a federal reserve bank.

(4) FFIEC--The Federal Financial Institutions Examination Council.

(5) Foreign bank--A foreign bank or foreign bank corporation, as defined in Section 1(b)(7), International Banking Act (12 USC Section 3107(7)), that is licensed under Finance Code, Chapter 204, to establish and maintain a Texas state branch or Texas state agency.

(6) ROCA--The rating system used by the Federal Reserve Board, the Office of the Comptroller of the Currency, and state banking regulatory authorities that measures risk management, operation controls, compliance and asset quality and thereby determines the condition of a foreign bank's branch or agency or commercial lending subsidiary in the United States.

(7) Texas state branch--One or more branches established and maintained in Texas by a foreign bank under a license issued pursuant to Finance Code, Chapter 204. The term also includes a foreign bank branch as referred to in subchapters B and C of this title (relating to General state bank regulations and Foreign Bank Agencies, respectively).

(8) Texas state agency--One or more agencies established and maintained in Texas by a foreign bank under a license issued pursuant to Finance Code, Chapter 204. The term also includes a foreign bank agency as referred to in subchapters B and C of this title (relating to General state bank regulations and Foreign Bank Agencies, respectively).

(9) Nonrelated deposit liabilities--The liabilities to nonrelated parties consisting of deposits and credit balances reported in the Call Report in accordance with Call Report instructions, currently reported on line 4.a. of Schedule RAL-Assets and Liabilities.

(10) Nonrelated other liabilities--The liabilities to nonrelated parties, exclusive of nonrelated deposit liabilities, reported in the Call Report in accordance with Call Report instructions, currently reported on lines 4.b-4.g. of Schedule RAL-Assets and Liabilities. Nonrelated other liabilities include federal funds purchased and sold under agreements to repurchase, other borrowed money, branch or agency liability on acceptances executed and outstanding, trading liabilities and other liabilities to nonrelated parties.

§3.53. Asset Deposit and Pledge Requirement Applicable to Branch or Agency with Nonrelated Deposit Liabilities.

(a) Asset pledge required. A foreign bank that maintains and operates a Texas state branch or agency, and carries nonrelated deposit liabilities on the books and records of its Texas state branch or agency as liabilities of such branch or agency, must pledge and keep assets on deposit with a depository in accordance with this subchapter.

(b) Amount of deposit. Subject to a minimum deposit of $100,000, the amount of assets required to be deposited under subsection (a), based upon the lower of principal amount or market value, is equal to the lesser of:

(1) one percent of the average total nonrelated liabilities, consisting of nonrelated deposit liabilities and nonrelated other liabilities, for the previous calendar quarter of such branch or agency appearing on the books, accounts and records of such branch or agency; or

(2) $100 million.

(c) Pledge of assets to banking commissioner. The assets required to be deposited under this section are deemed to be pledged to the banking commissioner for the benefit of the creditors and depositors of the Texas state branch's or agency's business in this State. Notwithstanding any provision of the Uniform Commercial Code to the contrary, the banking commissioner is deemed to have a security interest in such assets.

(d) Projection of liabilities. Upon opening its first Texas state branch or agency that will carry nonrelated deposit liabilities on the books and records of such branch or agency, a foreign bank must deposit assets based upon such branch's or agency's projection of total nonrelated liabilities, consisting of nonrelated deposit liabilities and nonrelated other liabilities, at the end of its first year of operation.

(e) Increase in amount of required deposit. The banking commissioner may increase the amount required to be deposited by a foreign bank under this section if necessary or desirable to:

(1) maintain the Texas state branch or agency in sound financial condition;

(2) protect the depositors, creditors and the public interest in Texas; or

(3) support public confidence in the business of the Texas state branch or agency.

§3.54. Asset Deposit and Pledge Requirement Applicable to Branch or Agency with Only Nonrelated Other Liabilities.

(a) Asset pledge not generally required. Subject to subsection (b) of this section, a foreign bank that carries only nonrelated other liabilities on the books and records of its Texas state branch or agency, and does not carry nonrelated deposit liabilities, is not required to pledge assets under this subchapter.

(b) Authority of banking commissioner to require asset pledge. The banking commissioner, in his sole discretion based upon the factors identified in §3.53(e) of this title (relating to Asset Deposit and Pledge Requirement Applicable to Branch or Agency with Nonrelated Deposit Liabilities), may require a foreign bank that carries only nonrelated other liabilities on the books and records of its Texas state branch or agency to pledge assets in accordance with §3.53 of this title (relating to Asset Deposit and Pledge Requirement Applicable to Branch or Agency with Nonrelated Deposit Liabilities). In such event, the bank must comply with all provisions of this subchapter relating to the deposit and pledge of assets.

§3.55. Calculation of Liabilities.

(a) Calculation of liabilities in accordance with Call Report. For purposes of §3.53(b), and except as otherwise provided in this subchapter, a foreign bank must:

(1) calculate the nonrelated deposit liabilities and nonrelated other liabilities of its Texas state branch or agency in accordance with the instructions in the FFEIC Call Report; and

(2) calculate the asset pledge on the same basis on which it calculates quarterly averages for Call Report purposes (currently, the average of liabilities subject to asset pledge either as of the close of business for each day of the calendar quarter or as of the close of business on each Wednesday during the calendar quarter).

(b) Aggregation. A foreign bank that maintains more than one Texas state branch or agency must calculate the amount of the required asset pledge on an aggregate basis.

§3.56. Asset Pledge Report and Additional Deposits.

(a) Report of liabilities and pledged assets. Each foreign bank that maintains a Texas state branch or agency that carries nonrelated liabilities, consisting of nonrelated deposit liabilities and nonrelated other liabilities, on the books and records of its Texas state branch or agency as liabilities of such branch or agency, must prepare and submit to the banking commissioner, on a form prescribed by the banking commissioner, a report showing:

(1) the average total nonrelated liabilities, consisting of nonrelated deposit liabilities and nonrelated other liabilities, of its Texas state branch or agency for the previous calendar quarter, calculated in accordance with §3.55 of this title (relating to Calculation of Liabilities); and

(2) if assets are deposited and pledged for the account of the banking commissioner under §3.53 of this title (relating to Asset Deposit and Pledge Requirement Applicable to Branch or Agency with Nonrelated Deposit Liabilities), the assets deposited and pledged and the total value of such assets as of the end of the quarter for which liabilities are reported under subsection (a)(1) of this section.

(b) Authentication and submission of report. A duly authorized officer of the foreign bank must sign the report required under subsection (a) of this section and certify that the report is true and correct. The report must be submitted to the banking commissioner no later than the date the foreign bank must submit the Call Report for the end of the quarter for which the calculation is made to the appropriate Federal Reserve Bank according to Call Report instructions.

(c) Additional deposits to satisfy the pledge requirement. A foreign bank must deposit into the pledge account such additional assets as may be required, based upon the quarterly calculation, to satisfy the pledge requirement established in §3.53 of this title (relating to Asset Deposit and Pledge Requirement Applicable to Branch or Agency with Nonrelated Deposit Liabilities). The foreign bank must deposit the additional assets no later than the date on which the bank must submit the Call Report for the end of the quarter for which the calculation is made.

§3.57. Excluded Liabilities.

The following liabilities of a foreign bank's Texas state branch or agency are not included for purposes of calculating the amount of assets required to be pledged under §3.53 of this title (relating to Asset Deposit and Pledge Requirement Applicable to Branch or Agency with Nonrelated Deposit Liabilities):

(1) amounts due and other liabilities to other offices, agencies, branches and affiliates of the foreign bank;

(2) liabilities arising from repurchase agreements and other similar instruments to the extent secured by collateral;

(3) reserves for possible loan losses and other contingencies; and

(4) such other liabilities as the banking commissioner may determine.

§3.58. Eligible Assets and Conditions.

(a) Eligible assets. In addition to the assets consisting of dollar deposits and investment securities described in Finance Code, §204.113(a), a foreign bank may deposit the following assets to satisfy the pledge requirement established in §3.53 of this title (relating to Asset Deposit and Pledge Requirement Applicable to Branch or Agency with Nonrelated Deposit Liabilities):

(1) reserves maintained with a federal reserve bank in or outside this state;

(2) United States and non-United States debt obligations that are rated investment grade by a recognized United States rating service; and

(3) assets specifically approved by the banking commissioner upon prior written application.

(b) Asset pledge conditions and limitations. Unless the banking commissioner specifically permits otherwise, the following conditions and limitations apply to the asset pledge:

(1) Assets must be payable in the United States and payable in United States dollars; and

(2) Assets must be capable of being promptly sold under ordinary market conditions at a fair market value determined by reliable and continuously available price quotations, based upon actual transactions on an auction or similarly available daily bid and ask price market.

(c) Authority of banking commissioner to impose additional conditions. With respect to any asset, the commissioner may determine that, for purposes of this subchapter, a foreign bank must hold such asset in such form or subject to such conditions as the banking commissioner may prescribe. The banking commissioner may expressly disallow one or more otherwise eligible assets, either for all foreign banks or a specific foreign bank. All assets are subject to any additional conditions or limitations deemed by the banking commissioner to be necessary or desirable.

§3.59. Deposit Agreement and Conditions.

(a) Approved deposit agreement. A foreign bank and a depository must execute a deposit agreement approved by the banking commissioner before the foreign bank may deposit assets for purposes of Finance Code, §204.113, and this subchapter. In addition to any other terms and conditions that are not inconsistent with those listed in this section or imposed by the banking commissioner, the deposit agreement must include the terms and conditions set forth in subsections (b) through (m) of this section.

(b) Limitation on assets that may be deposited. Only assets eligible to be pledged under §3.58 of this title (relating to Eligible Assets and Conditions) may be deposited into the pledge account.

(c) Assets pledged to banking commissioner. The assets must be pledged to the banking commissioner for the benefit of the creditors and depositors of the Texas state branch's or agency's business in this State. The banking commissioner is deemed to have a security interest in the pledged assets.

(d) Assets held as special deposit. The depository must hold the assets deposited under the agreement as a special deposit free of any lien, charge, right of set-off, credit, or preference in connection with any claim of the depository against the foreign bank or the Texas state branch or agency. The depository may not accept any asset under the agreement that is not accompanied by documentation necessary to facilitate transfer of title.

(e) Depository to furnish receipt. The depository must furnish the foreign bank, upon the deposit of assets under the depository agreement, a receipt or statement as evidence of the deposit. The receipt or statement must identify the deposit as having been made pursuant to Finance Code, §204.113, and under the deposit agreement, and must state the amount of the deposit and, with respect to the deposit of securities, a description of each security deposited.

(f) Release of securities by depository. The depository must release deposited assets to the foreign bank upon written request:

(1) when accompanied by a certificate, as described in subsection (g) of this section, signed by a duly authorized officer of the foreign bank; or

(2) upon receipt of the banking commissioner's written order to release such part of the deposited assets under such conditions and terms as the order may specify.

(g) Model certificate. A duly authorized officer of the foreign bank must execute the following or a similar certificate before making a withdrawal under subsection (f)(1) of this section: It is hereby certified that the aggregate value of securities and/or funds remaining on deposit pursuant to the Deposit Agreement after this withdrawal or substitution amounts to $_____, valued at the lower of principal amount or market value, and that such amount is at least equal to the amount required to be deposited under Finance Code, §204.113, and 7 TAC §3.51 et seq. The amount required to be maintained on deposit, calculated in accordance with this subchapter, is $_____ as of this date.

(h) Depository to furnish monthly statement of all transactions. The depository must furnish to the foreign bank, at least once in each calendar month, a statement of all transactions in the pledge account since the closing date of the previous statement. The statement must include a listing of the securities and/or the amount of funds on deposit as of the closing date of the statement. The depository must simultaneously send a copy of the statement to the banking commissioner.

(i) Depository may pay interest. So long as the Texas state branch or agency continues business in the ordinary course, the depository may pay interest earned on the assets in the pledge account in accordance with such arrangements as may be made between the depository and the foreign bank.

(j) Responsibility of depository with respect to deposited securities. Except as provided in this subsection, a depository must hold securities deposited under the deposit agreement separate and apart from all other securities and must permit duly authorized representatives of the foreign bank or of the banking commissioner to examine and compare such securities. A depository may utilize a central depository, clearing corporation or book entry system to hold securities deposited under the deposit agreement, provided that the records of the central depository, clearing corporation or book entry system show that the depository holds the securities as principal or as agent or as custodian of its customers. The depository must maintain adequate records to demonstrate the disposition of any book entry deposits.

(k) Safeguarding of deposited securities. The depository must give the same degree of care to the safekeeping, handling and shipping of deposited securities that the depository would give to its own securities.

(l) Banking commissioner not to pay for services rendered. The banking commissioner is not required to pay for any of the services rendered or any expenses incurred by the depository or the foreign bank under or in connection with 7 TAC §§3.51-3.61 or the deposit agreement.

(m) Termination of deposit agreement by foreign bank or depository. The foreign bank or the depository may terminate the deposit agreement by giving the other party at least sixty days written notice of the termination, or such shorter notice as the banking commissioner may approve, provided that no termination by the foreign bank or the depository is effective until:

(1) the foreign bank has designated another depository;

(2) the foreign bank has provided the banking commissioner with the name and address of the successor depository;

(3) the foreign bank and the successor depository have executed a deposit agreement that conforms to this section and has been approved by the banking commissioner; and

(4) the depository has released to foreign bank all the deposited assets in accordance with written instructions from the foreign bank approved by the banking commissioner.

(n) Additional terms and conditions. The banking commissioner may at any time impose different or additional terms and conditions upon the deposit agreement as deemed necessary or desirable.

(o) Termination of the right to substitute or withdraw assets. Upon notice to the foreign bank and the depository, the banking commissioner may terminate or suspend the authority of the foreign bank under subsection (f)(1) of this section to substitute or withdraw deposited assets.

(p) Termination of deposit agreement by banking commissioner. Upon notice to the foreign bank and the depository, the banking commissioner may terminate the deposit agreement and order the depository to release the pledged assets on such terms as are specified in the order if the foreign bank or the depository fails to comply with any term of the deposit agreement required by this section or with any other terms and conditions imposed by the banking commissioner under subsection (n) of this section.

§3.60. Record of Deposited and Withdrawn Assets.

(a) Retention of receipts of statements. A foreign bank must retain for three years from the date of receipt the originals of all receipts or statements obtained from a depository under §3.59 of this title (relating to Deposit Agreement and Conditions). The foreign bank must make such originals available to the department at the time of the examination of such branch or agency.

(b) Withdrawal request and certificate. Coincidentally with any withdrawal request authorized pursuant to §3.59 of this title (relating to Deposit Agreement and Conditions), a foreign bank must furnish the banking commissioner a copy of the withdrawal request and the certificate required under §3.59(g) of this title (relating to Deposit Agreement and Conditions).

§3.61. Record of Assets and Liabilities.

(a) Maintenance of record of liabilities. A foreign bank must maintain a record of the liabilities of the foreign bank appearing on the books, accounts and records of its Texas state branch or agency as liabilities of such branch or agency as determined in accordance with §3.55 of this title (relating to Calculation of Liabilities) and §3.56 of this title (relating to Asset Pledge Report and Additional Deposits). The record must be maintained in permanent ledger form. A foreign bank authorized to maintain more than one branch or agency in this State must maintain the record on a consolidated basis. No specific format for the record is prescribed. It must, however, contain such information in sufficient detail as will permit ready verification of its accuracy.

(b) Maintenance of record of assets. In addition to the record of liabilities required to be maintained by subsection (a) of this section, a foreign bank must maintain an itemized record of assets deposited for the account of the banking commissioner under §3.53 of this title (relating to Asset Deposit and Pledge Requirement Applicable to Branch or Agency with Nonrelated Deposit Liabilities). The record must describe each deposited asset and include the value of such asset, at principal or market value, whichever is lower.

(c) General requirements applicable to records. The records required to be maintained under subsections (a) and (b) must:

(1) support the calculations and asset lists and valuations contained in the quarterly asset pledge report required under §3.56 of this title (relating to Asset Pledge Report and Additional Deposits);

(2) be authenticated by the signature of a duly authorized officer of the foreign bank; and

(3) be retained for three years from the date the records are received or generated.

(d) Additional records and reports. The banking commissioner may require a foreign bank subject to this subchapter to maintain records and submit reports in addition to those required by this section and §3.60 of this title (relating to Record of Deposited and Withdrawn Assets) as deemed necessary or desirable.

§3.62. Asset Maintenance.

(a) Maintenance of specific ratio not generally required. Subject to subsection (b) of this section, a foreign bank is not required to maintain a specific ratio of assets to liabilities appearing on the books, accounts and records of its Texas state branch or agency.

(b) Authority of banking commissioner to require maintenance of specific ratio. The banking commissioner may require a foreign bank to maintain a specific ratio of assets to liabilities as deemed necessary or desirable. In addition to the factors identified in Finance Code, §204.114(d), the banking commissioner may take into account the following in determining the ratio:

(1) the existence any formal supervisory, regulatory or enforcement actions outstanding against the foreign bank in any jurisdiction or its Texas state branch or Texas state agency;

(2) the composite ROCA rating for the Texas state branch or agency; and

(3) the comprehensive composite ROCA rating of the foreign bank's operations in the United States; and

(4) the financial strength or condition of the foreign bank.

(c) Determination of Assets and Liabilities. The banking commissioner will determine the assets and liabilities that may or must be included for purposes satisfying the requirements of this section consistent with Finance Code, §204.114.

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 August 15, 2003.

TRD-200305220
Everette D. Jobe
Certifying Official
Finance Commission of Texas
Proposed date of adoption: October 23, 2003
For further information, please call: (512) 475-1300

♦ ♦ ♦

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 15. CORPORATE ACTIVITIES

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (department), proposes amendments to §15.1, concerning definitions; §15.2, concerning filing fees and cost deposits; §15.3, concerning expedited filings; §15.4, concerning required information and abandoned filings; §15.5, concerning public notice; §15.7, regarding submission of reproductions, §15.8, concerning corporate filings; and §15.24, concerning the option to withhold identity of officers. The commission, on behalf of the department, also proposes new §15.9, concerning waiver of requirements.

As a result of a rule review of chapter 15, subchapters A and B, the department is revising certain statutory references to conform with changes to the Finance Code, and is deleting references to trust companies in recognition of subsequently adopted trust company rules located in chapter 21 of this title. The department is also proposing a number of clarifying, nonsubstantive edits.

Finally, the department proposes to increase the fee in §15.2 for an application to amend a bank charter from $200 to $300. This fee increase is established by the commission, and not mandated by the legislature. The proposed fee increase is necessary to more fully recover the cost of processing an application to amend a bank charter. The increased fee will be equal to the current fee applicable to a business corporation or trust company for a similar filing or application.

Beginning September 1, 2003, certain corporate filings will no longer be required of business corporations. The department is therefore deleting similar filing requirements applicable to banks in §15.8.

Finally, the department proposes new §15.9 to allow the banking commissioner to waive or modify requirements of this chapter.

Lynda A. Drake, Director of the Corporate Activities Division, Texas Department of Banking, has determined that for the first five-year period the section as proposed will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section because the proposal will merely rearrange sources of revenue and is not expected to increase or decrease the net revenue of the department from the banking industry.

Ms. Drake also has determined that for each year of the first five-year period the section as proposed will be in effect, the public benefit anticipated as a result of the amendment will be improved efficiency from better matching of the actual cost of regulation with the service provided, for the purpose of achieving economic self-sufficiency for application processing within the department. There will be no effect on small businesses. On average, approximately 25 banks per year file amendments to their charters, and each filing bank will incur an increase of $100 in the economic cost of complying with the section as proposed.

Comments concerning the proposed amendments should be submitted within 30 days of publication to Shannon Phillips Jr., Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4924, or by email to sphillips@banking.state.tx.us.

SUBCHAPTER A. FEES AND OTHER PROVISIONS OF GENERAL APPLICABILITY

7 TAC §§15.1 - 15.5, 15.7, 15.8

The amendments are proposed under the authority of Finance Code, §31.003, which authorizes the commission to adopt rules as necessary to accomplish the purposes of Finance Code, Title 3, Subtitle A and Chapters 11, 12, and 13, and Finance Code, §201.003, which authorizes the commission to adopt rules as necessary to accomplish the purposes of Finance Code, Title 3, Subtitle G.

Finance Code, Title 3, Subtitles A and G, are affected by the proposed amendments.

§15.1. Definitions.

Words and terms used in this chapter that are defined in the Finance Code, Title 3, Subtitle A or Subtitle G, have the same meanings as defined in the Finance Code. The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Accepted filing--An [~~Includes any~~] application, request, notice, or protest filed [~~under~~] with the banking commissioner pursuant to the Finance Code, Title 3, Subtitle A or G, this chapter, or another [~~any~~] rule [~~or regulation~~] adopted pursuant to the Finance Code if: [~~, in which the banking commissioner has received sufficient information to reach an informed decision,~~]

(A) the appropriate fee has been paid pursuant to §15.2 of this title (relating to Filing Fees and Cost Deposits); [~~,~~] and

(B) the banking commissioner has received sufficient information to reach an informed decision and has notified the person or entity who submitted the filing, in writing, that the submission is complete and has been accepted for filing.

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

(8) Public notice--A notice [~~Any matter including an application, request, notice, or protest, whether by proclamation or declaration, required or authorized to be~~] published in a newspaper of general circulation concerning the subject matter of a submitted filing [~~by the Finance Code, Title 3, Subtitle A, this chapter, any rule or regulation adopted pursuant to the Finance Code, or required to be published by the banking commissioner~~].

(9) Submitted filing--An [~~Includes any initial~~] application, request, notice, or protest, that is neither an accepted filing nor an abandoned filing, filed under the Finance Code, Title 3, Subtitle A or G, this chapter, or another [~~any~~] rule [~~or regulation~~] adopted pursuant to the Finance Code [~~, that is neither an accepted filing nor been abandoned~~].

§15.2. Filing Fees and Cost Deposits.

(a) (No change.)

(b) Filing fees. Simultaneously with a submitted application or notice, an applicant shall pay to the department:

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

(3) $4,000 for an application to authorize a merger or share exchange (including an interstate transaction) pursuant to Finance Code, §32.302, and §15.104 of this title (relating to Application for Merger or Share Exchange), or $2,500 for an expedited application if permissible pursuant to §15.103 of this title;

(4) (No change.)

(5) $4,000 for an application to authorize a purchase of assets (including an interstate transaction) pursuant to Finance Code, §32.401, and §15.105 of this title (relating to Application for Authority to Purchase Assets of Another Financial Institution), or $2,000 for an expedited application if permissible pursuant to §15.103 of this title;

(6) $1,000 for an application to authorize the sale of substantially all assets (including an interstate transaction) pursuant to Finance Code, §32.405, and §15.106 of this title (relating to Application for Authority to Sell Assets);

(7) $1,500 for an application to establish a branch office (including an interstate transaction) pursuant to Finance Code, § 32.203, and §15.42 of this title (relating to Establishment and Closing of a Branch Office), or $500 for an expedited application if permissible pursuant to §15.3 of this title, provided that the department will not require a filing fee for an application for a new branch office to be located in a low or moderate income area and where no other depository institution operates a branch or home office;

(8)-(13) (No change.)

(14) $3,000 for an application for a foreign bank branch or agency license pursuant to Finance Code, §204.101 [~~§39.103~~], and §3.41(a) of this title (relating to Applications, Notices, and Reports of a Foreign Bank Corporation);

(15) $500 for the statement of registration of a foreign bank representative office pursuant to Finance Code, §204.201 [~~§39.203~~], and §3.44(b) of this title (relating to Statement of Registration, Notices and Filings by a Representative Office);

(16) $300 [~~$200~~] for an application to amend a bank charter (articles of association) pursuant to Finance Code, §32.101;

(17) (No change.)

(18) $500 for filing a copy of an application to acquire a bank or bank holding company pursuant to Finance Code, §202.001 [~~§38.001, to acquire a bank or bank holding company~~];

(19) $500 for filing a copy of an application to acquire a nonbank entity pursuant to Finance Code, §202.004 [~~§38.004, to acquire a nonbank entity~~];

(20)-(22) (No change.)

(c)-(f) (No change.)

§15.3. Expedited Filings.

(a) An eligible bank [~~Eligible banks~~] may file an expedited filing according to forms and instructions provided by the department solely for the following matters:

(1) a branch application [~~applications~~] pursuant to Finance Code, §32.203 [~~the Act, §3.203~~], and §15.42 of this title (relating to Establishment and Closing of a Branch Facility);

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

[~~(b) Eligible trust companies may file an expedited filing according to forms and instructions provided by the department solely for home office relocations where there is no abandonment of the community pursuant to Texas Civil Statutes, Article 342a-3.202(c) and (d), and §15.41 of this title.~~]

(b) [~~(c)~~] Notwithstanding another provision of this section, the banking commissioner may deny expedited filing treatment to an eligible bank [~~or eligible trust company~~], in the exercise of discretion, if the banking commissioner finds that the filing involves one or more of the following:

(1) the proposed transaction involves significant policy, supervisory, or legal issues;

(2) approval of the proposed transaction is contingent on additional statutory or regulatory approval by the banking commissioner or another state or federal regulatory agency;

(3) the proposed transaction will result in a fixed asset investment in excess of the limitation contained in the Finance Code, §34.002(a);

(4) the proposed transaction requires the approval of the banking commissioner under the Finance Code, §33.109(b);

(5) the proposed transaction involves an issue of parity between state and national banks pursuant to the Finance Code, §32.009;

(6) the proposed transaction significantly impacts the strategic plan of the bank [~~or trust company~~];

(7) the proposed transaction will result in a decrease in capital below the levels required to meet the definition of "well capitalized" in 12 Code of Federal Regulations, §325.103 [~~, or, in the case of a trust company, would cause capital and surplus to fall below current minimum statutory or regulatory requirements~~];

(8) the proposed transaction will result in an abandonment of the community pursuant to the Finance Code, §32.202(d);

(9) the proposed transaction involves an issue of regulatory concern as determined by the banking commissioner in the exercise of discretion; or

(10) the application is deficient and specific additional information is required, or the filing fee has not been paid.

(c) [~~(d)~~] The sole filing fee for an expedited filing is $500.

(d) [~~(e)~~] The department shall notify the applicant on or before the 15th day after receipt of the application if expedited filing treatment is not available under this section. Such notification must be in writing and must indicate the reason why expedited treatment is not available. Notification is effective when mailed by the department and is not subject to appeal.

(e) [~~(f)~~] Unless the applicant is otherwise notified by the department, an expedited filing is approved on the 15th day after the later of the date the application is complete and accepted for filing, or expiration of the period for filing a comment, protest, response or reply, whichever is the last to occur, unless a protest is filed. If a protest is filed, the application will be processed under §15.41 of this title (relating to Written Notice or Applications for Change of Home Office) or §15.42, whichever is applicable.

§15.4. Required Information and Abandoned Filings.

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

(c) Time limit for providing required information. An applicant must provide all information necessary for the banking commissioner to declare that a submission is an accepted filing, whether the information is required by form or rule or is requested by the department. The information must be provided to the department on or before the 61st day after the date of initial submission of the filing, except as otherwise provided by law. [~~Unless otherwise provided for in the Finance Code, Title 3, Subtitle A, this chapter, or rules and regulations~~

~~adopted pursuant to the Finance Code, all required information necessary for the banking commissioner to declare that a submission is an accepted filing shall be provided to the department on or before the 61st day after the date of the initial submission of the filing~~]. A person or entity may request an automatic 30-day extension of time to submit required information if the request is in writing and is received by the department prior to the end of the initial 60-day period provided for in this subsection. An additional extension may be requested in writing if such request is received prior to the expiration of the automatic extension. The additional extension shall be granted only if there is a finding of good and sufficient cause, in the banking commissioner's discretion, to grant an extension. Notice of the decision of the banking commissioner shall be mailed to the person or entity seeking the extension within ten days of the receipt of the request by the department.

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

§15.5. Public Notice.

(a) (No change.)

(b) Contents. The public notice must state that a filing is being made; the date (or expected date) of the filing; sufficient information describing the proposed transaction, and other related information required by the Finance Code, Title 3, Subtitle A or G, this chapter, or another rule [~~rules and regulations~~] adopted pursuant to the Finance Code. [~~; and~~] The notice must also contain any other information as may required by the banking commissioner. In addition, the notice must include substantially the following text as a separately stated paragraph: "Any person wishing to comment on this application, either for or against, may file written comments with the Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294 on or before the 14th day after the date of this publication. Such comments will be made a part of the record before and considered by the banking commissioner. Any person wishing to formally protest and oppose (describe type of application in general terms) and participate in the application process may do so by filing a written notice of protest with the Texas Department of Banking on or before the 14th calendar day after the date of this publication accompanied by a protest filing fee of $2,500. The protest fee may be reduced or waived by the banking commissioner upon a showing of substantial hardship."

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

(e) Other acceptable public notice. The banking commissioner may determine that public notice required by another regulatory agency of a bank [~~, trust company~~] or other regulated entity satisfies the public notice requirements of this section. For example, if a state bank converts, merges, or organizes into a financial institution that is no longer regulated by the banking commissioner and the banking commissioner determines that public notice requirements imposed by the successor regulatory authority regarding the conversion, merger, or organization satisfy the notice requirements of the Act and this section, the banking commissioner may permit the notice required by the successor regulatory authority to serve as notice under the Act and this section.

§15.7. Submission of Reproductions.

(a) (No change.)

(b) Reproduction. For purposes of this section, the term reproduction means:

(1) a photographic or photostatic copy or similar reproduction of an original document that is submitted to the department by mail or[~~,~~] hand delivery; [~~, or~~]

(2) a facsimile copy of an original document submitted by telephonic document transmission to the telecopier telephone number [~~machine~~] specified by the department; or

(3) if permitted by the department with respect to a specific filing, an electronic copy of an original document submitted to the email address specified by the department.

(c)-(g) (No change.)

§15.8. Corporate Filings.

(a) In accordance with the applicable provisions of the Finance Code, Title 3, Subtitle A or G, the following corporate forms regarding a state bank, along with the applicable filing fees, must be filed with the banking commissioner:

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

(9) statement regarding a restriction on the transfer of shares under TBCA, Article 2.22(E); and

(10) [~~statement of cancellation of redeemable shares under TBCA, Article 4.10(B);~~]

[~~(11) statement of cancellation of treasury shares under TBCA, Article 4.11;~~]

[~~(12) statement regarding the reduction of capital and surplus under TBCA, Article 4.12; and~~]

[~~(13)~~] abandonment of a merger or share exchange prior to its effective date under TBCA, Article 5.03(I).

(b)-(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 August 15, 2003.

TRD-200305219
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: October 23, 2003
For further information, please call: (512) 475-1300

♦ ♦ ♦

7 TAC §15.9

The new section is proposed under the authority of Finance Code, §31.003, which authorizes the commission to adopt rules as necessary to accomplish the purposes of Finance Code, Title 3, Subtitle A and Chapters 11, 12, and 13, and Finance Code, §201.003, which authorizes the commission to adopt rules as necessary to accomplish the purposes of Finance Code, Title 3, Subtitle G.

Finance Code, Title 3, Subtitles A and G, are affected by the proposed amendments.

§15.9. Waiver of Requirements.

The banking commissioner in the exercise of discretion may waive or modify any requirement imposed by this chapter, unless specifically required by statute.

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 August 15, 2003.

TRD-200305218

Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: October 23, 2003
For further information, please call: (512) 475-1300

♦ ♦ ♦

SUBCHAPTER B. BANK CHARTERS

7 TAC §15.24

The amendments are proposed under the authority of Finance Code, §31.003, which authorizes the commission to adopt rules as necessary to accomplish the purposes of Finance Code, Title 3, Subtitle A.

Finance Code, Title 3, Subtitle A, is affected by the proposed amendments.

§15.24. Option to Withhold Identity of Officers.

An applicant for a state bank [~~or trust charter~~] may, at its option, withhold the identity of prospective officers until such time as the banking commissioner issues a final order on the application. Approval of the application is [~~will be~~] conditioned [~~conditional~~] upon [~~the applicant's~~] filing, with the banking commissioner, the required information and authorizations [~~submitting resumes~~] on [~~of~~] qualified proposed officers [~~to the banking commissioner~~]. Upon receipt of the required information [~~resumes~~], the banking commissioner shall review and investigate the qualification of the proposed officers and deliver the certificate of authority pursuant to the Finance Code, §32.006, if the banking commissioner finds that the proposed officers meet the requirements of the Finance Code, §32.003(b)(4).

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 August 15, 2003.

TRD-200305217
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: October 23, 2003
For further information, please call: (512) 475-1300

♦ ♦ ♦

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER B. UNDERWRITING, MARKET ANALYSIS, APPRAISAL, ENVIRONMENTAL SITE ASSESSMENT, AND PROPERTY CONDITION ASSESSMENT RULES AND GUIDELINES

10 TAC §§1.31 - 1.33, 1.35, 1.36

The Texas Department of Housing and Community Affairs (the Department) proposes amendments to §§1.31-1.33 and §1.35, and new §1.36, concerning Underwriting, Market Analysis, Appraisal, Environmental Site Assessment and Property Condition Assessment Rules and Guidelines. The proposed amendments and new section implement new legislation enacted by the 78th Legislative Session. Chapter 50 of this title, referenced in this amendment, is also being proposed in this issue of the *Texas Register*. Chapter 60 of this title, referenced in this amendment, has not yet been proposed by the Department.

Edwina P. Carrington, Executive Director, has determined that for the first five-year period the proposed amendments and new section are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the amended and new sections.

Ms. Carrington also has determined that for each year of the first five years the proposed amended and new sections are in effect the public benefit anticipated as a result of enforcing the amended and new sections will be to permit the adoption of new rules for underwriting within the State of Texas, thereby enhancing the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on persons, small businesses or micro-businesses. There are no anticipated economic costs to any person, business or micro-business required to comply with the amended and new sections as proposed. The proposed amended and new sections will not have an impact on any local economy.

Comments may be submitted to Lisa Vecchietti, Real Estate Analysis, Texas Department of Housing and Community Affairs, P. O. Box 13941, Austin, Texas, 78711-3941 or by e-mail at the following address: lvecchietti@tdhca.state.tx.us

The proposed amendments and new section are proposed pursuant to the authority of the Texas Government Code, Chapter 2306.

The proposed amendments affect no other code, article or statute.

§1.31. General Provisions.

(a) Purpose. The Rules in this subchapter apply to the underwriting, market analysis, appraisal, and environmental site assessment standards employed by the Texas Department of Housing and Community Affairs (the "Department" or "TDHCA"). This chapter provides rules for the underwriting review of an affordable housing Development's financial feasibility and economic viability. In addition, this chapter guides the underwriting staff in making recommendations to the Executive Award and Review Advisory Committee ("the Committee"), Executive Director, and TDHCA Governing Board ("the Board") to help ensure procedural consistency in the award determination process. Due to the unique characteristics of each Development the interpretation of the rules and guidelines described in subchapter B of this chapter is subject to the discretion of the Department and final determination by the Board.

(b) Definitions. Many of the terms used in this subchapter are defined in [~~10 TAC §§49 and~~]Chapter 50 of this title (the Department's [~~Low Income~~] Housing Tax Credit Program Qualified Allocation Plan and Rules, known as the "QAP"), as proposed. Those terms that are not defined in the QAP or which may have another meaning when used in subchapter B of this title, shall have the meanings set forth in this subsection unless the context clearly indicates otherwise.

(1) Affordable Housing-Housing that has been funded through one or more of the Department's programs or other local, state or federal programs or has at least one unit that is restricted in the rent that can be charged either by a Land Use Restriction Agreement

or other form of Deed Restriction or by natural market forces at the equivalent of 30% of 100% of an area's median income as determined by the United States Department of Housing and Urban Development ("HUD").

(2) Affordability Analysis-An analysis of the ability of a prospective buyer or renter at a specified income level to buy or rent a housing unit at specified price or rent.

(3) Cash Flow--The funds available from operations after all expenses and debt service required to be paid have been considered.

(4) Credit Underwriting Analysis Report-Sometimes referred to as the "Report." A decision making tool used by the Department and Board, described more fully in §1.32(a) and (b) of this subchapter.

(5) Comparable Unit-A unit of housing that is of similar type, age, size, location and other discernable characteristics that can be used to compare and contrast from a proposed or existing unit.

(6) DCR--Debt Coverage Ratio. Sometimes referred to as the "Debt Coverage" or "Debt Service Coverage." A measure of the number of times the required payments of loan principal and interest are covered by Net Operating Income.

(7) Development-Proposed multi-unit residential housing that meets the affordability requirements for and requests funds from one or more of the Department's sources of funds.

(8) EGI--Effective Gross Income. The sum total of all sources of anticipated or actual income for a rental Development less vacancy and collection loss, leasing concessions, and rental income from employee-occupied units that is not anticipated to be charged or collected.

(9) Gross Program Rent-Sometimes called the "Program Rents." Maximum Rent Limits based upon the tables promulgated by the Department's division responsible for compliance by program and by county or Metropolitan Statistical Area ("MSA") or Primary Metropolitan Statistical Area ("PMSA").

(10) HUD--The United States Department of Housing and Urban Development. The department of the US Government responsible for major housing and urban Development programs, including programs that are redistributed through the State such as HOME and CDBG.

(11) Local Amenities-- Amenities located near and available to the tenants of a proposed Development, including but not limited to police and fire protection, transportation, healthcare, retail, grocers, educational institutions, employment centers, parks, public libraries, and entertainment centers.

(12) [~~Low~~ ~~Income~~] Housing Tax Credit(s)--Sometimes referred to as "LIHTC" or "Tax Credit(s)." A financing source allocated by the Department as determined by the QAP. The Tax Credits are typically sold through syndicators to raise equity for the Development.

(13) Market Analysis-Sometimes referred to as a Market Study. An evaluation of the economic conditions of supply, demand and pricing conducted in accordance with the Department's Market Analysis Rules and Guidelines in §1.33 of this subchapter as it relates to a specific Development

(14) Market Analyst-An individual or firm providing market information for use by the Department.

(15) Market Rent-The unrestricted rent concluded by the Market Analyst for a particular unit type and size after adjustments are made to Comparable Units.

(16) NOI--Net Operating Income. The income remaining after all operating expenses, including replacement reserves and taxes have been paid.

(17) Primary Market-Sometimes referred to as "Primary Market Area" or "Submarket." The area defined from which political/geographical boundaries that a proposed or existing Development is most likely to draw the bulk of its prospective tenants or homebuyers.

(18) PCA--Property Condition Assessment- Sometimes referred to as a Physical Needs Assessment, Project Capital Needs Assessments, Property Condition Report or Property Work Write-up. An evaluation of the physical condition of the existing property and evaluation of the cost of rehabilitation conducted in accordance with the Department's Property Condition Assessment Rules and Guidelines in §1.36 of this subchapter as it relates to a specific Development.

(19) [~~(18)~~] Rent Over-Burdened Households-- Non-elderly households paying more than 35% of gross income towards total housing expenses (unit rent plus utilities) and elderly households paying more than 40% of gross income towards total housing expenses.

(20) [~~(19)~~] Sustaining Occupancy--The occupancy level at which rental income plus secondary income is equal to all operating expenses and mandatory debt service requirements for a Development.

(21) [~~(20)~~] TDHCA Operating Expense Database-Sometimes called the TDHCA Database. This is a consolidation of recent actual operating expense information collected through the Department's Annual Owner Financial Certification process and published on the Department's web site.

(22) [~~(21)~~] Third Party--A Third Party is a Person which is not an Affiliate, Related Party, or Beneficial Owner of the Applicant, General Partner(s), Developer, or Person receiving any portion of the developer fee or contractor fee.

(23) Transitional Housing- Rental housing intended solely for short term occupancy by individuals or households transitioning from homelessness or abusive situations to permanent housing and typically consisting primarily of efficiency units.

(24) [~~(22)~~] Underwriter-the author(s), as evidenced by signature, of the Credit Underwriting Analysis Report.

(25) [~~(23)~~] Unstabilized Development- A Development that has not maintained a 90% occupancy level for at least 12 consecutive months.

(26) [~~(24)~~] Utility Allowance(s)-The estimate of tenant-paid utilities, based either on the most current HUD Form 52667, "Section 8, Existing Housing Allowance for Tenant-Furnished Utilities and Other Services," provided by the appropriate local Public Housing Authority consistent with the current QAP or a documented estimate from the utility provider proposed in the Application. Documentation from the local utility provider to support an alternative calculation can be used to justify alternative Utility Allowance conclusions but must be specific to the subject Development and consistent with the building plans provided.

§1.32. Underwriting Rules and Guidelines.

(a) General Provisions. The Department, through the division responsible for underwriting, produces or causes to be produced a Credit Underwriting Analysis Report (the "Report") for every Development recommended for funding through the Department. The primary function of the Report is to provide the Committee, Executive Director, the Board, Applicants, and the public a comprehensive analytical report and recommendations necessary to make well informed decisions in the allocation or award of the State's limited resources. The

Report in no way guarantees or purports to warrant the actual performance, feasibility, or viability of the Development by the Department.

(b) Report Contents. The Report provides an organized and consistent synopsis and reconciliation of the application information submitted by the Applicant. At a minimum, the Report includes:

(1) Identification of the Applicant and any principals of the Applicant;

(2) Identification of the funding type and amount requested by the Applicant;

(3) The Underwriter's funding recommendations and any conditions of such recommendations;

(4) Evaluation of the affordability of the proposed housing units to prospective residents;

(5) Review and analysis of the Applicant's operating proforma as compared to industry information, similar Developments previously funded by the Department, and the Department guidelines described in this section;

(6) Analysis of the Development's debt service capacity;

(7) Review and analysis of the Applicant's Development budget as compared to the estimate prepared by the Underwriter under the guidelines in this section;

(8) Evaluation of the commitment for additional sources of financing for the Development;

(9) Review of the experience of the Development team members;

(10) Identification of related interests among the members of the Development team, Third Party service providers and/or the seller of the property;

(11) Analysis of the Applicant's and principals' financial statements and creditworthiness including a review of the credit report for each of the principals in for-profit Developments subject to the Texas Public Information Act;

(12) Review of the proposed Development plan and evaluation of the proposed improvements and architectural design;

(13) Review of the Applicant's evidence of site control and any potential title issues that may affect site control;

(14) Identification and analysis of the site which includes review of the independent site inspection report prepared by a TDHCA staff member;

(15) Review of the Phase I Environmental Site Assessment in conformance with the Department's Environmental Site Assessment Rules and Guidelines in §1.35 of this subchapter or soils and hazardous material reports as required; and,

(16) Review of market data and Market Study information and any valuation information available for the property in conformance with the Department's Market Analysis Rules and Guidelines in §1.33 of this subchapter.

(17) Review of the appraisal, if required, for conformance with the Department's Appraisal Rules and Guidelines in §1.34 of this subchapter.

(18) Review of the Property Condition Assessment, if required, for conformance with the Department's Property Condition Assessment Rules and Guidelines in §1.36 of this subchapter.

(c) Recommendations in the Report. The conclusion of the Report includes a recommended award of funds or allocation of Tax Credits based on the lesser amount calculated by the eligible basis method (if applicable), equity gap method, or the amount requested by the Applicant as further described in paragraphs (1) through (3) of this subsection.

(1) Eligible Basis Method. This method is only used for Developments requesting Low Income Housing Tax Credits. This method is based upon calculation of eligible basis after applying all cost verification measures and limits on profit, overhead, general requirements, and developer fees as described in this section. The Applicable Percentage used in the Eligible Basis Method is as defined in the QAP.

(2) Equity Gap Method. This method evaluates the amount of funds needed to fill the gap created by total Development cost less total non-Department-sourced funds. In making this determination, the Underwriter resizes any anticipated deferred developer fee down to zero before reducing the amount of Department funds. In the case of [~~Low Income~~] Housing Tax Credits, the syndication proceeds are divided by the syndication rate to determine the amount of Tax Credits. In making this determination, the Department adjusts the permanent loan amount and/or any Department-sourced loans, as necessary, such that it conforms to the NOI and DCR standards described in this section.

(3) The Amount Requested. This is the amount of funds that is requested by the Applicant as reflected in the application documentation.

(d) Operating Feasibility. The operating financial feasibility of every Development funded by the Department is tested by adding total income sources and subtracting vacancy and collection losses and operating expenses to determine Net Operating Income. This Net Operating Income is divided by the annual debt service to determine the Debt Coverage Ratio. The Underwriter characterizes a Development as infeasible from an operational standpoint when the Debt Coverage Ratio does not meet the minimum standard set forth in paragraph (7) of this subsection. The Underwriter may choose to make adjustments to the financing structure, such as lowering the debt and increasing the deferred developer fee that could result in a re-characterization of the Development as feasible based upon specific conditions set forth in the Report.

(1) Rental Income. The Program Rent less Utility Allowances and/or Market Rent (if the project is not 100% affordable) is utilized by the Underwriter in calculating the rental income for comparison to the Applicant's estimate in the application. Where multiple programs are funding the same units, the lowest Program Rents for those units is used. If the Market Rents, as determined by the Market Analysis, are lower than the net Program Rents, then the Market Rents for those units are utilized.

(A) Market Rents. The Underwriter reviews the Attribute Adjustment Matrix of Market Rent comparables by unit size provided by the Market Analyst and determines if the adjustments and conclusions made are reasoned and well documented. The Underwriter uses the Market Analyst's conclusion of adjusted Market Rent by unit, as long as the proposed Market Rent is reasonably justified and does not exceed the highest existing unadjusted market comparable rent. Random checks of the validity of the Market Rents may include direct contact with the comparable properties. The Market Analyst's Attribute Adjustment Matrix should include, at a minimum, adjustments for location, size, amenities, and concessions as more fully described in §1.33 of this subchapter, the Department's Market Analysis Rules and Guidelines.

(B) Program Rents. The Underwriter reviews the Applicant's proposed rent schedule and determines if it is consistent with the representations made in the remainder of the application. The Underwriter uses the Program Rents as promulgated by the Department's Compliance Division for the year that is most current at the time the underwriting begins. When underwriting for a simultaneously funded competitive round, all of the applications are underwritten with the rents promulgated for the same year. Program Rents are reduced by the Utility Allowance. The Utility Allowance figures used are determined based upon what is identified in the application by the Applicant as being a utility cost paid by the tenant and upon other consistent documentation provided in the application. Water and sewer can only be a tenant-paid utility if the units will be individually metered for such services. Gas utilities are verified on the building plans and elsewhere in the application when applicable. Trash allowances paid by the tenant are rare and only considered when the building plans allow for individual exterior receptacles. Refrigerator and range allowances are not considered part of the tenant-paid utilities unless the tenant is expected to provide their own appliances, and no eligible appliance costs are included in the Development cost breakdown.

(2) Miscellaneous Income. All ancillary fees and miscellaneous secondary income, including but not limited to late fees, storage fees, laundry income, interest on deposits, carport rent, washer and dryer rent, telecommunications fees, and other miscellaneous income, are anticipated to be included in a $5 to $15 per unit per month range. Any estimates for secondary income above or below this amount are only considered if they are well documented by the financial statements of comparable properties as being achievable in the proposed Primary Market as determined by the Underwriter. Exceptions may be made for special uses, such as garages, congregate care/assisted living/elderly facilities, and child care facilities. Exceptions must be justified by operating history of existing comparable properties and should also be documented as being achievable in the submitted Market Study. The Applicant must show that the tenant will not be required to pay the additional fee or charge as a condition of renting an apartment unit and must show that the tenant has a reasonable alternative. Collection rates of these exceptional fee items will generally be heavily discounted. If the total secondary income is over the maximum per unit per month limit, any cost associated with the construction, acquisition, or Development of the hard assets needed to produce an additional fee may also need to be reduced from eligible basis for Tax Credit Developments as they may, in that case, be considered to be a commercial cost rather than an incidental to the housing cost of the Development. The use of any secondary income over the maximum per unit per month limit that is based on the factors described in this paragraph is subject to the determination by the Underwriter that the factors being used are well documented.

(3) Vacancy and Collection Loss. The Underwriter uses a vacancy rate of 7.5% (5% vacancy plus 2.5% for collection loss) unless the Market Analysis reflects a higher or lower established vacancy rate for the Primary Market. Elderly and 100% project-based rental subsidy Developments and other well documented cases may be underwritten at a combined 5% at the discretion of the Underwriter if the historical performance reflected in the Market Analysis is consistently higher than a 95% occupancy rate.

(4) Effective Gross Income ("EGI"). The Underwriter independently calculates EGI. If the EGI figure provided by the Applicant is within five percent of the EGI figure calculated by the Underwriter, the Applicant's figure is characterized as acceptable or reasonable in the Report, however, for purposes of calculating DCR the Underwriter will maintain and use its independent calculation of EGI regardless of the characterization of the Applicant's figure.

(5) Expenses. The Underwriter evaluates the reasonableness of the Applicant's expense estimate based upon line item comparisons with specific data sources available. Evaluating the relative weight or importance of the expense data points is one of the most subjective elements of underwriting. Historical stabilized certified or audited financial statements of the property will reflect the strongest data points to predict future performance. The Department also maintains a database of performance of other similar sized and type properties across the State. In the case of a new Development, the Department's database of property in the same location or region as the proposed Development provides the most heavily relied upon data points. The Department also uses data from the Institute of Real Estate Management's (IREM) most recent *Conventional Apartments-Income/Expense Analysis* book for the proposed Development's property type and specific location or region. In some cases local or project-specific data such as Public Housing Authority ("PHA") Utility Allowances and property tax rates are also given significant weight in determining the appropriate line item expense estimate. Finally, well documented information provided in the Market Analysis, the application, and other well documented sources may be considered. In most cases, the data points used from a particular source are an average of the per unit and per square foot expense for that item. The Underwriter considers the specifics of each transaction, including the type of Development, the size of the units, and the Applicant's expectations as reflected in the proforma to determine which data points are most relevant. The Underwriter will determine the appropriateness of each data point being considered and must use their reasonable judgment as to which one fits each situation. The Department will create and utilize a feedback mechanism to communicate and allow for clarification by the Applicant when the overall expense estimate is over five percent greater or less than the Underwriter's estimate or when specific line items are inconsistent with the Underwriter's expectation based upon the tolerance levels set forth for each line item expense in subparagraphs (A)[~~(a)~~] through (J)[~~(j)~~] of this paragraph. If an acceptable rationale for the individual or total difference is not provided, the discrepancy is documented in the Report and the justification provided by the Applicant and the countervailing evidence supporting the Underwriter's determination is noted. If the Applicant's total expense estimate is within five percent of the final total expense figure calculated by the Underwriter, the Applicant's figure is characterized as acceptable or reasonable in the Report, however, for purposes of calculating DCR the Underwriter will maintain and use its independent calculation of expenses regardless of the characterization of the Applicant's figure.

(A) General and Administrative Expense. General and Administrative Expense includes all accounting fees, legal fees, advertising and marketing expenses, office operation, supplies, and equipment expenses. Historically, the TDHCA Database average has been used as the Department's strongest initial data point as it has generally been consistent with IREM regional and local figures. The underwriting tolerance level for this line item is 20%.

(B) Management Fee. Management Fee is paid to the property management company to oversee the effective operation of the property and is most often based upon a percentage of Effective Gross Income as documented in the management agreement contract. Typically, five percent of the effective gross income is used, though higher percentages for rural transactions that are consistent with the TDHCA Database can be concluded. Percentages as low as three percent may be utilized if documented with a Third Party management contract agreement with an acceptable management company. The Underwriter will require documentation for any percentage difference from the 5% of the Effective Gross Income standard.

(C) Payroll and Payroll Expense. Payroll and Payroll Expense includes all direct staff payroll, insurance benefits, and payroll taxes including payroll expenses for repairs and maintenance typical of a conventional Development. It does not, however, include direct security payroll or additional supportive services payroll. In urban areas, the local IREM per unit figure has historically held considerable weight as the Department's strongest initial data point. In rural areas, however, the TDHCA Database is often considered more reliable. The underwriting tolerance level for this line item is 10%.

(D) Repairs and Maintenance Expense. Repairs and Maintenance Expense includes all repairs and maintenance contracts and supplies. It should not include extraordinary capitalized expenses that would result from major renovations. Direct payroll for repairs and maintenance activities are included in payroll expense. Historically, the TDHCA Database average has been used as the Department's strongest data point as it has generally been consistent with IREM regional and local figures. The underwriting tolerance level for this line item is 20%.

(E) Utilities Expense (Gas & Electric). Utilities Expense includes all gas and electric energy expenses paid by the owner. It includes any pass-through energy expense that is reflected in the unit rents. Historically, the lower of an estimate based on 25.5% of the PHA local Utility Allowance or the TDHCA Database or local IREM averages have been used as the most significant data point for utility expenses attributable to common areas. The higher amount may be used, however, if the current typical higher efficiency standard utility equipment is not projected to be included in the Development upon completion or if the higher estimate is more consistent with the Applicant's projected estimate. Also a lower or higher percentage of the PHA allowance may be used, depending on the amount of common area, and adjustments will be made for utilities typically paid by tenants that in the subject are owner-paid as determined by the Underwriter. The underwriting tolerance level for this line item is 30%.

(F) Water, Sewer and Trash Expense. Water, Sewer and Trash Expense includes all water, sewer and trash expenses paid by the owner. It would also include any pass-through water, sewer and trash expense that is reflected in the unit rents. Historically, the lower of the PHA allowance or the TDHCA Database average has been used. The underwriting tolerance level for this line item is 30%.

(G) Insurance Expense. Insurance Expense includes any insurance for the buildings, contents, and liability but not health or workman's compensation insurance. The[~~Historically, the~~] TDHCA Database is used with a minimum $0.25[~~$0.16~~] per net rentable square foot. Additional weight is given to a Third Party bid or insurance cost estimate provided in the application reflecting a higher amount for the proposed Development. The underwriting tolerance level for this line item is 30%.[~~50%.~~]

(H) Property Tax. Property Tax includes all real and personal property taxes but not payroll taxes. The TDHCA Database is used to interpret a per unit assessed value average for similar properties which is applied to the actual current tax rate. The per unit assessed value is most often contained within a range of $15,000 to $35,000 but may be higher or lower based upon documentation from the local tax assessor. Location, size of the units, and comparable assessed values also play a major role in evaluating this line item expense. Property tax exemptions or proposed payment in lieu of taxes (PILOT) must be documented as being reasonably achievable if they are to be considered by the Underwriter. For Community Housing Development Organization ("CHDO") owned or controlled properties, this documentation includes, at a minimum, a letter from the local appraisal district recognizing that the Applicant is or will be considered eligible for the ad valorem tax exemption. The underwriting tolerance level for this line item is 10%.

(I) Reserves. Reserves include annual reserve for replacements of future capitalizable expenses as well as any ongoing additional operating reserve requirements. The Underwriter includes reserves of $200 per unit for new construction and $300 per unit for rehabilitation Developments. Higher levels of reserves may be used if they are documented in the financing commitment letters. The Underwriter will require documentation for any difference from the $200 new construction and $300 rehabilitation standard.

(J) Other Expenses. The Underwriter will include other reasonable and documented expenses, other than depreciation, interest expense, lender or syndicator's asset management fees, or other ongoing partnership fees. Lender or syndicator's asset management fees or other ongoing partnership fees are not considered in the Department's calculation of debt coverage in any way. The most common other expenses are described in more detail in clauses (i) through (iii) of this subparagraph.

(i) Supportive Services Expense. Supportive Services Expense includes the cost to the owner of any non-traditional tenant benefit such as payroll for instruction or activities personnel. Documented contract costs will be reflected in Other Expenses. Any selection points for this item will be evaluated prior to underwriting. The Underwriter's verification will be limited to assuring any documented costs are included. For all transactions supportive services expenses are considered part of Other Expenses and are considered part of the Debt Coverage Ratio.

(ii) Security Expense. Security Expense includes contract or direct payroll expense for policing the premises of the Development and is included as part of Other Expenses. The Applicant's amount is moved to Other Expenses and typically accepted as provided. The Underwriter will require documentation of the need for security expenses that exceed 50% of the anticipated payroll and payroll expenses estimate discussed in subsection (d)(4)(c) of this section.

(iii) Compliance Fees. Compliance fees include only compliance fees charged by TDHCA. The Department's charge for a specific program may vary over time, however, the Underwriter uses the current charge per unit per year at the time of underwriting. For all transactions compliance fees are considered part of Other Expenses and are considered part of the Debt Coverage Ratio.

(6) Net Operating Income and Debt Service. The Underwriter will review the Development's proposed NOI and DCR and determine an acceptable debt level for the Development. If the Applicant's EGI, total expenses, and NOI are each within five percent of the Underwriter's estimates, then the Applicant's estimate of NOI will be used to determine the acceptable debt level for the Development. Otherwise, the Underwriter's estimate of NOI will be used to determine the acceptable debt level for the Development. In addition to NOI, the interest rate, term, and Debt Coverage Ratio range affect the determination of the acceptable debt service amount.

(A) Interest Rate. The interest rate used should be the rate documented in the commitment letter. The maximum rate that will be allowed for a competitive application cycle is evaluated by the Director of Credit Underwriting and posted to the Department's web site prior to the close of the application acceptance period. Historically this maximum acceptable rate has been at or below the average rate for 30-year U.S. Treasury Bonds plus 400 basis points.

(B) Term. The primary debt loan term utilized by the Underwriter is the one reflected in the commitment letter. The Department generally requires an amortization of not less than 30 years and not more than 50 years or an adjustment to the amortization structure is evaluated and recommended. In non-Tax Credit transactions a lesser amortization term may be used if the Department's funds are fully amortized over the same period.

(C) Acceptable Debt Coverage Ratio Range. The initial acceptable DCR range for all debt associated with permanent priority liens that are foreclosable as a result of nonpayment of a regularly scheduled amount plus the Department's proposed financing falls between a minimum of 1.10 to a maximum of 1.30. In rare instances, such as for HOPE VI and USDA Rural Development transactions, the minimum DCR may be less than 1.10 based upon documentation of acceptance of such an acceptable DCR from the lender. If the DCR is less than the minimum, a reduction in the debt service amount is recommended based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subsections[~~subparagraphs~~] (a) and (b) of this secton.[~~paragraph.~~] If the DCR is greater than the maximum, an increase in the debt service amount is recommended based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subsections[~~subparagraphs~~] (a) and (b) of this section,[~~paragraph,~~] and the funding gap is reviewed to determine the continued need for Department financing. When the funding gap is reduced no adjustments are made to the level of Department financing unless there is an excess of financing, after the need for deferral of any developer fee is eliminated. If the increase in debt capacity provides excess sources of funds, the Underwriter adjusts any Department grant funds to a loan, if possible, and/or adjusts the interest rate of any Department loans upward until the DCR does not exceed the maximum or up to the prevailing current market rate for similar conventional funding, whichever occurs first. Where no Department grant or loan exists or the full market interest rate for the Department's loan has been accomplished, the Underwriter increases the conventional debt amount until the DCR is reduced to the maximum allowable. Any adjustments in debt service will become a condition of the Report, however, future changes in income, expenses, rates, and terms could allow additional adjustments to the final debt amount to be acceptable. In a Tax Credit transaction, an excessive DCR could negatively affect the amount of recommended tax credit, if based upon the Gap Method, more funds are available than are necessary after all deferral of developer fee is reduced to zero.

(7) Long Term Feasibility. The Underwriter will evaluate the long term feasibility of the Development by creating a 30-year operating proforma. A three percent annual growth factor is utilized for income and a four percent annual growth factor is utilized for expenses. The base year projection utilized is the Underwriter's EGI, total expenses, and NOI unless the Applicant's EGI, total expenses, and NOI are each within five percent of the Underwriter's estimates and characterized as acceptable or reasonable in the Report. The DCR should remain above a 1.10 and a continued positive Cash Flow should be projected for the initial 30-year period in order for the Development to be characterized as feasible for the long term. Any Development where the amount of cumulative Cash Flow over the first fifteen years is insufficient to pay the projected amount of deferred developer fee amortized in irregular payments at zero percent interest is characterized as infeasible and will not be recommended for funding unless the Underwriter can determine a plausible alternative feasible financing structure and conditions the recommendation(s) in the Report accordingly.

(e) Development Costs. The Department's estimate of the Development's cost will be based on the Applicant's project cost schedule to the extent that it can be verified to a reasonable degree of certainty with documentation from the Applicant and tools available to the Underwriter. For new construction Developments, the Applicant's total cost estimate will be compared to the Underwriter's total cost estimate and where the difference in cost exceeds five percent of the Underwriter's estimate, the Underwriter shall substitute their own estimate for the Total Housing Development Cost to determine the Equity Gap Method and Eligible Basis Method where applicable. In the case of a rehabilitation Development, the Underwriter may use a lower tolerance level due to the reliance upon the Applicant's authorized Third Party cost assessment. Where the Applicant's costs are inconsistent with documentation provided in the Application, the Underwriter may adjust the Applicant's total cost estimate. The Department will create and utilize a feedback mechanism to communicate and allow for clarification by the Applicant before the Underwriter's total cost estimate is substituted for the Applicant's estimate.

(1) Acquisition Costs. The proposed acquisition price is verified with the fully executed site control document(s) for the entirety of the site.

(A) Excess Land Acquisition. Where more land is being acquired than will be utilized for the site and the remaining acreage is not being utilized as permanent green space, the value ascribed to the proposed Development will be prorated from the total cost reflected in the site control document(s). An appraisal or tax assessment value may be tools that are used in making this determination; however, the Underwriter will not utilize a prorated value greater than the total amount in the site control document(s).

(B) Identity of Interest Acquisitions. Where the seller or any principals of the seller is an Affiliate, Beneficial Owner, or Related Party to the Applicant, Developer, General Contractor, Housing Consultant, or persons receiving any portion of the Contractor or Developer Fees, the sale of the property will be considered to be an Identity of Interest transfer. In all such transactions the Applicant is required to provide the additional documentation identified in clauses (i) through (iv) of this subparagraph to support the transfer price and this information will be used by the Underwriter to make a transfer price determination.

(i) Documentation of the original acquisition cost, such as the settlement statement.

(ii) An appraisal that meets the Department's Appraisal Rules and Guidelines as described in §1.34 of this subchapter. In no instance will the acquisition value utilized by the Underwriter exceed the appraised value.

(iii) A copy of the current tax assessment value for the property.

(iv) Any other reasonably verifiable costs of owning, holding, or improving the property that when added to the value from clause (i) of this subparagraph justifies the Applicant's proposed acquisition amount. A reasonable return on the original owner equity, other than tax credit equity, contributed by the current seller at the time of original acquisition, and which did not take the form of a deferred fee or cost, calculated at a rate consistent with the historical returns of similar risks may be considered a holding cost.

(I) For land-only transactions, documentation of owning, holding or improving costs since the original acquisition date may include: property taxes; interest expense; a calculated return on equity at a rate consistent with the historical returns of similar risks; the cost of any physical improvements made to the property; the cost of rezoning, replatting, or developing the property; or any costs to provide or improve access to the property.

(II) For transactions which include existing buildings that will be rehabilitated or otherwise maintained as part of the property, documentation of owning, holding, or improving costs since the original acquisition date may include capitalized costs of improvements to the property and the cost of exit taxes not to exceed an amount necessary to allow the sellers to be indifferent to foreclosure or breakeven transfer.

(C) Non-Identity of Interest Acquisition of Buildings for Tax Credit Properties. In order to make a determination of the appropriate building acquisition value, the Applicant will provide and the Underwriter will utilize an appraisal that meets the Department's Appraisal Rules and Guidelines as described in §1.34 of this subchapter. The value of the improvements are the result of the difference between the as-is appraised value less the land value. Where the actual sales price is more than ten percent different than the appraised value, the Underwriter may alternatively prorate the actual sales price based upon the calculated improvement value over the as-is value provided in the appraisal, so long as the improved value utilized by the Underwriter does not exceed the total as-is appraised value of the entire property.

(2) Off-Site Costs. Off-Site costs are Development costs for work done outside of the actual Development site such as the cost of roads, water, sewer and other utilities to provide the site with access. All off-site costs must be well documented and certified by a Third Party engineer as presented in the required application form to be included in the Underwriter's cost budget.

(3) Site Work Costs. If Project site work costs exceed $7,500 per Unit, the Applicant must submit a detailed cost breakdown certified as being prepared by a Third Party engineer or architect, to be included in the Underwriter's cost budget. In addition, for Applicants seeking Tax Credits, a letter from a certified public accountant properly allocating which portions of the engineer's or architect's site costs should be included in eligible basis and which ones are ineligible, in keeping with the holding of the Internal Revenue Service Technical Advice Memoranda, is required for such costs to be included in the Underwriter's cost budget.

(4) Direct Construction Costs. Direct construction costs are the costs of materials and labor required for the building or rehabilitation of a Development.

(A) New Construction. The Underwriter will use the "Average Quality" multiple or townhouse costs, as appropriate, from the *Marshal and Swift Residential Cost Handbook*, based upon the details provided in the application and particularly site and building plans and elevations. If the Development contains amenities not included in the Average Quality standard, the Department will take into account the costs of the amenities as designed in the Development. If the Development will contain single-family buildings, then the cost basis should be consistent with single-family Average Quality as defined by *Marshall & Swift Residential Cost Handbook*. Whenever the Applicant's estimate is more than five percent greater or less than the Underwriter's *Marshall and Swift* based estimate, the Underwriter will attempt to reconcile this concern and ultimately identify this as a cost concern in the Report. The Underwriter shall also evaluate the cost of the development based on acceptable cost parameters as adjusted for inflation and as established by historical final cost certifications of all previous housing tax credit allocations for:

(i) the county in which the development is to be located, or

(ii) if cost certifications are unavailable under clause (i) of this subparagraph, the uniform state service region in which the development is to be located.

(B) Rehabilitation Costs. In the case where the Applicant has provided Third Party signed bids with a work write-up from contractors or estimates from certified or licensed professionals which are inconsistent with the Applicant's figures as proposed in the project cost schedule, the Underwriter utilizes the Third Party estimations in lieu of the Applicant's estimates even when the difference between the Underwriter's costs and the Applicant's costs is less than five percent. The underwriting staff will evaluate rehabilitation Developments for comprehensiveness of the Third Party work write-up and will determine if additional information is needed.

(5) Hard Cost Contingency. This is the only contingency figure considered by the Underwriter and is only considered in underwriting prior to final cost certification. Contingency is limited to a maximum of five percent (5%) of direct costs plus site work for new construction Developments and ten percent (10%) of direct costs plus site work for rehabilitation Developments. The Applicant's figure is used by the Underwriter if the figure is less than five percent (5%) or ten percent (10%), respectively.

(6) Contractor Fee Limits. Contractor fees are limited to six percent (6%) for general requirements, two percent (2%) for contractor overhead, and six percent (6%) for contractor profit. These fees are based upon the direct costs plus site work costs. Minor reallocations to make these fees fit within these limits may be made at the discretion of the Underwriter. For Developments also receiving financing from TxRD-USDA, the combination of builder's general requirements, builder's overhead, and builder's profit should not exceed the lower of TDHCA or TxRD-USDA requirements.

(7) Developer Fee Limits. For Tax Credit Developments, the Development cost associated with developer's fees cannot exceed fifteen percent (15%) of the project's Total Eligible Basis, as defined in Chapter[~~§§49 and~~] 50 of this title, as proposed[~~title~~] (adjusted for the reduction of federal grants, below market rate loans, historic credits, etc.), not inclusive of the developer fees themselves. The fee can be divided between overhead and fee as desired but the sum of both items must not exceed the maximum limit. The Developer Fee may be earned on non-eligible basis activities, but only the maximum limit as a percentage of eligible basis items may be included in basis for the purpose of calculating a project's credit amount. Any non-eligible amount of developer fee claimed must be proportionate to the work for which it is earned. For non-Tax Credit Developments, the percentage remains the same but is based upon total Development costs less: the fee itself, land costs, the costs of permanent financing, excessive construction period financing described in paragraph (8) of this subsection, and reserves.

(8) Financing Costs. Eligible construction period financing is limited to not more than one year's worth of fully drawn construction loan funds at the construction loan interest rate indicated in the commitment. Any excess over this amount is removed to ineligible cost and will not be considered[~~considerd~~] in the determination of developer fee.

(9) Reserves. The Department will utilize the terms proposed by the syndicator or lender as described in the commitment letter(s) or the amount described in the Applicant's projected cost schedule if it is within the range of three to six months of stabilized operating expenses less management fees plus debt service.

(10) Other Soft Costs. For Tax Credit Developments all other soft costs are divided into eligible and ineligible costs. Eligible costs are defined by Internal Revenue Code but generally are costs that can be capitalized in the basis of the Development for tax purposes; whereas ineligible costs are those that tend to fund future operating activities. The Underwriter will evaluate and accept the allocation of

these soft costs in accordance with the Department's prevailing interpretation of the Internal Revenue Code. If the Underwriter questions the eligibility of any soft costs, the Applicant is given an opportunity to clarify and address the concern prior to removal from basis.

(f) Developer Capacity. The Underwriter will evaluate the capacity of the Person(s) accountable for the role of the Developer to determine their ability to secure financing and successfully complete the Development. The Department will review certification of previous participation, financial statements, and personal credit reports for those individuals anticipated to guarantee the completion of the Development.

(1) Previous Experience. The Underwriter will characterize the Development as "high risk" if the Developer has no previous experience in completing construction and reaching Sustaining Occupancy in a previous Development.

(2) Credit Reports. The Underwriter will characterize the Development as "high risk" if the Developer or principals thereof have a credit score which reflects a 40% or higher potential default rate.

(3) Financial Statements of Principals. The Applicant, Developer, any principals of the Applicant, General Partner, and Developer and any Person who will be required to guarantee the Development will be required to provide a signed and dated financial statement and authorization to release credit information. The financial statement for individuals may be provided on the Personal Financial and Credit Statement form provided by the Department and must not be older than 90 days from the first day of the Application Acceptance Period. If submitting partnership and corporate financials in addition to the individual statements, the certified annual financial statement or audited statement, if available, should be for the most recent fiscal year not more than twelve months from first date of the Application Acceptance Period. This document is required for an entity even if the entity is wholly-owned by a person who has submitted this document as an individual. For entities being formed for the purposes of facilitating the contemplated transaction but who have no meaningful financial statements at the present time, a letter attesting to this condition will suffice.

(A) Financial statements must be provided to the Underwriting Division at least seven days prior to the close of the application acceptance period in order for an acknowledgment of receipt to be provided as a substitute for inclusion of the statements themselves in the application. The Underwriting Division will FAX, e-mail or send via regular mail an acknowledgement for each financial statement received. The acknowledgement will not constitute acceptance by the Department that financial statements provided are acceptable in any manner but only acknowledge their receipt. Where time permits, the acknowledgement may identify the date of the statement and whether it will meet the time constraints under the QAP.

(B) The Underwriter will evaluate and discuss individual financial statements in a confidential portion of the Report. Where the financial statement indicates a limited net worth and/ or lack of significant liquidity and the Development is characterized as a high risk for either of the reasons described in paragraphs (1) and (2) of this subsection, the Underwriter must condition any potential award upon the identification and inclusion of additional Development partners who can meet the criteria described in this subsection.

(g) Other Underwriting Considerations. The Underwriter will evaluate numerous additional elements as described in subsection (b) of this section and those that require further elaboration are identified in this subsection.

(1) Floodplains. The Underwriter evaluates the site plan, floodplain map, local engineering studies provided through the Applicant, and other information provided to determine if any of the buildings, drives, or parking areas reside within the 100-year floodplain. If such a determination is made by the Underwriter and the buildings' finished ground floor are not clearly engineered to be at least one foot above the floodplain and all drives and parking lots are not clearly engineered to be not lower than six inches below the floodplain, the Report will include a condition that the Applicant must pursue and receive a Letter of Map Amendment (LOMA) or Letter of Map Revision (LOMR-F) or require the Applicant to identify the cost of flood insurance for the buildings and for the tenant's contents for buildings within the 100-year floodplain.

(2) Inclusive Capture Rate. The Underwriter will not recommend the approval of funds to new Developments requesting funds where the anticipated inclusive capture rate is in excess of 25% for the Primary Market unless the market is a rural market or the units are targeted toward the elderly. In rural markets and for Developments that are strictly targeted to the elderly, the Underwriter will not recommend the approval of funds to new housing Developments requesting funds from the Department where the anticipated capture rate is in excess of 100% of the qualified demand. Affordable Housing which replaces previously existing substandard Affordable Housing within the same Submarket on a Unit for Unit basis, and which gives the displaced tenants of the previously existing Affordable Housing a leasing preference, is excepted from these inclusive capture rate restrictions. The inclusive capture rate for the Development is defined as the sum of the proposed units for a given project plus any previously approved but not yet stabilized new Comparable Units in the Submarket divided by the total income-eligible targeted renter demand identified in the Market Analysis for a specific Development's Primary Market. The Department defines Comparable Units, in this instance, as units that are dedicated to the same household type as the proposed subject property using the classifications of family, elderly or transitional as housing types. The Department defines a stabilized project as one that has maintained a 90% occupancy level for at least 12 consecutive months. The Department will independently verify the number of affordable units included in the Market Study and may substitute the Underwriter's independent calculation based on the data provided in the Market Analysis or obtained through the Market Analysis performed for other developments or other independently verified data obtained by the Underwriter regarding the market area. This may include revising the definitional boundaries of the Primary Market Area defined by the Market Analyst. The Underwriter will ensure that all projects previously allocated funds through the Department are included in the final analysis. The documentation requirements needed to support decisions relating to the Inclusive Capture Rate[~~this item~~] are identified in §1.33 of this subchapter. The Underwriter will verify that no other developments of the same type within one linear mile have been funded by the Department in the three years prior to the application as provided in Section 2306.6703, Texas Government Code. The Underwriter will identify in the report any other developments funded or known and anticipated to be eligible for funding within one linear mile of the subject.

(3) Transitional Housing. The unique development and operating characteristics of transitional housing developments may require special consideration be given the following areas when underwriting these developments:

(A) Operating Income: The extremely-low-income tenant population typically targeted with a Transitional Housing Development may include deep-skewing of rents to well below the 50% AMI level or other maximum rent limits established by the Department. The Underwriter should utilize the Applicant's proposed rents in the Report as long as such rents are at or below and maximum rent limit

rent propsed for the units and equal to any project based rental subsidy rent to be utilized for the development. The initial rents should be structured, however, such that they satisfy the anticipated operating expenses by some margin. The use of project based rental or ongoing operating subsidies and/or supplemental fundraising to offset operating expenses is often critical for a Transitional Housing Development.

(B) Operating Expenses: A Transitional Housing Development may have significantly higher expenses for payroll, security, resident support services, or other items than typical affordable housing developments. The Underwriter will rely heavily upon the historical operating expenses of other Transitional Housing developments provided the Applicant or otherwise available to the Underwriter., The Applicant should provide substantiation from existing Transitional Housing developments that they operate in the form of several years of historical operating expenses with sufficient detail for individual expense line items as identified in the current proforma operating expense form promulgated by the Department. Applicant's with no historical experience of their own are encouraged to provide evidence of historical operating information from comparable properties, estimates or quotes from third party service providers (e.g., insurance, tenant services), or other pertinent information.

(C) DCR and Long Term Feasibility: Transitional housing developments may be exempted from the DCR requirements of Section 1.32.(d)(6)(C) of this subchapter if the development is anticipated to operate without conventional debt. Applicants must provide evidence of sufficient financial resources to offset any projected 30-year cumulative negative cash flows. Such evidence will be evaluated by the Underwriter on a case-by-case basis to satisfy the Department's long term feasibility requirements and may take the form of one or a combination of the following: executed subsidy commitment(s), set-aside of Applicant's financial resources, to be substantiated by an audited financial statement evidencing sufficient resources, and/or proof of annual fundraising success sufficient to fill anticipated operating losses. Where either a set aside of financial resources or annual fundraising are used to evidence the long term feasibility of a Transitional Housing Development, a resolution from the Applicant's governing board should be provided confirming their irrevocable commitment to the provision of these funds and activities.

(D) Development Costs: For Transitional housing that is styled as efficiency the Underwriter may use "Average Quality" dormitory costs from the Marshall & Swift Valuation Service, with adjustments for amenities and/or quality as evidenced in the application, as a base cost in evaluating the reasonableness of the Applicant's direct construction cost estimate for new construction developments.

§1.33. Market Analysis Rules and Guidelines.

(a) General Provision. A Market Analysis prepared for the Department must evaluate the need for decent, safe, and sanitary housing at rental rates or sales prices that eligible tenants can afford. The analysis must determine the feasibility of the subject property rental rates or sales price and state conclusions as to the impact of the property with respect to the determined housing needs. Furthermore, the Market Analyst shall certify that they are a Third Party and are not being compensated for the assignment based upon a predetermined outcome.

(b) Self-Contained. A Market Analysis prepared for the Department must contain sufficient data and analysis to allow the reader to understand the market data presented, the analysis of the data, and the conclusion(s) derived from such data and its relationship to the subject property. The complexity of this requirement will vary in direct proportion with the complexity of the real estate and the real estate market being analyzed. The analysis must clearly lead the reader to the same or similar conclusion(s) reached by the Market Analyst.

(c) Market Analyst Qualifications. A Market Analysis submitted to the Department must be prepared and certified by an approved Market Analyst. The Department will maintain an approved Market Analyst list based on the guidelines set forth in paragraphs (1) through (3) of this subsection.

(1) Market analysts must submit subparagraphs (A) through (F) of this paragraph for review by the Department.

(A) A current organization chart or list reflecting all members of the firm who may author or sign the Market Analysis.

(B) General information regarding the firm's experience including references, the number of previous similar assignments and time frames in which previous assignments were completed.

(C) Resumes for all members of the firm who may author or sign the Market Analysis.

(D) Certification from an authorized representative of the firm that the services to be provided will conform to the Department's Market Analysis Rules and Guidelines described in this section.

(E) A sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines described in this section.

(F) Documentation of organization and good standing in the State of Texas.

(2) During the underwriting process each Market Analysis will be reviewed and any discrepancies with the rules and guidelines set forth in this section may be identified and require timely correction. Subsequent to the completion of the funding cycle and as time permits, staff and/or a review appraiser will re-review a sample set of submitted market analyses to ensure that the Department's Market Analysis Rules and Guidelines are met. If it is found that a Market Analyst has not conformed to the Department's Market Analysis Rules and Guidelines, as certified to, the Market Analyst will be notified of the discrepancies in the Market Analysis and will be removed from the approved Market Analyst list.

(A) Removal from the list of approved Market Analysts will not, in and of itself, invalidate a Market Analysis. A Market Analysis, completed by a Market Analyst who is removed from the approved Market Analyst list, may be valid if the Market Analysis was commissioned before the Market Analyst's removal from the list, and this removal occurred less than 90 days before the Department's due date for submission of Market Analyses. For purposes of this paragraph, the effective date of removal from the approved Market Analyst list is the first date in which the Department's web posting no longer reflects the Market Analyst as being an approved Market Analyst.

(B) To be reinstated as an approved Market Analyst, the Market Analyst must submit a new sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines. This new study will then be reviewed for conformance with the rules of this section and if found to be in compliance, the Market Analyst will be reinstated.

(3) The list of approved Market Analysts is posted on the Department's web site and updated within 72 hours of a change in the status of a Market Analyst.

(d) Market Analysis Contents - Multifamily. A Market Analysis for a Development prepared for the Department must be organized in a format that follows a logical progression and must include, at minimum, items addressed in paragraphs (1) through (17) of this subsection.

(1) Title Page. Include property address and/or location, housing type, TDHCA addressed as client, effective date of analysis,

date of report, name and address of person authorizing report, and name and address of Market Analyst.

(2) Letter of Transmittal. Include date of letter, property address and/or location, description of property type, statement as to purpose of analysis, reference to accompanying Market Analysis, reference to all person(s) providing significant assistance in the preparation of analysis, statement from Market Analyst indicating any and all relationships to any member of the Development team and/or owner of the subject property, date of analysis, effective date of analysis, date of property inspection, name of person(s) inspecting subject property, and signatures of all Market Analysts authorized to work on the assignment.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Summary Form. Complete and include the TDHCA Primary Market Area Analysis Summary form. An electronic version of the form and instructions are available on the Department's website at http://www.tdhca.state.tx.us/underwrite.html.

(5) Assumptions and Limiting Conditions. Include a summary of all assumptions, both general and specific, made by the Market Analyst concerning the property.

(6) Disclosure of Competency. Include the Market Analyst's qualifications, detailing education and experience of all Market Analysts authorized to work on the assignment.

(7) Identification of the Property. Provide a statement to acquaint the reader with the Development. Such information includes street address, tax assessor's parcel number(s), and Development characteristics.

(8) Statement of Ownership for the Subject Property. Disclose the current owners of record and provide a three year history of ownership.

(9) Purpose of the Market Analysis. Provide a brief comment stating the purpose of the analysis.

(10) Scope of the Market Analysis. Address and summarize the sources used in the Market Analysis. Describe the process of collecting, confirming, and reporting the data used in the Market Analysis.

(11) Secondary Market Information. Include a general description of the geographic location and demographic data and analysis of the secondary market area if applicable. The secondary market area will be defined on a case-by-case basis by the Market Analyst engaged to provide the Market Analysis. Additional demand factors and comparable property information from the secondary market may be addressed. However, use of such information in conclusions regarding the subject property must be well-reasoned and documented. A map of the secondary market area with the subject property clearly identified should be provided. In a Market Analysis for a Development targeting families, the demand and supply effects from the secondary market are not significant. For a Development that targets smaller subgroups such as elderly households, the demand and supply effects may be more relevant.

(12) Primary Market Information. Include a specific description of the subject's geographical location, specific demographic data, and an analysis of the Primary Market Area. The Primary Market Area will be defined on a case-by-case basis by the Market Analyst engaged to provide the Market Analysis. The Department encourages a conservative Primary Market Area delineation with use of natural political/geographical boundaries whenever possible. Furthermore, the Primary Market for a Development chosen by the Market Analyst will generally be most informative if it contains no more than 250,000 persons, though a Primary Market with more residents may be indicated by the Market Analyst, where political/geographic boundaries indicate doing so, with additional supportive narrative. A summary of the neighborhood trends, future Development, and economic viability of the specific area must be addressed with particular emphasis given to Affordable Housing. A map of the Primary Market with the subject property clearly identified must be provided. A separate scaled distance map of the Primary Market that clearly identifies the subject and the location and distances of all Local Amenities describe in §50.9(g)(4) of this title must also be included.

(13) Comparable Property Analysis. Provide a comprehensive evaluation of the existing supply of comparable properties in the Primary Market Area defined by the Market Analyst. The analysis should include census data documenting the amount and condition of local housing stock as well as information on building permits since the census data was collected. The analysis must separately evaluate existing market rate housing and existing subsidized housing to include local housing authority units and any and all other rent- or income-restricted units with respect to items discussed in subparagraphs (A) through (F) of this paragraph.

(A) Analyze comparable property rental rates. Include a separate attribute adjustment matrix for the most comparable market rate and subsidized units to the units proposed in the subject, a minimum of three Developments each. The Department recommends use of HUD Form 922273. Analysis of the Market Rents must be sufficiently detailed to permit the reader to understand the Market Analyst's logic and rationale. Total adjustments made to the Comparable Units in excess of 15% suggest a weak comparable. Total adjustments in excess of 15% must be supported with additional narrative. The Department also encourages close examination of the overall use of concessions in the Primary Market Area and the effect on effective Market Rents.

(B) Provide an Affordability Analysis of the comparable unrestricted units.

(C) Analyze occupancy rates of each of the comparable properties and occupancy trends by property class. Physical occupancy should be compared to economic occupancy.

(D) Provide annual turnover rates of each of the comparable properties and turnover trends by property class.

(E) Provide absorption rates for each of the comparable properties and absorption trends by property class.

(F) The comparable Developments must indicate current research for the proposed property type. The rental data must be confirmed with the landlord, tenant or agent and individual data sheets must be included. The minimum content of the individual data sheets include: property address, lease terms, occupancy, turnover, Development characteristics, current physical condition of the property, etc. A scaled distance map of the Primary Market that clearly identifies the subject Development and existing comparable market rate Developments and all existing/proposed subsidized Developments must be provided.

(14) Demand Analysis. Provide a comprehensive evaluation of the demand for the proposed housing. The analysis must include an analysis of the need for market rate and Affordable Housing within the subject Development's Primary Market Area using the most current census and demographic data available. The demand for housing must be quantified, well reasoned, and segmented to include only relevant income- and age-eligible targets of the subject Development. Each demand segment should be addressed independently and overlapping segments should be minimized and clearly identified when required. In

instances where more than 20% of the proposed units are comprised of three- and four-bedroom units, the analysis should be refined by factoring in the number of large households to avoid overestimating demand. The final quantified demand calculation may include demand due to items in subparagraphs (A) through (C) of this paragraph.

(A) Quantify new household demand due to documented population and household growth trends for targeted income-eligible renter households OR confirmed targeted income-eligible renter household growth due to new employment growth.

(B) Quantify existing household demand due to documented turnover of existing targeted income-eligible renter households OR documented rent over-burdened targeted income-eligible renter households that would not be rent over-burdened in the proposed Development and documented targeted income-eligible renter households living in substandard housing.

(C) Include other well reasoned and documented sources of demand determined by the Market Analyst.

(15) Conclusions. Include a comprehensive evaluation of the subject property, separately addressing each housing type and specific population to be served by the Development in terms of items in subparagraphs (A) through (F) of this paragraph.

(A) Provide a separate market and restricted rental rate conclusion for each proposed unit type and rental restriction category. Conclusions of rental rates below the maximum net rent limit rents must be well reasoned, documented, consistent with the market data, and address any inconsistencies with the conclusions of the demand for the subject units.

(B) Provide rental income, secondary income, and vacancy and collection loss projections for the subject derived independent of the Applicant's estimates, but based on historic and/or well established data sources of comparable properties.

(C) Correlate and quantify secondary market and Primary Market demographics of housing demand to the current and proposed supply of housing and the need for each proposed unit type and the subject Development as a whole. The subject Development specific demand calculation may consider total demand from the date of application to the proposed place in service date.

(D) Calculate an inclusive capture rate for the subject Development defined as the sum of the proposed subject units plus any comparable units in previously approved new, but unstabilized Developments in the Primary Market, divided by the total income-eligible targeted renter demand identified by the Market Analysis for the subject Development's Primary Market Area. The Market Analyst should calculate a separate inclusive capture rate for the subject Development's proposed affordable units, market rate units, and the subject Development as a whole.

(E) Project an absorption period and rate for the subject until a Sustaining Occupancy level has been achieved. If absorption projections for the subject differ significantly from historic data, an explanation of such should be included.

(F) Analyze the effects of the subject Development on the Primary Market occupancy rates and provide sufficient support documentation.

(G) Identify any other developments located within one linear mile of the proposed site and awarded funds by the Department in the three years prior to the Application Acceptance Period.

(16) Photographs. Include good quality color photographs of the subject property (front, rear and side elevations, on-site amenities, interior of typical units if available). Photographs should be properly labeled. Photographs of the neighborhood, street scenes, and comparables should also be included. An aerial photograph is desirable but not mandatory.

(17) Appendices. Any Third Party reports relied upon by the Market Analyst must be provided in appendix form and verified directly by the Market Analyst as to its validity.

(e) Market Analysis Contents - Single Family.

(1) Market studies for single-family Developments proposed as rental Developments must contain the elements set forth in subsections (d)(1) through (17) of this section. Market analyses for Developments proposed for single-family home ownership must contain the elements set forth in subsections (d)(1) through (17) of this section as they would apply to home ownership in addition to paragraphs (2) through (4) of this subsection.

(2) Include no less than three actual market transactions to inform the reader of current market conditions for the sale of each unit type in the price range contemplated for homes in the proposed Development. The comparables must rely on current research for this specific property type. The sales prices must be confirmed with the buyer, seller, or real estate agent and individual data sheets must be included. The minimum content of the individual data sheets should include property address, Development characteristics, purchase price and terms, description of any federal, state, or local affordability subsidy associated with the transaction, date of sale, and length of time on the market.

(3) Analysis of the comparable sales should be sufficiently detailed to permit the reader to understand the Market Analyst's logic and rationale. The evaluation should address the appropriateness of the living area, room count, market demand for Affordable Housing, targeted sales price range, demand for interior and/or exterior amenities, etc. A scaled distance map of the Primary Market that clearly identifies the subject Development and existing comparable single family homes must be provided.

(4) A written statement is required stating if the projected sales prices for homes in the proposed Development are, or are not, below the range for comparable homes within the Primary Market Area. Sufficient documentation should be included to support the Market Analyst's conclusion with regard to the Development's absorption.

(f) The Department reserves the right to require the Market Analyst to address such other issues as may be relevant to the Department's evaluation of the need for the subject property and the provisions of the particular program guidelines.

(g) All Applicants shall acknowledge, by virtue of filing an application, that the Department shall not be bound by any such opinion or Market Analysis, and may substitute its own analysis and underwriting conclusions for those submitted by the Market Analyst.

§1.35. Environmental Site Assessment Rules and Guidelines.

(a) General Provisions.[~~Environmental Site Assessment Guidelines.~~] The Environmental Site Assessments (ESA) prepared for the Department [~~environmental assessment required under Section 50.7(e) of this title~~] should be conducted and reported in conformity with the standards of the American Society for Testing and Materials. The initial report should conform with the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E 1527). Any subsequent reports should also conform to ASTM standards [~~Materials (ASTM)~~] and such other recognized industry standards as a reasonable person would deem

relevant in view of the Property's anticipated use for human habitation. The environmental assessment shall be conducted by a Third Party[~~an~~] environmental [~~or~~]professional [~~engineer and be prepared~~]at the expense of the Applicant, and addressed to TDHCA as the client. Copies of reports provided to TDHCA which were commissioned by other financial institutions should address TDHCA as a co-recipient of the report, or letters from both the provider and the recipient of the report should be submitted extending reliance on the report to TDHCA. The ESA report should also include a statement that the person or company preparing the PCA report will not materially benefit from the Development in any other way than receiving a fee for performing the Environmental Site Assessment.[~~Development Owner.~~]

(b) [~~(1)~~] The report must include, but is not limited to:

(1) [~~(A)~~] A review of records, interviews with people knowledgeable about the property;

(2) [~~(B)~~] A certification that the environmental engineer has conducted an inspection of the property, the building(s), and adjoining properties, as well as any other industry standards concerning the preparation of this type of environmental assessment;

(3) A noise study is recommended for property located adjacent to or in close proximity to industrial zones, major highways, active rail lines, and civil and military airfields;

(4) [~~(C)~~] A copy of a current survey or other drawing of the site reflecting the boundaries and adjacent streets, all improvements on the site, and any items of concern described in the body of the environmental site assessment or identified during the physical inspection;

(5) [~~(D)~~] A copy of the current FEMA Flood Insurance Rate Map showing the panel number and encompassing the site with the site boundaries precisely identified and superimposed on the map. A determination of the flood risk for the proposed Development described in the narrative of the report includes a discussion of the impact of the 100-year floodplain on the proposed Development based upon a review of the current site plan; and

~~[(E) A statement that clearly states that the person or company preparing the environmental assessment will not materially benefit from the Development in any other way than receiving a fee for the environmental assessment.]~~

~~[(2) A noise study is recommended for property located adjacent to or in close proximity to industrial zones, major highways, active rail lines, and civil and military airfields.]~~

(6) An assessment of the potential threat for asbestos containing materials (ACMs) to be present on the property, and a recommendation as to whether specific testing for ACMs would be necessary as required by state law;

(7) An assessment of the potential presence of Lead Based Paint on the property, and a recommendation as to whether specific testing in accordance with any state and federal laws would be necessary;

(8) An assessment of the potential presence of Radon on the property, and a recommendation as to whether specific testing would be necessary.

(c) [~~(3)~~] If the report recommends further studies or establishes that environmental hazards currently exist on the Property, or are originating off-site but would nonetheless affect the Property, the Development Owner must act on such a recommendation or provide a plan for either the abatement or elimination of the hazard. Evidence of action or a plan for the abatement or elimination of the hazard must be presented upon Application submittal.

(d) [~~(4)~~] For Developments which have had a Phase II Environmental Assessment performed and hazards identified, the Development Owner is required to maintain a copy of said assessment on site available for review by all persons which either occupy the Development or are applying for tenancy.

(e) [~~(5)~~] For Developments [~~whose funds have been obligated by~~] in programs that allow a waiver of the Phase I ESA such as a TxRD funded development, [~~will not be required to supply this information; however,~~] the Development Owners [~~of such Developments~~] are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(f) [~~(6)~~] Those Developments which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms with the requirements of this subsection.

§1.36. Property Condition Assessment Guidelines.

(a) General Provisions. The objective of the Property Condition Assessment (the PCA) is to provide cost estimates for repairs and replacements which are necessary immediately, and for repairs and replacements which are expected to be required throughout the term of the regulatory period. The PCA prepared for the Department should be conducted and reported in conformity with the American Society for Testing and Materials *Standard Guide for Property Condition Assessments: Baseline Property Condition Assessment Process (ASTM Standard Designation: E 2018)* except as provided for in subsection (b) and (c) of this section. The PCA must include discussion and analysis of the following:

(1) Useful Life Estimates: For each system and component of the property the PCA should assess the condition of the system or component, and estimate its remaining useful life, citing the basis or the source from which such estimate is derived;

(2) Code Compliance: The PCA should review and document any known violations of any applicable federal, state, or local codes. In developing the cost estimates specified herein, it is the responsibility of the Housing Sponsor or Applicant to ensure that the PCA adequately considers any and all applicable federal, state, and local laws and regulations which may govern any work performed to the subject property;

(3) Program Rules: The PCA should assess the extent to which any systems or components must be modified, repaired, or replaced in order to comply with any specific requirements of the housing program under which the Development is proposed to be financed, particular consideration being given to accessibility requirements, the Department's Housing Quality Standards, and any scoring criteria for which the Applicant may claim points;

(4) Immediate Repairs: Systems or components which are expected to have a remaining useful life of less than one year, which are found to be in violation of any applicable codes, which must be modified, repaired or replaced in order to satisfy program rules, or which are otherwise in a state of deferred maintenance or pose health and safety hazards should be considered necessary immediate repairs. The PCA should estimate the costs associated with the repair, replacement, or maintenance of each system or component which is identified as being an immediate need, citing the basis or the source from which such cost estimate is derived;

(5) Expected Repairs Over Time: Based on the estimated remaining useful life of each system or component, the PCA should estimate the periodic costs which would be expected to arise during the regulatory period for repairing or replacing such system or component.

The PCA should include a table of the estimated long term costs which identifies in each line the individual component of the property being examined, and in each column the year in the regulatory period during which the costs are estimated to be incurred. The estimated costs for future years should be given in present dollar values; and

(6) Obsolescence: If the development plan calls for additional modification or replacement of certain systems, components, or other aspects of the property strictly due to functional obsolescence or external market obsolescence, such items should be identified and the nature or source of the obsolescence discussed. The associated costs may be included either with immediate repairs or with expected repairs over time as appropriate.

(b) The Department will also accept copies of reports commissioned or required by the primary lender for a proposed transaction, which have been prepared in accordance with:

(1) Fannie Mae's criteria for Physical Needs Assessments,

(2) Federal Housing Administration's criteria for Project Capital Needs Assessments,

(3) Freddie Mac's guidelines for Engineering and Property Condition Reports, or

(4) Standard and Poor's Property Condition Assessment Criteria: Guidelines for Conducting Property Condition Assessments, Multifamily Buildings.

(c) The Department may consider for acceptance reports prepared according to other standards which are not specifically named above in subsection (b) of this section, if a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied.

(d) The PCA shall be conducted by a Third Party at the expense of the Applicant, and addressed to TDHCA as the client. Copies of reports provided to TDHCA which were commissioned by other financial institutions should address TDHCA as a co-recipient of the report, or letters from both the provider and the recipient of the report should be submitted extending reliance on the report to TDHCA. The PCA report should also include a statement that the person or company preparing the PCA report will not materially benefit from the Development in any other way than receiving a fee for performing the PCA. The PCA should be signed and dated by the Third Party report provider not more than six months prior to the date of the application. However, an original report may be accepted up to 24 months old if a review inspection and update letter dated less than six months from the date of the application is signed by the original report provider, and that such letter identifies specific details of necessary amendments to the original report or specifies that no such amendments are necessary.

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 August 18, 2003.

TRD-200305275
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 475-3726

♦ ♦ ♦

CHAPTER 33. GUIDELINES FOR MULTIFAMILY HOUSING REVENUE BOND

10 TAC §§33.1 - 33.13

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

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of §§33.1 - 33.13, concerning the Guidelines for Multifamily Housing Revenue Bond rules. These sections are proposed for repeal in order to implement new legislation enacted by the 78th Legislative Session, including particularly Section 4 of Senate Bill 1664, and Section 15 of Senate Bill 264.

Edwina P. Carrington, Executive Director, has determined that for the first five-year period the repeal is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Ms. Carrington also has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be to permit the adoption of new rules for multifamily housing revenue bonds within the State of Texas, thereby enhancing the State's ability to provide decent, safe and sanitary housing for Texans through the multifamily housing revenue bond program administered by the Department. There will be no effect on persons, small businesses or micro-businesses. There are no anticipated economic costs to any person, business or micro-business required to comply with the repeal as proposed. The proposed repeal will not have an impact on any local economy.

Comments may be submitted to Robbye Meyer, Multifamily Finance Production, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas, 78711-3941 or by e-mail at the following address: rmeyer@tdhca.state.tx.us.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306.

The proposed repeal affects no other code, article or statute.

§33.1. Introduction.
§33.2. Definitions.
§33.3. Application for Financing of a Housing Development.
§33.4. Market Study.
§33.5. Limitation on Loan Amounts.
§33.6. Bond Rating.
§33.7. Housing Development Occupancy.
§33.8. Amenities for Families with Children.
§33.9. Accessibility to Individuals with Physical Handicaps.
§33.10. Elderly Tenant Survey.
§33.11. Agency Review of Applications for Financing; Findings.
§33.12. Housing Development Cost Requisitions and Limits.
§33.13. Waiver of 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 August 18, 2003.

TRD-200305303
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 475-3726

♦ ♦ ♦

CHAPTER 33. MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§33.1 - 33.10

The Texas Department of Housing and Community Affairs (the Department) proposes new §§33.1 - 33.10, concerning the Multifamily Housing Revenue Bond Rules. These sections are proposed new in order to implement new legislation enacted by the 78th Legislative Session, including particularly Section 4 of Senate Bill 1664, and Section 15 of Senate Bill 264. Chapter 50 of this title and Chapter 1, Subchapter B of this title, referenced in these new sections, are also being proposed in this issue of the *Texas Register*. Chapter 60 of this title, referenced in the new sections, has not yet been proposed by the Department.

Edwina P. Carrington, Executive Director, has determined that for the first five-year period the new sections are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the new sections.

Ms. Carrington also has determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be to permit the adoption of new rules for multifamily housing revenue bonds within the State of Texas, thereby enhancing the State's ability to provide decent, safe and sanitary housing for Texans through the multifamily housing revenue bond program administered by the Department. There will be no effect on persons, small businesses or micro-businesses. There are no anticipated economic costs to any person, business or micro-business required to comply with the new sections as proposed. The proposed new sections will not have an impact on any local economy.

Comments may be submitted to Robbye Meyer, Multifamily Finance Production, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas, 78711-3941 or by e-mail at the following address: rmeyer@tdhca.state.tx.us .

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306.

The proposed new sections affect no other code, article or statute.

§33.1. Introduction.

The purpose of this chapter is to state the Texas Department of Housing and Community Affairs (the "Department") requirements for issuing Bonds, the procedures for applying for multifamily housing revenue Bond financing, and the regulatory and land use restrictions imposed upon Housing Developments financed with the issuance of Bonds. The rules and provisions contained in this chapter are separate from the rules relating to the Department's administration of the Housing Tax Credit Program. Applicants seeking a tax credit allocation should consult the Department's 2004 Qualified Allocation Plan and Rules ("QAP"), Chapter 50 of this title, as proposed, relating to the Housing Tax Credit Program.

§33.2. Authority.

The Department receives its authority to issue Bonds from Chapter 2306 of the Texas Government Code (the "Act"). All Bonds issued by the Department must conform to the requirements of the Act. Notwithstanding anything herein to the contrary, tax-exempt Bonds which are issued to finance the Housing Development of multifamily rental housing are specifically subject to the requirements of the laws of the State of Texas, including but not limited to the Act, Chapter 1372 of the Texas Government Code relating to Private Activity Bonds, and to the requirements of the Code (as defined in this chapter).

§33.3. Definitions.

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

(1) Applicant--means any Person or Affiliate of a Person who files a Pre-Application or an Application with the Department requesting the Department issue Bonds to finance a Housing Development.

(2) Application--means an Application, in the form prescribed by the Department, filed with the Department by an Applicant, including any exhibits or other supporting material.

(3) Board--means the governing Board of the Department.

(4) Bond--means an evidence of indebtedness or other obligation, regardless of the sources of payment, issued by the Department under the Act, including a bond, note, or bond or revenue anticipation note, regardless of whether the obligation is general or special, negotiable, or nonnegotiable, in bearer or registered form, in certified or book entry form, in temporary or permanent form, or with or without interest coupons.

(5) Code--means the Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued by the United States Department of the Treasury or the Internal Revenue Service.

(6) Development--means property or work or a development, building, structure, facility, or undertaking, whether existing, new construction, remodeling, improvement, or rehabilitation, that meets or is designed to meet minimum property standards required by the Department for the primary purpose of providing sanitary, decent, and safe dwelling accommodations for rent, lease, or use by individuals and families of Low Income and Very Low Income and Families of Moderate Income in need of housing. The term includes:

(A) buildings, structures, land, equipment, facilities, or other real or personal properties that are necessary, convenient, or desirable appurtenances, including streets, water, sewers, utilities, parks, site preparation, landscaping, stores, offices, and other non-housing facilities, such as administrative, community, and recreational facilities the Department determines to be necessary, convenient, or desirable appurtenances; and

(B) multifamily dwellings in rural and urban areas.

(7) Development Owner--means an Applicant that is approved by the Department as qualified to own, construct, acquire, rehabilitate, operate, manage, or maintain a Housing Development subject to the regulatory powers of the Department and other terms and conditions required by the Department and the Act.

(8) Eligible Tenants--means

(A) individuals and families of Extremely Low, Low and Very Low Income,

(B) Families of Moderate Income (in each case in the foregoing subparagraphs (A) and (B) of this paragraph as such terms are defined by the Issuer under the Act), and

(C) Persons with Special Needs, in each case, with an Anticipated Annual Income not in excess of 140% of the area median income for a four-person household in the applicable standard metropolitan statistical area; provided that all Low-Income Tenants shall count as Eligible Tenants.

(9) Extremely Low Income--means the income received by an individual or family whose income does not exceed thirty percent (30%) of the area median income or applicable federal poverty line, as determined by the Act.

(10) Family of Moderate Income--means a family

(A) that is determined by the Board to require assistance taking into account

(i) the amount of total income available for the housing needs of the individuals and family,

(ii) the size of the family,

(iii) the cost and condition of available housing facilities,

(iv) the ability of the individuals and family to compete successfully in the private housing market and to pay the amounts required by private enterprise for sanitary, decent, and safe housing, and

(v) standards established for various federal programs determining eligibility based on income; and

(B) that does not qualify as a family of Low Income.

(11) Housing Development--means property or work or a development, building, structure, facility, or undertaking, whether existing, new construction, remodeling, improvement, or rehabilitation, that meets or is designed to meet minimum property standards required by the Department for the primary purpose of providing sanitary, decent, and safe dwelling accommodations for rent, lease, or use by individuals and families of Low Income and Very Low Income and Families of Moderate Income in need of housing. The term includes:

(A) buildings, structures, land, equipment, facilities, or other real or personal properties that are necessary, convenient, or desirable appurtenances, including streets, water, sewers, utilities, parks, site preparation, landscaping, stores, offices, and other non-housing facilities, such as administrative, community, and recreational facilities the Department determines to be necessary, convenient, or desirable appurtenances; and

(B) multifamily dwellings in rural and urban areas.

(12) Institutional Buyer--means

(A) an accredited investor as defined in Regulation D promulgated under the Securities Act of 1933, as amended (17 CFR §230.501(a)), but excluding any natural person or any director or executive officer of the Department (17 CFR §230.501(a)(4) - (6)) or

(B) a qualified institutional buyer as defined by Rule 144A promulgated under the Securities Act of 1933, as amended (17 CFR §230.144A).

(13) Low Income--means the income received by an individual or family whose income does not exceed eighty percent (80%) of the area median income or applicable federal poverty line, as determined by the Act.

(14) Land Use Restriction Agreement (LURA)--means an agreement between the Department and the Housing Development Owner which is binding upon the Housing Development Owner's successors in interest that encumbers the Housing Development with respect to the requirements of law, including this title, the Act and §42 of the Code.

(15) Owner--means an Applicant that is approved by the Department as qualified to own, construct, acquire, rehabilitate, operate, manage, or maintain a Housing Development subject to the regulatory powers of the Department and other terms and conditions required by the Department and the Act.

(16) Persons with Special Needs--means persons who

(A) are considered to be disabled under a state or federal law,

(B) are elderly, meaning 60 years of age or older or of an age specified by an applicable federal program,

(C) are designated by the Board as experiencing a unique need for decent, safe housing that is not being met adequately by private enterprise, or

(D) are legally responsible for caring for an individual described by subparagraph (A), (B) or (C) of this paragraph and meet the income guidelines established by the Board.

(17) Private Activity Bonds--means any Bonds described by §141(a) of the Code.

(18) Private Activity Bond Program Scoring Criteria--means the scoring criteria established by the Department for the Department's Multifamily Housing Revenue Bond Program, §33.6(b) of this title. The Scoring Criteria are also available on the Department website.

(19) Private Activity Bond Program Threshold Requirements--means the threshold requirements established by the Department for the Department's Multifamily Housing Revenue Bond Program, §33.6(b) of this title. The Threshold Requirements are also available on the Department's website.

(20) Program--means the Department's Multifamily Housing Revenue Bond Program.

(21) Property--means the real estate and all improvements thereon, whether currently existing or proposed to be built thereon in connection with the Housing Development, and including all items of personal property affixed or related thereto.

(22) Qualified 501(c)(3) Bonds--means any Bonds described by §145(a) of the Code.

(23) Tenant Income Certification--means a certification as to income and other matters executed by the household members of each tenant in the Housing Development, in such form as reasonably may be required by the Department in satisfaction of the criteria prescribed the Secretary of Housing and Urban Development under §8(f)(3) of the Housing Act of 1937 ("the Housing Act") (42 U.S.C. §1437f) for purposes of determining whether a family is a lower income family within the meaning of the §8(f)(1) of the Housing Act.

(24) Tenant Services--means social services, including child care, transportation, and basic adult education, that are provided to individuals residing in low income housing under Title IV-A, Social Security Act (42 U.S.C. §601 et seq.), and other similar services.

(25) Tenant Services Program Plan--means the plan, subject to approval by the Department, which describes the Tenant Services to be provided by the Development Owner in a Housing Development.

(26) Trustee--means a national banking association organized and existing under the laws of the United States, as trustee (together with its successors and assigns and any successor trustee).

(27) Unit--means any residential rental unit in a Housing Development consisting of an accommodation, including a single room used as an accommodation on a non-transient basis, that contains complete physical facilities and fixtures for living, sleeping, eating, cooking and sanitation.

(28) Very Low Income--means the income received by an individual or family whose income does not exceed sixty percent (60%) of the area median income or applicable federal poverty line as determined under the Act.

§33.4. Policy Objectives and Eligible Housing Developments.

The Department will issue Bonds to finance the preservation or construction of decent, safe and affordable housing throughout the State of Texas. Eligible Housing Developments may include those which are constructed, acquired, or rehabilitated and which provide housing for individuals and families of Low Income, Very Low Income, or Extremely Low Income, and Families of Moderate Income.

§33.5. Bond Rating and Investment Letter.

(a) Bond Ratings. All publicly offered Bonds issued by the Department to finance Housing Developments shall have and be required to maintain a debt rating the equivalent of at least an "A" rating assigned to long-term obligations by Standard & Poor's Ratings Services, a division of The McGraw-Hill Companies, Inc. or Moody's Investors Service, Inc. If such rating is based upon credit enhancement provided by an institution other than the Applicant or Development Owner, the form and substance of such credit enhancement shall be subject to approval by the Board, which approval shall be evidenced by adoption by the Board of a resolution authorizing the issuance of the credit-enhanced Bonds. Remedies relating to failure to maintain appropriate credit ratings shall be provided in the financing documents relating to the Housing Development.

(b) Investment Letters. Bonds rated less than "A," or Bonds which are unrated must be placed with one or more Institutional Buyers and must be accompanied by an investment letter acceptable to the Department. Subsequent purchasers of such Bonds shall also be qualified as Institutional Buyers and shall sign and deliver to the Department an investment letter in a form acceptable to the Department. Bonds rated less than "A," and Bonds which are unrated shall be issued in physical form, in minimum denominations of one hundred thousand dollars ($100,000), and shall carry a legend requiring any purchasers of the Bonds to sign and deliver to the Department an investment letter in a form acceptable to the Department.

§33.6. Application Procedures, Evaluation and Approval.

(a) Application Costs, Costs of Issuance, Responsibility and Disclaimer. The Applicant shall pay all costs associated with the preparation and submission of the Application--including costs associated with the publication and posting of required public notices--and all costs and expenses associated with the issuance of the Bonds, regardless of whether the Application is ultimately approved or whether Bonds are ultimately issued. At any stage during the Application process, the Applicant is solely responsible for determining whether to proceed with the Application, and the Department disclaims any and all responsibility and liability in this regard.

(b) Pre-application. An Applicant who requests financing from the Department for a Housing Development shall submit a pre-application in a format prescribed by the Department. Within fourteen (14) days of the Department's receipt of the pre-application, the Department will be responsible for federal, state, and local community notifications of the proposed Housing Development. Upon review of the pre-application, if the Housing Development is determined to be ineligible for Bond financing by the Department, the Department will send a letter to the Applicant explaining the reason for the ineligibility. If the Housing Development is determined to be eligible for Bond financing by the Department, the Department will score and rank the pre-application based on the Private Activity Bond Program Scoring Criteria as set out in Figure 1 of this subsection. The Department will score and rank with higher scores ranking higher within each priority defined by §1372.0321, Texas Government Code. All Priority 1 Applications will be ranked above all Priority 2 Application which will be ranked above all Priority 3 Applications, regardless of score. This ranking will be used throughout the calendar year. In the event two or more Applications receive the same score, the Department will use, as a tie-breaking mechanism, the number of points awarded for Quality and Amenities for the Housing Development. If a tie still exists, the Department will consider the number of net rentable square feet per bond amount requested. Pre-Applications must meet the threshold requirements as stated in The Private Activity Bond Program Threshold Requirements as set out in Figure 2 of this subsection. The Private Activity Bond Program Threshold Requirements will be posted on the Department's website. After scoring, the Housing Development and the proposed financing structure will be presented to the Department's Board for consideration of a resolution declaring the Department's intent to issue Bonds (the "inducement resolution") with respect to the Housing Development. After Board approval of the inducement resolution, the scored and ranked Applications will be submitted to the Texas Bond Review Board for its lottery processing. The Texas Bond Review Board will draw the number of lottery numbers that equates to the number of eligible Applications submitted by the Department. The lottery numbers drawn will not equate to a specific Housing Development. The Texas Bond Review Board will thereafter assign the lowest lottery number drawn to the highest scored and ranked Application as previously submitted by the Department. The criteria by which a Housing Development may be deemed to be eligible or ineligible are explained below in subsection (e) of this section, Evaluation Criteria. Private Activity Bond Program Scoring Criteria form will be posted on the Department's website. The pre-application shall consist of the following information:
Figure 1: 10 TAC §33.6(b)
Figure 2: 10 TAC §33.6(b)

(1) Completed Uniform Application forms in the format required by the Department;

(2) Texas Bond Review Board's Residential Rental Attachment;

(3) Relevant Development Information (form on website);

(4) Public Notification Information (form on website);

(5) Certification and agreement to comply with the Department's rules;

(6) Agreement of responsibility of all cost incurred;

(7) An organizational chart showing the structure of the Applicant and the ownership structure of any principals of the Applicant;

(8) Evidence that the Applicant and principals are registered with the Texas Secretary of State, or if the Applicant has not yet been formed, evidence that the name of the Applicant is reserved with the Secretary of State;

(9) Organizational documents such as partnership agreements and articles of incorporation, as applicable, for the Applicant and its principals;

(10) Documentation of non-profit status if applicable;

(11) Evidence of good standing from the Comptroller of Public Accounts of the State of Texas for the Applicant and its principals;

(12) Corporate resumes and individual resumes of the Applicant and any principals;

(13) A copy of an executed earnest money contract between the Applicant and the seller of the Property. This earnest money contract must be in effect at the time of submission of the application and expire no earlier than December 1 of the year preceding the applicable program year. The earnest money contract must stipulate and provide for the Applicant's option to extend the contract expiration date through March 1 of the program year, subject only to the seller's receipt of additional earnest money or extension fees, so that the Applicant will have site control at the time a reservation is granted. If the Applicant owns the Property, a copy of the recorded warranty deed is required;

(14) Evidence of zoning appropriate for the proposed use or application for the appropriate zoning or statement that no zoning is required;

(15) A local map showing the location of the Property;

(16) A boundary survey or subdivision plat which clearly identifies the location and boundaries of the subject Property;

(17) Name, address and telephone number of the Seller of the Property;

(18) Construction draw and lease-up proforma for Housing Developments involving new construction;

(19) Past two years' operating statements for existing Housing Developments;

(20) Current market information which includes rental comparisons;

(21) Documentation of local Section 8 utility allowances;

(22) Verification/Evidence of delivery of federal, state, and local community notifications;

(23) Self-Scoring Criteria; and

(24) Such other items deemed necessary by the Department per individual application.

(c) Financing Commitments. After approval by the Board of the inducement resolution, and before submission of a final application, the Applicant will be solely responsible for making appropriate arrangements with financial institutions which are to be involved with the issuance of the Bonds or the financing of the Housing Development, and to begin the process of obtaining firm commitments for financing from each of the financial institutions involved.

(d) Final Application. An Applicant who elects to proceed with submitting a final Application to the Department must provide a final Application and such supporting material as is required by the Department at least sixty (60) days prior to the scheduled meeting of the Board at which the Housing Development and the Bond issuance are to be considered, unless the Department directs the Applicant otherwise in writing. The Department may determine that supporting materials listed in paragraphs (1) - (42) of this subsection shall be provided subsequent to the final Application deadline in accordance with a schedule approved by the Department. Failure to provide any supporting materials in accordance with the approved schedule may be grounds for terminating the Application and returning the reservation to the Texas Bond Review Board. The final application and supporting material shall consist of the following information:

(1) A Public Notification Sign shall be installed on the Housing Development site no later than fourteen (14) days after the submission of Volume I and II of the Tax Credit Application to the Department (pictures and invoice receipts must be submitted as evidence of installation within fourteen (14) days of the submission). For minimum signage requirements and language, as set out in the figure in this paragraph. As an alternative to installing a Public Notification Sign and at the same required time, the Applicant may instead, at the Applicant's Option, mail written notification to all addresses located within the footage distance required by the local municipality zoning ordinance or 1,000 feet, if there is no local zoning ordinance or if the zoning ordinance does not require notification, of any part of the proposed Development site. This written notification must include the information otherwise required for the sign, as set out in the Figure in this paragraph. If the Applicant chooses to provide this mailed notice in lieu of signage, the final Application must include a map of the proposed Development site and mark the 1,000 foot or local ordinance area showing street names and addresses; a list of all addresses the notice was mailed to; an exact copy of the notice that was mailed; and a certification that the notice was mailed through the U.S. Postal Service and stating the date of mailing.
Figure: 10 TAC §33.6(d)(1)

(2) Completed Uniform Application forms in the format required by the Department;

(3) Certification of no changes from the pre-application to the final application. If there are changes to the Application that have an adverse affect on the score and ranking order and that would have resulted in the application being placed below another application in the ranking, the Department will terminate the Application and return the reservation to the Texas Bond Review Board (with the exception of changes to deferred developer's fees and support or opposition points) ;

(4) Certification and agreement to comply with the Department's rules;

(5) A narrative description of the Housing Development;

(6) A narrative description of the proposed financing;

(7) Firm letters of commitment from any lenders, credit providers, and equity providers involved in the transaction;

(8) Documentation of local Section 8 utility allowances;

(9) Site plan;

(10) Unit and building floor plans and elevations;

(11) Complete construction plans and specifications;

(12) General contractor's contract;

(13) Completion schedule;

(14) Copy of a recorded warranty deed if the Applicant already owns the Property, or a copy of an executed earnest money contract between the Applicant and the seller of the Property if the Property is to be purchased, or other form of site control acceptable to the Department;

(15) A local map showing the location of the Property;

(16) Photographs of the Site;

(17) Survey with legal description;

(18) Flood plain map;

(19) Evidence of zoning appropriate for the proposed use from the appropriate local municipality that satisfies one of these subparagraphs (A) - (C) of this paragraph:

(A) no later than fourteen (14) days before the Board meets to consider the transaction, the Applicant must submit to the Department written evidence that the local entity responsible for initial approval of zoning has approved the appropriate zoning and that they will recommend approval of the appropriate zoning to the entity responsible for final approval of zoning decisions;

(B) provide a letter the chief executive officer of the political subdivision or another local official with appropriate jurisdiction stating that the Development is located within the boundaries of a political subdivision which does not have a zoning ordinance;

(C) a letter from the chief executive officer of the political subdivision or another local official with appropriate jurisdiction stating the Development is permitted under the provision of the zoning ordinance that apply to the location of the Development or that there is not a zoning requirement.

(20) Evidence of the availability of utilities;

(21) Copies of any deed restrictions which may encumber the Property;

(22) A Phase I Environmental Site Assessment performed in accordance with the Department's Environmental Site Assessment Rules and Guidelines (§1.35 of this title, as proposed);

(23) Title search or title commitment;

(24) Current tax assessor's valuation or tax bill;

(25) For existing Housing Developments, current insurance bills;

(26) For existing Housing Developments, past two (2) fiscal year end development operating statements;

(27) For existing Housing Developments, current rent rolls;

(28) For existing Housing Developments, substantiation that income-based tenancy requirements will be met prior to closing;

(29) Study performed in accordance with the Department's Market Analysis Rules and Guidelines (§1.33 of this title, as proposed);

(30) Appraisal of the existing or proposed Housing Development performed in accordance with the Department's Underwriting Rules and Guidelines (§1.32 of this title, as proposed);

(31) Statement that the Development Owner will accept tenants with Section 8 or other government housing assistance;

(32) An organizational chart showing the structure of the Applicant and the ownership structure of any principals of the Applicant;

(33) Evidence that the Applicant and principals are registered with the Texas Secretary of State, as applicable;

(34) Organizational documents such as partnership agreements and articles of incorporation, as applicable, for the Applicant and its principals;

(35) Documentation of non-profit status if applicable;

(36) Evidence of good standing from the Comptroller of Public Accounts of the State of Texas for the Applicant and its principals;

(37) Corporate resumes and individual resumes of the Applicant and any principals;

(38) Latest two (2) annual financial statements and current interim financial statement for the Applicant and its principals;

(39) Latest income tax filings for the Applicant and its principals;

(40) Resolutions or other documentation indicating that the transaction has been approved by the general partner;

(41) Resumes of the general contractor's and the property manager's experience; and

(42) Such other items deemed necessary by the Department per individual application.

(e) Evaluation Criteria. The Department will evaluate the Housing Development for eligibility at the time of pre-application, and at the time of final Application. If there are changes to the Application that have an adverse affect on the score and ranking order and that would have resulted in the Application being placed below another Application in the ranking, the Department will terminate the Application and return the reservation to the Texas Bond Review Board. The Housing Development and the Applicant must satisfy the conditions set out in paragraphs (1) - (6) of this subsection in order for a Housing Development to be considered eligible:

(1) The proposed Housing Development must further the public purposes of the Department as identified in the Act.

(2) The proposed Housing Development and the Applicant and its principals must satisfy the Department's Underwriting Rules and Guidelines (§1.32 of this title, as proposed). The pre-application must include sufficient information for the Department to establish that the Underwriting Guidelines can be satisfied. The final Application will be thoroughly underwritten according to the Underwriting Rules and Guidelines (§1.32 of this title, as proposed).

(3) The Housing Development must not be located on a site determined to be unacceptable for the intended use by the Department.

(4) Any Housing Development in which the Applicant or principals of the Applicant have an ownership interest must be found not to be in Material Non-Compliance under the compliance rules in effect at the time of Application submission.

(5) Neither the Applicant nor any principals of the Applicant is, at the time of Application

(A) barred, suspended, or terminated from procurement in a state or federal program or listed in the List of Parties Excluded from Federal Procurement or Non-Procurement Programs;

(B) or has been convicted of a state or federal crime involving fraud, bribery, theft, misrepresentation, misappropriation of funds, or other similar criminal offenses within fifteen (15) years;

(C) or is subject to enforcement action under state or federal securities law, subject to a federal tax lien, or the subject of an enforcement proceeding with any governmental entity; or

(D) otherwise disqualified or debarred from participation in any of the Department's programs.

(6) Neither the Applicant nor any of its principals may have provided any fraudulent information, knowingly false documentation or other intentional or negligent misrepresentation in the Application or other information submitted to the Department.

(f) Bond Documents. After receipt of the final Application, bond counsel for the Department shall draft Bond documents which conform to the state and federal laws and regulations which apply to the transaction.

(g) Public Hearings; Board Decisions. For every Bond issuance, the Department will hold a public hearing in accordance with §2306.0661, Texas Government Code and §147(f) of the Code, in order to receive comments from the public pertaining to the Housing Development and the issuance of the Bonds. Publication of all notices required for the public hearing shall be at the sole expense of the Applicant. The Board's decisions on approvals of proposed Housing Developments will consider all relevant matters. Any topics or matters, alone or in combination, may or may not determine the Board's decision. The Department's Board will consider the following topics in relation to the approval of a proposed Housing Development:

(1) The Development Owner market study;

(2) The location, including supporting broad geographic dispersion;

(3) The compliance history of the Development Owner;

(4) The financial feasibility;

(5) The Housing Development's proposed size and configuration;

(6) The housing needs of the community in which the Housing Development is located and the needs of the area, region and state;

(7) The Housing Development's proximity to other low income Housing Developments including avoiding over concentration;

(8) The availability of adequate public facilities and services;

(9) The anticipated impact on local school districts, giving due consideration to the authorized land use;

(10) Fair Housing law;

(11) Any matter considered by the Board to be relevant to the approval decision and in furtherance of the Department's purposes and the policies of Chapter 2306, Texas Government Code.

(h) Approval of the Bonds. Subject to the timely receipt and approval of commitments for financing, an acceptable evaluation for eligibility, the satisfactory negotiation of Bond documents, and the completion of a public hearing, the Board, upon presentation by the Department's staff, will consider the approval of the Bond issuance, final Bond documents and, in the instance of privately placed Bonds, the pricing of the Bonds. The process for appeals and grounds for appeals may be found under §1.7 and §1.8 of this title. The Department's conduit housing transactions, will be processed in accordance with the Texas Bond Review Board rules Title 34, Part 9, Chapter 181, Subchapter A. The Bond issuance must receive an approving opinion from the Department's bond counsel with respect to the legality and validity of the Bonds and the security therefore, and in the case of tax-exempt Bonds, with respect to the excludability from gross income for federal income tax purposes of interest on the Bonds.

(i) Local Permits. Prior to the closing of the Bonds, all necessary approvals, including building permits, from local municipalities, counties, or other jurisdictions with authority over the Housing Development must have been obtained or evidence that the permits are obtainable subject only to payment of certain fees must be provided to the Department.

(j) Closing. Once all approvals have been obtained and Bond documents have been finalized to the respective parties' satisfaction, the Bond transaction will close. Upon satisfaction of all conditions precedent to closing, the Department will issue Bonds in exchange for payment therefor. The Department will then loan the proceeds of the Bonds to the Applicant and disbursements of the proceeds may begin.

§33.7. Regulatory and Land Use Restrictions.

(a) Filing and Term of LURA. A Regulatory and Land Use Restriction Agreement or other similar instrument (the "LURA"), will be filed in the property records of the county in which the Housing Development is located for each Housing Development financed from the proceeds of Bonds issued by the Department. For Housing Developments involving new construction, the term of the LURA will be the longer of 30 years, or the period for which Bonds are outstanding. For the financing of an existing Housing Development, the term of the LURA will be the longer of the longest period which is economically feasible in accordance with the Act, or the period for which Bonds are outstanding.

(b) Housing Development Occupancy. The LURA will specify occupancy restrictions for each Housing Development based on the income of its tenants, and will restrict the rents that may be charged for Units occupied by tenants who satisfy the specified income requirements. Pursuant to §2306.269, Texas Government Code, the LURA will prohibit a Development Owner from excluding an individual or family from admission to the Housing Development because the individual or family participates in the housing choice voucher program under Section 8, United States Housing Act of 1937 (the "Housing Act"), and from using a financial or minimum income standard for an individual or family participating in the voucher program that requires the individual or family to have a monthly income of more than two and one half (2.5) times the individual's or family's share of the total monthly rent payable to the Development Owner of the Housing Development. Housing Development occupancy requirements must be met on or prior to the date on which Bonds are issued unless the Housing Development is under construction. Adequate substantiation that the occupancy requirements have been met, in the sole discretion of the Department, must be provided prior to closing. Occupancy requirements exclude units for managers and maintenance personnel that are reasonably required by the Housing Development.

(c) Set-Asides.

(1) Housing Developments which are financed from the proceeds of Private Activity Bonds or from the proceeds of Qualified 501(c)(3) Bonds must be restricted under one of the following two set-asides:

(A) at least twenty percent (20%) of the Units within the Housing Development that are available for occupancy shall be occupied or held vacant and available for occupancy at all times by persons or families whose income does not exceed fifty percent (50%) of the area median income, or

(B) at least forty percent (40%) of the Units within the Housing Development that are available for occupancy shall be occupied or held vacant and available for occupancy at all times by persons or families whose income does not exceed sixty percent (60%) of the area median income.

(2) The Development Owner must designate at the time of Application which of the two set-asides will apply to the Housing Development and must also designate the selected priority for the Housing Development in accordance with §1372.0321, Texas Government Code. Units intended to satisfy set-aside requirements must be distributed evenly throughout the Housing Development, and must include a reasonably proportionate amount of each type of unit available in the Housing Development.

(3) No tenant qualifying under either of the set-asides shall be denied continued occupancy of a Unit in the Housing Development

because, after commencement of such occupancy, such tenant's income increases to exceed the qualifying limit; provided, however, that, should a tenant's income, as of the most recent determination thereof, exceed 140% of the then applicable income limit and such tenant constitutes a portion of the set-aside requirement of this section, then such tenant shall only continue to qualify for so long as no Unit of comparable or smaller size is rented to a tenant that does not qualify as a Low-Income Tenant. (These are the federal set-aside requirements)

(d) Global Income Requirement. All of the Units that are available for occupancy in Housing Developments financed from the proceeds of Private Activity Bonds or from the proceeds of Qualified 501(c)(3) Bonds shall be occupied or held vacant (in the case of new construction) and available for occupancy at all times by persons or families whose income does not exceed one hundred and forty percent (140%) of the area median income for a four-person household.

(e) Qualified 501(c)(3) Bonds. Housing Developments which are financed from the proceeds of Qualified 501(c)(3) Bonds are further subject to the restriction that at least seventy-five percent (75%) of the Units within the Housing Development that are available for occupancy shall be occupied (or, in the case of new construction, held vacant and available for occupancy until such time as initial lease-up is complete) at all times by individuals and families of Low Income.

(f) Taxable Bonds. The requirements for Housing Developments financed from the issuance of taxable Bonds will be negotiated and considered on a case by case basis.

(g) Special Needs. At least five percent (5%) of the Units within each Housing Development must be designed to be accessible to Persons with Special Needs and hardware and cabinetry must be stored on site or provided to be installed on an as needed basis in such Units. The Development Owner will use its best efforts (including giving preference to Persons with Special Needs) to:

(1) make at least five percent (5%) of the Units within the Housing Development available for occupancy by Persons with Special Needs;

(2) make reasonable accommodations for such persons; and

(3) allow reasonable modifications at the tenant's sole expense pursuant to the Housing Act. During the term of the LURA, the Development Owner shall maintain written policies regarding the Development Owner's outreach and marketing program to Persons with Special Needs.

(h) Fair Housing. All Housing Developments financed by the Department must comply with the Fair Housing Act which prohibits discrimination in the sale, rental, and financing of dwellings based on race, color, religion, sex, national origin, familial status, and disability. The Fair Housing Act also mandates specific design and construction requirements for multifamily housing built for first occupancy after March 13, 1991, in order to provide accessible housing for individuals with disabilities.

(i) Tenant Services. The LURA will require that the Development Owner offer a variety of services for residents of the Housing Development through a Tenant Services Program Plan which is subject to annual approval by the Department.

(j) The LURA will require the Development Owner:

(1) To obtain, complete and maintain on file Tenant Income Certifications from each Eligible Tenant, including:

(A) a Tenant Income Certification dated immediately prior to the initial occupancy of each new Eligible Tenant in the Housing Development and

(B) thereafter, annual Tenant Income Certifications which must be obtained on or before the anniversary of such Eligible Tenant's occupancy of the Unit, and in no event less than once in every 12-month period following each Eligible Tenant's occupancy of a Unit in the Housing Development. For administrative convenience, the Development Owner may establish the first date that a Tenant Income Certification for the Housing Development is received as the annual recertification date for all tenants. The Development Owner will obtain such additional information as may be required in the future by §142(d) of the Code, as the same may be amended from time to time, or in such other form and manner as may be required by applicable rules, rulings, policies, procedures, Regulations or other official statements now or hereafter promulgated, proposed or made by the Department of the Treasury or the Internal Revenue Service with respect to obligations which are tax-exempt private activity bonds described in §142(d) of the Code. The Development Owner shall make a diligent and good-faith effort to determine that the income information provided by an applicant in a Tenant Income Certification is accurate by taking steps required under §142(d) of the Code pursuant to provisions of the Housing Act.

(2) As part of the verification, such steps may include the following, provided such action meets the requirements of §142(d) of the Code:

(A) obtain pay stubs for the most recent one-month period;

(B) obtain income tax returns for the most recent two tax years;

(C) conduct a consumer credit search;

(D) obtain an income verification from the applicant's current employer;

(E) obtain an income verification from the Social Security Administration, or

(F) if the applicant is self-employed, unemployed, does not have income tax returns or is otherwise not reasonably able to provide other forms of verification as required above, obtain another form of independent verification as would, in the Development Owner's reasonable commercial judgment, enable the Development Owner to determine the accuracy of the applicant's income information. The Development Owner shall retain all Tenant Income Certifications obtained in compliance with this subsection (b) of this section until the date that is six years after the last Bond is retired;

(3) To obtain from each tenant in the Housing Development, at the time of execution of the lease pertaining to the Unit occupied by such tenant, a written certification, acknowledgment and acceptance in such form as provided by the Department to the Development Owner from time to time that

(A) such lease is subordinate to the Mortgage and the LURA;

(B) all statements made in the Tenant Income Certification submitted by such tenant are accurate;

(C) the family income and eligibility requirements of the LURA and the Loan Agreement are substantial and material obligations of tenancy in the Housing Development;

(D) such tenant will comply promptly with all requests for information with respect to such requirements from the Development Owner, the Trustee and the Department; and

(E) failure to provide accurate information in the Tenant Income Certification or refusal to comply with a request for information with respect thereto will constitute a violation of a substantial obligation of the tenancy of such tenant in the Housing Development;

(4) To maintain complete and accurate records pertaining to the Low-Income Units and to permit, at all reasonable times during normal business hours and upon reasonable notice, any duly authorized representative of the Department, the Trustee, the Department of the Treasury or the Internal Revenue Service to enter upon the Housing Development Site to examine and inspect the Housing Development and to inspect the books and records of the Development Owner pertaining to the Housing Development, including those records pertaining to the occupancy of the Low-Income Units;

(5) On or before each February 15 during the qualified development period, to submit to the Department (to the attention of the Portfolio Management and Compliance Division) a draft of the completed Internal Revenue Service Form 8703 or such other annual certification required by the Code to be submitted to the Secretary of the Treasury as to whether the Housing Development continues to meet the requirements of §142(d) of the Code and on or before each March 31 during the qualified development period, to submit such completed form to the Secretary of the Treasury and the Department;

(6) To prepare and submit the compliance monitoring report. To cause to be prepared and submitted to the Department and the Trustee on the first day of the state restrictive period, and thereafter by the tenth calendar day of each March, June, September, and December, or other quarterly schedule as determined by the Department with written notice to the Development Owner, a certified compliance monitoring report and Development Owner's certification in such form as provided by the Department to the Development Owner from time to time; and

(7) To provide regular maintenance to keep the Housing Development sanitary, decent and safe.

(8) To establish a reserve account consistent with the requirements of §2306.186, Texas Government Code.

§33.8. Fees.

(a) Application and Issuance Fees. The Department shall set fees to be paid by the Applicant in order to cover the costs of pre-application review, Application and Development review, the Department's expenses in connection with providing financing for a Housing Development, and as required by law. (§1372.006(a), Texas Government Code)

(b) Administration and Portfolio Management and Compliance Fees. The Department shall set ongoing fees to be paid by Development Owners to cover the Department's costs of administering the Bonds and portfolio management and compliance with the program requirements applicable to each Housing Development.

§33.9. Waiver of Rules.

Provided all requirements of the Act, the Code, and any other applicable law are met, the Board may waive any one or more of the rules set forth in §§33.3 - 33.8 of this title relating to the Multifamily Housing Revenue Bond Program in order to further the purposes and the policies of Chapter 2306, Texas Government Code; to encourage the acquisition, construction, reconstruction, or rehabilitation of a Housing Development that would provide decent, safe, and sanitary housing, including, but not limited to, providing such housing in economically depressed or blighted areas, or providing housing designed and equipped for Persons with Special Needs; or for other good cause, as determined by the Board.

§33.10. No Discrimination.

The Department and its staff or agents, Applicants, Development Owners, and any participants in the Program shall not discriminate under this Program against any person or family on the basis of race, creed, national origin, age, religion, handicap, family status, or sex, or against persons or families on the basis of their having minor children, except that nothing herein shall be deemed to preclude a Development Owner from selecting tenants with Special Needs, or to preclude a Development Owner from selecting tenants based on income in renting Units to comply with the set asides under the provisions of this chapter.

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 August 18, 2003.

TRD-200305304
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 475-3726

♦ ♦ ♦

CHAPTER 35. TAXABLE MULTIFAMILY MORTGAGE REVENUE BOND PROGRAM

10 TAC §§35.1 - 35.15

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

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of §§35.1 - 35.15, concerning the Guidelines for Multifamily Housing Revenue Bond rules. The sections are proposed for repeal in order to implement new legislation enacted by the 78th Legislative Session, including particularly Section 4 of Senate Bill 1664, and Section 15 of Senate Bill 264.

Edwina P. Carrington, Executive Director, has determined that for the first five-year period the repeal is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Ms. Carrington also has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be to permit the adoption of new rules for multifamily housing revenue bonds within the State of Texas, thereby enhancing the State's ability to provide decent, safe and sanitary housing for Texans through the multifamily housing revenue bond program administered by the Department. There will be no effect on persons, small businesses or micro-businesses. There are no anticipated economic costs to any person, business or micro-business required to comply with the repeal as proposed. The proposed repeal will not have an impact on any local economy.

Comments may be submitted to Robbye Meyer, Multifamily Finance Production, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas, 78711-3941 or by e-mail at the following address: rmeyer@tdhca.state.tx.us.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306.

The proposed repeal affects no other code, article or statute.

§35.1. Introduction.
§35.2. Definitions.
§35.3. Policy Objectives.
§35.4. Pre-application and Final Application for Mortgage Loans.
§35.5. Market Study; Project Feasibility Study.
§35.6. Housing Development Occupancy.
§35.7. Department Review of Developer Applications.
§35.8. Housing Development Cost Requisitions and Limits.
§35.9. Limitation on Mortgage Loan Amounts.
§35.10. Bond Rating.
§35.11. Selection of Qualified Lending Institutions as Originators or Servicers.
§35.12. Mortgage Loan Requirements.
§35.13. No Discrimination.
§35.14. Fees.
§35.15. Advertisements.

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 August 18, 2003.

TRD-200305302
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 475-3726

♦ ♦ ♦

CHAPTER 39. TAX-EXEMPT MULTIFAMILY MORTGAGE REVENUE BOND PROGRAM

10 TAC §§39.1 - 39.17

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

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of §§39.1 - 39.17, concerning the Guidelines for Multifamily Housing Revenue Bond rules. The sections are proposed for repeal in order to implement new legislation enacted by the 78th Legislative Session, including particularly Section 4 of Senate Bill 1664, and Section 15 of Senate Bill 264.

Edwina P. Carrington, Executive Director, has determined that for the first five-year period the repeal is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Ms. Carrington also has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be to permit the adoption of new rules for multifamily housing revenue bonds within the State of Texas, thereby enhancing the State's ability to provide decent, safe and sanitary housing for Texans through the multifamily housing revenue bond program administered by the Department. There will be no effect on persons, small businesses or micro-businesses. There are no anticipated economic costs to any person, business or micro-business required to comply with the repeal as proposed. The proposed repeal will not have an impact on any local economy.

Comments may be submitted to Robbye Meyer, Multifamily Finance Production, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas, 78711-3941 or by e-mail at the following address: rmeyer@tdhca.state.tx.us.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306.

The proposed repeal affects no other code, article or statute.

§39.1. Introduction.
§39.2. Definitions.
§39.3. Policy Objectives.
§39.4. Pre-application and Final Application for Mortgage Loans.
§39.5. Market Study.
§39.6. Rules Relating to Refundings.
§39.7. Housing Development Occupancy.
§39.8. Department Review of Housing Sponsor Applications.
§39.9. Housing Development Cost Requisitions and Limits.
§39.10. Existing Properties.
§39.11. Amenities for Families with Children.
§39.12. Limitation on Loan Amounts; Limitation on Costs of Issuance.
§39.13. Bond Rating.
§39.14. No Discrimination.
§39.15. Fees.
§39.16. Advertisements.
§39.17. Waiver of 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 August 18, 2003.

TRD-200305289
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 475-3726

♦ ♦ ♦

CHAPTER 50. 2001 LOW INCOME HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§50.1 - 50.16

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

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of §§50.1-50.16, concerning the 2001 Low Income Housing Tax Credit Program Qualified Allocation Plan and Rules. The sections are proposed to be repealed in order to enact new sections conforming to the requirements of regulations enacted under the Internal Revenue Code of 1986, §42 as amended, which provides for credits against federal income taxes for owners of qualified low income rental housing.

Edwina Carrington, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Ms. Carrington also has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be to permit the adoption of new rules for the allocation of low income housing tax credit authority within the State of Texas, thereby enhancing the State's ability to provide decent, safe and sanitary housing for Texans through the tax credit program administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

Comments may be submitted to Jennifer Joyce, Program Analyst, Multifamily Finance Production Division, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas, 78711-3941 or by email at the following address: jjoyce@tdhca.state.tx.us.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306; and the Internal Revenue Code of 1986, §42 as amended, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs and Executive Order AWR-92-3 (March 4, 1992), which provides this Department with the authority to make housing tax credit allocations in the State of Texas.

No other code, article or statute is affected by this proposed repeal.

§50.1. Scope.
§50.2. Definitions.
§50.3. State Housing Credit Ceiling.
§50.4. Application Submission; Unacceptable Applications; Availability of Application; Confidential Information; Required Application Notifications and Receipt of Public Comment; Board Recommendations; Board Decisions; Commitment Notices and Determination Notices; Waiting List; Agreements and Election Statement; Cost Certification and Carryover Filings; LURA.
§50.5. Ineligible and Disqualified Applications.
§50.6. Regional Allocation Formula and Set-Asides.
§50.7. Evaluation Process; Evaluation Factors; Tie Breaker Criteria; Threshold Criteria; Selection Criteria; Credit Amount; Limitations on the Size of Projects; Tax Exempt Bond Financed Projects; Adherence to Obligations.
§50.8. Compliance Monitoring.
§50.9. Housing Credit Allocations.
§50.10. Department Records; Certain Required Filings.
§50.11. Program Fees and Extensions.
§50.12. Manner and Place of Filing Applications and Other Required Documentation.
§50.13. Withdrawals, Cancellations, Amendments.
§50.14. Waiver and Amendment of Rules.
§50.15. Forward Reservations; Binding Commitments.
§50.16. Deadlines for Allocation of Low Income Housing Tax Credits.

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 August 18, 2003.

TRD-200305277
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 475-3726

♦ ♦ ♦

CHAPTER 50. 2004 HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§50.1 - 50.24

The Texas Department of Housing and Community Affairs proposes new §§50.1-50.24, concerning the 2004 Housing Tax Credit Program Qualified Allocation Plan and Rules. The new sections are necessary to provide procedures for the allocation by the Department of certain housing tax credits available under federal income tax laws to owners of qualified rental housing developments.

Edwina Carrington, Executive Director, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules. Chapter 1, Subchapter B of this title, referenced in these new sections, is also being proposed in this issue of the *Texas Register*. Chapter 60 of this title, referenced in these new sections, has not yet been proposed by the Department.

Ms. Carrington also has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be the enhancement of the state's ability to provide safe and sanitary housing for Texans through the efficient and coordinated allocation of federal income tax credit authority available to the state for administration of state housing agencies. There will be no effect on small businesses or persons. There is no anticipated economic costs to persons who are required to comply with the sections as proposed.

Comments may be submitted to Jennifer Joyce, Program Analyst, Multifamily Finance Production Division, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas, 78711-3941 or by email at the following address: jjoyce@tdhca.state.tx.us.

The proposed new sections are proposed under the Texas Government Code, Chapter 2306; the Internal Revenue Code of 1986, §42, as amended, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs; and Executive Order AWR-92-3 (March 4, 1992), which provides this Department with the authority to make housing tax credit allocations in the State of Texas.

No other code, article or statute is affected by these new sections.

§50.1. Purpose, Program Statement, Allocation Goals.

(a) Purpose. The Rules in this chapter apply to the allocation by the Texas Department of Housing and Community Affairs (the Department) of Housing Tax Credits authorized by applicable federal income tax laws. The Internal Revenue Code of 1986, §42, as amended, provides for credits against federal income taxes for owners of qualified low income rental housing Developments. That section provides for the allocation of the available tax credit amount by state housing credit agencies. Pursuant to Executive Order AWR-92-3 (March 4, 1992), the Department was authorized to make Housing Credit Allocations for the State of Texas. As required by the Internal Revenue Code, §42(m)(1), the Department developed this Qualified Allocation Plan (QAP) which is set forth in §§50.1 through 50.24 of this title. Sections in this chapter establish procedures for applying for and obtaining an allocation of Housing Tax Credits, along with ensuring that the proper threshold criteria, selection criteria, priorities and preferences are followed in making such allocations.

(b) Program Statement. The Department shall administer the program to encourage the development and preservation of appropriate types of rental housing for households that have difficulty finding suitable, accessible, affordable rental housing in the private marketplace; maximize the number of suitable, accessible, affordable residential rental units added to the state's housing supply; prevent losses for any reason to the state's supply of suitable, accessible, affordable residential rental units by enabling the rehabilitation of rental housing or by providing other preventive financial support; and provide for the participation of for-profit organizations and provide for and encourage the participation of nonprofit organizations in the acquisition, development and operation of accessible affordable housing developments in rural and urban communities.

(c) Allocation Goals. It shall be the goal of this Department and the Board, through these provisions, to encourage diversity through broad geographic allocation of tax credits within the state, and in accordance with the regional allocation formula, and to promote maximum utilization of the available tax credit amount. The processes and criteria utilized to realize this goal are described in §§50.8 and 50.9 of this title, without in any way limiting the effect or applicability of all other provisions of this title.

§50.2. Coordination with Rural Agencies.

To assure maximum utilization and optimum geographic distribution of tax credits in rural areas, and to achieve increased sharing of information, reduction of processing procedures, and fulfillment of Development compliance requirements in rural areas, the Department has entered into a Memorandum of Understanding (MOU) with the TX-USDA-RHS to coordinate on existing, rehabilitated, and new construction housing Developments financed by TX-USDA-RHS; and will jointly administer the Rural Regional Allocation with the Texas Office of Rural Community Affairs (ORCA). ORCA will assist in developing all Threshold, Selection and Underwriting Criteria applied to Applications eligible for the Rural Regional Allocation. The Criteria will be approved by that Agency. To ensure that the Rural Regional Allocation receives a sufficient volume of eligible Applications, the Department and ORCA shall jointly implement outreach, training, and rural area capacity building efforts.

§50.3. Definitions.

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

(1) Administrative Deficiencies--The absence of information or a document from the Application which is important to a review and scoring of the Application and is required under §§50.8(d) and 50.9(e), (f) and (g) of this title.

(2) Affiliate--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, Controls, is Controlled by, or is under common Control with any other Person, and specifically shall include parents or subsidiaries. Affiliates also include all General Partners, Special Limited Partners and Principals with at least a 10% ownership interest.

(3) Agreement and Election Statement--A document in which the Development Owner elects, irrevocably, to fix the Applicable Percentage with respect to a building or buildings, as that in effect for the month in which the Department and the Development Owner enter into a binding agreement as to the housing credit dollar amount to be allocated to such building or buildings.

(4) Applicable Fraction--The fraction used to determine the Qualified Basis of the qualified low income building, which is the smaller of the Unit fraction or the floor space fraction, all determined as provided in the Code, §42(c)(1).

(5) Applicable Percentage--The percentage used to determine the amount of the Housing Tax Credit, as defined more fully in the Code, §42(b).

(A) For purposes of the Application, the Applicable Percentage will be projected at 10 basis points above the greater of:

(i) the current applicable percentage for the month in which the Application is submitted to the Department, or

(ii) the trailing 1-year, 2-year or 3-year average rate in effect during the month in which the Application is submitted to the Department.

(B) For purposes of making a credit recommendation at any other time, the Applicable Percentage will be based in order of priority on:

(i) The percentage indicated in the Agreement and Election Statement, if executed; or

(ii) The actual applicable percentage as determined by the Code, §42(b), if all or part of the Development has been placed in service and for any buildings not placed in service the percentage will be the actual percentage as determined by Code, §42(b) for the most current month; or

(iii) The percentage as calculated in subparagraph (A) of this paragraph if the Agreement and Election Statement has not been executed and no buildings have been placed in service.

(6) Applicant--Any Person or Affiliate of a Person who files a Pre-Application or an Application with the Department requesting a Housing Credit Allocation.

(7) Application--An application, in the form prescribed by the Department, filed with the Department by an Applicant, including any exhibits or other supporting material.

(8) Application Acceptance Period--That period of time during which Applications for a Housing Credit Allocation from the State Housing Credit Ceiling may be submitted to the Department as more fully described in §§50.9(a) and 50.22 of this title. For Tax Exempt Bond Developments this period is that period of time prior to the deadline stated in §50.12 of this title.

(9) Application Round--The period beginning on the date the Department begins accepting Applications for the State Housing Credit Ceiling and continuing until all available Housing Tax Credits

from the State Housing Credit Ceiling (as stipulated by the Department) are allocated, but not extending past the last day of the calendar year.

(10) Application Submission Procedures Manual--The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for the filing of Pre-Applications and Applications for Housing Tax Credits.

(11) Area Median Gross Income (AMGI)--Area median gross household income, as determined for all purposes under and in accordance with the requirements of the Code, §42.

(12) At-Risk Development--a Development that:

(A) has received the benefit of a subsidy in the form of a below-market interest rate loan, interest rate reduction, equity incentive, rental subsidy, Section 8 housing assistance payment, rental supplement payment, rental assistance payment, or equity incentive under the following federal laws, as applicable:

(i) Sections 221(d)(3), (4) and (5), National Housing Act (12 U.S.C. Section 1715l);

(ii) Section 236, National Housing Act (12 U.S.C. Section 1715z-1);

(iii) Section 202, Housing Act of 1959 (12 U.S.C. Section 1701q);

(iv) Section 101, Housing and Urban Development Act of 1965 (12 U.S.C. Section 1701s);

(v) any project-based assistance authority pursuant to Section 8 of the U.S. Housing Act of 1937;

(vi) Sections 514, 515, 516, and 538 Housing Act of 1949 (42 U.S.C. Sections 1484, 1485, and 1486); and

(vii) Section 42, of the Internal Revenue Code of 1986 (26 U.S.C. Section 42), and

(B) is subject to the following conditions:

(i) the stipulation to maintain affordability in the contract granting the subsidy is nearing expiration (expiration will occur within two calendar years of July 31 of the year the Application is submitted); or

(ii) the federally insured mortgage on the Development is eligible for prepayment or is nearing the end of its mortgage term (the term will end within two calendar years of July 31 of the year the Application is submitted).

(C) An Application for a Development that includes the demolition of the existing Units which have received the financial benefit described in subparagraph (A) of this paragraph will not qualify as an At-Risk Development, except that a Housing Authority proposing reconstruction of public housing, supplemented with HOPE VI funding, will be qualified as an At-Risk Development if it meets the requirements described in §50.7(b)(3) of this title.

(D) Developments that have an opportunity to retain or renew any of the financial benefit described in subparagraph (A) of this paragraph must retain or renew all possible financial benefit to qualify as an At-Risk Development.

(13) Bedroom--A portion of a Unit set aside for sleeping which is no less than 100 square feet; has no width or length less than 8 feet; has at least one window that provides exterior access; and has at least one closet that is not less than 2 feet deep and 3 feet wide and high enough to accommodate 5 feet of hanging space.

(14) Board--The governing Board of the Department.

(15) Carryover Allocation--An allocation of current year tax credit authority by the Department pursuant to the provisions of the Code, §42(h)(1)(E) and Treasury Regulations, §1.42-6.

(16) Carryover Allocation Document--A document issued by the Department, and executed by the Development Owner, pursuant to §50.14 of this title.

(17) Carryover Allocation Procedures Manual--The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for filing Carryover Allocation requests.

(18) Code--The Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued thereunder by the United States Department of the Treasury or the Internal Revenue Service.

(19) Colonia--A geographic area located in a county some part of which is within 150 miles of the international border of this state and that:

(A) has a majority population composed of individuals and families of low income and very low income, based on the federal Office of Management and Budget poverty index, and meets the qualifications of an economically distressed area under §17.921, Water Code; or

(B) has the physical and economic characteristics of a colonia, as determined by the Texas Water Development Board.

(20) Commitment Notice--A notice issued by the Department to a Development Owner pursuant to §50.13 of this title and also referred to as the "commitment."

(21) Compliance Period - With respect to a building, the period of 15 taxable years, beginning with the first taxable year of the Credit Period pursuant to the Code, §42(i)(1).

(22) Control--(including the terms "Controlling," "Controlled by", and/or "under common Control with") the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership of voting securities, by contract or otherwise, including specifically ownership of more than 50% of the General Partner interest in a limited partnership, or designation as a managing General Partner of a limited liability company.

(23) Cost Certification Procedures Manual--The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for filing requests for IRS Form(s) 8609 for Developments placed in service under the Housing Tax Credit Program.

(24) Credit Period--With respect to a building within a Development, the period of ten taxable years beginning with the taxable year the building is placed in service or, at the election of the Development Owner, the succeeding taxable year, as more fully defined in the Code, §42(f)(1).

(25) Department--The Texas Department of Housing and Community Affairs, an agency of the State of Texas, established by Chapter 2306, Texas Government Code, including Department employees and/or the Board.

(26) Determination Notice--A notice issued by the Department to the Development Owner of a Tax Exempt Bond Development which states that the Development may be eligible to claim Housing Tax Credits without receiving an allocation of Housing Tax Credits

from the State Housing Credit Ceiling because it satisfies the requirements of this QAP; sets forth conditions which must be met by the Development before the Department will issue the IRS Form(s) 8609 to the Development Owner; and specifies the Department's determination as to the amount of tax credits necessary for the financial feasibility of the Development and its viability as a rent restricted Development throughout the affordability period.

(27) Developer--Any Person entering into a contract with the Development Owner to provide development services with respect to the Development and receiving a fee for such services (which fee cannot exceed 15% of the Eligible Basis) and any other Person receiving any portion of such fee, whether by subcontract or otherwise.

(28) Development--A proposed qualified low income housing project, for new construction or rehabilitation, as defined by the Code, §42(g), that consists of one or more buildings containing multiple Units, and that, if the Development shall consist of multiple buildings, is financed under a common plan and is owned by the same Person for federal tax purposes, and the buildings of which are either:

(A) located on a single site or contiguous site; or

(B) located on scattered sites and contain only rent-restricted units.

(29) Development Consultant--Any Person (with or without ownership interest in the Development) who provides professional services relating to the filing of an Application, Carryover Allocation Document, and/or cost certification documents.

(30) Development Owner--Any Person, General Partner, or Affiliate of a Person who owns or proposes a Development or expects to acquire Control of a Development under a purchase contract approved by the Department.

(31) Development Team--All Persons or Affiliates thereof that play a role in the development, construction, rehabilitation, management and/or continuing operation of the subject Property, which will include any Development Consultant and Guarantor.

(32) Economically Distressed Area--Consistent with §17.921 of Texas Water Code, an area in which:

(A) water supply or sewer services are inadequate to meet minimal needs of residential users as defined by Texas Water Development Board rules;

(B) financial resources are inadequate to provide water supply or sewer services that will satisfy those needs; and

(C) an established residential subdivision was located on June 1, 1989, as determined by the Texas Water Development Board.

(33) Eligible Basis--With respect to a building within a Development, the building's Eligible Basis as defined in the Code, §42(d).

(34) Executive Award and Review Advisory Committee ("The Committee")--A Departmental committee that will make funding and commitment recommendations to the Board based upon the evaluation of an Application in accordance with the housing priorities as set forth in Chapter 2306 of the Texas Government Code, and as set forth herein, and the ability of an Applicant to meet those priorities.

(35) Extended Housing Commitment--An agreement between the Department, the Development Owner and all successors in interest to the Development Owner concerning the extended housing use of buildings within the Development throughout the extended use period as provided in the Code, §42(h)(6). The Extended Housing Commitment with respect to a Development is expressed in the LURA applicable to the Development.

(36) General Contractor--One who contracts for the construction or rehabilitation of an entire Development, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the subcontractors. This party may also be referred to as the "contractor."

(37) General Partner--That partner, or collective of partners, identified as the general partner of the partnership that is the Development Owner and that has general liability for the partnership. In addition, unless the context shall clearly indicate the contrary, if the Development Owner in question is a limited liability company, the term "General Partner" shall also mean the managing member or other party with management responsibility for the limited liability company.

(38) Governmental Entity--Includes federal or state agencies, departments, boards, bureaus, commissions, authorities, and political subdivisions, special districts and other similar entities.

(39) Guarantor--Means any Person that provides, or is anticipated to provide, a guaranty for the equity or debt financing for the Development.

(40) Historic Development--A residential Development that has received a historic property designation by a federal, state or local government entity.

(41) Historically Underutilized Businesses (HUB)--Any entity defined as a historically underutilized business with its principal place of business in the State of Texas in accordance with Chapter 2161, Texas Government Code.

(42) Housing Credit Agency--A Governmental Entity charged with the responsibility of allocating Housing Tax Credits pursuant to the Code, §42. For the purposes of this title, the Department is the sole "Housing Credit Agency" of the State of Texas.

(43) Housing Credit Allocation--An allocation by the Department to a Development Owner of Housing Tax Credit in accordance with the provisions of this title.

(44) Housing Credit Allocation Amount--With respect to a Development or a building within a Development, that amount the Department determines to be necessary for the financial feasibility of the Development and its viability as a Development throughout the affordability period and which it allocates to the Development.

(45) Housing Tax Credit ("tax credits")--A tax credit allocated, or for which a Development may qualify, under the Housing Tax Credit Program, pursuant to the Code, §42.

(46) HUD--The United States Department of Housing and Urban Development, or its successor.

(47) Ineligible Building Types--Those Developments which are ineligible, pursuant to this QAP, for funding under the Housing Tax Credit Program, as follows:

(A) Hospitals, nursing homes, trailer parks, dormitories (or other buildings that will be predominantly occupied by students) or other facilities which are usually classified as transient housing (other than certain specific types of transitional housing for the homeless and single room occupancy units, as provided in the Code, §§42(i)(3)(B)(iii) and (iv)) are not eligible. However, structures formerly used as hospitals, nursing homes or dormitories are eligible for Housing Tax Credits if the Development involves the conversion of the building to a non-transient multifamily residential development.

(B) Any Qualified Elderly Development of two stories or more that does not include elevator service for any Units or living space above the first floor.

(C) Any Qualified Elderly Development with any Units having more than two bedrooms.

(D) Any Development with building(s) with four or more stories that does not include an elevator.

(E) Any Development proposing new construction, other than a Development (new construction or rehabilitation) composed entirely of single-family dwellings, having any Units with four or more bedrooms.

(F) Any Development that violates the Integrated Housing Policy of the Department.

(G) Any Development involving new construction, other than a Qualified Elderly Development, in which any of the designs in clauses (i) through (iii) of this subparagraph are proposed. For purposes of this limitation, a den, study or other similar space that could reasonably function as a bedroom will be considered a bedroom.

(i) more than 60% of the total Units are one bedroom Units; or

(ii) more than 50% of the total Units are two bedroom Units; or

(iii) more than 30% of the total Units are three bedroom Units.

(48) IRS--The Internal Revenue Service, or its successor.

(49) Land Use Restriction Agreement (LURA)--An agreement between the Department and the Development Owner which is binding upon the Development Owner's successors in interest, that encumbers the Development with respect to the requirements of this chapter, Chapter 2306, Texas Government Code, and the requirements of the Code, §42.

(50) Material Non-Compliance--A property located within the state of Texas will be classified by the Department as being in material non-compliance status if the non-compliance score for such property is equal to or exceeds 30 points in accordance with the provisions of §50.5(b)(3) of this title and under the methodology and point system set forth in Chapter 60 of this title, to be proposed. A property located outside the state of Texas will be classified by the Department as being in Material Non-compliance status if the non-compliance score for such property is equal to or exceeds 30 points in accordance with the provisions of §50.5(b)(4) of this title and under the methodology and point system set forth in Chapter 60 of this title, to be proposed.

(51) Minority Owned Business--A business entity at least 51% of which is owned by members of a minority group or, in the case of a corporation, at least 51% of the shares of which are owned by members of a minority group, and that is managed and Controlled by members of a minority group in its daily operations. Minority group includes women, African Americans, American Indians, Asian Americans, and Mexican Americans and other Americans of Hispanic origin.

(52) ORCA--Office of Rural Community Affairs, as established by Chapter 487 of Texas Government Code.

(53) Person--Means, without limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability company, trust, estate, association, cooperative, government, political subdivision, agency or instrumentality or other organization or entity of any nature whatsoever and shall include any group of Persons acting in concert toward a common goal, including the individual members of the group.

(54) Persons with Disabilities--A person who:

(A) has a physical, mental or emotional impairment that:

(i) is expected to be of a long, continued and indefinite duration,

(ii) substantially impedes his or her ability to live independently, and

(iii) is of such a nature that the disability could be improved by more suitable housing conditions, or

(B) has a developmental disability, as defined in the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. Section 15002).

(55) Pre-Application--A preliminary application, in a form prescribed by the Department, filed with the Department by an Applicant prior to submission of the Application, including any required exhibits or other supporting material, as more fully described in §§50.8 and 50.22 of this title.

(56) Pre-Application Acceptance Period--That period of time during which Pre-Applications for a Housing Credit Allocation from the State Housing Credit Ceiling may be submitted to the Department.

(57) Principal--the term Principal is defined as Persons that will exercise Control over a partnership, corporation, limited liability company, trust, or any other private entity. In the case of:

(A) partnerships, Principals include all General Partners regardless of their percentage interest;

(B) corporations, Principals include any officer authorized by the board of directors to act on behalf of the corporation, including the president, vice president, secretary, treasurer and all other executive officers, and each stock holder having a ten percent or more interest in the corporation; and

(C) limited liability companies, Principals include all managing members, members having a ten percent or more interest in the limited liability company or any officer authorized to act on behalf of the limited liability company.

(58) Prison Community--A city or town which is located outside of a Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA) and was awarded a state prison within the past five years.

(59) Property--The real estate and all improvements thereon which are the subject of the Application (including all items of personal property affixed or related thereto), whether currently existing or proposed to be built thereon in connection with the Application.

(60) Qualified Allocation Plan (QAP)--A plan adopted by the Board, and approved by the Governor, under this title, and as provided in the Code, §42(m)(1) and as further provided in §§50.1 through 50.24 of this title, that:

(A) provides the threshold and scoring, and underwriting process based on housing priorities of the Department that are appropriate to local conditions; and

(B) consistent with §2306.6710(e), Texas Government Code, gives preference in Housing Credit Allocations to Developments that, as compared to other Developments:

(i) when practicable and feasible based on documented, committed, and available Third-Party funding sources, serve the lowest income tenants per housing tax credit; and

(ii) produce for the longest economically feasible period the greatest number of high quality Units committed to remaining affordable to any tenants who are income-eligible under the Housing Tax Credit Program; and

(C) provides a procedure for the Department, the Department's agent, or private contractor of the Department to use in monitoring compliance with the Qualified Allocation Plan, notifying the IRS of noncompliance, and monitoring for noncompliance with habitability standards through regular site visits.

(61) Qualified Basis--With respect to a building within a Development, the building's Eligible Basis multiplied by the Applicable Fraction, within the meaning of the Code, §42(c)(1).

(62) Qualified Census Tract--Any census tract which is so designated by the Secretary of HUD in accordance with the Code, §42(d)(5)(C)(ii).

(63) Qualified Elderly Development--A Development which meets the requirements of the federal Fair Housing Act and:

(A) is intended for, and solely occupied by, individuals 62 years of age or older; or

(B) is intended and operated for occupancy by at least one individual 55 years of age or older per Unit, where at least 80% of the total housing Units are occupied by at least one individual who is 55 years of age or older; and where the Development Owner publishes and adheres to policies and procedures which demonstrate an intent by the owner and manager to provide housing for individuals 55 years of age or older. (See 42 U.S.C. Section 3607(b)).

(64) Qualified Market Analyst--A real estate appraiser certified or licensed by the Texas Appraiser or Licensing and Certification Board or a real estate consultant or other professional currently active in the subject property's market area who demonstrates competency, expertise, and the ability to render a high quality written report. The individual's performance, experience, and educational background will provide the general basis for determining competency as a Market Analyst. Competency will be determined by the Department, in its sole discretion. The Qualified Market Analyst must be a Third Party.

(65) Qualified Nonprofit Organization--An organization that is described in the Code, §501(c)(3) or (4), as these cited provisions may be amended from time to time, that is exempt from federal income taxation under the Code, §501(a), that is not affiliated with or Controlled by a for profit organization, and includes as one of its exempt purposes the fostering of low income housing within the meaning of the Code, §42(h)(5)(C). A Qualified Nonprofit Organization may select to compete in one or more of the Set-Asides, including, but not limited to, the nonprofit Set-Aside, the At-Risk Development Set-Aside and the TX-USDA-RHS Set-Aside.

(66) Qualified Nonprofit Development--A Development in which a Qualified Nonprofit Organization is the sole General Partner of the ownership entity and otherwise meets the requirements of the Code, §42(h)(5).

(67) Reference Manual--That certain manual, and any amendments thereto, produced by the Department which sets forth reference material pertaining to the Housing Tax Credit Program.

(68) Related Party--As defined,

(A) The following individuals or entities:

(i) the brothers, sisters, spouse, ancestors, and descendants of a person within the third degree of consanguinity, as determined by Chapter 573, Texas Government Code;

(ii) a person and a corporation, if the person owns more than 50 percent of the outstanding stock of the corporation;

(iii) two or more corporations that are connected through stock ownership with a common parent possessing more than 50 percent of:

(I) the total combined voting power of all classes of stock of each of the corporations that can vote;

(II) the total value of shares of all classes of stock of each of the corporations; or

(III) the total value of shares of all classes of stock of at least one of the corporations, excluding, in computing that voting power or value, stock owned directly by the other corporation;

(iv) a grantor and fiduciary of any trust;

(v) a fiduciary of one trust and a fiduciary of another trust, if the same person is a grantor of both trusts;

(vi) a fiduciary of a trust and a beneficiary of the trust;

(vii) a fiduciary of a trust and a corporation if more than 50 percent of the outstanding stock of the corporation is owned by or for:

(I) the trust; or

(II) a person who is a grantor of the trust;

(viii) a person or organization and an organization that is tax-exempt under the Code, §501(a), and that is controlled by that person or the person's family members or by that organization;

(ix) a corporation and a partnership or joint venture if the same persons own more than:

(I) 50 percent of the outstanding stock of the corporation; and

(II) 50 percent of the capital interest or the profits' interest in the partnership or joint venture;

(x) an S corporation and another S corporation if the same persons own more than 50 percent of the outstanding stock of each corporation;

(xi) an S corporation and a C corporation if the same persons own more than 50 percent of the outstanding stock of each corporation;

(xii) a partnership and a person or organization owning more than 50 percent of the capital interest or the profits' interest in that partnership; or

(xiii) two partnerships, if the same person or organization owns more than 50 percent of the capital interests or profits' interests. Nothing in this definition is intended to constitute the Department's determination as to what relationship might cause entities to be considered "related" for various purposes under the Code.

(69) Rules--The Department's Housing Tax Credit Qualified Allocation Plan and Rules as presented in this title.

(70) Rural Area--An area that is located:

(A) outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(B) within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has

a population of 20,000 or less and does not share a boundary with an urban area; or

(C) in an area that is eligible for new construction or rehabilitation funding by TX-USDA-RHS.

(71) Rural Development--A Development located within a Rural Area and for which the Applicant applies for tax credits under the Rural Regional Allocation.

(72) Selection Criteria--Criteria used to determine housing priorities of the State under the Housing Tax Credit Program as specifically defined in §50.9(g) of this title.

(73) Set-Aside--A reservation of a portion of the available Housing Tax Credits to provide financial support for specific types of housing or geographic locations or serve specific types of Applicants as permitted by the Qualified Allocation Plan on a priority basis.

(74) State Housing Credit Ceiling--The limitation imposed by the Code, §42(h), on the aggregate amount of Housing Credit Allocations that may be made by the Department during any calendar year, as determined from time to time by the Department in accordance with the Code, §42(h)(3).

(75) Student Eligibility--Per the Code, §42(i)(3)(D), "A unit shall not fail to be treated as a low-income unit merely because it is occupied:

(A) by an individual who is:

(i) a student and receiving assistance under Title IV of the Social Security Act (42 U.S.C. §§601 et seq.), or

(ii) enrolled in a job training program receiving assistance under the Job Training Partnership Act (29 USCS §§1501 et seq., generally; for full classification, consult USCS Tables volumes) or under other similar Federal, State, or local laws, or

(B) entirely by full-time students if such students are:

(i) single parents and their children and such parents and children are not dependents (as defined in section 152) of another individual, or

(ii) married and file a joint return."

(76) Tax Exempt Bond Development--A Development which receives a portion of its financing from the proceeds of tax exempt bonds which are subject to the state volume cap as described in the Code, §42(h)(4), such that the Development does not receive an allocation of tax credit authority from the State Housing Credit Ceiling.

(77) Third Party--a Person who is not an Affiliate of the Applicant, General Partner, Developer or General Contractor.

(78) Threshold Criteria--Criteria used to determine whether the Development satisfies the minimum level of acceptability for consideration as specifically defined in §50.9(f) of this title.

(79) Total Housing Development Cost--The total of all costs incurred or to be incurred by the Development Owner in acquiring, constructing, rehabilitating and financing a Development, as determined by the Department based on the information contained in the Application. Such costs include reserves and any expenses attributable to commercial areas. Costs associated with the sale or use of Housing Tax Credits to raise equity capital shall also be included in the Total Housing Development Cost. Such costs include but are not limited to syndication and partnership organization costs and fees, filing fees, broker commissions, related attorney and accounting fees, appraisal, engineering, and the environmental site assessment.

(80) TX-USDA-RHS--The Rural Housing Services (RHS) of the United States Department of Agriculture (USDA) serving the State of Texas (formerly known as TxFmHA) or its successor.

(81) Unit--Any residential rental unit in a Development consisting of an accommodation including a single room used as an accommodation on a non-transient basis, that contains complete physical facilities and fixtures for living, sleeping, eating, cooking and sanitation.

§50.4. State Housing Credit Ceiling.

The Department shall determine the State Housing Credit Ceiling for each calendar year as provided in the Code, §42(h)(3)(C), using such information and guidance as may be made available by the Internal Revenue Service. The Department shall publish each such determination in the Texas Register within 30 days after the receipt of such information as is required for that purpose by the Internal Revenue Service. The aggregate amount of commitments of Housing Credit Allocations made by the Department during any calendar year shall not exceed the State Housing Credit Ceiling for such year as provided in the Code, §42. Housing Credit Allocations made to Tax Exempt Bond Developments are not included in the State Housing Credit Ceiling.

§50.5. Ineligibility, Disqualification and Debarment, Applicant Standards, Representation by Former Board Member or Other Person.

(a) Ineligibility. An Application will be ineligible if:

(1) The Applicant, Development Owner, Developer or Guarantor has been or is barred, suspended, or terminated from procurement in a state or federal program or listed in the List of Parties Excluded from Federal Procurement or Non-Procurement Programs; or,

(2) The Applicant, Development Owner, Developer or Guarantor has been convicted of a state or federal crime involving fraud, bribery, theft, misrepresentations of material facts, misappropriation of funds, or other similar criminal offenses within fifteen years preceding the Application deadline; or,

(3) The Applicant, Development Owner, Developer or Guarantor at the time of Application is: subject to an enforcement action under state or federal securities law; is subject to a federal tax lien; or is the subject of an enforcement proceeding with any Governmental Entity; or

(4) The Applicant, Development Owner, Developer or Guarantor with any past due audits has not submitted those past due audits to the Department in a satisfactory format on or before the close of the Application Acceptance Period. A Person is not eligible to receive a commitment of Housing Tax Credits from the Department if any audit finding or questioned or disallowed cost is unresolved as of June 1 of each year, or for Tax Exempt Bond Developments is unresolved as of the date the Application is submitted; or

(5) At the time of Application or at any time during the two-year period preceding the date the Application Round begins (or for Tax Exempt Bond Developments any time during the two-year period preceding the date the Application is submitted to the Department), the Applicant or a Related Party is or has been:

(A) a member of the Board; or

(B) the Executive Director, a Deputy Executive Director, the Director of Multifamily Finance Production, the Director of Portfolio Management and Compliance, the Director of Real Estate Analysis, or a manager over housing tax credits employed by the Department.

(6) The Applicant proposes to replace in less than 15 years any private activity bond financing of the Development described by the Application, unless:

(A) the Applicant proposes to maintain for a period of 30 years or more 100 percent of the Development Units supported by Housing Tax Credits as rent-restricted and exclusively for occupancy by individuals and families earning not more than 50 percent of the Area Median Gross Income, adjusted for family size; and

(B) at least one-third of all the units in the Development are public housing units or Section 8 Development-based units; or,

(7) The Development is located in a municipality or, if located outside a municipality, a county, that has more than twice the state average of units per capita supported by Housing Tax Credits or private activity bonds unless the Applicant:

(A) has obtained prior approval of the Development from the governing body of the appropriate municipality or county containing the Development; and

(B) has included in the Application a written statement of support from that governing body referencing this rule and authorizing an allocation of housing tax credits for the Development; or

(8) The Applicant proposes to construct a new Development that is located one linear mile (measured by a straight line on a map) or less from a Development that:

(A) serves the same type of household as the new Development, regardless of whether the Developments serve families, elderly individuals, or another type of household;

(B) has received an allocation of Housing Tax Credits (including Tax Exempt Bond Developments) for new construction at any time during the three-year period preceding the date the application round begins; and

(C) has not been withdrawn or terminated from the Housing Tax Credit Program.

(D) An Application is not ineligible under this paragraph if:

(i) the Development is using federal HOPE VI funds received through the United States Department of Housing and Urban Development; locally approved funds received from a public improvement district or a tax increment financing district; funds provided to the state under the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. Section 12701 et seq.); or funds provided to the state and participating jurisdictions under the Housing and Community Development Act of 1974 (42 U.S.C. Section 5301 et seq.); or

(ii) the Development is located in a county with a population of less than one million; or

(iii) the Development is located outside of a metropolitan statistical area; or

(iv) the local government where the Development is to be located has by vote specifically allowed the construction of a new Development located within one linear mile or less from a Development described under subparagraphs (A) through (C) of this paragraph.

(b) Disqualification and Debarment. The Department will disqualify an Application, and/or debar a Person (see §2306.6721, Texas Government Code), if it is determined by the Department that those issues identified in paragraphs (1) through (6) of this subsection exist. The Department shall debar a Person for the longer of, one year from the date of debarment, or until the violation causing the debarment has been remedied. Causes for disqualification and debarment include:

(1) The provision of fraudulent information, knowingly false documentation, or other intentional or negligent material misrepresentation in the Application or other information submitted to the Department at any stage of the evaluation or approval process; or,

(2) The Applicant, Development Owner, Developer or Guarantor that is active in the ownership or Control of one or more other tax credit properties in the state of Texas for which credits were allocated (Carryover Allocation or issuance of 8609's) has failed to close the construction loan, failed to meet the deadline for the commencement of substantial construction, or failed to place in service buildings or removed from service buildings within the past five years, except for instances where an extension has been approved by the Department or the Board. The Department may consider the facts and circumstances on a case-by-case basis, including whether the credits were returned prior to the expiration date for re-issuance of the credits, in its sole determination of Applicant eligibility; or,

(3) The Applicant, Development Owner, Developer or Guarantor that is active in the ownership or Control of one or more other rent restricted rental housing properties in the state of Texas funded by the Department is in Material Non-Compliance with the LURA (or any other document containing an Extended Housing Commitment) or the program rules in effect for such property on the date the Application Round closes or upon the date of filing Volume I of the Application for a Tax Exempt Bond Development, and such Material-Noncompliance is not corrected as provided herein. Any corrective action documentation affecting the Material Non-Compliance status score for Applicants competing in the 2004 Application Round must be received by the Department no later than 30 days prior to the close of the Application Acceptance Period, and any corrective action documentation affecting the Material Non-Compliance status score for Applicants with a Tax Exempt Bond Development must be received by the Department no later than 30 days prior to the submission of Volumes I and II. The Department may take into consideration the representations of the Applicant regarding compliance violations described in §50.9(f)(9)(C) and (D) of this title; however, the records of the Department are Controlling; or,

(4) The Applicant, Development Owner, Developer or Guarantor that is active in the ownership or Control of one or more other rent restricted rental housing properties outside of the state of Texas has an incidence of non-compliance with the LURA or the program rules in effect for such tax credit property as reported on the Uniform Application Previous Participation Certification and/or as determined by the state regulatory authority for such state and such non-compliance is determined to be Material Non-Compliance by the Department using methodology as set forth in Chapter 60 of this title, to be proposed; or,

(5) The Applicant or the Development Owner that is active in the ownership or Control of one or more tax credit properties in the state of Texas has failed to pay in full any fees billed by the Department after the due date has passed, as further described in §50.21 of this title; or

(6) the Applicant or a Related Party, the Development Owner, or the General Contractor, or any Affiliate of the General Contractor that is active in the ownership or Control of the Development, or individual employed as a lobbyist or in another capacity on behalf of the Development, communicates with any Board member with respect to the Development during the period of time starting with the time an Application is submitted until the time the Board makes a final decision with respect to any approval of that Application, unless the communication takes place at any board meeting or public hearing held with respect to that Application. Communication with Department staff must be in accordance with §50.9(b) of this title;

violation of the communication restrictions of §50.9(b) is also a basis for disqualification and/or debarment.

(7) It is determined by the Department's General Counsel that there is evidence that establishes probable cause to believe that an Applicant, Development Owner, Developer, or any of their employees or agents has violated a state revolving door or other standard of conduct or conflict of interest statute, including Section 2306.6733, Texas Government Code, or a section of Chapter 572, Texas Government Code, in making, advancing, or supporting the Application.

(c) Certain Applicant and Development Standards. Notwithstanding any other provision of this section, the Department may not allocate tax credits to a Development proposed by an Applicant if the Department determines that:

(1) the Development is not necessary to provide needed decent, safe, and sanitary housing at rental prices that individuals or families of low and very low income or families of moderate income can afford;

(2) the Development Owner undertaking the proposed Development will not supply well-planned and well-designed housing for individuals or families of low and very low income or families of moderate income;

(3) the Development Owner is not financially responsible;

(4) the Development Owner has contracted, or will contract for the proposed Development with, a Developer that:

(A) is on the Department's debarred list, including any parts of that list that are derived from the debarred list of the United States Department of Housing and Urban Development;

(B) has breached a contract with a public agency and failed to cure that breach; or

(C) misrepresented to a subcontractor the extent to which the Developer has benefited from contracts or financial assistance that has been awarded by a public agency, including the scope of the Developer's participation in contracts with the agency and the amount of financial assistance awarded to the Developer by the agency;

(5) the financing of the housing Development is not a public purpose and will not provide a public benefit; and

(6) the Development will be undertaken outside the authority granted by this chapter to the Department and the Development Owner. (See §2306.223, Texas Government Code).

(d) Representation by Former Board Member or Other Person.

(1) A former Board member or a former executive director, deputy executive director, director of multifamily finance production, director of portfolio management and compliance, director of real estate analysis or manager over housing tax credits previously employed by the Department may not:

(A) for compensation, represent an Applicant or one of its Related Parties for an allocation of tax credits before the second anniversary of the date that the Board member's, director's, or manager's service in office or employment with the Department ceased;

(B) represent any Applicant or a Related Party of an Applicant or receive compensation for services rendered on behalf of any Applicant or Related Party regarding the consideration of an Application in which the former board member, director, or manager participated during the period of service in office or employment with the Department, either through personal involvement or because the matter was within the scope of the board member's, director's, or manager's official responsibility; or for compensation, communicate directly with a member of the legislative branch to influence legislation on behalf of an Applicant or Related Party before the second anniversary of the date that the board member's, director's, or manager's service in office or employment with the Department ceased.

(2) A Person commits an offense if the Person violates this section. An offense under this section is a Class A misdemeanor. (See §2306.6733, Texas Government Code).

(e) Appeals for Ineligibility, Disqualification and Debarment. An Applicant or Person found ineligible, disqualified, debarred or otherwise terminated under subsections (a) through (d) of this section may utilize the appeals process described in §50.18(b) of this title.

§50.6. Site and Development Restrictions: Floodplain, Ineligible Building Types, Scattered Site Limitations, Credit Amount, Limitations on the Size of Developments, Rehabilitation Costs.

(a) Floodplain. Any Development proposing new construction located within the 100 year floodplain as identified by the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps must develop the site so that all finished ground floor elevations are at least one foot above the flood plain and parking and drive areas are no lower than six inches below the floodplain, subject to more stringent local requirements. If no FEMA Flood Insurance Rate Maps are available for the proposed Development, flood zone documentation must be provided from the local government with jurisdiction identifying the 100 year floodplain. No Developments proposing rehabilitation will be permitted in the 100 year floodplain unless they already meet the requirements established in this subsection for new construction.

(b) Ineligible Building Types. Applications involving Ineligible Building Types as defined in §50.3(47) of this title will not be considered for allocation of tax credits.

(c) Scattered Site Limitations. Consistent with §50.3(28) of this title, a Development must be financed under a common plan, be owned by the same Person for federal tax purposes, and the buildings may be either located on a single site or contiguous site, or be located on scattered sites and contain only rent-restricted units.

(d) Credit Amount. The Department shall issue tax credits only in the amount needed for the financial feasibility and viability of a Development throughout the affordability period. The issuance of tax credits or the determination of any allocation amount in no way represents or purports to warrant the feasibility or viability of the Development by the Department, or that the Development will qualify for and be able to claim Housing Tax Credits. The Department will limit the allocation of tax credits to no more than $1.2 million per Development. The Department shall not allocate more than $2 million of tax credits in any given Application Round to any Applicant, Developer, Related Party or Guarantor. Tax Exempt Bond Development Applications are not subject to these Housing Tax Credit limitations, and Tax Exempt Bond Developments will not count towards the total limit on tax credits per Applicant. The limitation does not apply:

(1) to an entity which raises or provides equity for one or more Developments, solely with respect to its actions in raising or providing equity for such Developments (including syndication related activities as agent on behalf of investors);

(2) to the provision by an entity of "qualified commercial financing" within the meaning of the Code (without regard to the 80% limitation thereof);

(3) to a Qualified Nonprofit Organization or other not-for-profit entity, to the extent that the participation in a Development by such organization consists only of the provision of loan funds, grants or social services; and

(4) to a Development Consultant with respect to the provision of consulting services, provided the Development Consultant fee received for such services does not exceed 10% of the fee to be paid to the Developer (or 20% for Qualified Nonprofit Developments), or $150,000, whichever is greater.

(e) Limitations on the Size of Developments.

(1) The minimum Development size will be 16 Units.

(2) Rural Developments involving new construction will be limited to 76 Units unless the Market Analysis clearly documents that larger developments are consistent with the comparables in the community and that there is significant demand for additional Units. Rural Developments involving only rehabilitation do not have a size limitation.

(3) Developments involving new construction, that are not Tax Exempt Bond Developments, will be limited to 250 Units, wherein the maximum rent restricted Units will be limited to 200 Units. Tax Exempt Bond Developments will be limited to 250 Units. These maximum Unit limitations also apply to those Developments which involve a combination of rehabilitation and new construction. Developments that consist solely of acquisition/rehabilitation or rehabilitation only may exceed the maximum Unit restrictions. For those Developments which are a second phase or are otherwise adjacent to an existing tax credit Development unless such proposed Development is being constructed to provide replacement of previously existing affordable multifamily units on its site (in a number not to exceed the original units being replaced) or that were originally located within a one mile radius from the proposed Development, the combined Unit total for the Developments may not exceed the maximum allowable Development size, unless the first phase has been completed and has attained Sustaining Occupancy (as defined in §1.31 of this title, as proposed) for at least six months.

(f) Limitations on the Location of Developments. Staff will only recommend, and the Board may only allocate, housing tax credits to more than one Development in the same calendar year if the Developments are, or will be, located more than one linear mile apart as determined by the Department. This limitation applies only to communities contained within counties with populations exceeding one million (which for calendar year 2004 are Harris, Dallas, Tarrant and Bexar Counties). For Tax Exempt Bond Developments, the year of the Development is the calendar year in which the Board approves the housing tax credits for the Development.

(g) Rehabilitation Costs. Rehabilitation Developments must establish that the rehabilitation will substantially improve the condition of the housing and will involve at least $6,000 per Unit in direct hard costs.

(h) Unacceptable Sites. Developments will be ineligible if the Development is located on a site that is determined to be unacceptable by the Department.

§50.7. Regional Allocation Formula, Set-Asides, Redistribution of Credits.

(a) Regional Allocation Formula. As required by §2306.111, Texas Government Code, the Department uses a regional distribution formula developed by the Department to distribute credits from the State Housing Credit Ceiling to all urban/exurban areas and rural areas. The formula is based on the need for housing assistance, and the availability of housing resources in those urban/exurban areas and rural areas, and the Department uses the information contained in the Department's annual state low income housing plan and other appropriate data to develop the formula. This formula establishes separate targeted tax credit amounts for rural areas and urban/exurban areas within each of the Uniform State Service Regions. Each Uniform State Service Region's targeted tax credit amount will be published in the *Texas Register* and on the Department's web site. The regional allocation for rural areas is referred to as the Rural Regional Allocation and the regional allocation for urban/exurban areas is referred to as the Urban/Exurban Regional Allocation. Developments qualifying for the Rural Regional Allocation must meet the Rural Development definition or be located in a Prison Community.

(b) Set-Asides. An Applicant may elect to compete in as many of the following Set-Asides for which the proposed Development qualifies:

(1) At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Developments which meet the requirements of the Code, §42(h)(5). Qualified Nonprofit Organizations must have the Controlling interest in the Qualified Nonprofit Development applying for this Set-Aside. If the organization's Application is filed on behalf of a limited partnership, the Qualified Nonprofit Organization must be the sole managing General Partner. If the organization's Application is filed on behalf of a limited liability company, the Qualified Nonprofit Organization must be the sole Managing Member. Additionally, a Qualified Nonprofit Development submitting an Application in the nonprofit set-aside must have the nonprofit entity or its nonprofit affiliate or subsidiary be the Developer or a co-Developer as evidenced in the development agreement and must receive at least 51% of the developer fee as stated in the development agreement.

(2) Approximately 5% of the State Housing Credit Ceiling for each calendar year shall be allocated to Developments which are financed through TX-USDA-RHS, meet the definition of a Rural Development, and do not exceed 76 Units if new construction. However, these Developments will be attributed to the Rural Regional Allocation in each region where they are located. Developments financed through TX-USDA-RHS's 538 Guaranteed Rural Rental Housing Program will not be considered under this set-aside.

(3) At least 15% of the allocation to each Uniform State Service Region will be set aside for allocation under the At-Risk Development Set-Aside. Through this Set-Aside, the Department, to the extent possible, shall allocate credits to Applications involving the preservation of developments designated as At-Risk Developments as defined in §50.3(12) of this title and in both urban/exurban and rural communities in approximate proportion to the housing needs of each Uniform State Service Region. A Housing Authority proposing reconstruction of public housing supplemented with HOPE VI funding will be eligible to participate in this set-aside. In order to qualify for this set-aside, the housing authority providing the HOPE VI funding must provide evidence that it received a HOPE VI grant from HUD and made a commitment that HOPE VI funds will be provided to the Development. To qualify as an At-Risk Development, the Applicant must provide evidence that it either is not eligible to renew, retain or preserve any portion of the financial benefit described in §50.3(12)(A) of this title, or provide evidence that it will renew, retain or preserve the financial benefit described in §50.3(12)(A) of this title.

(c) Redistribution of Credits. If any amount of housing tax credits remain after the initial commitment of housing tax credits among the Rural Regional Allocation and Urban/Exurban Regional Allocation within each Uniform State Service Region and among the Set-Asides, the Department may redistribute the credits amongst the different regions and Set-Asides depending on the quality of Applications submitted as evaluated under the factors described in §50.9(c) of this title and the level of demand exhibited in the Uniform State Service Regions during the Allocation Round. However as described in subsection (b)(1) of this section, no more than 90% of

the State's Housing Credit Ceiling for the calendar year may go to Developments which are not Qualified Nonprofit Developments. If credits will be transferred from a Uniform State Service Region which does not have enough qualified Applications to meet its regional credit distribution amount, then those credits will be apportioned to the other Uniform State Service Regions.

§50.8. Pre-Application: Submission, Evaluation Process, Threshold Criteria and Review, Results.

(a) Pre-Application Submission. Any Applicant requesting a Housing Credit Allocation may submit a Pre-Application to the Department during the Pre-Application Acceptance Period along with the required Pre-Application Fee as described in §50.21 of this title. Only one Pre-Application may be submitted by an Applicant for each site under the State Housing Credit Ceiling. The Pre-Application submission is a voluntary process. While the Pre-Application Acceptance Period is open, Applicants may withdraw their Pre-Application and subsequently file a new Pre-Application utilizing the original Pre-Application Fee that was paid as long as no evaluation was performed by the Department. The Department is authorized to request the Applicant to provide additional information it deems relevant to clarify information contained in the Pre-Application or to submit documentation for items it considers to be Administrative Deficiencies. The rejection of a Pre-Application shall not preclude an Applicant from submitting an Application with respect to a particular Development or site at the appropriate time.

(b) Communication with the Department. Applicants that submit a Pre-Application are restricted from communication with Department staff as provided in §50.9(b) of this title.

(c) Pre-Application Evaluation Process. Eligible Pre-Applications will be evaluated for Pre-Application Threshold Criteria, and if requested by the Applicant, evaluated in regard to the inclusive capture rate as restricted under §1.32(g)(2) of this title, as proposed. Any Application from a TX-USDA-RHS 515 Development (including new construction and rehabilitation) is exempted from the Pre-Application Evaluation Process and is not eligible to receive points for submission of a Pre-Application. An Application that has not received confirmation from the state office of RHS of its financing from TX-USDA-RHS may qualify for Pre-Application points, but such points shall be withdrawn upon the Development's receipt of TX-USDA-RHS financing. Pre-Applications that are found to have Administrative Deficiencies will be handled in accordance with §50.9(d)(3) of this title.

(d) Pre-Application Threshold Criteria and Review. Applicants submitting a Pre-Application will be required to submit information demonstrating their satisfaction of the Pre-Application Threshold Criteria. The Pre-Applications not meeting the Pre-Application Threshold Criteria will be terminated and the Applicant will receive a written notice to the effect that the Pre-Application Threshold Criteria have not been met. The Department shall not be responsible for the Applicant's failure to meet the Pre-Application Threshold Criteria and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Pre-Application Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled . The Pre-Application Threshold Criteria include:

(1) Submission of a "Pre-Application Submission Form" and "Pre-Application Self-Scoring Form," and

(2) Evidence of site control as evidenced by the documentation required under §50.9(f)(7)(A) of this title.

(3) Consistent with §50.9(f)(8)(B) of this title, evidence that all of the notifications required under that section have been made prior to the close of the Pre-Application Acceptance Period.

(e) Pre-Application Results. Only Pre-Applications which have satisfied all of the Pre-Application Threshold Criteria requirements set forth in subsection (c) of this section and §50.9(g)(18) of this title, will be eligible for Pre-Application points. The order and scores of those Developments released on the Pre-Application Submission Log do not represent a commitment on the part of the Department or the Board to allocate tax credits to any Development and the Department bears no liability for decisions made by Applicants based on the results of the Pre-Application Submission Log. Inclusion of a Development on the Pre-Application Submission Log does not ensure that an Applicant will receive points for a Pre-Application.

§50.9. Application: Submission, Adherence to Obligations, Evaluation Process, Required Pre-Certification and Acknowledgement, Threshold Criteria, Selection Criteria, Evaluation Factors, Staff Recommendations.

(a) Application Submission. Any Applicant requesting a Housing Credit Allocation or a Determination Notice must submit an Application, and the required Application fee as described in §50.21 of this title, to the Department during the Application Acceptance Period. A complete Application may be submitted at any time during the Application Acceptance Period, and is not limited to submission after the close of the Pre-Application Cycle. Only one Application may be submitted for a site in an Application Round. While the Application Acceptance Period is open, Applicants may withdraw their Application and subsequently file a new Application utilizing the original Pre-Application Fee that was paid as long as no evaluation was performed by the Department. The Department is authorized, but not required, to request the Applicant to provide additional information it deems relevant to clarify information contained in the Application or to submit documentation for items it considers to be an Administrative Deficiency, including both threshold and selection criteria documentation. An Applicant may not change or supplement an Application in any manner after the filing deadline, except in response to a direct request from the Department to remedy an Administrative Deficiency as further described in §50.3(1) of this title or to the amendment of an Application after a commitment or allocation of tax credits as further described in §50.18 of this title.

(b) Communication with the Department. Applicants that submit a Pre-Application or Application are restricted from communication with Department staff as described in this subsection. The Applicant or a Related Party, the Development Owner, or the General Contractor, or any Affiliate of the General Contractor, that is active in the ownership or Control of the Development, or individual employed as a lobbyist or in another capacity on behalf of the Development, may communicate with an employee of the Department with respect to the Development so long as that communication satisfies the conditions established under paragraphs (1) through (5) of this subsection. §50.5(b)(6) of this title applies to all communication with Board members. Communications with Department employees is unrestricted during any board meeting or public hearing held with respect to that Application.

(1) The communication must be restricted to technical or administrative matters directly affecting the Application;

(2) The communication must occur or be received on the premises of the Department during established business hours;

(3) Communication with the Executive Director, the Deputy Executive Director, the Director of Multifamily Finance Production, the Director of Single Family Finance Production, the Director of Portfolio Management and Compliance, and the Director of Real Estate Analysis of the Department must only be in written form which includes electronic communication through the Internet; and

(4) Communication with other Department staff may be oral or in written form which includes electronic communication through the Internet; and

(5) a record of the communication must be maintained by the Department and included with the Application for purposes of board review and must contain the date, time, and means of communication; the names and position titles of the persons involved in the communication and, if applicable, the person's relationship to the Applicant; the subject matter of the communication; and a summary of any action taken as a result of the communication.

(c) Adherence to Obligations. All representations, undertakings and commitments made by an Applicant in the application process for a Development, whether with respect to Threshold Criteria, Selection Criteria or otherwise, shall be deemed to be a condition to any Commitment Notice, Determination Notice, or Carryover Allocation for such Development, the violation of which shall be cause for cancellation of such Commitment Notice, Determination Notice, or Carryover Allocation by the Department, and if concerning the ongoing features or operation of the Development, shall be enforceable even if not reflected in the LURA. All such representations are enforceable by the Department and the tenants of the Development, including enforcement by administrative penalties for failure to perform, in accordance with the LURA.

(d) Evaluation Process. Applications will be reviewed according to the process outlined in this subsection.

(1) Threshold Criteria Review. Applications will be initially evaluated against the Threshold Criteria. Applications not meeting Threshold Criteria will be terminated, unless the Department determines that the failure to meet the Threshold Criteria is the result of Administrative Deficiencies, in which event the Applicant may be given an opportunity to correct such deficiencies. Applications not meeting Threshold Criteria will be rejected and the Applicant will be provided a written notice to the effect that the Threshold Criteria have not been met. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled.

(2) Selection Criteria Review. For an Application to be considered under the Selection Criteria, the Applicant must demonstrate that the Development meets all of the Threshold Criteria requirements. Applications that satisfy the Threshold Criteria will then be scored and ranked according to the Selection Criteria listed in subsection (g) of this section. Where a particular scoring criterion involves multiple points, the Department will award points to the proportionate degree, in its determination, to which a proposed Development complied with that criterion. Applications not scored by the Department's staff shall be deemed to have the points allocated through self-scoring by the Applicants until actually scored. This shall apply only for purposes of releasing the Submission Log in ranked order by score.

(3) Administrative Deficiencies. If an Application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies. The Department staff may request clarification or correction in a deficiency notice in the form of a facsimile and a telephone call to the Applicant advising that such a request has been transmitted. If Administrative Deficiencies are not clarified or corrected to the satisfaction of the Department within three business days of the deficiency notice date, then five points shall be deducted from the Selection Criteria score for each additional day the deficiency remains unresolved. If deficiencies are not clarified or corrected within five business days from the deficiency notice date, then the Application shall be terminated. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period.

(4) Subsequent Evaluation of Prioritized Applications. After the Application is scored under the Selection Criteria, the Department will assign, as herein described, Developments for review for financial feasibility by the Department's Real Estate Analysis Division. This prioritization order will also be used in making recommendations to the Board. Assignments will be determined by first selecting the Applications with the highest scores in the Nonprofit and USDA Set-Asides statewide. Then selection will be made for the Applications with the highest scores in the At-Risk Set-Aside within each Uniform State Service Region. Remaining funds within each Uniform State Service Region will then be selected based on the highest scoring Developments, regardless of Set-Aside, in accordance with the requirements under §50.7(a) of this title for a Rural Regional Allocation and Urban/Exurban Regional Allocation. Selection for each of the Set-Asides will take precedence over selection for the Rural Regional Allocation and Urban/Exurban Regional Allocation. Funds for the Rural Regional Allocation within a region, for which there are no eligible feasible applications, will go to the Urban/Exurban Regional Allocation for that region and will not be shifted to Rural Developments in another region. If the Department determines that an allocation recommendation would cause a violation of the $2 million limit described in §50.6(d) of this title, the Department will make its recommendation by selecting the Development(s) that most effectively satisfies(y) the Department's goals in meeting set-aside and regional allocation goals. Based on Application rankings, the Department shall continue to underwrite Applications until the Department has processed enough Applications satisfying the Department's underwriting criteria to enable the allocation of all available housing tax credits according to regional allocation goals and Set-Aside categories. To enable the Board to establish a Waiting List, the Department shall underwrite as many additional Applications as necessary to ensure that all available housing tax credits are allocated within the period required by law.

(5) Underwriting Evaluation and Criteria. The Department shall underwrite an Application to determine the financial feasibility of the Development and an appropriate level of housing tax credits. In determining an appropriate level of housing tax credits, the Department shall, at a minimum, evaluate the cost of the Development based on acceptable cost parameters as adjusted for inflation and as established by historical final cost certifications of all previous housing tax credit allocations for the county in which the Development is to be located; if certifications are unavailable for the county, then the metropolitan statistical area in which the Development is to be located; or if certifications are unavailable under the county or the metropolitan statistical area, then the Uniform State Service Region in which the Development is to be located. Underwriting of a Development will include a determination by the Department, pursuant to the Code, §42, that the amount of credits recommended for commitment to a Development is necessary for the financial feasibility of the Development and its long-term viability as a qualified rent restricted housing property. In making this determination, the Department will use the Underwriting Rules and Guidelines, §1.32 of this title, as proposed. Receipt of feasibility points under §50.9(g)(1) of this title does not ensure that an Application will be considered feasible during the feasibility evaluation by the Real Estate Analysis Division and conversely, a Development may be found feasible during the feasibility evaluation by the Real Estate Analysis Division even if it did not receive points under §50.9(g)(1) of this title.

(A) The Department may have an external party perform the underwriting evaluation to the extent it determines appropriate. The expense of any external underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation.

(B) The Department will reduce the Applicant's estimate of Developer's and/or Contractor fees in instances where these exceed the fee limits determined by the Department. In the instance where the Contractor is an Affiliate of the Development Owner and both parties are claiming fees, Contractor's overhead, profit, and general requirements, the Department shall be authorized to reduce the total fees estimated to a level that it determines to be reasonable under the circumstances. Further, the Department shall deny or reduce the amount of Housing Tax Credits allocated with respect to any portion of costs which it deems excessive or unreasonable. The Department also may require bids or Third Party estimates in support of the costs proposed by any Applicant.

(6) Compliance Evaluation. After the Department has determined which Developments will be reviewed for financial feasibility, those same Developments will be reviewed for evaluation of the compliance status of all members of the ownership structure by the Department's Portfolio Management and Compliance Division, in accordance with Chapter 60 of this title, as proposed.

(7) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by the Department. Such inspection will evaluate the site based upon the criteria set forth in the Site Evaluation form provided in the Application and the inspector shall provide a written report of such site evaluation. The evaluations shall be based on the condition of the surrounding neighborhood, including appropriate environmental and aesthetic conditions and proximity to retail, medical, recreational, and educational facilities, and employment centers. The site's appearance to prospective tenants and its accessibility via the existing transportation infrastructure and public transportation systems shall be considered. "Unacceptable" sites include, without limitation, those containing a non-mitigable environmental factor that may adversely affect the health and safety of the residents. For Developments applying under the TX-USDA-RHS Set-Aside, the Department may rely on the physical site inspection performed by TX-USDA-RHS.

(e) Required Pre-Certification and Acknowledgement Procedures. No later than 7 days prior to the close of the Application Acceptance Period, an Applicant must submit the documents required in this subsection to obtain the required pre-certification and acknowledgement.

(1) Experience Certificate. Upon receipt of the evidence required under this paragraph, a certification from the Department will be provided to the Applicant for inclusion in their Application(s). Evidence must show that one of the Development Owner's General Partners, the Developer or their Principals have a record of successfully constructing or developing residential units in the capacity of owner, General Partner or Developer. If a Public Housing Authority organized an entity for the purpose of developing residential units the Public Housing Authority shall be considered a principal for the purpose of this requirement. If the individual requesting the certification was not the Development Owner, General Partner or Developer, but was the individual within one of those entities doing the work associated with the development of the units, the individual must show that the units were successfully developed as required below, and also provide written confirmation from the entity involved stating that the individual was the person responsible for the development. If rehabilitation experience is being claimed to qualify for an Application involving new construction, then the rehabilitation must have been substantial and involved at least $6,000 of direct hard cost per unit.

(A) The term "successfully" is defined as acting in a capacity as the owner, General Partner, or Developer of:

(i) at least 100 residential units; or

(ii) at least 36 residential units if the Development applying for credits is a Rural Development.

(B) One of the following documents must be submitted: American Institute of Architects (AIA) Document A111 - Standard Form of Agreement Between Owner & Contractor, AIA Document G704 - Certificate of Substantial Completion, IRS Form 8609, HUD Form 9822, development agreements, partnership agreements, or other documentation satisfactory to the Department verifying that the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member), Developer or their Principals have the required experience. If submitting the IRS Form 8609, only one form per Development is required. The evidence must clearly indicate:

(i) that the Development has been completed (i.e. Development Agreements, Partnership Agreements, etc. must be accompanied by certificates of completion.);

(ii) that the names on the forms and agreements tie back to the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member), Developer or their Principals as listed in the Application; and

(iii) the number of units completed or substantially completed.

(2) Financial Statement and Authorization to Release Credit Information. Upon receipt of the evidence required under this paragraph, an acknowledgement from the Department will be provided to the Applicant for inclusion in their Application(s). A "Financial Statement and Authorization to Release Credit Information" must be completed and signed for any General Partner, Developer or Guarantor and any Person that has 10% or more ownership interest in the Development Owner, General Partner, Developer, or Guarantor. Nonprofit entities, public housing authorities and publicly traded corporations are only required to submit documentation for the entities involved; documentation for individual board members and executive directors is not required for this exhibit. The statement must not be older than 90 days from the date of submission. If submitting partnership or corporate financials in addition to the statements of individuals, the certified financial statements, or audited financial statements, if available, should be for the most recent fiscal year ended 90 days prior to the day the documentation is submitted. This document is required for an entity even if the entity is wholly-owned by a Person who has submitted this document as an individual. Entities that have not yet been formed and entities that have been formed recently but have no assets, liabilities, or net worth are not required to submit this documentation, but must submit a statement with their Application that this is the case.

(3) Previous Participation. Upon receipt of the evidence required under this paragraph, an acknowledgement from the Portfolio Management and Compliance Division will be provided to the Applicant for inclusion in their Application(s). A completed and executed "Previous Participation and Background Certification Form" as provided in the Application Submission Procedures Manual must be provided for each entity shown on an organizational chart as described in subsection (f)(9)(A) of this section that has 10% or more ownership interest in the Development Owner, Developer or Guarantor. Nonprofit entities, public housing authorities and publicly traded corporations are

only required to submit documentation for the entities involved; documentation for individual board members and executive directors is not required for this exhibit. Any Person receiving more than 10% of the Developer fee will also be required to submit documents for this exhibit. The 2004 versions of these forms, as required in the Uniform Application, must be submitted. Units of local government are also required to submit this document. The form must include a list of all developments that are, or were, previously under ownership or Control of the Person. All participation in any TDHCA funded or monitored activity, including non-housing activities, must be disclosed.

(4) National Previous Participation. Upon receipt of the evidence required under this paragraph, an acknowledgement from the Portfolio Management and Compliance Division will be provided to the Applicant for inclusion in their Application(s). If the Development Owner or any of its Affiliates shown on the organizational chart described in subsection (f)(9)(A) of this section that have 10% or more ownership interest in the Development Owner have, or have had, ownership or Control of affordable housing, being housing that receives any form of financing and/or assistance from any Governmental Entity for the purpose of enhancing affordability to persons of low or moderate income, outside the state of Texas, then evidence must be submitted that such Persons have sent the "National Previous Participation and Background Certification Form" to the appropriate Housing Credit Agency for each state in which they have developed or operated affordable housing. Nonprofit entities and public housing authorities are only required to submit documentation for the entity itself; documentation for board members and executive directors is not required for this exhibit. Any Person receiving more than 10% of the Developer fee will also be required to submit documents for this exhibit. This form is only necessary when the Developments involved are outside the state of Texas. An original form is not required. Evidence of such notification shall be a copy of the form sent to the agency and proof of delivery in the form of a certified mail receipt, overnight mail receipt, or confirmation letter from the agency.

(f) Threshold Criteria. The following Threshold Criteria listed in paragraphs (1) through (15) of this subsection are mandatory requirements at the time of Application submission:

(1) Completion and submission of the Application provided in the Application Submission Procedures Manual, which includes the entire Uniform Application and any other supplemental forms which may be required by the Department.

(2) Completion and submission of the Site Packet (Volume 2) as provided in the Application Submission Procedures Manual.

(3) Set-Aside Eligibility. Documentation must be provided that confirms eligibility for all Set-Asides under which the Application is seeking funding as required in the Application Submission Procedures Manual.

(4) Certifications. The "Certification Form" provided in the Application Submission Procedures Manual confirming the following items:

(A) A certification of the basic amenities selected for the Development. The amenities selected must be made available for the benefit of all tenants. If fees in addition to rent are charged for amenities reserved for an individual tenant's use, then the amenity may not be included among those provided to complete this exhibit. Developments with more than 36 units must provide all four of the amenities provided in clauses (i) through (iv) of this subparagraph. Developments with 36 Units or less and/or Developments receiving funding from TX-USDA-RHS must provide at least two of the amenities provided in clauses (i) through (iv) of this subparagraph. Any future changes in these amenities, or substitution of these amenities, may result in a decrease in awarded credits if the substitution or change includes a decrease in cost or in a cancellation of a Commitment Notice or Carryover Allocation if the Threshold Criteria are no longer met.

(i) Full perimeter fencing;

(ii) community laundry room and/or laundry hook-ups in Units (no hook-up fees of any kind may be charged to a tenant for use of the hook-ups);

(iii) a furnished community room;

(iv) public telephone(s) available to tenants 24 hours a day;

(B) A certification that the Development will have all of the following Unit Amenities. If fees in addition to rent are charged for amenities, then the amenity may not be included among those provided to complete this exhibit. Any future changes in these amenities, or substitution of these amenities, may result in a decrease in awarded credits if the substitution or change includes a decrease in cost or in a cancellation of a Commitment Notice or Carryover Allocation if the Threshold Criteria are no longer met.

(i) Computer line/phone jack available in all bedrooms (only one phone line needed);

(ii) Mini blinds or window coverings for all windows;

(iii) Dishwasher and Disposal (not required for TX-USDA-RHS Developments);

(iv) Refrigerator;

(v) Oven/Range;

(vi) Exhaust/vent fans in bathrooms;

(vii) Ceiling fans in living areas and bedrooms; and

(viii) be designed in accordance with International Building Code.

(C) A certification that the Development will adhere to the Texas Property Code relating to security devices and other applicable requirements for residential tenancies, and will adhere at a minimum to the International Building Codes or other locally adopted building codes.

(D) A certification that the Applicant is in compliance with state and federal laws, including but not limited to, fair housing laws, including Chapter 301, Property Code, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. Section 3601 et seq.), and the Fair Housing Amendments Act of 1988 (42 U.S.C. Section 3601 et seq.); the Civil Rights Act of 1964 (42 U.S.C. Section 2000a et seq.); the Americans with Disabilities Act of 1990 (42 U.S.C. Section 12101 et seq.); and the Rehabilitation Act of 1973 (29 U.S.C. Section 701 et seq.).

(E) A certification that the Applicant will attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses, and that the Applicant will submit a report at least once in each 90-day period following the date of the Commitment Notice until the Cost Certification is submitted, in a format prescribed by the Department and provided at the time a Commitment Notice is received, on the percentage of businesses with which the Applicant has contracted that qualify as Minority Owned Businesses.

(F) A certification that the Development will comply with the accessibility standards that are required under Section 504,

Rehabilitation Act of 1973 (29 U.S.C. Section 794), and specified under 24 C.F.R. Part 8, Subpart C. This includes that for all Developments, a minimum of five percent of the total dwelling Units or at least one Unit, whichever is greater, shall be made accessible for individuals with mobility impairments. A Unit that is on an accessible route and is adaptable and otherwise compliant with sections 3-8 of the Uniform Federal Accessibility Standards (UFAS), shall be deemed to meet this requirement. An additional two percent of the total dwelling Units, or at least one Unit, whichever is greater, shall be accessible for individuals with hearing or vision impairments. Additionally, in Developments where some Units are two-stories and are normally exempt from Fair Housing accessibility requirements, a minimum of 20% of each Unit type (i.e. one bedroom, two bedroom, three bedroom) must provide an accessible entry level in compliance with the Fair Housing Guidelines, and include a minimum of one bedroom and one bathroom or powder room at the entry level. At the construction loan closing, a certification from an accredited architect will be required stating that the Development was designed in conformance with these standards and that all features have been or will be installed to make the Unit accessible for individuals with mobility impairments or individuals with hearing or vision impairments. A similar certification will also be required after the Development is completed. This requirement applies to all Developments including new construction and rehabilitation.

(G) A certification that the Development will adhere to the 2000 International Energy Conservation Code (IECC) and the Department's Minimum Standard Energy Saving Devices in the construction of each tax credit Unit, historic preservation codes notwithstanding. Minimum Standard Energy Saving Measures are identified in clauses (i) through (v) of this subparagraph. All Units must be air-conditioned. The measures must be certified by the Development architect as being included in the design of each tax credit Unit prior to the closing of the construction loan and in actual construction upon Cost Certification.

(i) Insulation values must meet the 2000 International Energy Conservation Code (IECC) for the region in which the development is located. Developments must also include soffit and ridge vents and insulated windows;

(ii) If newly installed, Energy Star or equivalently rated air handler and condenser; or heating and cooling systems with minimum SEER 12 A/C and 90% AFUE furnace if using gas; or in dry climates an evaporative cooling system may replace the Energy Star cooling system;

(iii) Water heaters to have an energy factor no less than .93 for electric or greater than .62 for gas;

(iv) Maximum 2.5 gallon/minute showerheads and maximum 1.5 gallon/minute faucet aerators; and

(v) Installation of ceiling fans in living room and each sleeping room.

(H) A certification that the Development will be built by a General Contractor that satisfies the requirements of the General Appropriation Act, Article VII, Rider 7(c) applicable to the Department which requires that the General Contractor hired by the Development Owner or the Applicant, if the Applicant serves as General Contractor, must demonstrate a history of constructing similar types of housing without the use of federal tax credits.

(I) A certification that the Development Owner agrees to establish a reserve account consistent with §2306.186 Texas Government Code and as further described in Chapter 60 of this title, to be proposed.

(5) Design Items. This exhibit will provide:

(A) All of the architectural drawings identified in clauses (i) through (iv) of this subparagraph. While full size design or construction documents are not required, the drawings must have an accurate and legible scale and show the dimensions. All Developments involving new construction, or conversion of existing buildings not configured in the Unit pattern proposed in the Application, must provide all of the items identified in clauses (i) through (iv) of this subparagraph. For Developments involving rehabilitation for which the Unit configurations are not being altered, only the items identified in clauses (i) and (ii) of this subparagraph are required:

(i) a site plan which:

(I) is consistent with the number of Units and Unit mix specified in the "Rent Schedule" provided in the Application;

(II) identifies all residential and common buildings and amenities; and

(III) clearly delineates the flood plain boundary lines and all easements shown in the site survey;

(ii) floor plans for each type of residential building and each type of common area building;

(iii) floor plans and elevations for each type of residential building and each common area building clearly depicting the height of each floor and a percentage estimate of the exterior composition; and

(iv) Unit floor plans for each type of Unit showing special accessibility and energy features. The net rentable areas these Unit floor plans represent should be consistent with those shown in the "Rent Schedule" provided in the application. For purposes of completing the Rent Schedule for loft or studio type Units (which still must meet the definition of Bedroom), a Unit with 650 square feet or less is considered not more than a one-bedroom Unit, a Unit with 651 to 900 square feet is considered not more than a two-bedroom Unit and a Unit with greater than 900 square feet is considered not more than a three-bedroom Unit; and

(B) A boundary survey of the proposed Development site and of the property purchased. In cases where more property is purchased than the proposed site of the Development, the survey or plat must show the survey calls for both the larger site and the subject site. The survey does not have to be recent; but it must show the property purchased and the property proposed for development. In cases where the site of the Development is only a part of the site being purchased, the depiction or drawing of the Development portion may be professionally compiled and drawn by an architect, engineer or surveyor.

(C) Rehabilitation Developments must submit photographs of the existing signage, typical building elevations and interiors, existing Development amenities, and site work. These photos should clearly document the typical areas and building components which exemplify the need for rehabilitation.

(6) Evidence of the Development's development costs and corresponding credit request and syndication information as described in subparagraphs (A) through (G) of this paragraph.

(A) A written narrative describing the financing plan for the Development, including any non-traditional financing arrangements; the use of funds with respect to the Development; the funding sources for the Development including construction, permanent and bridge loans, rents, operating subsidies, and replacement reserves; and the commitment status of the funding sources for the Development. This information must be consistent with the information provided throughout the Application.

(B) All Developments must submit the "Development Cost Schedule" provided in the Application Submission Procedures Manual. This exhibit must have been prepared and executed not more than 6 months prior to the close of the Application Acceptance Period.

(C) Provide a letter of commitment from a syndicator that, at a minimum, provides an estimate of the amount of equity dollars expected to be raised for the Development in conjunction with the amount of housing tax credits requested for allocation to the Development Owner, including pay-in schedules, syndicator consulting fees and other syndication costs. No syndication costs should be included in the Eligible Basis.

(D) For Developments located in a Qualified Census Tract (QCT) as determined by the Secretary of HUD and qualifying for a 30% increase in Eligible Basis, pursuant to the Code, §42(d)(5)(C), Applicants must submit a copy of the census map clearly showing that the proposed Development is located within a QCT. Census tract numbers must be clearly marked on the map, and must be identical to the QCT number stated in the Department's Reference Manual.

(E) Rehabilitation Developments must submit a Property Condition Assessment performed in accordance with §1.36 of this title, as proposed, Property Condition Assessment Guidelines. This report is not required for Developments which are able to provide a current Property Condition Assessment from TX-USDA-RHS.

(F) If offsite costs are included in the budget as a line item, or embedded in the site acquisition contract, or referenced in the utility provider letters, then the supplemental form "Off Site Cost Breakdown" must be provided.

(G) If projected site work costs include unusual or extraordinary items or exceed $7,500 per Unit, then the Applicant must provide a detailed cost breakdown prepared by a Third Party engineer or architect, and a letter from a certified public accountant allocating which portions of those site costs should be included in Eligible Basis and which ones may be ineligible.

(7) Evidence of readiness to proceed as evidenced by at least one of the items under each of subparagraphs (A) through (D) of this paragraph:

(A) Evidence of site control in the name of Development Owner. If the evidence is not in the name of the Development Owner, then the documentation should reflect an expressed ability to transfer the rights to the Development Owner. All individual Persons who are members of the ownership entity of the seller of the proposed site must be identified at the time of Application (not required at Pre-Application). One of the following items described in clauses (i) through (iii) of this subparagraph must be provided:

(i) a recorded warranty deed; or

(ii) a contract for sale or lease (the minimum term of the lease must be at least 45 years) which is valid for the entire period the Development is under consideration for tax credits or at least 90 days, whichever is greater; or

(iii) an exclusive option to purchase which is valid for the entire period the Development is under consideration for tax credits or at least 90 days, whichever is greater.

(B) Evidence from the appropriate local municipal authority that satisfies one of clauses (i) through (iii) of this subparagraph. Documentation must have been prepared and executed not more than 6 months prior to the close of the Application Acceptance Period.

(i) a letter from the chief executive officer of the political subdivision or another local official with appropriate jurisdiction stating that the Development is located within the boundaries of a political subdivision which does not have a zoning ordinance;

(ii) a letter from the chief executive officer of the political subdivision or another local official with appropriate jurisdiction stating that:

(I) the Development is permitted under the provisions of the zoning ordinance that applies to the location of the Development or that there is not a zoning requirement; or

(II) the Applicant is in the process of seeking the appropriate zoning and has signed and provided to the political subdivision a release agreeing to hold the political subdivision and all other parties harmless in the event that the appropriate zoning is denied, and a time schedule for completion of appropriate zoning. The Applicant must also provide at the time of Application a copy of the application for appropriate zoning filed with the local entity responsible for zoning approval and proof of delivery of that application in the form of a signed certified mail receipt, signed overnight mail receipt, or confirmation letter from said official. No later than April 1, 2004 (or for Tax Exempt Bond Developments no later than 14 days before the Board meeting where the credits will be committed), the Applicant must submit to the Department written evidence that the local entity responsible for initial approval of zoning has approved the appropriate zoning and that it will recommend approval of appropriate zoning to the entity responsible for final approval of zoning decisions (city council or county commission). If this evidence is not provided on or before April 1, 2004, the Application will be terminated. Final approval of appropriate zoning must be achieved and documentation of acceptable zoning for the Development, as proposed in the Application, must be provided to the Department at the time the Commitment Fee, or Determination Notice Fee, is paid. If this evidence is not provided with the Commitment Fee, any commitment of credits will be rescinded.

(iii) In the case of a rehabilitation Development, if the property is currently a non-conforming use as presently zoned, a letter which discusses the items in subclauses (I) through (IV) of this clause:

(I) a detailed narrative of the nature of non-conformance;

(II) the applicable destruction threshold;

(III) owner's rights to reconstruct in the event of damage; and

(IV) penalties for noncompliance.

(C) Evidence of interim and permanent financing sufficient to fund the proposed Total Housing Development Cost less any other funds requested from the Department and any other sources documented in the Application. Such evidence must be consistent with the sources and uses of funds represented in the Application and shall be provided in one or more of the following forms described in clauses (i) through (iv) of this subparagraph:

(i) bona fide financing in place as evidenced by a valid and binding loan agreement and a deed(s) of trust in the name of the Development Owner and/or expressly allows the transfer to the Development Owner; or,

(ii) bona fide commitment or term sheet for the interim and permanent loans issued by a lending institution or mortgage company that is actively and regularly engaged in the business of lending money which is addressed to the Development Owner and which has been executed by the lender (the term of the loan must be for a minimum of 15 years with at least a 30 year amortization). The commitment must state an expiration date and all the terms and conditions

applicable to the financing including the mechanism for determining the interest rate, if applicable, and the anticipated interest rate and any required Guarantors. Such a commitment may be conditional upon the completion of specified due diligence by the lender and upon the award of tax credits; or,

(iii) any Federal, State or local gap financing, whether of soft or hard debt, must be identified at the time of Application. At a minimum, evidence from the lending agency that an application for funding has been made and a term sheet which clearly describes the amount and terms of the funding, and the date by which the funding determination will be made and any commitment issued, must be submitted. Evidence of application for funding from another Department program is not required except as indicated on the Uniform Application, as long as the Department funding is on a concurrent funding period with the Application submitted and the Applicant clearly indicates that such an application has been filed as required by the Application Submission Procedures Manual. No later than 14 days before the date of the Board meeting at which staff will make their initial recommendations for credit allocation to the Board, the Applicant or Development Owner must either provide evidence of a commitment for the required financing to the Department or notify the Department that no commitment was received. If the required financing commitment has not been received by that date, the Application will be reevaluated for financial feasibility; if determined to be feasible the Department may proceed with an allocation recommendation; or

(iv) if the Development will be financed through Development Owner contributions, provide a letter from an Third Party CPA verifying the capacity of the Development Owner to provide the proposed financing with funds that are not otherwise committed together with a letter from the Development Owner's bank or banks confirming that sufficient funds are available to the Development Owner. Documentation must have been prepared and executed not more than 6 months prior to the close of the Application Acceptance Period.

(D) Provide the documents in clause (i) of this subparagraph and either of the documents described in clauses (ii) and (iii) of this subparagraph, and satisfying the requirements of clause (iv) of this subparagraph, if applicable:

(i) a copy of the full legal description

(ii) a copy of the current title policy which shows that the ownership (or leasehold) of the land/Development is vested in the exact name of the Development Owner; or

(iii) a copy of a current title commitment with the proposed insured matching exactly the name of the Development Owner and the title of the land/Development vested in the exact name of the seller or lessor as indicated on the sales contract or lease.

(iv) if the title policy or title commitment is more than six months old as of the day the Application Acceptance Period closes, then a letter from the title company indicating that nothing further has transpired on the policy or commitment.

(8) Evidence of all of the notifications described in subparagraphs (A) through (E) of this paragraph. Such notices must be prepared in accordance with the "Public Notifications" statement provided in the Application Submission Procedures Manual.

(A) A copy of the public notice published in the most widely circulated newspaper in the area in which the proposed Development will be located. The newspaper must be intended for the general population and may not be a business newspaper or other specialized publication. Such notice must run at least twice within a thirty day period. Such notice must be published prior to the submission of the Application to the Department and can not be older than three months from the first day of the Application Acceptance Period. In communities located within a Metropolitan Statistical Area the notice must be published in the newspapers of both the Development community and the Metropolitan Statistical Area. Developments that involve rehabilitation and which are already serving low income residents are not required to provide this exhibit.

(B) Evidence of notification meeting the requirements identified in clause (i) of this subparagraph to all of the individuals and entities identified in clause (ii) of this subparagraph. Evidence of such notifications shall include a copy of the exact letter and other materials that were sent to the individual or entity and proof of delivery in the form of a signed certified mail receipt, signed overnight mail receipt, or confirmation letter from said official. Proof of notification must not be older than three months from the first day of the Application Acceptance Period. If evidence of these notifications was submitted with the Pre-Application Threshold for the same Application and satisfied the Department's review of Pre-Application Threshold, then no additional notification is required at Application.

(i) Each such notice must include, at a minimum, all of the following:

(I) The Applicant's name, address, individual contact name and phone number;

(II) The Development name, address, city and county;

(III) A statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(IV) Statement of whether the Development proposes new construction or rehabilitation;

(V) The type of Development being proposed (single family homes, duplex, apartments, townhomes, highrise etc.);

(VI) The total number of Units and total number of low income Units;

(VII) The percentage of Units serving each level of AMGI (e.g. 20% at 50% of AMGI, etc.) and the percentage of Units that are market rate;

(VIII) The number of Units and proposed rents (less utility allowances) for the low income Units and the number of Units and proposed rents for any market rate Units; and

(IX) The expected completion date if credits are awarded.

(ii) Notification must be sent to all of the following individuals and entities. Officials to be notified are those officials in office at the time the Application is submitted.

(I) City and County Clerks and Neighborhood Organizations. Evidence must be provided that a letter requesting information on neighborhood organizations and meeting the requirements of "Clerk Notification" as outlined in the Application Submission Procedures Manual was sent no later than January 15, 2004 to the city clerk and county clerk for the city and county where the Development is proposed to be located. A copy of the reply letter from the city and county clerks must be provided. All entities identified in the letters from the city and county clerks must be provided with written notification and evidence of that notification must be provided. If the Applicant can provide evidence that the proposed Development is not located within the boundaries of an entity on

a list from the clerk(s), then such evidence in lieu of notification may be acceptable. If no reply letter is received from the city or county clerk by February 25, 2004, then the Applicant must submit a statement attesting to that fact. If an Applicant has knowledge of any neighborhood organizations on record with the state or county in which the Development is to be located and whose boundaries contain the proposed Development site, the Applicant must notify those organizations. If the Applicant has no knowledge of neighborhood organizations within whose boundaries the Development is proposed to be located, the Applicant must attest to that fact.

(II) Superintendent of the school district containing the Development;

(III) Presiding officer of the board of trustees of the school district containing the Development;

(IV) Presiding officer of the governing body of any municipality containing the Development;

(V) All elected members of the governing body of any municipality containing the Development;

(VI) Presiding officer of the governing body of the county containing the Development;

(VII) All elected members of the governing body of the county containing the Development;

(VIII) State senator of the district containing the Development; and

(IX) State representative of the district containing the Development.

(C) Signage on Property or Alternative. A Public Notification Sign shall be installed on the Development site prior to the date the Application is submitted. Evidence submitted with the Application must include photographs of the site with the installed sign and invoice receipt confirming installation from the entity that installed the sign. The sign must be at least 4 feet by 8 feet in size and located within twenty feet of, and facing, the main road adjacent to the site. The sign shall be continuously maintained on the site until the day that the Board takes final action on the Application for the development. The information and lettering on the sign must meet the requirements identified in the Application Submission Procedures Manual. As an alternative to installing a Public Notification Sign and at the same required time, the Applicant may instead, at the Applicant's Option, mail written notification to those addresses described in either clause (i) or (ii) of this subparagraph. This written notification must include the information otherwise required for the sign as provided in the Application Submission Procedures Manual. If the Applicant chooses to provide this mailed notice in lieu of signage, the final Application must include a map of the proposed Development site and mark the distance required by clause (i) or (ii) of this subparagraph, up to 1,000 feet, showing street names and addresses; a list of all addresses the notice was mailed to; an exact copy of the notice that was mailed; and a certification that the notice was mailed through the U.S. Postal Service and stating the date of mailing. If the option in clause (i) of this subparagraph is used, then evidence must be provided affirming the local zoning notification requirements.

(i) all addresses required for notification by local zoning notification requirements. For example, if the local zoning notification requirement is notification to all those addresses within 200 feet, then that would be the distance used for this purpose; or

(ii) for Developments located in communities that do not have zoning, communities that do not require a zoning notification, or those located outside of a municipality, all addresses located within 1,000 feet of any part of the proposed Development site.

(D) If any of the Units in the Development are occupied at the time of Application, then the Applicant must post a copy of the public notice in a prominent location at the Development throughout the period of time the Application is under review by the Department. A photograph of this posted notice must be provided with this exhibit. When the Department's public hearing schedule for comment on submitted Applications becomes available, a copy of the schedule must also be posted until such hearings are completed. Compliance with these requirements shall be confirmed during the Department's site inspection.

(E) Public Housing Waiting List. Evidence that the Development Owner has committed in writing to the local public housing authority(ies) (PHA) the availability of Units and that the Development Owner agrees to consider households on the PHA's waiting list as potential tenants and that the Property is available to Section 8 and other tenant-based rental assistance certificate or voucher holders. Evidence of this commitment must include a copy of the Development Owner's letter to the PHA(s) and proof of delivery in the form of a certified mail receipt, overnight mail receipt, or confirmation letter from the PHA(s). Proof of notification must not be older than six months from the close of the Application Acceptance Period. If no PHA is within the locality of the Development, the Development Owner must utilize the nearest authority or office responsible for administering Section 8 programs.

(9) Evidence of the Development's proposed ownership structure and the Applicant's previous experience as described in subparagraphs (A) through (E) of this paragraph.

(A) Chart which clearly illustrates the complete organizational structure of the final proposed Development Owner and of any Developer or Guarantor, providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner or the Developer or Guarantor, as applicable, whether directly or through one or more subsidiaries.

(B) Each entity shown on an organizational chart as described in subparagraph (A) of this paragraph that has 10% or more ownership interest in the Development Owner, Developer or Guarantor, shall provide the following documentation, as applicable:

(i) For entities that are not yet formed but are to be formed either in or outside of the state of Texas:

(I) a certificate of reservation of the entity name from the Texas Secretary of State or from the state in which the entity is to be formed if different from Texas; and

(II) executed letter(s) of intent to organize signed by a representative of each organization that is a party to the proposal or a copy of the draft organizational documents for the entity to be formed including Articles of Incorporation, Articles of Organization or Partnership Agreement with a signed notation from a representative of each organization acknowledging intent to organize.

(ii) For existing entities whether formed in or outside of the state of Texas:

(I) A Certificate of Account Status from the Texas Comptroller of Public Accounts or, if such a Certificate is not available because the entity is newly formed, a statement to such effect; and a Certificate of Organization from the Secretary of State; and

(II) for entities formed in a state other than Texas a certificate of authority to do business in Texas or an application for a certificate of authority,

(III) Copies of the entity's governing documents, including, but not limited to, its Articles of Incorporation, Articles of Organization, Certificate of Limited Partnership, Bylaws, Regulations and/or Partnership Agreement.

(iii) the Applicant must provide evidence that the signer(s) of the Application have the authority to sign on behalf of the Applicant in the form of a corporate resolution or by-laws which indicate same from the sub-entity in Control and that those Persons signing the Application constitute all Persons required to sign or submit such documents. A cover sheet must be placed before the copy of the organizational documents, identifying the relevant document(s) where the evidence of authority to sign is to be found and specifying exactly where the applicable information exists within all relevant documents by page number or by section and subsection if the pages are not numbered.

(C) Evidence that each entity shown on an the organizational chart described in subparagraph (A) of this paragraph that has 10% or more ownership interest in the Development Owner, Developer or Guarantor, has provided a copy of the completed and executed Previous Participation and Background Certification Form to the Department. Evidence must be a certification from the Department for each of those Persons required to submit these documents as further described under §50.9(e)(3) of this title. Applicants must request this certification at least seven days prior to the close of the Application Acceptance Period. Applicants must ensure that the Person whose name is on the certification is the appropriate Person appearing in the organizational chart provided in subparagraph (A) of this paragraph.

(D) Evidence that, if the Development Owner or any of its Affiliates shown on the organizational chart described in subparagraph (A) of this paragraph that have 10% or more ownership interest in the Development Owner have, or have had, ownership or Control of affordable housing, being housing that receives any form of financing and/or assistance from any Governmental Entity for the purpose of enhancing affordability to persons of low or moderate income, outside the state of Texas, that such Persons have submitted the appropriate "National Previous Participation and Background Certification Form" to the Department. Evidence must be a certification from the Department for each of those Persons required to submit these documents as further described under §50.9(e)(4) of this title. Applicants must request this certification at least seven days prior to the close of the Application Acceptance Period. Applicants must ensure that the Person whose name is on the certification is the appropriate Person appearing in the organizational chart provided in subparagraph (A) of this paragraph.

(E) Evidence, in the form of a certification, that one of the Development Owner's General Partners, the Developer or their Principals have a record of successfully constructing or developing residential units in the capacity of owner, General Partner or Developer. Evidence must be a certification from the Department that the Person with the experience satisfies this exhibit, as further described under subsection (e)(1) of this section. Applicants must request this certification at least seven days prior to the close of the Application Acceptance Period. Applicants must ensure that the Person whose name is on the certification appears in the organizational chart provided in subparagraph (A) of this paragraph.

(10) Evidence of the Development's projected income and operating expenses as described in subparagraphs (A) through (D) of this paragraph:

(A) All Developments must provide a 30-year proforma estimate of operating expenses and supporting documentation used to generate projections (operating statements from comparable properties).

(B) If rental assistance, an operating subsidy, an annuity, or an interest rate reduction payment is proposed to exist or continue for the Development, any related contract or other agreement securing those funds must be provided, which at a minimum identifies the source and annual amount of the funds, the number of Units receiving the funds, and the term and expiration date of the contract or other agreement.

(C) Applicant must provide documentation from the source of the "Utility Allowance" estimate used in completing the Rent Schedule provided in the Application. This exhibit must clearly indicate which utility costs are included in the estimate. If there is more than one entity (Section 8 administrator, public housing authority) responsible for setting the utility allowance(s) in the area of the Development location, then the Utility Allowance selected must be the one which most closely reflects the actual utility costs in that Development area. In this case, documentation from the local utility provider supporting the selection must be provided.

(D) Occupied Developments undergoing rehabilitation must also submit the items described in clauses (i) through (iv) of this subparagraph.

(i) The items in subclauses (I) and (II) of this clause are required unless the current property owner is unwilling to provide the required documentation. In that case, submit a signed statement as to its inability to provide all documentation as described.

(I) Submit at least one of the following:

(-a-) historical monthly operating statements of the subject Development for 12 consecutive months ending not more than 3 months from the first day of the Application Acceptance Period;

(-b-) The two most recent consecutive annual operating statement summaries;

(-c-) the most recent consecutive six months of operating statements and the most recent available annual operating summary;

(-d-) all monthly or annual operating summaries available and a written statement from the seller refusing to supply any other summaries or expressing the inability to supply any other summaries, and any other supporting documentation used to generate projections may be provided; and

(II) a rent roll not more than 6 months old as of the first day the Application Acceptance Period, that discloses the terms and rate of the lease, rental rates offered at the date of the rent roll, Unit mix, tenant names or vacancy, and dates of first occupancy and expiration of lease.

(ii) a written explanation of the process used to notify and consult with the tenants in preparing the Application;

(iii) a relocation plan outlining relocation requirements and a budget with an identified funding source; and

(iv) if applicable, evidence that the relocation plan has been submitted to the appropriate legal agency.

(11) Applications involving Nonprofit General Partners and Qualified Nonprofit Developments.

(A) All Applications involving a nonprofit General Partner, regardless of the Set-Aside applied under, must submit all of the documents described in clauses (i) and (ii) of this subparagraph:

(i) an IRS determination letter which states that the nonprofit organization is a 501(c)(3) or (4) entity; and

(ii) the "Nonprofit Participation Exhibit."

(B) Additionally, all Applications applying under the Nonprofit Set-Aside, established under §50.7(b)(1) of this title, must also provide the following information with respect to the Qualified Nonprofit Organization as described in clauses (i) through (vi) of this subparagraph.

(i) copy of the page from the articles of incorporation or bylaws indicating that one of the exempt purposes of the nonprofit organization is to provide low income housing;

(ii) copy of the page from the articles of incorporation or bylaws indicating that the nonprofit organization prohibits a member of its board of directors, other than a chief staff member serving concurrently as a member of the board, from receiving material compensation for service on the board;

(iii) a Third Party legal opinion stating:

(I) that the nonprofit organization is not affiliated with or Controlled by a for-profit organization and the basis for that opinion, and

(II) that the nonprofit organization is eligible, as further described, for a Housing Credit Allocation from the Nonprofit Set-Aside and the basis for that opinion. Eligibility is contingent upon the non-profit organization Controlling the Development, or if the organization's Application is filed on behalf of a limited partnership, or limited liability company, being the sole General Partner; and otherwise meet the requirements of the Code, §42(h)(5);

(iv) a copy of the nonprofit organization's most recent audited financial statement; and

(v) a certification that the Qualified Nonprofit Development will have the nonprofit entity or its nonprofit affiliate or subsidiary be the Developer or co-Developer as evidenced in the development agreement and that it will receive at least 51% of the developer fee as stated in the development agreement.

(vi) evidence, in the form of a certification, that a majority of the members of the nonprofit organization's board of directors principally reside:

(I) in this state, if the Development is located in a rural area; or

(II) not more than 90 miles from the Development, if the Development is not located in a rural area.

(12) Applicants applying for acquisition credits or affiliated with the seller, that will be evaluated in accordance with §1.32(e)(1) of this title, as proposed, must provide all of the documentation described in subparagraphs (A) through (C) of this paragraph. Applicants applying for acquisition credits must also provide the items described in subparagraph (D) of this paragraph and as provided in the Application Submission Procedures Manual.

(A) an appraisal, not more than 6 months old as of the first day of the Application Acceptance Period , which complies with the Uniform Standards of Professional Appraisal Practice and the Department's Market Analysis and Appraisal Policy. For Developments which require an appraisal from TX-USDA-RHS , the appraisal may be more than 6 months old, but not more than 12 months old as of the day the Application Acceptance Period closes and may be provided from TX-USDA-RHS. The appraisal may be submitted as a Supplemental Threshold Report consistent with the timelines and submission documentation requirements identified in paragraph (14)(D) of this subsection. This appraisal of the property must separately state the as-is, pre-acquisition or transfer value of the land and the improvements where applicable;

(B) a valuation report from the county tax appraisal district;

(C) clear identification of the selling Persons, and details of any relationship between the seller and the Applicant or any Affiliation with the Applicant or the Development Owner , Qualified Market Analyst or any other professional or other consultant performing services with respect to the Development. If any such relationship exists, complete disclosure and documentation of the seller's original acquisition and holding and improvement costs since acquisition, and any and all exit taxes, to justify the proposed sales price must also be provided; and

(D) "Acquisition of Existing Buildings Form."

(13) Evidence of an "Acknowledgement of Receipt of Financial Statement and Authorization to Release Credit Information" must be provided for any Person that has 10% or more ownership interest in the Development Owner or General Partner, the Developer, or Guarantor, as required under §50.9(e)(2) of this title. Entities that have not yet been formed and entities that have been formed recently but have no assets, liabilities, or net worth are not required to submit this documentation, but must submit a statement with their Application that this is the case in lieu of submitting the Acknowledgement.

(14) Supplemental Threshold Reports. Documents under subparagraph (A) and (B) of this paragraph must be submitted as further stated in subparagraph (C) and (D) of this paragraph and in accordance with the Market Analysis Rules and Guidelines and Environmental Site Assessment Rules and Guidelines, §§1.33 and 1.35 of this title, as proposed.

(A) A Phase I Environmental Site Assessment (ESA) on the subject Property, dated not more than 12 months prior to the first day of the Application Acceptance Period. In the event that a Phase I Environmental Site Assessment on the Development is more than 12 months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated letter or updated report dated at least three months prior to the first day of the Application Acceptance Period from the Person or organization which prepared the initial assessment confirming that the site has been reinspected and reaffirming the conclusions of the initial report or identifying the changes since the initial report; The ESA must be prepared in accordance with the Department Environmental Site Assessment Rules and Guidelines. Developments whose funds have been obligated by TX-USDA-RHS will not be required to supply this information; however, the Applicants of such Developments are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(B) A comprehensive Market Analysis prepared at the Applicant's expense by a disinterested Qualified Market Analyst approved by the Department in accordance with the approval process outlined in the Market Analysis Rules and Guidelines, §1.33 of this title, as proposed. The Market Analysis must be prepared in accordance with the methodology prescribed in the Market Analysis Rules and Guidelines, §1.33 of this title, as proposed. In the event that a Market Analysis on the Development is older than 6 months as of the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated Market Analysis from the Person or organization

which prepared the initial report; however the Department will not accept any Market Analysis which is more than 12 months old as of the first day of the Application Acceptance Period. The Market Analysis should be prepared for and addressed to the Department. For Applications in the TX-USDA-RHS Set-Aside, the appraisal, required under paragraph (12)(A) of this subsection, will satisfy the requirement for a Market Analysis; no additional Market Analysis is required; however the Department may request additional information as needed.

(i) The Department may determine from time to time that information not required in the Department Market Analysis and Appraisal Rules and Guidelines will be relevant to the Department's evaluation of the need for the Development and the allocation of the requested Housing Credit Allocation Amount. The Department may request additional information from the Qualified Market Analyst to meet this need.

(ii) All Applicants acknowledge by virtue of filing an Application that the Department is not bound by any opinion expressed in the Market Analysis and may substitute its own analysis and underwriting conclusions for those submitted by the Qualified Market Analyst.

(C) Inserted at the front of each of these reports must be a transmittal letter from the individual preparing the report that states that the Department is granted full authority to rely on the findings and conclusions of the report.

(D) The requirements for each of the reports identified in subparagraphs (A) and (B) of this paragraph can be satisfied in either of the methods identified in clauses (i) or (ii) of this subparagraph.

(i) Upon Application submission, the documentation for each of these exhibits may be submitted in its entirety as described in subparagraphs (A) and (B) of this paragraph; or

(ii) Upon Application submission, the Applicant may provide evidence in the form of an executed engagement letter with the party performing each of the individual reports that the required exhibit has been commissioned to be performed and that the delivery date will be no later than March 31, 2004. Subsequently, the entire exhibit must be submitted on or before 5:00 p.m. CST, March 31, 2004. If the entire exhibit is not received by that time, the Application will be terminated and will be removed from consideration.

(15) Self-Scoring. Applicant's self-score must be completed on the "Application Self-Scoring Form."

(g) Selection Criteria. All Applications will be evaluated and ranking points will be assigned according to the Selection Criteria listed in paragraphs (1) through (18) of this subsection.

(1) Development Financial Feasibility. Applications will receive points based on the supporting financial data provided behind this exhibit in addition to the commitment letter required under subsection (f)(7)(C) of this section. The supporting financial data shall include a thirty year pro forma prepared by the permanent or construction lender specifically identifying each of the first ten years and every fifth year thereafter. The commitment letter must include the anticipated total operating expenses, net operating income and debt service for the first year of stabilized operation as reflected in the pro forma. The pro forma must indicate, and the commitment letter must confirm, that the development pro forma maintains a 1.10 debt coverage ratio throughout the initial thirty years proposed. In addition, the commitment letter must state that the lenders assessment finds that the Development will be feasible for thirty years. Points will be awarded if these criteria are met. No partial points will be awarded. (28 points).

(2) Quantifiable Community Participation from Neighborhood Organizations. Points will be awarded based on written statements of support or opposition from neighborhood organizations on record with the state or county in which the Development is to be located and whose boundaries contain the proposed Development site.

(A) Receipt of Input. Letters must be received by the Department no later than April 30, 2004, and only, for scoring purposes, directly from neighborhood organizations. Letters must be addressed to the Texas Department of Housing and Community Affairs, "Attention: Brooke Boston (Neighborhood Input)". Letters received after April 30, 2004 will be summarized for the Board's information and consideration, but will not affect the score for the Application. Separate from scoring, the Department urges all persons and organizations that wish to provide input to the Department to do so well before the day of a Board meeting when a final decision must be made so the input may be carefully considered. Board decisions often cannot be delayed and late input is difficult for the Board and Department to fully consider.

(B) Neighborhood Organizations. For the purposes of the scoring of this exhibit, neighborhood organizations are organizations that have a primary purpose of working to affect matters related to the welfare of the neighborhood that contains the proposed development site, not including governmental entities.

(C) Scoring of Input. For scoring purposes, each neighborhood organization may submit one letter that represents the organization's input. The letter must identify the specific Development and be signed by the chairman of the board, chief executive office or comparable head of the organization and include the signer's address and phone number. The letter must state and provide documentation which shows that it is from a neighborhood organization; that it is on record with the state or county in which the Development is proposed to be located; and that the organization's boundaries contain the proposed Development site. The letter must also provide the total number of members of the organization and a brief description of the process used to determine the members' position. To be accurately scored, the letter must clearly and concisely state each reason for the organization's support for or opposition to the proposed Development and provide specific evidence supporting that input. It is possible for points to be awarded or deducted based on written statements from organizations that were not identified by the city and county clerks under subsection (f)(8)(B)(ii)(I) of this section, if the organization provides evidence that the proposed Development site is within the organization's boundaries and that it is on record with the county or state. It is also possible that neighborhood organizations that were initially identified as appropriate organizations for purposes of the notification requirements will subsequently be determined by the Department not to meet the requirements for scoring.

(i) Applicants that accurately certify that they do not know of any neighborhood organizations that are on record with the state or county in which the Development is to be located and whose boundaries contain the proposed Development, and for which no letters were received, will be awarded the higher of zero points or the average number of points received by all Applications for this exhibit.

(ii) The score for this exhibit will range from a maximum of +12 points to -12 points and the number of points to be allocated to each organization's letter will be determined by the Executive Award and Review Advisory Committee based on the factual basis of the written statements and evidence from the neighborhood organizations. The Department may investigate a matter and contact the Applicant and neighborhood organizations for more information.

(D) Evaluation of Basis of Input. The Department highly values quality public input addressed to the merits of a Development. Input that points out possible errors in the Department's analysis and matters that are specific to the neighborhood, the proposed site, the proposed Development, or Developer are valued. If a proposed Development is permitted by the existing or pending zoning or absence of zoning, concerns addressed by the allowable land use that are related to any multifamily development may generally be considered to have been addressed at the local level through the land use planning process. Input that evidences unlawful discrimination against classes of persons protected by Fair Housing law will not be considered. To protect the integrity of the Department's processes and decisions, evidence of false statements or misrepresentations from applicant representatives, neighborhood representatives, or other persons will be considered for appropriate action, including possible referral to local district and county attorneys.

(3) Development Location Characteristics. Evidence, not more than 6 months old from the date of the close of the Application Acceptance Period, that the subject Property is located within one of the geographical areas described in subparagraphs (A) through (F) of this paragraph. Areas qualifying under any one of the subparagraphs (A) through (F) of this paragraph will receive 5 points. An Application may only receive points under one of the subparagraphs (A) through (F) of this paragraph. An Application may receive an additional ten points pursuant to subparagraph (G) of this paragraph in addition to any points awarded in subparagraphs (A) through (F) of this paragraph.

(A) A geographical area which is:

(i) an Economically Distressed Area; or

(ii) a Colonia, or

(iii) a Difficult Development Area (DDA) as specifically designated by the Secretary of HUD.

(B) a designated state or federal empowerment/enterprise zone, urban enterprise community, or urban enhanced enterprise community. Such Developments must submit a letter and a map from a city/county official verifying that the proposed Development is located within such a designated zone. Letter should be no older than 6 months from the first day of the Application Acceptance Period.

(C) a city-sponsored area or zone where a city or county has, through a local government initiative, specifically encouraged or channeled growth, neighborhood preservation or redevelopment. Such Developments must submit all of the following documentation: a letter from a city/county official verifying that the proposed Development is located within the city sponsored zone or district; a map from the city/county official which clearly delineates the boundaries of the district; and a certified copy of the appropriate resolution or documentation from the mayor, local city council, county judge, or county commissioners court which documents that the designated area was:

(i) created by the local city council/county commission, and

(ii) targets a specific geographic area which was not created solely for the benefit of the Applicant.

(D) the Development is located in a census tract in which the median income, based on the most current available information as published by the United States Bureau of the Census as of October 1 of the year preceding the applicable program year, is higher than the median income for the county, metropolitan statistical area, or primary metropolitan statistical area, in which the census tract is located as established by the United States Department of Housing and Urban Development on the same date. Such developments must submit evidence documenting the median income for both the census tract and the county, metropolitan statistical area or primary metropolitan statistical area.

(E) the Development is located in a census tract in which there are no other existing developments supported by housing tax credits.

(F) the Development is located in a county that has received an award as of November 15, 2003, within the past three years, from the Texas Department of Agriculture's Rural Municipal Finance Program or Real Estate Development and Infrastructure Program. Cities which have received one of these awards are categorized as awards to the county as a whole so Developments located in a different city than the city awarded, but in the same county, will still be eligible for these points.

(G) the Development is located in a community that is not a Rural Area but has a population no greater than 100,000 based on the most current available information published by the United States Bureau of the Census as of October 1 of the year preceding the applicable program year. The Development can not exceed 100 Units to qualify for these points. (10 points)

(4) Site Location Characteristics. Sites will be evaluated based on proximity to amenities, the presence of positive site features and the absence of negative site features. Sites will be rated based on the criteria below.

(A) Proximity of site to amenities. Developments located on sites within a one mile radius (two-mile radius for Developments competing for a Rural Regional Allocation) of at least three services appropriate to the target population will receive five points. A site located within one-quarter mile of public transportation or located within a community that has "on demand" transportation, or specialized elderly transportation for Qualified Elderly Developments, will receive full points regardless of the proximity to amenities, as long as the Applicant provides appropriate evidence of the transportation services used to satisfy this requirement. If a Qualified Elderly Development is providing its own specialized van service, then this will be a requirement of the LURA. Only one service of each type listed below will count towards the points. A map must be included identifying the development site and the location of the services, as well as written directions from the site to each service. The services must be identified by name on the map and in the written directions. If the services are not identified by name, points will not be awarded. All services must exist or, if under construction, must be at least 50% complete by the date the Application is submitted. (5 points)

(i) Full service grocery store or supermarket

(ii) Pharmacy

(iii) Convenience Store/Mini-market

(iv) Department or Retail Merchandise Store

(v) Bank/Credit Union

(vi) Restaurant (including fast food)

(vii) Indoor public recreation facilities, such as civic centers, community centers, and libraries

(viii) Outdoor public recreation facilities such as parks, golf courses, and swimming pools

(ix) Hospital/medical clinic

(x) Doctor's offices (medical, dentistry, optometry)

(xi) Public Schools (only eligible for Developments that are not Qualified Elderly Developments)

(xii) Senior Center (only eligible for Qualified Elderly Developments)

(B) Negative Site Features. Sites with the following negative characteristics will have points deducted from their score. For purpose of this exhibit, the term 'adjacent' is interpreted as sharing a boundary with the Development site. The distances are to be measured from all boundaries of the Development site. Applicants must indicate on a map the location of any negative site feature, with the exception of slope which must be documented with an engineer's certificate to ensure that points are not deducted. If an Applicant negligently fails to note a negative feature, double points will be deducted from the score or the Application may be terminated. If none of these negative features exist, the Applicant must sign a certification to that effect. (-7 points)

(i) Developments located adjacent to or within 300 feet of junkyards will have 1 point deducted from their score.

(ii) Developments located adjacent to or within 300 feet of active railroad tracks will have 1 point deducted from their score. Rural Developments funded through TX-USDA-RHS are exempt from this point deduction.

(iii) Developments located adjacent to or within 300 feet of an Interstate Highway including frontage and service roads will have 1 point deducted from their score.

(iv) Developments located adjacent to or within 300 feet of heavy industrial uses such as manufacturing plants will have 1 point deducted from their score.

(v) Developments located adjacent to or within 300 feet of a solid waste or sanitary landfills will have 1 point deducted from their score.

(vi) Developments located adjacent to or within 100 feet of high voltage transmission power lines will have 1 point deducted from their score.

(vii) Developments where the overall existing slope of site in any location exceeds 15% will have 1 point deducted from their score.

(5) Housing Needs Characteristics. Each Application, dependent on the city or county where the Development is located, will yield a score based on the Uniform Housing Needs Scoring Component. If a Development is in an incorporated city, the city score will be used. If a Development is outside the boundaries of an incorporated city, then the county score will be used. The Uniform Housing Needs Scoring Component scores for each city and county will be published in the Reference Manual. (20 points maximum).

(6) Support and Consistency with Local Planning. All documents must not be older than 6 months from the first day of the Application Acceptance Period. Points may be received under any of subparagraphs (A) through (C) of this paragraph.

(A) Evidence from the local municipal authority stating that the Development fulfills a need for additional affordable rental housing as evidenced in a local consolidated plan, comprehensive plan, or other local planning document; or a letter from the local municipal authority stating that there is no local plan and that the city supports the Development (3 points).

(B) Evidence that the Applicant has hosted a public meeting to which the neighborhood and other interested persons have been invited. Evidence must include copies of the method of notification used and a transcript of the meeting, as well as a list of meeting attendees. (6 points).

(C) Community Support from State Elected Officials. Points will be awarded based on the written statements of support or opposition from state elected officials representing constituents in areas that include the location of the Development. Letters of support must identify the specific Development and must clearly state support or opposition of the specific Development at the proposed location. This documentation will be accepted with the Application or through delivery to the Department from the Applicant or official no later than May 31, 2004. Letters received after May 31, 2004 will be summarized for the Board in the board summary provided by staff, but will not affect the score of the Application. Officials to be considered are those officials in office at the time the Application is submitted. Letters of support from state officials that do not represent constituents in areas that include the location of the Development will not qualify for points under this Exhibit. Points can be awarded for letters of support or opposition as identified in clauses (i) and (ii) of this subparagraph, not to exceed a total of 6 points. Neutral letters, or letters that do not specifically refer to the Development, will receive neither positive nor negative points.

(i) Letter of support from State of Texas Representative or Senator (3 points each, maximum of 6 points); and

(ii) Letter of opposition from State of Texas Representative or Senator (-3 points each, maximum of -6 points).

(7) Development Characteristics. Applications may receive points under as many of the following subparagraphs as are applicable; however to qualify for points under this paragraph, the Development must first meet the minimum requirements identified under subparagraph (A) of this paragraph, unless otherwise provided in the particular subparagraph. This minimum requirement does not apply to Applications involving rehabilitation, Developments receiving funding from TX-USDA-RHS, or Developments proposing single room occupancy.

(A) Unit Size. The square feet of all of the Units in the Development, for each type of Unit, must be at minimum:

(i) 500 square feet for an efficiency unit;

(ii) 650 square feet for a non-elderly one bedroom unit; 550 square feet for an elderly one bedroom unit;

(iii) 900 square feet for a two bedroom unit; 750 square feet for an elderly two bedroom unit; and

(iv) 1,000 square feet for a three bedroom unit.

(B) Cost per Square Foot. For this exhibit, costs shall be defined as construction costs, including site work, contingency, contractor profit, overhead and general requirements, as represented in the Development Cost Schedule. This calculation does not include indirect construction costs. The calculation will be costs per square foot of net rentable area (NRA). The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule of the Application. Developments do not exceed $60 per square foot. (9 points).

(C) Unit Amenities and Quality. Applications in which Developments provide specific amenity and quality features in every Unit at no extra charge to the tenant will be awarded points based on the point structure provided in clauses (i) through (xviii) of this subparagraph, not to exceed 12 points in total. Applications involving rehabilitation or proposing single room occupancy will double the points listed for each item, not to exceed 12 points in total.

(i) Covered entries (1 point);

(ii) Nine foot ceilings (1 point);

(iii) Microwave ovens (1 point);

(iv) Self-cleaning or continuous cleaning ovens (1 point);

(v) Ceiling fixtures in all rooms (globe with ceiling fan in all bedrooms) (1 point);

(vi) Refrigerator with icemaker (1 point);

(vii) Laundry connections (1 point);

(viii) Storage room or closet, of approximately 9 square feet or greater, which does not include bedroom, entryway or linen closets (1 point);

(ix) Laundry equipment (washers and dryers) in units (3 points);

(x) Thirty year architectural shingle roofing (1 point);

(xi) Covered patios or covered balconies (1 point);

(xii) Covered parking (including garages) of at least one covered space per Unit (2 points);

(xiii) 100% masonry on exterior, which can include stucco and cementious board products, excluding efis (3 points);

(xiv) Greater than 75% masonry on exterior, which can include stucco and cementious board products, excluding efis (1 points);

(xv) Use of energy efficient alternative construction materials (structurally insulated panels) with wall insulation at a minimum of R-20 (3 points).

(xvi) R-15 Walls / R-30 Ceilings (rating of wall system) (3 points);

(xvii) 14 SEER HVAC (3 points);

(vxiii) Energy Star or equivalently rated Kitchen Appliances (2 points)

(D) Common Amenities. To receive points for this exhibit, Developments must first provide a minimum number of common amenities in relation to the Development size being proposed. The amenities selected must be selected from clause (iii) of this subparagraph and made available for the benefit of all tenants. If fees in addition to rent are charged for amenities, then the amenity may not be included among those provided to complete this exhibit.

(i) Applications must meet a minimum threshold of points (based on the total number of Units in the Development) prior to accruing actual points for this exhibit, as follows:

(I) Total Units are less than 40, 3 points are required to meet Threshold;

(II) Total Units are between 40 and 76, 6 points are required to meet Threshold;

(III) Total Units are between 77 and 99, 9 points are required to meet Threshold;

(IV) Total Units are between 100 and 149, 12 points are required to meet Threshold;

(V) Total Units are between 150 and 199, 15 points are required to meet Threshold;

(VI) Total Units are more than 200, 18 points are required to meet Threshold.

(ii) Points for additional amenities. Developments providing additional amenities beyond the threshold identified in clause (i) of this subparagraph will be awarded points based on the point structure below, not to exceed 6 points. The Applicant will total its points for amenities and then subtract the threshold requirement in order to come up with the point total. (For example, a 200-unit Development would have to accumulate 24 points in Common Amenities in order to net a score of 6, but a 36-Unit Development would only have to accumulate 9 points in order to net a score of 6.) Developments proposing rehabilitation or proposing Single Room Occupancy will receive double points for each item. Any future changes in these amenities, or substitution of these amenities, must be approved by the Department in accordance with §50.18(c) of this title and may result in a decrease in awarded credits if the substitution or change includes a decrease in cost or in the cancellation of a Commitment Notice or Carryover Allocation if all of the Common Amenities claimed are no longer met.

(iii) Amenities for selection include those items listed in subclauses (I) through (XX) of this clause. Both Developments designed for families and Qualified Elderly Developments can earn points for providing each identified amenity unless the item is specifically restricted to one type of Development. All amenities must meet accessibility standards as further described in §50.9(f)(4)(D) of this title. An Application can only count an amenity once, therefore combined functions (a library which is part of a community room) only count under one category. Items selected are in addition to threshold amenities being provided under subsection (f)(4)(A) of this section. Spaces for activities must be sized appropriately to serve the anticipated population.

(I) Full perimeter fencing with controlled gate access (3 points)

(II) Gazebo w/sitting area (1 point)

(III) Accessible walking path (1 point)

(IV) Community gardens (1 point)

(V) Barbecue grills and picnic tables- at least one for every 50 Units (1 point)

(VI) Covered pavilion w/barbecue grills and tables (2 points)

(VII) Swimming pool (3 points)

(VIII) Furnished fitness center (2 points)

(IX) Equipped Business Center (computer and fax machine) (2 points)

(X) Game/TV room (1 point)

(XI) Library (separate from the community room) (1 point)

(XII) Enclosed sun porch or covered community porch/patio (2 points)

(XIII) Service coordinator office in addition to leasing offices (1 point)

(XIV) Senior Activity Room (Arts and Crafts, Health Screening, etc.)- Only Qualified Elderly Developments Eligible (2 points)

(XV) Secured Entry (elevator buildings only) - (1 point)

(XVI) Horseshoe or Shuffleboard Court- Only Qualified Elderly Developments Eligible (1 point)

(XVII) Community Dining Room w/full or warming kitchen - Only Qualified Elderly Developments Eligible (3 points)

(XVIII) Two Children's Playground Equipped for 5 to 12 year olds, two Tot Lots, or one of each - Only Family Developments Eligible (2 points)

(XIX) Sport Court (Tennis, Basketball or Volleyball) - Only Family Developments Eligible (2 points)

(XX) Furnished and staffed Children's Activity Center - Only Family Developments Eligible (3 points).

(E) The Development is an existing Residential Development without maximum rent limitations or set-asides for affordable housing and the proposed rehabilitation is part of a community revitalization plan. If maximum rent limitations had existed previously, then the restrictions must have expired at least one year prior to the first day of the Application Acceptance Period (4 points).

(F) The Development is a mixed-income Development comprised of both market rate Units and qualified tax credit Units. Points will be awarded to Developments with a Unit based Applicable Fraction which is no greater than:

(i) 80% (8 points); or,

(ii) 85% (6 points); or,

(iii) 90% (4 points); or

(iv) 95% (2 points).

(G) The Development consists of not more than 36 Units and is not a part of, or contiguous to, a larger Development (5 points).

(8) Sponsor Characteristics. Applicants or Developer with previous experience in the development and ownership of housing tax credit developments will receive points based on experience. Applicants must provide an IRS Form 8609 from the Department or any other state housing agency. Only one Form 8609 per development is required. The Form 8609 and any accompanying evidence must clearly indicate that the names on the Form 8609 tie back to the Development Owner's General Partner, Developer or their Principals as listed in the Application (maximum of 2 points).

(A) Evidence that one of the Development Owner's General Partners, the Developer or a Principal, has developed at least three tax credit developments that cumulatively contain at least three times the number of housing units in the proposed Development. To qualify, the units must have been placed in service on or prior to the application date. (2 points)

(B) Evidence that one of the Development Owner's General Partners, the Developer or a Principal, has developed at least two tax credit developments that cumulatively contain at least two times the number of housing units in the proposed Development. To qualify, the units must have been placed in service on or prior to the application date. (1 points)

(9) Developments Targeting Tenant Populations of Individuals with Children. The Rent Schedule of the Application must show that 35% or more of the Units in the Development have 3 bedrooms (1 point).

(10) Development Provides Supportive Services to Tenants. Points may be received under both subparagraphs (A) and (B) of this paragraph.

(A) Applicants will receive points for coordinating their tenant services with those services provided through state workforce development and welfare programs as evidenced by execution of a Tenant Supportive Services Certification (2 points).

(B) The Applicant must certify that the Development will provide a combination of special supportive services appropriate for the proposed tenants. The provision of supportive services will be included in the LURA as selected from the list of services identified in this subparagraph. Services must be provided on-site or transportation to off-site services must be provided (maximum of 6 points).

(i) Applications will be awarded points for selecting services listed in clause (ii) of this subparagraph based on the following scoring range:

(I) Two points will be awarded for providing one of the services; or

(II) Four points will be awarded for providing two of the services; or

(III) Six points will be awarded for providing three of the services.

(ii) Service options include child care; transportation; basic adult education; legal assistance; counseling services; GED preparation; English as a second language classes; vocational training; home buyer education; credit counseling; financial planning assistance or courses; health screening services; health and nutritional courses; organized team sports programs, youth programs; scholastic tutoring; social events and activities; senior meal program; home-delivered meal program; community gardens or computer facilities; any other programs described under Title IV-A of the Social Security Act (42 U.S.C. §§601 et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of out-of wedlock pregnancies; and encourages the formation and maintenance of two-parent families; or any other services approved in writing by the Department.

(11) Tenant Characteristics- Populations with Special Needs. Evidence that the Development is designed for transitional housing for homeless persons on a non-transient basis, with supportive services designed to assist the homeless tenants in locating and retaining permanent housing. For the purpose of this exhibit, homeless persons are individuals or families that lack a fixed, regular, and adequate nighttime residence as more fully defined in 24 Code of Federal Regulations, §91.5, as may be amended from time to time. All of the items described in subparagraphs (A) through (E) of this paragraph must be submitted. Points will be awarded consistent with subparagraph (F) of this paragraph:

(A) a detailed narrative describing the type of proposed housing;

(B) a referral agreement, not more than 12 months old from the first day of the Application Acceptance Period, with an established organization which provides services to the homeless;

(C) a marketing plan designed to attract qualified tenants and housing providers;

(D) a list of supportive services; and

(E) adequate additional income source to supplement any anticipated operating and funding gaps

(F) Points will be awarded as follows:

(i) If all Units in the Development are designed solely for transitional housing for homeless persons, 25 points will be awarded; or

(ii) If at least 25% of the Units in the Development are designed for transitional housing for homeless persons, 15 points will be awarded.

(12) Low Income Targeting Points for Serving Residents at 40% and 50% of AMGI (up to 8 points). An Application may qualify for points under subparagraph (C) of this paragraph. To qualify for these points, the rents for the rent-restricted Units must not be higher than the allowable tax credit rents at the rent-restricted AMGI level. For Section 8 residents, or other rental assistance tenants, the tenant paid rent plus the utility allowance is compared to the rent limit to determine compliance. The Development Owner, upon making selections for this exhibit will set aside Units at the rent-restricted levels of AMGI and will maintain the percentage of such Units continuously over the compliance and extended use period as specified in the LURA.

(A) No more than 40% of the total number of low income units (including Units at 60% of AMGI) will be counted as designated for tenants at or below 50% of the AMGI for purposes of determining the points in the 50% and 40% AMGI categories. No more than 15% of the total number of low income targeted units will be counted as designated for tenants at 40% of the AMGI for purposes of determining the points in the 40% AMGI categories. For purposes of calculating "Total Low Income Targeted Units" for this exhibit, Units at 60% of AMGI are also included.

(B) In the table below no Unit may be counted twice in determining point eligibility. Use normal rounding to the hundredth to calculate the percentages, points and "Total Points" for 40% and 50% Units. In calculating the percentages, the denominator includes every low income Unit in the Development, not just the 40% and 50% Units. Normal rounding disregards all digits that are more than one decimal place past the digit rounded; therefore, the thousandths place must not be rounded prior to rounding to the hundredth, e.g. 35.0449% equals 35.04%, 35.05%. To calculate "Rounded Total Points" disregard the hundredth place in "Total Points" and round normally, eg. 7.50 equals 8 and 7.49 equals 7. The final total points requested must be a whole number consistent with this rounding methodology.

(C) Developments should be scored based on the structure in the table below. Only Developments located in counties whose AMGI is below the statewide AMGI, may use Weight Factor B. All other Applicants are required to use Weight Factor A.
Figure: 10 TAC §50.9(g)(12)(C)

(13) Low Income Targeting Points for Serving Residents at 30% of AMGI (up to 12 points). Applications that propose Units with rents set at 30% AMGI and reserved for occupancy by extremely low-income (those earning annual gross incomes of 30% or less of the AGMI) will be awarded up to 12 points if the Development is not in a Qualified Census Tract and 6 points if it is in a Qualified Census Tract. Developments must have a source of financing for the 30% units. Applicant must submit evidence that the proposed Development has either received project-based rental assistance from a local housing authority or non-governmental entity, which does not have an identity of interest with the Applicant (with the exception of Applications involving Public Housing Authorities); or received an allocation of funds for on-site Development costs from a local unit of government or a nonprofit organization, which is not related to the Applicant (with the exception of Applications involving Public Housing Authorities). Points will be determined on a sliding scale based on the percentage of 30% units. The Development must have already applied for funding from the funding entity. Evidence at the application stage shall include a copy of the application to the funding entity and a letter from the funding entity indicating that the application was received. No later than 14 days before the date of the Board meeting at which staff will make their initial recommendations for credit allocation to the Board, the Applicant or Development Owner must either provide evidence of a commitment for the required financing to the Department or notify the Department that no commitment was received. If the required financing commitment has not been received by that date, the Application will have the points for this item deducted from its final score and will be reevaluated for financial feasibility. No funds from TDHCA's HOME or Housing Trust Fund sources will qualify under this category. An Application can only receive points under only one of either subparagraphs (A) or (B) of this paragraph.

(A) Development located outside a QCT. In order to qualify for these points, the Applicant must provide a 5 year rental assistance contract for project-based vouchers for each 30% Unit or grant funds of $25,000 per Unit. Use normal rounding.

(i) 3% to 5% of total Development Units at 30% AMGI receives 8 points; or

(ii) 6% to 8% of total Development Units at 30% AMGI receives 10 points; or

(iii) 9% to 10% of total Development Units at 30% AMGI receives 12 points.

(B) Development located within a QCT. In order to qualify for these points, the Applicant must provide a 5 year rental assistance contract for project-based vouchers for each 30% unit or grant funds of $12,500 per unit. Use normal rounding.

(i) 3% to 5% of total Development Units at 30% AMGI receives 4 points; or

(ii) 6% to 8% of total Development Units at 30% AMGI receives 6 points; or

(iii) 9% to 10% of total Development Units at 30% AMGI receives 8 points.

(14) Leveraging from local and private resources. An Application may qualify for points under only one of subparagraphs (A) or (B) of this paragraph. However, if an Applicant has requested points under paragraph 14 of this section, the Application is not eligible to receive points under this paragraph. (maximum of 14 points)

(A) Evidence that the proposed Development has received an allocation of funds for on-site development costs from a local unit of government or a nonprofit organization, which is not related to the Applicant. Such funds can include Community Development Block Grant funds, local HOME (not funded from the Department), a local housing trust, Affordable Housing Program from the Federal Home Loan Bank or Tax Increment Financing, and must be in the form of a grant or a forgivable loan. In-kind contributions such as donation of land or waivers of fees such as building permits, water and sewer tap fees, or similar contributions that benefit the Development will be acceptable to qualify for these points. Points will be determined on a sliding scale based on the amount per Unit from outside sources. The Development must have already applied for funding from the funding entity. Evidence to be submitted with the Application must include a copy of the commitment of funds or a copy of the application to the funding entity and a letter from the funding entity indicating that the application was received. No later than 14 days before the date of the Board meeting at which staff will make their initial recommendations for credit allocation to the Board, the Applicant or Development Owner

must either provide evidence of a commitment for the required financing to the Department or notify the Department that no commitment was received. If the required financing commitment has not been received by that date, the Application will have the points for this item deducted from its final score and will be reevaluated for financial feasibility. No funds from the Department's HOME or Housing Trust Fund sources will qualify under this category. Use normal rounding. (up to 14 points).

(i) A contribution of $500 to $1,000 per Low Income Unit receives 6 points; or

(ii) A contribution of $1,001 to $3,500 per Low Income Unit receives 10 points; or

(iii) A contribution of $3,501 to $6,000 per Low Income Unit receives 14 points; or

(B) Evidence that the proposed Development is partially funded by project-based Housing Choice or rental assistance vouchers from a governmental or non-governmental entity for a minimum of five years. Such entity cannot have an identity of interest with the Applicant with the exception of Applications involving Public Housing Authorities. Evidence at the time the Application is submitted must include a copy of the commitment of funds or a copy of the application to the funding entity and a letter from the funding entity indicating that the application was received. No later than 14 days before the date of the Board meeting at which staff will make their initial recommendations for credit allocation to the Board, the Applicant or Development Owner must either provide evidence of a commitment for the required financing to the Department or notify the Department that no commitment was received. If the required financing commitment has not been received by that date, the Application will have the points for this item deducted from its final score and will be reevaluated for financial feasibility. No funds from the Department's HOME or Housing Trust Fund sources will qualify under this category. Use normal rounding. (up to 6 points).

(i) Project-Based Vouchers for 3% to 5% of the total Units receives 6 points; or

(ii) Project-Based Vouchers for 6% to 8% of the total Units receives 10 points; or

(iii) Project-Based Vouchers for 9% to 10% of the total Units receives 14 points.

(15) Length of Affordability Period. In accordance with the Code, each Development is required to maintain its affordability for a 15-year compliance period and, subject to certain exceptions, an additional 15-year extended use period. Development Owners that are willing to extend the affordability period for a Development beyond the 30 years required in the Code may receive points as follows:

(A) Add 5 years of affordability after the extended use period for a total affordability period of 35 years (3 points); or

(B) Add 10 years of affordability after the extended use period for a total affordability period of 40 years (6 points)

(16) Evidence that Development Owner agrees to provide a right of first refusal to purchase the Development upon or following the end of the Compliance Period for the minimum purchase price provided in, and in accordance with the requirements of, §42(i)(7) of the Code (the "Minimum Purchase Price"), to a Qualified Nonprofit Organization, the Department, or either an individual tenant with respect to a single family building, or a tenant cooperative, a resident management corporation in the Development or other association of tenants in the Development with respect to multifamily developments (together, in all such cases, including the tenants of a single family building, a "Tenant Organization"). Development Owner may qualify for these points by providing the right of first refusal in the following terms (5 points).

(A) Upon the earlier to occur of:

(i) the Development Owner's determination to sell the Development, or

(ii) the Development Owner's request to the Department, pursuant to §42(h)(6)(E)(II) of the Code, to find a buyer who will purchase the Development pursuant to a "qualified contract" within the meaning of §42(h)(6)(F) of the Code, the Development Owner shall provide a notice of intent to sell the Development ("Notice of Intent") to the Department and to such other parties as the Department may direct at that time. If the Development Owner determines that it will sell the Development at the end of the Compliance Period, the Notice of Intent shall be given no later than two years prior to expiration of the Compliance Period. If the Development Owner determines that it will sell the Development at some point later than the end of the Compliance Period, the Notice of Intent shall be given no later than two years prior to date upon which the Development Owner intends to sell the Development.

(B) During the two years following the giving of Notice of Intent, the Sponsor may enter into an agreement to sell the Development only in accordance with a right of first refusal for sale at the Minimum Purchase Price with parties in the following order of priority:

(i) during the first six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization that is also a community housing development organization, as defined for purposes of the federal HOME Investment Partnerships Program at 24 C.F.R. § 92.1 (a "CHDO") and is approved by the Department,

(ii) during the second six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization or a Tenant Organization; and

(iii) during the second year after the Notice of Intent, only with the Department or with a Qualified Nonprofit Organization approved by the Department or a Tenant Organization approved by the Department.

(iv) If, during such two-year period, the Development Owner shall receive an offer to purchase the Development at the Minimum Purchase Price from one of the organizations designated in clauses (i) through (iii) of this subparagraph (within the period(s) appropriate to such organization), the Development Owner shall sell the Development at the Minimum Purchase Price to such organization. If, during such period, the Development Owner shall receive more than one offer to purchase the Development at the Minimum Purchase Price from one or more of the organizations designated in clauses (i) through (iii) of this subparagraph (within the period(s) appropriate to such organizations), the Development Owner shall sell the Development at the Minimum Purchase Price to whichever of such organizations it shall choose.

(C) After whichever occurs the later of:

(i) the end of the Compliance Period; or

(ii) two years from delivery of a Notice of Intent, the Development Owner may sell the Development without regard to any right of first refusal established by the LURA if no offer to purchase the Development at or above the Minimum Purchase Price has been made by a Qualified Nonprofit Organization, a Tenant Organization or the Department, or a period of 120 days has expired from the date of acceptance of all such offers as shall have been received without the sale having occurred, provided that the failure(s) to close within any

such 120-day period shall not have been caused by the Development Owner or matters related to the title for the Development.

(D) At any time prior to the giving of the Notice of Intent, the Development Owner may enter into an agreement with one or more specific Qualified Nonprofit Organizations and/or Tenant Organizations to provide a right of first refusal to purchase the Development for the Minimum Purchase Price, but any such agreement shall only permit purchase of the Development by such organization in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(E) The Department shall, at the request of the Development Owner, identify in the LURA a Qualified Nonprofit Organization or Tenant Organization which shall hold a limited priority in exercising a right of first refusal to purchase the Development at the Minimum Purchase Price, in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(F) The Department shall have the right to enforce the Development Owner's obligation to sell the Development as herein contemplated by obtaining a power-of-attorney from the Development Owner to execute such a sale or by obtaining an order for specific performance of such obligation or by such other means or remedy as shall be, in the Department's discretion, appropriate.

(17) Pre-Application Points. Applications which submitted a Pre-Application during the Pre-Application Acceptance Period and meet the requirements of this paragraph shall receive 7 points. To be eligible for these points, the Application must:

(A) be for the identical site as the proposed Development in the Pre-Application;

(B) have met the Pre-Application Threshold Criteria;

(C) be serving the same target population (family or elderly) as in the Pre-Application in the same Set-Asides; and

(D) be awarded by the Department an Application score that is not more than 5% greater or less than the number of points awarded by the Department at Pre-Application, with the exclusion of points for support and opposition under subsections (f)(2) and (f)(3)(C) of this title. An Applicant must choose, at the time of Application either clause (i) or (ii) of this subparagraph:

(i) to request the Pre-Application points and have the Department cap the Application score at no greater than the 5% increase regardless of the total points accumulated in the scoring evaluation. This allows an Applicant to avoid penalty for changing the point structure outside the 5% range from Pre-Application to Application; or

(ii) to request that the Pre-Application points be forfeited and that the Department evaluate the Application as requested in the self-scoring sheet.

(18) Point Reductions.

(A) Penalties will be imposed on an Application if the Applicant has requested extensions of Department deadlines, and did not meet the original submission deadlines, relating to developments receiving a housing tax credit commitment made in the application round preceding the current round. Extensions that will receive penalties are those extensions related to the submission of the carryover and the closing of the construction loan as identified in §50.21 of this title. For each extension request made, the Applicant will be required to pay a $2,500 extension fee as provided in §50.21(k) of this title and will receive a 2 point deduction for not meeting the Carryover deadline and a 5 point deduction for not meeting the closing of the construction loan deadline. Subsequent extension requests after the first extension request made for each development from the preceding round for these two deadlines will not result in a further point reduction than already described. No penalty points will be deducted for extensions that were requested on developments that involved rehabilitation or in which the Department is the primary lender.

(B) Penalties will be imposed on an Application if the Developer or Principal of the Applicant has been removed by the lender, equity provider, or limited partners in the past five years for its failure to perform its obligations under the loan documents or limited partnership agreement. An affidavit will be provided by the Applicant and the Developer certifying that they have not been removed as described, or requiring that they disclose each instance of removal with a detailed description of the situation. If an Applicant or Developer submits the affidavit, and the Department learns at a later date that a removal did take place as described, then the Application will be terminated and any Allocation made will be rescinded. The Applicant, Developers or Principals of the Applicant that are in court proceedings at the time of Application, must disclose this information and the situation will be evaluated on a case-by-case basis. 3 points will be deducted for each instance of removal.

(h) Tie Breaker Factors. In the event that two or more Applications receive the same number of points in any given Set-Aside category, Rural Regional Allocation or Urban/Exurban Regional Allocation, or Uniform State Service Region, and are both practicable and economically feasible, the Department will utilize the factors in paragraphs (1) through (3) of this subsection, in the order they are presented, to determine which Development will receive a preference in consideration for a tax credit commitment.

(1) The number of points awarded for amenities under subsection (g)(4)(C) of this section;

(2) The number of points awarded for amenities under subsection (g)(4)(D) of this section;

(3) The number of rentable square feet per credit amount requested; and

(4) The length of time the Development will be kept affordable.

(i) Staff Recommendations. After eligible Applications have been evaluated, ranked and underwritten in accordance with the QAP and the Rules, the Department staff shall make its recommendations to the Executive Award and Review Advisory Committee. The Committee will develop funding priorities and shall make commitment recommendations to the Board. Such recommendations and supporting documentation shall be made in advance of the meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed. The Committee will provide written, documented recommendations to the Board which will address at a minimum the financial or programmatic viability of each Application and a list of all submitted Applications which enumerates the reason(s) for the Development's proposed selection or denial, including all evaluation factors provided in subsection (g) of this section that were used in making this determination.

§50.10. Board Decisions; Waiting List; Forward Commitments.

(a) Board Decisions. The Board's decisions shall be based upon the Department's and the Board's evaluation of the proposed Developments' consistency with the criteria and requirements set forth in this QAP and Rules.

(1) On awarding tax credits, the Board shall document the reasons for each Application's selection, including any discretionary factors used in making its determination, and the reasons for any decision that conflicts with the recommendations made by Department

staff. The Board may not make, without good cause, a commitment decision that conflicts with the recommendations of Department staff. Good cause includes the Board's decision to apply discretionary factors.

(2) In making a determination to allocate tax credits, the Board shall be authorized to not rely solely on the number of points scored by an Application. It shall in addition, be entitled to take into account, as it deems appropriate, the discretionary factors listed in this paragraph. The Board may also apply these discretionary factors to its consideration of Tax Exempt Bond Developments. If the Board disapproves or fails to act upon an Application, the Department shall issue to the Applicant a written notice stating the reason(s) for the Board's disapproval or failure to act. In making tax credit decisions (including those related to Tax Exempt Bond Developments), the Board, in its discretion, may evaluate, consider and apply any one or more of the following discretionary factors:

(A) the market study;

(B) the proposed location of the Development, including supporting broad geographic dispersion;

(C) the compliance history of the Applicant and/or Developer;

(D) the Applicant and/or Developer's efforts to engage the neighborhood;

(E) the financial feasibility of the Development;

(F) the Development's proposed size and configuration;

(G) the housing needs of the community in which the Development will be located and the needs of the community, area, region and state;

(H) the Development's proximity to other rent restricted developments, including avoiding overconcentration;

(I) the availability of adequate public and private facilities and services;

(J) the anticipated impact on local school districts, giving due consideration to the authorized land use;

(K) laws relating to fair housing;

(L) the efficient use of the tax credits;

(M) consistency with local needs, including consideration of revitalization or preservation needs;

(N) the allocation of credits among many different entities without diminishing the quality of the housing;

(O) meeting a compelling housing need;

(P) providing integrated, affordable housing for individuals and families with different levels of income;

(Q) any matter considered by the Board to be relevant to the approval decision and in furtherance of the Department's purposes and the policies of Chapter 2306, Texas Government Code; or

(R) other good cause as determined by the Board.

(2) Before the Board approves any Application, the Department shall assess the compliance history of the Applicant with respect to all applicable requirements; and the compliance issues associated with the proposed Development, including compliance information provided by the Texas State Affordable Housing Corporation. The Committee shall provide to the Board a written report regarding the results of the assessments. The written report will be included in the appropriate Development file for Board and Department review. The Board shall fully document and disclose any instances in which the Board approves a Development Application despite any noncompliance associated with the Development or Applicant.

(b) Waiting List. If the entire State Housing Credit Ceiling for the applicable calendar year has been committed or allocated in accordance with this chapter, the Board shall generate, concurrently with the issuance of commitments, a waiting list of additional Applications ranked by score in descending order of priority based on Set-Aside categories and regional allocation goals. The Board may also apply discretionary factors in determining the Waiting List. If at any time prior to the end of the Application Round, one or more Commitment Notices expire and a sufficient amount of the State Housing Credit Ceiling becomes available, the Board shall issue a Commitment Notice to Applications on the waiting list subject to the amount of returned credits, the regional allocation goals and the Set-Aside categories, including the 10% Nonprofit Set-Aside allocation required under the Code, §42(h)(5). At the end of each calendar year, all Applications which have not received a Commitment Notice shall be deemed terminated. The Applicant may re-apply to the Department during the next Application Acceptance Period.

(c) Forward Commitments. The Board may determine to issue commitments of tax credit authority with respect to Developments from the State Housing Credit Ceiling for the calendar year following the year of issuance (each a "forward commitment"). The Board will utilize its discretion in determining the amount of credits to be allocated as forward commitments and the reasons for those commitments considering score and discretionary factors. The Board may utilize the forward commitment authority to allocate credits to TX-USDA-RHS Developments which are experiencing foreclosure or loan acceleration at any time during the 2004 calendar year.

(1) Unless otherwise provided in the Commitment Notice with respect to a Development selected to receive a forward commitment, actions which are required to be performed under this chapter by a particular date within a calendar year shall be performed by such date in the calendar year of the anticipated commitment rather than in the calendar year of the forward commitment.

(2) Any forward commitment made pursuant to this section shall be made subject to the availability of State Housing Credit Ceiling in the calendar year with respect to which the forward commitment is made. If a forward commitment shall be made with respect to a Development placed in service in the year of such commitment, the forward commitment shall be a "binding commitment" to allocate the applicable credit dollar amount within the meaning of the Code, §42(h)(1)(C).

(3) If tax credit authority shall become available to the Department in a calendar year in which forward commitments have been awarded, the Department may allocate such tax credit authority to any eligible Development which received a forward commitment, in which event the forward commitment shall be canceled with respect to such Development.

§50.11. Required Application Notifications, Receipt of Public Comment, and Meetings with Applicants; Viewing of Pre-Applications and Applications; Confidential Information.

(a) Required Application Notifications, Receipt of Public Comment, and Meetings with Applicants.

(1) Within approximately seven business days after the close of the Pre-Application Acceptance Period, the Department shall publish a Pre-Application Submission Log on its web site. Such log shall contain the Development name, address, Set-Aside, number of units, requested credits, owner contact name and phone number.

(2) Approximately 30 days before the close of the Application Acceptance Period, the Department will release the evaluation and assessment of the Pre-Applications on its web site.

(3) Not later than 14 days after the close of the Pre-Application Acceptance Period, or Application Acceptance Period for Applications for which no Pre-Application was submitted, the Department shall:

(A) publish an Application submission log on its web site.

(B) give notice of a proposed Development in writing that provides the information required under clause (i) of this subparagraph to all of the individuals and entities described in clauses (ii) through (viii) of this subparagraph.

(i) The following information will be provided in these notifications:

(I) The relevant dates affecting the Application including the date on which the Application was filed, the date or dates on which any hearings on the Application will be held and the date by which a decision on the Application will be made;

(II) A summary of relevant facts associated with the Development;

(III) A summary of any public benefits provided as a result of the Development, including rent subsidies and tenant services; and

(IV) The name and contact information of the employee of the Department designated by the director to act as the information officer and liaison with the public regarding the Application.

(ii) Presiding officer of the governing body of the political subdivision containing the Development (mayor or county judge) to advise such individual that the Development, or a part thereof, will be located in his/her jurisdiction and request any comments which such individual may have concerning such Development. If the presiding officer of the governing body expresses opposition to the Development, the Department will give consideration to the objections raised and will visit the proposed site or Development within 30 days of notification to conduct a physical inspection of the Development site and consult with the presiding officer of the governing body before the Application is scored, if opposition is received prior to scoring being completed. The Department will obtain reimbursement from the Applicant for the necessary travel and expenses at rates consistent with the state authorized rate;

(iii) Any member of the governing body of a political subdivision who represents the area containing the Development. If the governing body has single-member districts, then only that member of the governing body for that district will be notified, however if the governing body has at-large districts, then all members of the governing body will be notified;

(iv) state representative and state senator who represent the community where the Development is proposed to be located. If the state representative or senator hold a community meeting, the Department shall provide appropriate representation.

(v) United States representative who represents the community containing the Development;

(vi) Superintendent of the school district containing the Development;

(vii) Presiding officer of the board of trustees of the school district containing the Development;

(viii) Any Neighborhood Organizations on record with the city or county in which the Development is to be located and whose boundaries contain the proposed Development site, based on the letters obtained by the Applicant from the city and county clerks under §50.9(f) of this title or otherwise known to the Applicant or Department and on record with the state or county.

(C) The elected officials identified in subparagraph (B) of this paragraph will be provided an opportunity to comment on the Application during the Application evaluation process.

(4) The Department shall hold at least three public hearings in different Uniform State Service Regions of the state to receive comment on the submitted Applications and on other issues relating to the Housing Tax Credit Program.

(5) The Department shall make available on the Department's website information regarding the Housing Tax Credit Program including notice of public hearings, meetings, Application Round opening and closing dates, submitted Applications, and Applications approved for underwriting and recommended to the Board, and shall provide that information to locally affected community groups, local and state elected officials, local housing departments, any appropriate newspapers of general or limited circulation that serve the community in which a proposed Development is to be located, nonprofit and for-profit organizations, on-site property managers of occupied Developments that are the subject of Applications for posting in prominent locations at those Developments, and any other interested persons including community groups, who request the information.

(6) Approximately forty days prior to the date of the July Board meeting at which the issuance of Commitment Notices shall be discussed, the Department will notify each Applicant of the receipt of any opposition received by the Department relating to his or her Development at that time.

(7) Not later than the third working day after the date of completion of each stage of the Application process, including the results of the Application scoring and underwriting phases and the commitment phase, the results will be posted to the Department's web site.

(8) At least thirty days prior to the date of the July Board meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed, the Department will:

(A) provide the Application scores to the Board;

(B) if feasible, post to the Department's web site the entire Application, including all supporting documents and exhibits, the Application Log as further described in §50.20(b) of this title, a scoring sheet providing details of the Application score, and any other documents relating to the processing of the Application.

(9) A summary of comments received by the Department on specific Applications shall be part of the documents required to be reviewed by the Board under this subsection if it is received 30 business days prior to the date of the Board Meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed. Comments received after this deadline will not be part of the documentation submitted to the Board. However, a public comment period will be available prior to the Board's decision, at the Board meeting where tax credit commitment decisions will be made.

(10) Not later than the 120th day after the date of the initial issuance of Commitment Notices for housing tax credits, the Department shall provide an Applicant who did not receive a commitment for

housing tax credits with an opportunity to meet and discuss with the Department the Application's deficiencies, scoring and underwriting.

(b) Viewing of Pre-Applications and Applications. Pre-Applications and Applications for tax credits are public information and are available upon request after the Pre-Application and Application Acceptance Periods close, respectively. All Pre-Applications and Applications, including all exhibits and other supporting materials, except Personal Financial Statements and Social Security numbers, will be made available for public disclosure after the Pre-Application and Application periods close, respectively. The content of Personal Financial Statements may still be made available for public disclosure upon request if the Attorney General's office deems it is not protected from disclosure by the Texas Public Information Act.

(c) Confidential Information. The Department may treat the financial statements of any Applicant as confidential and may elect not to disclose those statements to the public. A request for such information shall be processed in accordance with §552.305 of the Government Code.

§50.12. Tax Exempt Bond Developments: Filing of Applications, Applicability of Rules, Supportive Services, Financial Feasibility Evaluation, Satisfaction of Requirements.

(a) Filing of Applications for Tax Exempt Bond Developments. Applications for a Tax Exempt Bond Development may be submitted to the Department as described in paragraphs (1) and (2) of this subsection:

(1) Applicants which receive advance notice of a Program Year 2004 reservation as a result of the Texas Bond Review Board's (TBRB) lottery for the private activity volume cap must file a complete Application not later than 60 days after the date of the TBRB lottery. Such filing must be accompanied by the Application fee described in §50.21 of this title.

(2) Applicants which receive advance notice of a Program Year 2004 reservation after being placed on the waiting list as a result of the TBRB lottery for private activity volume cap must submit Volume 1 and Volume 2 of the Application and the Application fee described in §50.21 of this title prior to the Applicant's bond reservation date as assigned by the TBRB. Any outstanding documentation required under this section must be submitted to the Department at least 60 days prior to the Board meeting at which the decision to issue a Determination Notice would be made.

(b) Applicability of Rules for Tax Exempt Bond Developments. Tax Exempt Bond Development Applications are subject to all rules in this title, with the only exceptions being the following sections: §50.4 of this title (regarding State Housing Credit Ceiling), §50.7 of this title (regarding Regional Allocation and Set-Asides), §50.8 of this title (regarding Pre-Application), §50.9(d)(2) and (4) of this title (regarding Selection Criteria Review and Prioritization), §50.9(g) of this title (regarding Selection Criteria, §50.10(b) and (c) of this title (regarding Waiting List and Forward Commitments), and §50.14 of this title (regarding Carryover and 10% Test) of this title. Such Developments requesting a Determination Notice in the current calendar year must meet all Threshold Criteria requirements stipulated in §50.9(f) of this title. Such Developments which received a Determination Notice in a prior calendar year must meet all Threshold Criteria requirements stipulated in the QAP and Rules in effect for the calendar year in which the Determination Notice was issued; provided, however, that such Developments shall comply with all procedural requirements for obtaining Department action in the current QAP and Rules; and such other requirements of the QAP and Rules as the Department determines applicable. At the time of Application, Developments must demonstrate the Development's consistency with the bond issuer's consolidated plan or other similar planning document. Consistency with the local municipality's consolidated plan or similar planning document must also be demonstrated in those instances where the city or county has a consolidated plan. Applicants will be required to meet all conditions of the Determination Notice by the time the construction loan is closed unless otherwise specified in the Determination Notice. Applicants must meet the requirements identified in §50.15(a) of this title.

(c) Supportive Services for Tax Exempt Bond Developments. Tax Exempt Bond Development Applications must provide an executed agreement with a qualified service provider for the provision of special supportive services that would otherwise not be available for the tenants. The provision of these services will be included in the LURA. Acceptable services as described in paragraphs (1) through (3) of this subsection include:

(1) the services must be in at least one of the following categories: child care, transportation, basic adult education, legal assistance, counseling services, GED preparation, English as a second language classes, vocational training, home buyer education, credit counseling, financial planning assistance or courses, health screening services, health and nutritional courses, organized team sports programs, youth programs, scholastic tutoring, social events and activities, community gardens or computer facilities; or

(2) any other program described under Title IV-A of the Social Security Act (42 U.S.C. §§601 et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of out-of wedlock pregnancies; and encourages the formation and maintenance of two-parent families, or

(3) any other services approved in writing by the Issuer. The plan for tenant supportive services submitted for review and approval of the Issuer must contain a plan for coordination of services with state workforce development and welfare programs. The coordinated effort will vary depending upon the needs of the tenant profile at any given time as outlined in the plan.

(d) Financial Feasibility Evaluation for Tax Exempt Bond Developments. Code §42(m)(2)(D) requires the bond issuer (if other than the Department) to ensure that a Tax Exempt Bond Development does not receive more tax credits than the amount needed for the financial feasibility and viability of a Development throughout the Compliance Period. Treasury Regulations prescribe the occasions upon which this determination must be made. In light of the requirement, issuers may either elect to underwrite the Development for this purpose in accordance with the QAP and the Underwriting Rules and Guidelines, §1.32 of this title, as proposed, or request that the Department perform the function. If the issuer underwrites the Development, the Department will, nonetheless, review the underwriting report and may make such changes in the amount of credits which the Development may be allowed as are appropriate under the Department's guidelines. The Determination Notice issued by the Department and any subsequent IRS Form(s) 8609 will reflect the amount of tax credits for which the Development is determined to be eligible in accordance with this subsection, and the amount of tax credits reflected in the IRS Form 8609 may be greater or less than the amount set forth in the Determination Notice, based upon the Department's and the bond issuer's determination as of each building's placement in service. Any increase of tax credits, from the amount specified in the Determination Notice, at the time of each building's placement in service will only be permitted if it is determined by the Department, as required by Code §42(m)(2)(D), that the Tax Exempt Bond Development does not receive more tax credits than the amount needed for the financial feasibility and viability of a

Development throughout the Compliance Period, and upon approval by the Board.

(e) Satisfaction of Requirements for Tax Exempt Bond Developments. If the Department staff determines that all requirements of this QAP and Rules have been met, the Department will recommend that the Board authorize the issuance of a Determination Notice. The Board, however, may utilize the discretionary factors identified in §50.10(a) of this title in determining if they will authorize the Department to issue a Determination Notice to the Development Owner. The Determination Notice, if authorized by the Board, will confirm that the Development satisfies the requirements of the QAP and Rules in accordance with the Code, §42(m)(1)(D).

§50.13. Commitment and Determination Notices; Agreement and Election Statement.

(a) Commitment and Determination Notices. If the Board approves an Application, the Department will:

(1) if the Application is for a commitment from the State Housing Credit Ceiling, issue a Commitment Notice to the Development Owner which shall:

(A) confirm that the Board has approved the Application; and

(B) state the Department's commitment to make a Housing Credit Allocation to the Development Owner in a specified amount, subject to the feasibility determination described at §50.17 of this title, and compliance by the Development Owner with the remaining requirements of this chapter and any other terms and conditions set forth therein by the Department. This commitment shall expire on the date specified therein unless the Development Owner indicates acceptance of the commitment by executing the Commitment Notice or Determination Notice, pays the required fee specified in §50.21 of this title, and satisfies any other conditions set forth therein by the Department. A Development Owner may request an extension of the Commitment Notice expiration date by submitting an extension request and associated extension fee as described in §50.21 of this title. In no event shall the expiration date of a Commitment Notice be extended beyond the last business day of the applicable calendar year.

(2) if the Application regards a Tax Exempt Bond Development, issue a Determination Notice to the Development Owner which shall:

(A) confirm the Board's determination that the Development satisfies the requirements of this QAP; and

(B) state the Department's commitment to issue IRS Form(s) 8609 to the Development Owner in a specified amount, subject to the requirements set forth at §50.12 of this title and compliance by the Development Owner with all applicable requirements of this title and any other terms and conditions set forth therein by the Department. The Determination Notice shall expire on the date specified therein unless the Development Owner indicates acceptance by executing the Determination Notice and paying the required fee specified in §50.21 of this title. The Determination Notice shall also expire unless the Development Owner satisfies any conditions set forth therein by the Department within the applicable time period.

(3) notify, in writing, the mayor or other equivalent chief executive officer of the municipality in which the Property is located informing him/her of the Board's issuance of a Commitment Notice or Determination Notice, as applicable.

(4) A Commitment or Determination Notice shall not be issued with respect to any Development for an unnecessary amount or where the cost for the total development, acquisition, construction or rehabilitation exceeds the limitations established from time to time by the Department and the Board, unless the Department staff make a recommendation to the Board based on the need to fulfill the goals of the Housing Tax Credit Program as expressed in this QAP and Rules, and the Board accepts the recommendation. The Department's recommendation to the Board shall be clearly documented.

(5) A Commitment or Determination Notice shall not be issued with respect to any Development in violation of the calculation relating to the inclusive capture rate as restricted under §1.32(g)(2) of this title, as proposed, unless The Committee makes a recommendation to the Board based on the need to fulfill the goals of the Housing Tax Credit Program as expressed in this QAP and Rules, and the Board accepts the recommendation. The Department's recommendation to the Board shall be clearly documented.

(6) A Commitment or Determination Notice shall not be issued with respect to the Applicant, the Development Owner, the General Contractor, or any Affiliate of the General Contractor that is active in the ownership or Control of one or more other low income rental housing properties in the state of Texas funded by the Department, or outside the state of Texas, that is in Material Non-Compliance with the LURA (or any other document containing an Extended Low Income Housing Commitment) or the program rules in effect for such property as of June 30 of each year (or for Tax Exempt Bond Developments as of 10 business days prior to the Board's vote to allocate credits. Any corrective action documentation affecting the Material Non-Compliance status score for Applicants must be received by the Department no later than May 15 of each year (or for Tax Exempt Bond Developments no later than 20 business days prior to the Board's vote to allocate credits).

(b) Agreement and Election Statement. Together with the Development Owner's acceptance of the Carryover Allocation, the Development Owner may execute an Agreement and Election Statement, in the form prescribed by the Department, for the purpose of fixing the Applicable Percentage for the Development as that for the month in which the Carryover Allocation was accepted (or the month the bonds were issued for Tax Exempt Bond Developments), as provided in the Code, §42(b)(2). Current Treasury Regulations, §1.42-8(a)(1)(v), suggest that in order to permit a Development Owner to make an effective election to fix the Applicable Percentage for a Development, the Carryover Allocation Document must be executed by the Department and the Development Owner within the same month. The Department staff will cooperate with a Development Owner, as possible or reasonable, to assure that the Carryover Allocation Document can be so executed.

§50.14. Carryover, 10% Test.

(a) Carryover. All Developments which received a Commitment Notice, and will not be placed in service and receive IRS Form 8609 in the year the Commitment Notice was issued, must submit the Carryover documentation to the Department no later than November 1 of the year in which the Commitment Notice is issued. Developments involving acquisition/rehabilitation must submit the Carryover documentation to the Department no later than December 1 of the year in which the Commitment Notice is issued, however they will be ineligible for extensions beyond that date. Commitments for credits will be terminated if the Carryover documentation, or an approved extension, has not been received by this deadline. In the event that a Development Owner intends to submit the Carryover documentation in any month preceding November of the year in which the Commitment Notice is issued, in order to fix the Applicable Percentage for the Development in that month, it must be submitted no later than the first Friday in the preceding month. If the financing structure, syndication rate, amount of debt or syndication proceeds are revised at the time of Carryover from what was proposed in the original Application, applicable documentation of such changes must be provided and the Development may be

reevaluated by the Department. The Carryover Allocation format must be properly completed and delivered to the Department as prescribed by the Carryover Allocation Procedures Manual. All Carryover Allocations will be contingent upon the following, in addition to all other conditions placed upon the Application in the Commitment Notice:

(1) The Development Owner must have purchased the property for the Development.

(2) A current original plat or survey of the land, prepared by a duly licensed Texas Registered Professional Land Surveyor. Such survey shall conform to standards prescribed in the Manual of Practice for Land Surveying in Texas as promulgated and amended from time to time by the Texas Surveyors Association as more fully described in the Carryover Procedures Manual.

(3) A review of information provided by the IRS as permitted pursuant to IRS Form 8821, Tax Information Authorization, for the release of tax information relating to non-disclosure or recapture issues. Each Development Owner, General Partner and Principal must execute and provide to the Department Form 8821 within ten business days of the issuance of a Commitment Notice or Determination Notice. Any information provided by the IRS will be evaluated by the Department 50and may be utilized by the Board to determine if a Carryover Allocation will be made.

(4) Attendance of the Development Owner and Development architect at eight hours of Fair Housing training on or before the closing of the construction loan.

(5) For all Developments involving new construction, evidence of the availability of all necessary utilities/services to the Development site must be provided. Necessary utilities include natural gas (if applicable), electric, trash, water, and sewer. Such evidence must be a letter or a monthly utility bill from the appropriate municipal/local service provider. If utilities are not already accessible, then the letter must clearly state: an estimated time frame for provision of the utilities, an estimate of the infrastructure cost, and an estimate of any portion of that cost that will be borne by the Development Owner. Letters must be from an authorized individual representing the organization which actually provides the services. Such documentation should clearly indicate the Development property. If utilities are not already accessible (undeveloped areas), then the letter should not be older than three months from the first day of the Application Acceptance Period.

(6) Development Owners must provide evidence to the Department that they have notified the District office of the Texas Department of Transportation of their proposed property consistent with the template provided in the Carryover Allocation Procedures Manual.

(b) 10% Test. No later than six months from the date the Carryover Allocation Document is executed by the Department and the Development Owner, more than 10% of the Development Owner's reasonably expected basis must have been incurred pursuant to §42(h)(1)(E)(i) and (ii) of the Internal Revenue Code and Treasury Regulations, §1.42-6. The evidence to support the satisfaction of this requirement must be submitted to the Department no later than June 30 of the year following the execution of the Carryover Allocation Document in a format prescribed by the Department.

§50.15. Closing of the Construction Loan, Commencement of Substantial Construction.

(a) Closing of the Construction Loan. The Development Owner must submit evidence of having closed the construction loan. The evidence must be submitted no later than June 1 of the year after the execution of the Carryover Allocation Document, and no later than 14 days after the closing of the construction loan for Tax Exempt Bond Developments, with the possibility of an extension as described in §50.21 of this title. At the time of submission of the documentation, the Development Owner must also submit a Management Plan and an Affirmative Marketing Plan as further described in the Carryover Allocation Procedures Manual. The Carryover Allocation will automatically be terminated if the Development Owner fails to meet the aforementioned closing deadline (taking into account any extensions), and has not had an extension approved, and all credits previously allocated to that Development will be recovered and become a part of the State Housing Credit Ceiling for the applicable year. Owners of Tax Exempt Bond Developments will be fined $2,500 if this requirement is not fulfilled.

(b) Commencement of Substantial Construction. The Development Owner must submit evidence of having commenced and continued substantial construction activities. The evidence must be submitted not later than December 1 of the year after the execution of the Carryover Allocation Document with the possibility of an extension as described in §50.21 of this title. The minimum activity necessary to meet the requirement of substantial construction for new Developments will be defined as having expended 10% of the construction contract amount for the Development, adjusted for any change orders, and as documented by both the most recent construction contract application for payment and the inspecting architect. The minimum activity necessary to meet the requirement of substantial construction for rehabilitation Developments will be defined as having expended 10% of the construction budget as documented by the inspecting architect. Evidence of such activity shall be provided in a format prescribed by the Department.

§50.16. Cost Certification, LURA.

(a) Cost Certification. If a Carryover Allocation was not requested and received, Developments must be placed in service by December 31 of the year the Commitment Notice was issued. Developments receiving a Carryover Allocation must be placed in service by December 31 of the second year following the year the Carryover Allocation Agreement was executed. Developments requesting IRS Forms 8609 must submit the required Cost Certification documentation no later than April 1 of the year following the date the buildings were placed in service. Any Developments issued a Commitment Notice or Determination Notice that fails to submit its Cost Certification documentation by this time will be reported to the IRS. The Department will perform an initial evaluation of the Cost Certification documentation within 45 days from the date of receipt of the Cost Certification documentation and notify the Owner in a deficiency letter of all additional required documentation. Once the Department has determined that all required documents have been received, the Department will issue IRS Forms 8609 no later than 90 days from the date of receipt of those final documents. Any deficiency letters issued to the Owner pertaining to the Cost Certification documentation will also be copied to the syndicator.

(b) Land Use Restriction Agreement (LURA). The Development Owner must request a LURA from the Department no later than September 1 of the first year in which credits will be claimed. The Development Owner must date, sign and acknowledge before a notary public the LURA and send the original to the Department for execution by December 1 of the first year in which credits will be claimed. In addition, the initial compliance and monitoring fee must also be submitted to the Department by December 1 of that same year. After receipt of the signed LURA from the Department, the Development Owner shall then record said LURA, along with any and all exhibits attached thereto, in the real property records of the county where the Development is located and return the original document, duly certified as to recordation by the appropriate county official, to the Department no

later than the date that the Cost Certification Documentation is submitted to the Department. If any liens (other than mechanics' or materialmen's liens) shall have been recorded against the Development and/or the Property prior to the recording of the LURA, the Development Owner shall obtain the subordination of the rights of any such lienholder, or other effective consent, to the survival of certain obligations contained in the LURA, which are required by §42(h)(6)(E)(ii) of the Code to remain in effect following the foreclosure of any such lien. Receipt of such certified recorded original LURA by the Department is required prior to issuance of IRS Form 8609. A representative of the Department, or assigns, shall physically inspect the Development for compliance with the Application and the representatives, warranties, covenants, agreements and undertakings contained therein. Such inspection will be conducted before the IRS Form 8609 is issued for a building, but it shall be conducted in no event later than the end of the second calendar year following the year the last building in the Development is placed in service. The Development Owner for Tax Exempt Bond Developments shall obtain a subordination agreement wherein the lien of the mortgage is subordinated to the LURA.

§50.17. Housing Credit Allocations.

(a) In making a commitment of a Housing Credit Allocation under this chapter, the Department shall rely upon information contained in the Application to determine whether a building is eligible for the credit under the Code, §42. The Development Owner shall bear full responsibility for claiming the credit and assuring that the Development complies with the requirements of the Code, §42. The Department shall have no responsibility for ensuring that a Development Owner who receives a Housing Credit Allocation from the Department will qualify for the housing credit.

(b) The Housing Credit Allocation Amount shall not exceed the dollar amount the Department determines is necessary for the financial feasibility and the long term viability of the Development throughout the affordability period. Such determination shall be made by the Department at the time of issuance of the Commitment Notice or Determination Notice; at the time the Department makes a Housing Credit Allocation; and as of the date each building in a Development is placed in service. Any Housing Credit Allocation Amount specified in a Commitment Notice, Determination Notice or Carryover Allocation Document is subject to change by the Department based upon such determination. Such a determination shall be made by the Department based on its evaluation and procedures, considering the items specified in the Code, §42(m)(2)(B), and the department in no way or manner represents or warrants to any Applicant, sponsor, investor, lender or other entity that the Development is, in fact, feasible or viable.

(c) The General Contractor hired by the Development Owner must meet specific criteria as defined by the Seventy-fifth Legislature. A General Contractor hired by a Development Owner or a Development Owner, if the Development Owner serves as General Contractor must demonstrate a history of constructing similar types of housing without the use of federal tax credits. Evidence must be submitted to the Department, in accordance with §50.9(f)(4)(H) of this title, which sufficiently documents that the General Contractor has constructed some housing without the use of Housing Tax Credits. This documentation will be required as a condition of the commitment notice or carryover agreement, and must be complied with prior to commencement of construction and at cost certification and final allocation of credits.

(d) An allocation will be made in the name of the Development Owner identified in the related Commitment Notice or Determination Notice. If an allocation is made to a member or Affiliate of the ownership entity proposed at the time of Application, the Department will transfer the allocation to the ownership entity as consistent with the intention of the Board when the Development was selected for an award of tax credits.. Any other transfer of an allocation will be subject to review and approval by the Department consistent with §50.18(c) of this title. The approval of any such transfer does not constitute a representation to the effect that such transfer is permissible under §42 of the Code or without adverse consequences thereunder, and the Department may condition its approval upon receipt and approval of complete current documentation regarding the owner including documentation to show consistency with all the criteria for scoring, evaluation and underwriting, among others, which were applicable to the original Applicant.

(e) The Department shall make a Housing Credit Allocation, either in the form of IRS Form 8609, with respect to current year allocations for buildings placed in service, or in the Carryover Allocation Document, for buildings not yet placed in service, to any Development Owner who holds a Commitment Notice which has not expired, and for which all fees as specified in §50.21 of this title have been received by the Department and with respect to which all applicable requirements, terms and conditions have been met. For Tax Exempt Bond Developments, the Housing Credit Allocation shall be made in the form of a Determination Notice. For an IRS Form 8609 to be issued with respect to a building in a Development with a Housing Credit Allocation, satisfactory evidence must be received by the Department that such building is completed and has been placed in service in accordance with the provisions of the Department's Cost Certification Procedures Manual. The Cost Certification documentation requirements will include a certification and inspection report prepared by a Third-Party accredited accessibility inspector to certify that the Development meets all required accessibility standards. IRS Form 8609 will not be issued until the certifications are received by the Department. The Department shall mail or deliver IRS Form 8609 (or any successor form adopted by the Internal Revenue Service) to the Development Owner, with Part I thereof completed in all respects and signed by an authorized official of the Department. The delivery of the IRS Form 8609 will occur only after the Development Owner has complied with all procedures and requirements listed within the Cost Certification Procedures Manual. Regardless of the year of Application to the Department for Housing Tax Credits, the current year's Cost Certification Procedures Manual must be utilized when filing all cost certification materials. A separate Housing Credit Allocation shall be made with respect to each building within a Development which is eligible for a housing credit; provided, however, that where an allocation is made pursuant to a Carryover Allocation Document on a Development basis in accordance with the Code, §42(h)(1)(F), a housing credit dollar amount shall not be assigned to particular buildings in the Development until the issuance of IRS Form 8609s with respect to such buildings.

(f) In making a Housing Credit Allocation, the Department shall specify a maximum Applicable Percentage, not to exceed the Applicable Percentage for the building permitted by the Code, §42(b), and a maximum Qualified Basis amount. In specifying the maximum Applicable Percentage and the maximum Qualified Basis amount, the Department shall disregard the first-year conventions described in the Code, §42(f)(2)(A) and §42(f)(3)(B). The Housing Credit Allocation made by the Department shall not exceed the amount necessary to support the extended low income housing commitment as required by the Code, §42(h)(6)(C)(i).

(g) Development inspections shall be required to show that the Development is built or rehabilitated according to required plans and specifications. At a minimum, all Development inspections must include an inspection for quality during the construction process while defects can reasonably be corrected and a final inspection at the time the Development is placed in service. All such Development inspections shall be performed by the Department or by an independent Third Party inspector acceptable to the Department. The Development Owner shall

pay all fees and costs of said inspections as described in §50.21 of this title.

(h) After the entire Development is placed in service, which must occur prior to the deadline specified in the Carryover Allocation Document and as further outlined in §50.16 of this title, the Development Owner shall be responsible for furnishing the Department with documentation which satisfies the requirements set forth in the Cost Certification Procedures Manual. For purposes of this title, and consistent with IRS Notice 88-116, the placed in service date for a new or existing building used as residential rental property is the date on which the building is ready and available for its specifically assigned function and more specifically when the first Unit in the building is certified as being suitable for occupancy in accordance with state and local law and as certified by the appropriate local authority or registered architect as ready for occupancy. The Cost Certification must be submitted for the entire Development; therefore partial Cost Certifications are not allowed. The Department may require copies of invoices and receipts and statements for materials and labor utilized for the new construction or rehabilitation and, if applicable, a closing statement for the acquisition of the Development as well as for the closing of all interim and permanent financing for the Development. If the Development Owner does not fulfill all representations and commitments made in the Application, the Department may make reasonable reductions to the tax credit amount allocated via the IRS Form 8609, may withhold issuance of the IRS Form 8609s until these representations and commitments are met, and/or may terminate the allocation, if appropriate corrective action is not taken by the Development Owner.

(i) The Board at its sole discretion may allocate credits to a Development Owner in addition to those awarded at the time of the initial Carryover Allocation in instances where there is bona fide substantiation of cost overruns and the Department has made a determination that the allocation is needed to maintain the Development's financial viability.

(j) The Department may, at any time and without additional administrative process, determine to award credits to Developments previously evaluated and awarded credits if it determines that such previously awarded credits are or may be invalid and the owner was not responsible for such invalidity. The Department may also consider an amendment to a Commitment Notice or Carryover Allocation or other requirement with respect to a Development if the revisions:

(1) are consistent with the Code and the Housing Tax Credit Program;

(2) do not occur while the Development is under consideration for tax credits;

(3) do not involve a change in the number of points scored (unless the Development's ranking is adjusted because of such change);

(4) do not involve a change in the Development's site; or

(5) do not involve a change in the set-aside election.

§50.18. Board Reevaluation, Appeals; Amendments, Housing Tax Credit and Ownership Transfers, Sale of Tax Credit Properties, Withdrawals, Cancellations.

(a) Board Reevaluation. Regardless of development stage, the Board shall reevaluate a Development that undergoes a substantial change between the time of initial Board approval of the Development and the time of issuance of a Commitment Notice or Determination Notice for the Development. For the purposes of this subsection, substantial change shall be those items identified in subsection (c)(3) of this section. The Board may revoke any Commitment Notice or Determination Notice issued for a Development that has been unfavorably reevaluated by the Board.

(b) Appeals Process. An Applicant may appeal decisions made by the Department.

(1) The decisions that may be appealed are identified in subparagraphs (A) through (C) of this paragraph.

(A) a determination regarding the Application's satisfaction of:

(i) Eligibility Requirements;

(ii) Disqualification or debarment criteria;

(iii) Pre-Application or Application Threshold Criteria;

(iv) Underwriting Criteria;

(B) the scoring of the Application under the Application Selection Criteria; and

(C) a recommendation as to the amount of housing tax credits to be allocated to the Application.

(D) Any Department decision that results in termination of an Application.

(2) An Applicant may not appeal a decision made regarding an Application filed by another Applicant.

(3) An Applicant must file its appeal in writing with the Department not later than the seventh day after the date the Department publishes the results of any stage of the Application evaluation process identified in §50.9 of this title. In the appeal, the Applicant must specifically identify the Applicant's grounds for appeal, based on the original Application and additional documentation filed with the original Application. If the appeal relates to the amount of housing tax credits recommended to be allocated, the Department will provide the Applicant with the underwriting report upon request.

(4) The Executive Director of the Department shall respond in writing to the appeal not later than the 14th day after the date of receipt of the appeal. If the Applicant is not satisfied with the Executive Director's response to the appeal, the Applicant may appeal directly in writing to the Board, provided that an appeal filed with the Board under this subsection must be received by the Board before:

(A) the seventh day preceding the date of the Board meeting at which the relevant commitment decision is expected to be made; or

(B) the third day preceding the date of the Board meeting described by subparagraph (A) of this paragraph, if the Executive Director does not respond to the appeal before the date described by subparagraph (A) of this paragraph.

(5) Board review of an appeal under paragraph (4) of this subsection is based on the original Application and additional documentation filed with the original Application. The Board may not review any information not contained in or filed with the original Application. The decision of the Board regarding the appeal is final.

(6) The Department will post to its web site an appeal filed with the Department or Board and any other document relating to the processing of the appeal.

(c) Amendment of Application Subsequent to Allocation by Board.

(1) If a proposed modification would materially alter a Development approved for an allocation of a housing tax credit, or if the Applicant has altered any selection criteria item for which it received

points, the Department shall require the Applicant to file a formal, written request for an amendment to the Application.

(2) The Executive Director of the Department shall require the Department staff assigned to underwrite Applications to evaluate the amendment and provide an analysis and written recommendation to the Board. The appropriate party monitoring compliance during construction in accordance with §50.19 of this title shall also provide to the Board an analysis and written recommendation regarding the amendment.

(3) For Applications approved by the Board prior to September 1, 2001, the Executive Director will approve or deny the amendment request. For Applications approved by the Board after September 1, 2001, the Board must vote on whether to approve the amendment. The Board by vote may reject an amendment and, if appropriate, rescind a Commitment Notice or terminate the allocation of housing tax credits and reallocate the credits to other Applicants on the Waiting List if the Board determines that the modification proposed in the amendment:

(A) would materially alter the Development in a negative manner; or

(B) would have adversely affected the selection of the Application in the Application Round.

(4) Material alteration of a Development includes, but is not limited to:

(A) a significant modification of the site plan;

(B) a modification of the number of units or bedroom mix of units;

(C) a substantive modification of the scope of tenant services;

(D) a reduction of three percent or more in the square footage of the units or common areas;

(E) a significant modification of the architectural design of the Development;

(F) a modification of the residential density of the Development of at least five percent;

(G) an increase or decrease in the site acreage of greater than 10% from the original site under control and proposed in the Application; and

(H) any other modification considered significant by the Board.

(5) In evaluating the amendment under this subsection, the Department staff shall consider whether the need for the modification proposed in the amendment was:

(A) reasonably foreseeable by the Applicant at the time the Application was submitted; or

(B) preventable by the Applicant.

(6) This section shall be administered in a manner that is consistent with the Code, §42.

(7) Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and monitor regarding the amendment will be posted to the Department's web site.

(d) Housing Tax Credit and Ownership Transfers. A Development Owner may not transfer an allocation of housing tax credits or ownership of a Development supported with an allocation of housing tax credits to any Person other than an Affiliate of the Development Owner unless the Development Owner obtains the Executive Director's prior, written approval of the transfer. The Executive Director may not unreasonably withhold approval of the transfer. A Development Owner seeking Executive Director approval of a transfer and the proposed transferee must provide to the Department a copy of any applicable agreement between the parties to the transfer, including any third-party agreement with the Department. A Development Owner seeking Executive Director approval of a transfer must provide the Department with documentation requested by the Department, including but not limited to, a list of the names of transferees and Related Parties; and detailed information describing the experience and financial capacity of transferees and related parties. All transfer requests must disclose the reason for the request and specifically disclose if the transfer is requested because a Person active in the Development is being, or has been, removed by the lender, equity provider, or limited partners for its failure to perform its obligations under the loan documents or limited partnership agreement. The Development Owner shall certify to the Executive Director that the tenants in the Development have been notified in writing of the transfer before the 30th day preceding the date of submission of the transfer request to the Department. Not later than the fifth working day after the date the Department receives all necessary information under this section, the Department shall conduct a qualifications review of a transferee to determine the transferee's past compliance with all aspects of the Housing Tax Credit Program, LURAs; and the sufficiency of the transferee's experience with Developments supported with Housing Credit Allocations. If the viable operation of the Development is deemed to be in jeopardy by the Department, the Department may authorize changes that were not contemplated in the Application.

(e) Sale of Certain Tax Credit Properties. Consistent with §2306.6726, Texas Government Code, not later than two years before the expiration of the Compliance Period, a Development Owner who agreed to provide a right of first refusal under §2306.6725, Texas Government Code and who intends to sell the property shall notify the Department of its intent to sell.

(1) The Development Owner shall notify Qualified Nonprofit Organizations and tenant organizations of the opportunity to purchase the Development. The Development Owner may:

(A) during the first six-month period after notifying the Department, negotiate or enter into a purchase agreement only with a Qualified Nonprofit Organization that is also a community housing development organization as defined by the federal home investment partnership program;

(B) during the second six-month period after notifying the Department, negotiate or enter into a purchase agreement with any Qualified Nonprofit Organization or tenant organization; and

(C) during the year before the expiration of the compliance period, negotiate or enter into a purchase agreement with the Department or any Qualified Nonprofit Organization or tenant organization approved by the Department.

(2) Notwithstanding items for which points were received consistent with §50.9(g) of this title, a Development Owner may sell the Development to any purchaser after the expiration of the compliance period if a Qualified Nonprofit Organization or tenant organization does not offer to purchase the Development at the minimum price provided by §42(i)(7), Internal Revenue Code of 1986 (26 U.S.C. Section 42(i)(7)), and the Department declines to purchase the Development.

(f) Withdrawals. An Applicant may withdraw an Application prior to receiving a Commitment Notice, Determination Notice, Carryover Allocation Document or Housing Credit Allocation, or may cancel a Commitment Notice or Determination Notice by submitting to the Department a notice, as applicable, of withdrawal or cancellation, and making any required statements as to the return of any tax credits allocated to the Development at issue.

(g) Cancellations. The Department may cancel a Commitment Notice, Determination Notice or Carryover Allocation prior to the issuance of IRS Form 8609 with respect to a Development if:

(1) The Applicant or the Development Owner, or the Development, as applicable, fails to meet any of the conditions of such Commitment Notice or Carryover Allocation or any of the undertakings and commitments made by the Development Owner in the Applications process for the Development;

(2) any statement or representation made by the Development Owner or made with respect to the Development Owner or the Development is untrue or misleading;

(3) an event occurs with respect to the Applicant or the Development Owner which would have made the Development's Application ineligible for funding pursuant to §50.5 of this title if such event had occurred prior to issuance of the Commitment Notice or Carryover Allocation; or

(4) The Applicant or the Development Owner or the Development, as applicable, fails to comply with these Rules or the procedures or requirements of the Department.

§50.19. Compliance Monitoring and Material Non-Compliance.

(a) The Code, §42(m)(1)(B)(iii), requires the Department as the housing credit agency to include in its QAP a procedure that the Department will follow in monitoring Developments for compliance with the provisions of the Code, §42 and in notifying the IRS of any non-compliance of which the Department becomes aware. Detailed compliance rules are set forth in Department Rule §60.1 of this title, to be proposed, and in the Owner's Compliance Manual prepared by the Department's Compliance Division, as amended from time to time. Such procedure only addresses forms and records that may be required by the Department to enable the Department to monitor a Development for violations of the Code and the LURA and to notify the IRS of any such non-compliance. This procedure does not address forms and other records that may be required of Development Owners by the IRS more generally, whether for purposes of filing annual returns or supporting Development Owner tax positions during an IRS audit.

(b) The Department, through the division with responsibility for compliance matters, shall monitor for compliance with all applicable requirements the entire construction or rehabilitation phase associated with any Development under this title. The Department will monitor under this requirement by requiring a copy of reports from all construction inspections performed for the lender and/or syndicator for the Development. Those reports must indicate that the Department may rely on those reports. The Department may provide those inspectors for the lender and/or syndicator with required documentation to be completed that will confirm satisfaction of the requirements of this rule. If necessary, the Department may obtain a Third Party inspection report for purposes of monitoring. The Development Owner must provide the Department with copies of all inspections made throughout the construction of the Development within fifteen days of the date the inspection occurred. The Department, or any Third Party inspector hired by the Department, shall be provided, upon request, any construction documents, plans or specifications for the Development to perform these inspections. If reports are not submitted to the Department or can not be relied upon, the Applicant will be responsible for payment of any necessary inspections. The monitoring level for each Development must be based on the amount of risk associated with the Development. The Department shall use the division responsible for credit underwriting matters and the division responsible for compliance matters to determine the amount of risk associated with each Development. After completion of a Development's construction phase, the Department shall periodically review the performance of the Development to confirm the accuracy of the Department's initial compliance evaluation during the construction phase. Developments having financing from TX-USDA-RHS will be exempt from these inspections, provided that the Development Owner provides the Department with copies of all inspections made by TX-USDA-RHS throughout the construction of the Development within fifteen days of the date the inspection occurred.

(c) The Department will monitor compliance with all representations made by the Development Owner in the Application and in the LURA, whether required by the Code, Treasury Regulations or other rulings of the IRS, or undertaken by the Development Owner in response to Department requirements or criteria.

(d) The Development Owner must collect information and retain records for each qualified low income building in the Development, on a monthly basis (with respect to the first year of a building's Credit Period and on an annual basis, thereafter in accordance with IRS Regulation 1.42-5(b)(1) and (2)).

(e) The Development Owner will deliver to the Department no later than the last day in April each year, the current audited financial statements, in form and content satisfactory to the Department, itemizing the income and expenses of the Development for the prior year.

(f) Specifically, to evidence compliance with the requirements of the Code, §42(h)(6)(B)(iv) which requires that the LURA prohibit Development Owners of all tax credit Developments placed in service after August 10, 1993 from refusing to lease to persons holding Section 8 vouchers or certificates because of their status as holders of such Section 8 voucher or certificate. Development Owners must comply with Department rules under 10 TAC §1.14 of this title.

(g) Certification and Review.

(1) On or before February 1st of each year, the Department will send each Development Owner of a completed Development the Fair Housing Sponsor Report (form provided by the Department) to be completed by the Development Owner and returned to the Department on or before the first day of March of each year in the Compliance Period. Any Development for which the certification is not received by the Department, is received past due, or is incomplete, improperly completed or not signed by the Development Owner, will be considered not in compliance with the provisions of §42 of the Code and reported to the IRS on Form 8823, Low Income Housing Credit Agencies Report of Non Compliance. The Fair Housing Sponsor Report, Part A "Owner's Certification of Program Compliance" shall cover the preceding calendar year and shall at a minimum cover the requirements under IRS Regulation 1.42-5(c) and §60.1 of this title, to be proposed.

(2) Review.

(A) The Department staff will review the Fair Housing Sponsor Report for compliance with the requirements of the Code, §42.

(B) The Department will monitor the Development for compliance under Section 42 and §60.1 of this title, to be proposed.

(C) The Department will perform on-site inspections of all buildings in each low income Development by the end of the second calendar year following the year the last building in the Development is placed in service and, for at least 20% of the low income Units in

each Development, inspect the Units and review the low income certifications, the documentation the Development Owner has received to support the certifications, the rent records for each low income tenant in those Units, and any additional information that the Department deems necessary.

(D) At least once every three years, the Department will conduct on-site inspections of all buildings in the Development, and for at least 20% of the Development's low income Units, inspect the Units and review the low income certifications, the documentation supporting the certifications, and the rent records for the tenants in those Units.

(3) Exception. The Department may, at its discretion, enter into a Memorandum of Understanding with the TX-USDA-RHS, whereby the TX-USDA-RHS agrees to provide to the Department information concerning the income and rent of the tenants in buildings financed by the TX-USDA-RHS under its §515 program. Owners of such buildings may be excepted from the review procedures of subparagraph (B) or (C) of paragraph (2) of this subsection or both; however, if the information provided by TX-USDA-RHS is not sufficient for the Department to make a determination that the income limitation and rent restrictions of the Code, §42(g)(1) and (2), are met, the Development Owner must provide the Department with additional information. TX-USDA-RHS Developments satisfy the definition of Qualified Elderly Development if they meet the definition for elderly used by TX-USDA-RHS , which includes persons with disabilities.

(h) Inspection provision. The Department retains the right to perform an on site inspection of any low income Development including all books and records pertaining thereto through either the end of the Compliance Period or the end of the period covered by any Extended Low Income Housing Commitment, whichever is later. An inspection under this subsection may be in addition to any review under subsection (g)(2)(C) of this section.

(i) Inspection Standard. For the on-site inspections of buildings and low income Units, the Department shall review any local health, safety, or building code violations reported to, or notices of such violations provided by the Development Owner, and determine whether the Units satisfy local health, safety, and building codes or the uniform physical condition standards for public housing established by HUD (24 CFR 5.703). The HUD physical condition standards do not supersede or preempt local health, safety and building codes. Developments must continue to satisfy these codes and if the Department becomes aware of any violation of these codes, the violations must be reported to the IRS.

(j) The Department retains the right to require the Owner to submit tenant data in the electronic format as developed by the Department. The Department will provide general instruction regarding the electronic transfer of data.

(k) Notices to Owner. The Department will provide prompt written notice to the Development Owner if the Department does not receive the certification described in subsection (g)(1) of this section or discovers through audit, inspection, review or any other manner, that the Development is not in compliance with the provisions of the Code, §42 or the LURA. The notice will specify a correction period which will not exceed 90 days from the date of notice to the Development Owner, during which the Development Owner may respond to the Department's findings, bring the Development into compliance, or supply any missing certifications. The Department may extend the correction period for up to six months from the date of notice to the Development Owner if it determines there is good cause for granting an extension. If any communication to the Development Owner under this section is returned to the Department as unclaimed or undeliverable, the Development may be considered not in compliance without further notice to the Development Owner.

(l) Notice to the IRS.

(1) Regardless of whether the noncompliance is corrected, the Department is required to file IRS Form 8823 with the IRS. IRS Form 8823 will be filed not later than 45 days after the end of the correction period specified in the Notice to Owner (including any extensions permitted by the Department), but will not be filed before the end of the correction period. The Department will explain on IRS Form 8823 the nature of the noncompliance and will indicate whether the Development Owner has corrected the non-compliance or failure to certify.

(2) If a particular instance of non-compliance is not corrected within three years after the end of the permitted correction period, the Department is not required to report any subsequent correction to the IRS.

(3) The Department will retain records of noncompliance or failure to certify for six years beyond the Department's filing of the respective IRS Form 8823. In all other cases, the Department will retain the certification and records described in this section for three years from the end of the calendar year the Department receives the certifications and records.

(m) Notices to the Department. A Development Owner must comply with §50.18(d) of this title for the event listed in paragraph (1) of this subsection and must notify the division responsible for compliance within the Department in writing of the events listed in paragraphs (2) and (3) of this subsection.

(1) prior to any sale, transfer, exchange, or renaming of the Development or any portion of the Development. For Rural Developments that are federally assisted or purchased from HUD, the Department shall not authorize the sale of any portion of the Development;

(2) any change of address to which subsequent notices or communications shall be sent; or

(3) within thirty days of the placement in service of each building, the Department must be provided the in service date of each building.

(n) Liability. Compliance with the requirements of the Code, §42 is the sole responsibility of the Development Owner of the building for which the credit is allowable. By monitoring for compliance, the Department in no way assumes any liability whatsoever for any action or failure to act by the Development Owner including the Development Owner's noncompliance with the Code, §42.

(o) These provisions apply to all buildings for which a housing tax credit is, or has been, allowable at any time. The Department is not required to monitor whether a building or Development was in compliance with the requirements of the Code, §42, prior to January 1, 1992. However, if the Department becomes aware of noncompliance that occurred prior to January 1, 1992, the Department is required to notify the IRS in a manner consistent with subsection (j) of this section.

(p) Material Non-Compliance. In accordance with §50.5(b)(3) and (4) of this title, the Department will disqualify an Application for funding if the Applicant, the Development Owner, or the General Contractor, or any Affiliate of the General Contractor that is active in the ownership or Control of one or more other low income rental housing properties located in or outside the State of Texas is determined by the Department to be in Material Non-Compliance on the date the Application Round closes. The Department will classify a property as being in Material Non-Compliance when such property has a Non-Compliance score that is equal to or exceeds 30 points in accordance with

the methodology and point system set forth in this subsection, or if in accordance with §50.5(b)(4) of this title, the Department makes a determination that the non-compliance reported would equal or exceed a non-compliance score of 30 points if measured in accordance with the methodology and point system set forth in §60.1 of this title, to be proposed.

(q) Utility Allowances utilized during affordability period. The Department will monitor to determine whether rents comply with the published tax credit rent limits using the utility allowances established by the local housing authority. If there is more than one entity (Section 8 administrator, public housing authority) responsible for setting the utility allowance(s) in the area of the Development location, then the Utility Allowance selected must be the one which most closely reflects the actual utility costs in that Development area. In this case, documentation from the local utility provider supporting the selection must be provided.

§50.20. Department Records, Application Log, IRS Filings.

(a) Department Records. At all times during each calendar year the Department shall maintain a record of the following:

(1) the cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Commitment Notices during such calendar year;

(2) the cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Carryover Allocation Documents during such calendar year;

(3) the cumulative amount of Housing Credit Allocations made during such calendar year; and

(4) the remaining unused portion of the State Housing Credit Ceiling for such calendar year.

(b) Application Log. The Department shall maintain for each Application an Application Log that tracks the Application from the date of its submission. The Application Log will contain, at a minimum, the information identified in paragraphs (1) through (9) of this subsection.

(1) the names of the Applicant and all General Partners of the Development Owner, the owner contact name and phone number, and full contact information for all members of the Development Team;

(2) the name, physical location, and address of the Development, including the relevant Uniform State Service Region of the state;

(3) the number of Units and the amount of housing tax credits requested for allocation by the Department to the Applicant;

(4) any Set-Aside category under which the Application is filed;

(5) the requested and awarded score of the Application in each scoring category adopted by the Department under the Qualified Allocation Plan;

(6) any decision made by the Department or Board regarding the Application, including the Department's decision regarding whether to underwrite the Application and the Board's decision regarding whether to allocate housing tax credits to the Development;

(7) the names of individuals making the decisions described by paragraph (6) of this subsection, including the names of Department staff scoring and underwriting the Application, to be recorded next to the description of the applicable decision;

(8) the amount of housing tax credits allocated to the Development; and

(9) a dated record and summary of any contact between the Department staff, the Board, and the Applicant or any Related Parties.

(c) IRS Filings. The Department shall mail to the Internal Revenue Service, not later than the 28th day of the second calendar month after the close of each calendar year during which the Department makes Housing Credit Allocations, the original of each completed (as to Part I) IRS Form 8609, a copy of which was mailed or delivered by the Department to a Development Owner during such calendar year, along with a single completed IRS Form 8610, Annual Low Income Housing Credit Agencies Report. When a Carryover Allocation is made by the Department, a copy of the Carryover Allocation Agreement will be mailed or delivered to the Development Owner by the Department in the year in which the building(s) is placed in service, and thereafter the original will be mailed to the Internal Revenue Service in the time sequence in this subsection. The original of the Carryover Allocation Document will be filed by the Department with IRS Form 8610 for the year in which the allocation is made. The original of all executed Agreement and Election Statements shall be filed by the Department with the Department's IRS Form 8610 for the year a Housing Credit Allocation is made as provided in this section. The Department shall be authorized to vary from the requirements of this section to the extent required to adapt to changes in IRS requirements.

§50.21. Program Fees, Refunds, Public Information Requests, Amendments of Fees and Notification of Fees, Extensions.

(a) Timely Payment of Fees. All fees must be paid as stated in this section. Any fees, as further described in this section, that are not timely paid will cause an Applicant to be ineligible to apply for tax credits and additional tax credits and ineligible to submit extension requests, ownership changes and Application amendments. Payments made by check, for which insufficient funds are available, may cause the Application, commitment or allocation to be terminated.

(b) Pre-Application Fee. Each Applicant that submits a Pre-Application shall submit to the Department, along with such Pre-Application, a non refundable Pre-Application fee, in the amount of $5 per Unit. Units for the calculation of the Pre-Application Fee include all Units within the Development, including tax credit, market rate and owner-occupied Units. Pre-Applications without the specified Pre-Application Fee in the form of a check will not be accepted. Pre-Applications in which a CHDO or Qualified Nonprofit Organization intends to serve as the managing General Partner of the Development Owner, or Control the managing General Partner of the Development Owner, will receive a discount of 10% off the calculated Pre-Application fee.

(c) Application Fee. Each Applicant that submits an Application shall submit to the Department, along with such Application, an Application fee. For Applicants having submitted a Pre-Application which met Pre-Application Threshold and for which a Pre-Application fee was paid, the Application fee will be $15 per Unit. For Applicants not having submitted a Pre-Application, the Application fee will be $20 per Unit. Units for the calculation of the Application Fee include all Units within the Development, including tax credit, market rate and owner-occupied Units. Applications without the specified Application Fee in the form of a check will not be accepted. Applications in which a CHDO or Qualified Nonprofit Organization intends to serve as the managing General Partner of the Development Owner, or Control the managing General Partner of the Development Owner, will receive a discount of 10% off the calculated Application fee.

(d) Refunds of Pre-Application or Application Fees. The Department shall refund the balance of any fees collected for a Pre-Application or Application that is withdrawn by the Applicant or that is not fully processed by the Department. The amount of refund on Applications not fully processed by the Department will be commensurate

with the level of review completed. Intake and data entry will constitute 30% of the review, the site visit will constitute 45% of the review, and Threshold and Selection review will constitute 25% of the review. The Department must provide the refund to the Applicant not later than the 30th day after the date the last official action is taken with respect to the Application.

(e) Third Party Underwriting Fee. Applicants will be notified in writing prior to the evaluation of a Development by an independent external underwriter in accordance with §50.9(d)(4) of this title if such a review is required. The fee must be received by the Department prior to the engagement of the underwriter. The fees paid by the Development Owner to the Department for the external underwriting will be credited against the commitment fee established in subsection (f) of this section, in the event that a Commitment Notice or Determination Notice is issued by the Department to the Development Owner.

(f) Commitment or Determination Notice Fee. Each Development Owner that receives a Commitment Notice or Determination Notice shall submit to the Department, not later than the expiration date on the commitment notice, a non-refundable commitment fee equal to 4% of the annual Housing Credit Allocation amount. The commitment fee shall be paid by check.

(g) Compliance Monitoring Fee. Upon the Development being placed in service, the Development Owner will pay a compliance monitoring fee in the form of a check equal to $25 per tax credit Unit per year or $100, whichever is greater. Payment of the first year's compliance monitoring fee must be received by the Department prior to the release of the IRS Form 8609 on the Development. Subsequent anniversary dates on which compliance monitoring fee payments are due shall be determined by the date the Development was placed in service.

(h) Building Inspection Fee. The Building Inspection Fee must be paid at the time the Commitment Fee is paid. The Building Inspection Fee for all Developments is $750. Inspection fees in excess of $750 may be charged to the Development Owner not to exceed an additional $250 per Development.

(i) Public Information Requests. Public information requests are processed by the Department in accordance with the provisions of the Government Code, Chapter 552. The Texas Building and Procurement Commission (formerly General Services Commission) determines the cost of copying, and other costs of production.

(j) Periodic Adjustment of Fees by the Department and Notification of Fees. All fees charged by the Department in the administration of the tax credit program will be revised by the Department from time to time as necessary to ensure that such fees compensate the Department for its administrative costs and expenses. The Department shall publish each year an updated schedule of Application fees that specifies the amount to be charged at each stage of the Application process. Unless otherwise determined by the Department, all revised fees shall apply to all Applications in process and all Developments in operation at the time of such revisions.

(k) Extension Requests. All extension requests relating to the Commitment Notice, Carryover, Closing of Construction Loan, Substantial Construction Commencement, Placed in Service or Cost Certification requirements shall be submitted to the Department in writing and be accompanied by a non-refundable extension fee in the form of a check in the amount of $2,500. Such requests must be submitted to the Department at least 20 days prior to the date for which an extension is being requested and will not be accepted any later than this deadline date. The extension request shall specify a requested extension date and the reason why such an extension is required. Carryover extension requests shall not request an extended deadline later than December 1st of the year the Commitment Notice was issued. The Department, in its sole discretion, may consider and grant such extension requests for all items except for the Closing of Construction Loan and Substantial Construction Commencement. The Board may grant extensions, for the Closing of Construction Loan and Substantial Construction Commencement. The Board may waive related fees for good cause.

§50.22. Manner and Place of Filing All Required Documentation.

(a) All Applications, letters, documents, or other papers filed with the Department will be received only between the hours of 8:00 a.m. and 5:00 p.m. on any day which is not a Saturday, Sunday or a holiday established by law for state employees.

(b) All notices, information, correspondence and other communications under this title shall be deemed to be duly given if delivered or sent and effective in accordance with this subsection. Such correspondence must reference that the subject matter is pursuant to the Tax Credit Program and must be addressed to the Housing Tax Credit Program, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, TX 78711-3941 or for hand delivery or courier to 507 Sabine, Suite 400, Austin, Texas 78701. Every such correspondence required or contemplated by this title to be given, delivered or sent by any party may be delivered in person or may be sent by courier, telecopy, express mail, telex, telegraph or postage prepaid certified or registered air mail (or its equivalent under the laws of the country where mailed), addressed to the party for whom it is intended, at the address specified in this subsection. Regardless of method of delivery, documents must be received by the Department no later than 5:00 p.m. for the given deadline date. Notice by courier, express mail, certified mail, or registered mail will be considered received on the date it is officially recorded as delivered by return receipt or equivalent. Notice by telex or telegraph will be deemed given at the time it is recorded by the carrier in the ordinary course of business as having been delivered, but in any event not later than one business day after dispatch. Notice not given in writing will be effective only if acknowledged in writing by a duly authorized officer of the Department.

(c) If required by the Department, Development Owners must comply with all requirements to use the Department's web site to provide necessary data to the Department.

§50.23. Waiver and Amendment of Rules.

(a) The Board, in its discretion, may waive any one or more of these Rules if the Board finds that waiver is appropriate to fulfill the purposes or policies of Chapter 2306, Texas Government Code, or for other good cause, as determined by the Board.

(b) The Department may amend this chapter and the Rules contained herein at any time in accordance with the Government Code, Chapter 2001, as may be amended from time to time.

§50.24. Deadlines for Allocation of Housing Tax Credits.

(a) Not later than September 30 of each year, the Department shall prepare and submit to the Board for adoption the draft QAP required by federal law for use by the Department in setting criteria and priorities for the allocation of tax credits under the Housing Tax Credit program.

(b) The Board shall adopt and submit to the Governor the QAP not later than November 15 of each year.

(c) The Governor shall approve, reject, or modify and approve the QAP not later than December 1 of each year.

(d) The Board shall annually adopt a manual, corresponding to the QAP, to provide information on how to apply for housing tax credits.

(e) Applications for Housing Tax Credits to be issued a Commitment Notice during the Application Round in a calendar year must be submitted to the Department not later than March 1.

(f) The Board shall review the recommendations of Department staff regarding Applications and shall issue a list of approved Applications each year in accordance with the Qualified Allocation Plan not later than June 30.

(g) The Board shall approve final commitments for allocations of housing tax credits each year in accordance with the Qualified Allocation Plan not later than July 31. Department staff will subsequently issue Commitment Notices based on the Board's approval. Final commitments may be conditioned on various factors approved by the Board, including resolution of contested matters in litigation.

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 August 18, 2003.

TRD-200305276
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 475-3726

♦ ♦ ♦

CHAPTER 53. HOME INVESTMENT PARTNERSHIPS PROGRAM

The Texas Department of Housing and Community Affairs (the Department) proposes amendments to §§53.50-53.56, 53.58, and 53.60-53.63, and the repeal of §53.59 concerning HOME Investment Partnerships Program Rules. The proposed amendment and repeal implements amendments made to the Department's enabling statute by the 78th Legislative Session and to provide clarification. Chapter 1, Subchapter B, of this title, referenced in this amendment, is also being proposed in this issue of the *Texas Register*. Chapter 60 of this title, referenced in this amendment has not yet been proposed by the Department.

Edwina P. Carrington, Executive Director, has determined that for the first five-year period the proposed amendment and repeal is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal or amended sections.

Ms. Carrington also has determined that for each year of the first five years the proposed repeal and amended sections are in effect the public benefit anticipated as a result of enforcing the repeal and amended sections will be to permit the adoption of new rules for clarity with the administration of HOME Investment Partnerships Program rules, thereby enhancing the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on persons, small businesses or micro-businesses. There are no anticipated economic costs to any person, business or micro-business required to comply with the repeal and amended sections as proposed. The proposed repeal and amended sections will not have an impact on any local economy.

Comments may be submitted to Paige McGilloway, Single Family Finance Production, Texas Department of Housing and Community Affairs, P. O. Box 13941, Austin, Texas, 78711-3941 or by e-mail at the following address: pmcgilloway@tdhca.state.tx.us

10 TAC §§53.50 - 53.56, 53.58, 53.60 - 53.63

The amendments are proposed pursuant to the authority of the Texas Government Code, Chapter 2306.

The proposed amendments affect no other code, article or statute.

§53.50. Scope.

The rules in this chapter apply to the use and distribution of HOME Investment Partnerships Program (HOME) funds. The United States Department of Housing and Urban Development (HUD) [~~through the HOME Program~~] provides HOME funds to the State pursuant to Title II of the Cranston-Gonzalez National Affordable Housing Act of 1990 (42 United States Code §§12701-12839)[~~, as may be amended,~~] and HUD regulations at 24 Code of Federal Regulations (CFR) Part 92[~~, as may be amended~~]. The State's HOME Program is designed to:

(1) expend at least 95% of the funds received for the benefit of non-participating small cities and rural areas that do not receive HOME funds directly from HUD.

(2) [~~(1)~~] focus on the areas with the greatest housing need described in the State Consolidated Plan;

(3) [~~(2)~~] provide funds for home ownership and rental housing through acquisition, new construction, rehabilitation, reconstruction, tenant-based rental assistance, and pre-development loans;

(4) [~~(3)~~] promote partnerships among all levels of government and the private sector, including non-profit and for-profit organizations; and

(5) [~~(4)~~] provide low, very low, and extremely low income Texans with affordable, decent, safe and sanitary housing.

§53.51. Definitions.

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

(1) Activity--A form of assistance by which HOME funds are used to provide incentives to develop and support affordable housing and homeownership through acquisition, new construction, reconstruction, and rehabilitation of housing.

(2) Administrative Deficiencies--The absence of information or a document from the application which is important to a review and scoring of the application as required in this rule.

(3) Applicant--An eligible entity which is preparing to submit or has submitted an application for HOME funds and is designated in the application to assume contractual liability and legal responsibility as the Recipient executing the written agreement with the Department.

(4) [~~(1)~~] Board--The governing board of the Texas Department of Housing and Community Affairs.

(5) [~~(2)~~] CFR--Code of Federal Regulations.

[~~(3) C/MIS--Cash Management Information System established by HUD.~~]

(6) Colonia--An identifiable unincorporated area of a county any part of which is located within 150 miles of the Texas-Mexico border that lacks infrastructure and decent housing.

(7) [~~(4)~~] Community Housing Development Organization (CHDO)--A private nonprofit organization that satisfies the requirements of 24 CFR §92.2 and is[~~, as~~] certified as such by the Department.

(8) [~~(5)~~] Consolidated Plan--The State Consolidated Plan prepared in accordance with 24 CFR Part 91[~~, as may be amended~~], which describes the needs, resources, priorities and proposed activities to be undertaken with respect to certain HUD programs and is subject to approval annually by HUD.

[~~(6) Cooperating Entity--An eligible applicant that the lead applicant has designated in its application to carry out certain functions in the HOME Program. The responsibilities of the cooperating entity must be specified in a Memorandum of Understanding signed by the lead applicant and the cooperating entity, and submitted with the application.~~]

(9) [~~(7)~~] Demonstration Fund--A reserve fund for use alone or in combination and coordination with other programs administered by the Department. This Fund will be available for out of cycle applications, innovative programs brought to the Department for consideration and emergency programs. Additionally, this fund may be used with other programs administered by the Department as outlined in the Consolidated Plan, [~~such as the Down Payment Assistance Program, the Contract for Deed Program, the Weatherization Program and the Low Income Housing Tax Credit Program,~~] as approved by the Board.

(10) [~~(8)~~] Department--The Texas Department of Housing and Community Affairs.

(11) Development--Projects that have a construction component, either in the form of new construction or the rehabilitation of multi-unit residential housing that meet the affordability requirements.

(12) [~~(9)~~] Expenditure--Approved expense evidenced by documentation submitted by the Recipient to the Department for purposes of drawing funds from HUD's IDIS[~~C/MIS~~] for work completed, inspected and certified as complete, and as otherwise required by the Department.

[~~(10) Extremely Low Income Families--Families whose annual incomes do not exceed 30% of the median income of the area, as determined by HUD, with adjustments for family size.~~]

(13) Family--Includes but is not limited to the following types of families as defined in 24 CFR §5.403:

(A) A family with or without children;

(B) An elderly family;

(C) A near elderly family;

(D) A disabled family;

(E) A displaced family;

(F) The remaining member of a tenant family; and

(G) A single person who is not an elderly or displaced person or a person with disabilities or the remaining member of a tenant family.

(14) [~~(11)~~] Homebuyer Assistance--Down payment and closing costs assistance provided to eligible homebuyers.[~~A form of assistance to non-profit organizations, for profit housing organizations, sole proprietors, CHDOs, units of general local government and public housing agencies to provide funds to eligible homebuyers for the acquisition of affordable housing.~~]

(15) [~~(12)~~] HOME--The HOME Investment Partnerships Program at [~~pursuant to~~] 42 United States Code §§12701-12839 and the regulations promulgated thereafter [~~HUD regulations~~] at 24 CFR Part 92[~~, as may be amended, and the rules promulgated hereunder~~].

(16) Household--One or more persons occupying a housing unit.

(17) [~~(13)~~] HUD--The United States Department of Housing and Urban Development, or its successor.

[~~(14) Interim Construction Assistance--A form of assistance to make funds available to HOME eligible applicants including non-profit organizations, CHDOs, units of general local government, for-profit housing organizations, sole proprietors and public housing agencies for the purpose of constructing affordable housing units.~~]

[~~(15) Joint Venture--An agreement between a lead applicant and a cooperating entity formed to administer or implement a HOME program. Each applicant must be eligible to apply for HOME funds as defined by §53.52(a) of this title (relating to Applicant Requirements). Each applicant or Joint Venture must sign a Memorandum of Understanding which outlines the responsibilities of each participant in the implementation of HOME Program activities.~~]

[~~(16) Lead Applicant--An eligible applicant designated in a HOME application to assume contractual liability and legal responsibility as the recipient executing the written agreement with the Department.~~]

[~~(17) Low-Income Families--Families whose annual incomes do not exceed 80% of the median income of the area, as determined by HUD, with adjustments for family size.~~]

(18) IDIS--Integrated Disbursement and Information System established by HUD.

(19) Income Eligible Families:

(A) Low-Income Families--Families whose annual incomes do not exceed 80% of the median income of the area, as determined by HUD and published by the Department, with adjustments for family size.

(B) Very Low-Income Families--Families whose annual incomes do not exceed 50% of the median family income for the area, as determined by HUD and published by the Department, with adjustments for family size.

(C) Extremely Low Income Families--Families whose annual incomes do not exceed 30% of the median income of the area, as determined by HUD and published by the Department, with adjustments for family size. In accordance with Rider 3, and published by the Department, those counties where the median family income is lower than the state average median family income, Applicants targeting households at or below 30% of the median income of the area may use the average state median family income based on number of persons in a household.

(20) [~~(18)~~] Match--Eligible forms of non-federal contributions to a program or project in the forms specified in [~~accordance with~~] 24 CFR 92.220[~~, as may be amended~~].

(21) [~~(19)~~] NOFA--Notice of Funding Availability, published in the *Texas Register*.

(22) Nonprofit organization--A public or private organization that:

(A) is organized under state or local laws;

(B) has no part of its net earnings inuring to the benefit of any member, founder, contributor, or individual; and

(C) has a tax exemption ruling form the Internal Revenue Service under the Internal Revenue Code of 1986, §501 (c), as amended.

(23) [~~(20)~~] Owner-Occupied Housing Assistance--A form of assistance [~~to nonprofit organizations, CHDOs, units of general local government and public housing agencies~~] for the purpose of rehabilitating or reconstructing existing owner-occupied housing.

(24) [~~(21)~~] Participating Jurisdiction (PJ)--Any state or unit of general local government, including consortia as specified in 24 CFR 92.101, [~~as may be amended,~~] designated by HUD in accordance with 24 CFR 92.105[~~, as may be amended~~].

(25) [~~(22)~~] Program--Funds [~~Funding~~] provided in the form of a contract to an eligible Applicant [~~applicant~~] for the purpose of administering more than one Project or assisting more than one household.

(26) [~~(23)~~] Program Income--Gross income received by the Department or program administrators directly generated from the use of HOME funds or matching contributions as further described in 24 CFR [~~Part~~] 92.2.

(27) [~~(24)~~] Project--A site or an entire building (including a manufactured housing unit), or two or more buildings, together with the site or sites on which the building or buildings are located, that are under common ownership, management, and financing and are to be assisted with HOME funds, under a commitment by the owner, as a single undertaking under 24 CFR [~~Part~~] 92.2[~~, as may be amended~~].

(28) [~~(25)~~] Recipient--A successful applicant that has been awarded funds by the Department to administer a HOME program, including a State Recipient, Subrecipient, for-profit entity, nonprofit entity, or CHDO. [~~sole proprietor, general or limited partnership, trust, firm, corporation, association, cooperative or other entity described in §53.52(a) of this title (relating to Applicant Requirements), and that is approved by the Department to administer a HOME Program subject to the terms and conditions of these rules.~~]

(29) [~~(26)~~] Rental Housing Development--[~~A form of assistance available to nonprofit organizations, CHDOs, units of general local government, for-profit housing development organizations and sole proprietors and public housing agencies~~] A project for the acquisition, new construction, reconstruction or rehabilitation of multi-family or single family rental housing, or conversion of commercial property to rental housing.

(30) [~~(27)~~] Rural Area--A project located within an area which:

(A) is situated outside the boundaries of a PMSA or MSA; or

(B) is situated within the boundaries of a PMSA or MSA if it has a population of not more than 20,000 and does not share boundaries with an urbanized area; or

(C) is located in an area that is eligible for funding by the Rural Housing Service. [~~Texas Rural Development (TxRD).~~]

(31) Single Family Housing Development--A form of assistance to make funds available to HOME eligible Applicants including non-profit organizations, CHDOs, units of general local government, for-profit housing organizations, sole proprietors and public housing agencies for the purpose of constructing affordable housing units.

(32) [~~(28)~~] Special Needs--Those individuals or categories of individuals determined by the Department to have unmet housing needs consistent with 42 USC §12701 et seq.[~~, as may be amended,~~] and as provided in the Consolidated Plan.

(33) State Recipient--A unit of general local government designated by the Department to receive HOME funds.

(34) Subrecipient--A public agency or nonprofit organization selected by the Department to administer all or a portion of the Department's HOME program. A public agency or nonprofit that receives HOME funds solely as a developer or owner of housing is not a Subrecipient. The Department's selection of a Subrecipient is not subject to the procurement procedures and requirements.

(35) [~~(29)~~] Tenant-Based Rental Assistance (TBRA)--A form of rental assistance [~~to nonprofit organizations, CHDOs, units of general local government, and public housing agencies~~] in which the assisted tenant may move from a dwelling unit with a right to continued assistance. Tenant-based rental assistance also includes security deposits for rental of dwelling units.

(36) [~~(30)~~] Unit of General Local Government--A city, town, county, or other general purpose political subdivision of the State; a consortium of such subdivisions recognized by HUD in accordance with 24 CFR [~~Part~~] 92.101[~~, as may be amended,~~] and any agency or instrumentality thereof that is established pursuant to legislation and designated by the chief executive to act on behalf of the jurisdiction. An urban county is considered a unit of general local government under the HOME Program.

~~[(31) Very Low-Income Families--Low-income families whose annual incomes do not exceed 50% of the median family income for the area as established by HUD, with adjustments for family size.]~~

§53.52. Applicant Requirements.

(a) Eligible Applicants. The following organizations or entities are eligible to apply for HOME eligible activities:

(1) nonprofit organizations;

(2) CHDOs;

(3) units of general local government;

(4) for-profit entities and [~~and/or~~] sole proprietors; and

(5) public housing agencies.

(b) Ineligible Applicants: The following violations will cause an Applicant, and any applications they have submitted, to be ineligible:[~~Previously funded Recipient(s) whose HOME funds have been partially or fully deobligated during the 12 months prior to the current funding cycle; applicants who have not satisfied all threshold requirements described in §53.52(c) of this title (relating to Applicant Requirements); applicants who have submitted incomplete applications; or as otherwise barred by the Department.~~]

(1) Previously funded Recipient(s) whose HOME funds have been partially or fully deobligated due to failure to meet contractual obligations during the 12 months prior to the current funding cycle;

(2) Applicants who have not satisfied all eligibility requirements described in subsection (f) of this section and the NOFA to which they are responding, and for which Administrative Deficiencies were unresolved (relating to Applicant Requirements);

(3) Applicants who have submitted incomplete applications;

(4) Applicants that have been otherwise barred by the Department;

(5) Applicant or developer, or their staff, that violate the state revolving door policy.

(c) Restrictions on Communication.

(1) The Applicant or other person that is active in the ownership or control of the proposed Activity, or individual employed as a lobbyist or in another capacity on behalf of the application, may not communicate with any Board member with respect to the application during the period of time starting with the time an application is submitted until the time the Board makes a final decision with respect to any approval of that Application, unless the communication takes place at any board meeting or public hearing held with respect to that Application.

(2) Applicants are restricted from communication with Department staff as described in subsection (c) of this section. The Applicant or other person that is active in the ownership or control of the application, or individual employed as a lobbyist or in another capacity on behalf of the application, may communicate with an employee of the Department with respect to the Development so long as that communication satisfies the conditions established under subparagraphs (A) through (E) of this paragraph. Communication with Department employees is unrestricted during any board meeting or public hearing held with respect to that application.

(A) The communication must be restricted to technical or administrative matters directly affecting the application;

(B) The communication must occur or be received on the premises of the Department during established business hours;

(C) Communication with the Executive Director, the Deputy Executive Director, the Director of Multifamily Finance Production, the Director of Single Family Finance Production, the Director of Portfolio Management and Compliance, and the Director of Real Estate Analysis of the Department must only be in written form which includes electronic communication through the Internet; and

(D) Communication with other Department staff may be oral or in written form which includes electronic communication through the Internet; and

(E) A record of the communication must be maintained by the Department and included with the application for purposes of board review and must contain the date, time, and means of communication; the names and position titles of the persons involved in the communication and, if applicable, the person's relationship to the Applicant; the subject matter of the communication; and a summary of any action taken as a result of the communication.

(d) Noncompliance. Each application will be reviewed for its compliance history by the Department, consistent with Chapter 60 of this title, to be proposed. Applications found to be in Material Noncompliance, or otherwise violating the compliance rules of the Department, will be terminated.

(e) Rental Housing Development Site and Development Restrictions

(1) Floodplain. Any Development proposing new construction located within the 100 year floodplain as identified by the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps must develop the site so that all finished ground floor elevations are at least one foot above the flood plain and parking and drive areas are no lower than six inches below the floodplain, subject to more stringent local requirements. If no FEMA Flood Insurance Rate Maps are available for the proposed Development, flood zone documentation must be provided from the local government with jurisdiction identifying the 100 year floodplain. No Developments proposing rehabilitation will be permitted in the 100 year floodplain unless they already are constructed in accordance with the policy stated in this subsection for new construction or are able to provide evidence of flood insurance on the buildings and the contents of the units.

(2) Ineligible Building Types. Applications involving Ineligible Building Types will not be eligible for an award. Those buildings or facilities which are ineligible are as follows:

(A) Hospitals, nursing homes, trailer parks and dormitories (or other buildings that will be predominantly occupied by students) or other facilities which are usually classified as transient housing (other than certain specific types of transitional housing for the homeless and single room occupancy units) are ineligible. However, structures formerly used as hospitals, nursing homes or dormitories are eligible if the Development involves the conversion of the building to a non-transient multifamily residential development.

(B) Any elderly development of two stories or more that does not include elevator service for any Units or living space above the first floor.

(C) Any elderly development with any units having more than two bedrooms.

(D) Any Development with building(s) with four or more stories that does not include an elevator.

(E) Any Development proposing new construction, other than a Development (new construction or rehabilitation) composed entirely of single-family dwellings, having any Units with four or more bedrooms.

(F) Any Development, other than an elderly Development, in which more than 40% of the total Units have the same number of bedrooms. For purposes of this limitation, a den, study or other similar space that otherwise has the potential to meet the definition of a bedroom will be considered a bedroom.

(3) Limitations on the Size of Developments.

(A) The minimum Development size will be 16 Units.

(B) Developments involving new construction will be limited to 250 Units. These maximum Unit limitations also apply to those Developments which involve a combination of rehabilitation and new construction. Developments that consist solely of acquisition/rehabilitation or rehabilitation only may exceed the maximum Unit restrictions.

(4) Unacceptable Sites. Developments will be ineligible if the Development is located on a site that is determined to be unacceptable by the Department.

(f) [~~(c)~~] Eligibility [~~Threshold~~] requirements. An Applicant [~~applicant~~] must satisfy each of the following requirements in order to be eligible to apply for HOME funding and as more fully described in the NOFA, when applicable:

(1) provide evidence of its ability to carry out the Program in the areas of financing, acquiring, rehabilitating, developing or managing affordable housing developments;

(2) demonstrate fiscal, programmatic, and contractual compliance on previously awarded Department contracts or loan agreements;

(3) resolve any previous audit findings, unless deemed irresolvable by the Department, and outstanding monetary obligations with the Department;

(4) demonstrate reasonable HOME Program expenditure and project performance on open contract(s), as determined through program monitoring. Evidence of expenditure and project identification is submitted with the application, and is reconciled with the Department's IDIS[~~C/MIS~~] reports during the application review process; and

(5) demonstrate satisfactory performance otherwise required by the Department and set out in the application guidelines.

(g) If indicated by the Department, Recipients must comply with all requirements to utilize the Department's web site to provide necessary data to the Department.

(h) For funds being used for Rental Housing Developments, the Recipient must establish a reserve account consistent with §2306.186, Texas Government Code, and as further described in Chapter 60 of this title, to be proposed.

§53.53. Application Limitations.

An eligible Applicant [~~applicant~~] may apply for several eligible activities provided that the total amount requested does not exceed the funding limits established in this section. The Department reserves the right to reduce the amount requested in an application based on program or project [~~program/project~~] feasibility, underwriting analysis, or [~~and/or~~] availability of funds:

(1) Award amount for Owner-Occupied Housing Assistance, Homebuyer Assistance, and Tenant-Based Rental Assistance[~~, and Interim Construction Assistance~~] shall not exceed $500,000 per Activity, [~~activity,~~] except as may be otherwise allowed by the Board.

(2) Award amount for Development activities [~~Rental Housing Development~~] shall not exceed $1.5 [~~$1~~] million, except as may be otherwise allowed by the Board.

(3) Award amount for Operating Expenses shall not exceed operating expenses in each fiscal year up to $50,000 or 50% of the CHDO's total annual operating expenses for that year, whichever is greater.

(4) [~~(3)~~] Per unit subsidy for all HOME-assisted housing may not exceed the per-unit dollar limits established by HUD under §221(d)(3) of the National Housing Act which are applicable to the area in which the housing is located, and published by the Department.

§53.54. Program Activities [~~Restrictions~~].

(a) Owner-Occupied Housing Assistance: Assisted homeowners must be income eligible [~~low-income~~] and must occupy the property as their principal residence. Housing assisted with HOME funds must meet all applicable [~~local~~] codes and standards, as specified in the application guide.[~~and, at a minimum, Section 8 Housing Quality Standards or Colonia Housing Quality Standards, as applicable, and Minimum Rehabilitation Standards as provided by the Department.~~] In addition, housing that is reconstructed or rehabilitated with HOME funds must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with 24 CFR 92.251(a)[~~, as may be amended~~].

(b) Homebuyer Assistance: HOME funds utilized for Homebuyer Assistance are subject to the Department's recapture restrictions as approved by HUD in the Consolidated Plan and as outlined in the application guidelines. The eligible uses for Homebuyer Assistance are down-payment assistance, closing cost assistance, gap financing, and homebuyer counseling. The total assistance provided per eligible homebuyer may not exceed the limits as determined or [~~$5,000, unless otherwise~~] allowed by the Board.

(c) Rental Housing Development: Owners of rental units assisted with HOME funds must comply with income and rent restrictions pursuant to 24 CFR 92.252 [~~HOME rules and guidelines~~] and keep the units affordable for a period of time, depending upon the amount of HOME assistance provided. Housing assisted with HOME funds must meet all applicable [~~local~~] codes and standards, as specified in the application guide.[~~and, at a minimum, Section 8 Housing Quality Standards or Colonia Housing Quality Standards, as applicable, and Minimum Rehabilitation Standards as provided by the Department.~~] In addition, housing that is newly constructed or rehabilitated with HOME funds must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with 24 CFR 92.251(a)[~~, as may be amended~~].

(d) Tenant-Based Rental Assistance: Recipients must comply with 24 CFR 92.209 [~~92.211~~] and 92.216[~~., as may be amended~~].

(e) Single Family Housing Development [~~Interim Construction Assistance~~]: Newly constructed housing must meet all applicable [~~local~~] codes and standards, as specified in the application guide.[~~, Section 8 Housing Quality Standards, ordinances, and zoning ordinances in accordance with 24 CFR 92.251(a), as may be amended.~~]In addition, housing that is newly constructed or rehabilitated with HOME funds must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with 24 CFR 92.251(a). An eligible Applicant [~~applicant~~] that applies for Single Family Housing Development [~~Interim Construction Assistance~~] may also apply for Homebuyer Assistance.

(f) CHDO Pre-Development Loans: The Department may set-aside up to 10% of the CHDO 15% Set-Aside for pre-development loans in accordance with 24 CFR 92.300(c) [~~92.301, as may be amended~~]. Funds for pre-development loans are available only when provided in conjunction with a [~~Rental Housing~~] Development application and may only be used for activities such as project-specific technical assistance, site control loans, and project-specific seed money. Pre-development loans must be repaid from construction loan proceeds or other project income. In accordance with 24 CFR 92.301, [~~as may be amended,~~] the Department may elect to waive pre-development loan repayment, in whole or in part, if there are impediments to project development that the Department determines are reasonably beyond the control of the CHDO.

(g) Set-Asides: other activities deemed eligible under set-asides defined by the Department and outlined in the Consolidated Plan.

§53.55. Prohibited Activities.

In accordance with 24 CFR 92.214, [~~as may be amended,~~] HOME funds may not be used to:

(1) provide a project reserve account for replacements or increases in operating costs, or operating subsidies;

(2) provide TBRA for existing Section 8 Programs;

(3) provide non-federal matching contributions for other programs;

(4) provide assistance to Public Housing Agency owned or leased projects;

(5) carry out Public Housing Modernization;

(6) provide pre-payment of low-income housing mortgages under 24 CFR Part 248[~~, as may be amended~~];

(7) provide assistance to a project previously assisted with HOME funds during the period of affordability;

(8) provide funds to reimburse an Applicant [~~applicant~~] for acquisition costs for a property already owned by the Applicant [~~applicant~~], and

(9) pay for any cost that is not eligible under 24 CFR [§§]92.206-92.209.

§53.56. Distribution of Funds.

In accordance with 24 CFR 92.201(b)(1), [as may be amended,] the Department makes [will make] every effort to distribute HOME funds throughout the state according to the Department's assessment of the geographic distribution of housing needs, as identified in the Consolidated Plan. Funds shall also be allocated in accordance with §2306.111(d) through (g), Texas Government Code.[The Department will take into consideration the non-metropolitan share of the state's total population and objective measures of rural housing need, such as poverty and substandard housing when allocating funds by region. Applicants may submit applications for programs or projects located in a PJ, however, the Department will give priority for funding to non-participating jurisdictions. If funds remain in a region or activity after all non-PJ applications that meet or exceed threshold have been funded, then the funds may be transferred to another region or activity, or the Department may consider funding PJ applications that meet or exceed threshold.] The Department receives HOME funds for areas of the state which have not received Participating Jurisdiction (PJ) status from HUD. §2306.111(c) of the Texas Government Code requires the Department to award at least 95% of HOME Program funds to entities in nonparticipating jurisdictions. All funds not set aside under this section shall be used for the benefit of persons with disabilities who live in areas other than nonparticipating areas.[The Department may distribute HOME funds by direct award or through competition.]

(1) CHDO Set-Aside. In accordance with 24 CFR 92.300, [as may be amended,] not less than 15% of the [HUD-provided]HOME allocation will be set aside by the Department for CHDO eligible activities[, specifically where the CHDO will perform the role of developer, owner, or sponsor]. CHDO set-aside projects are owned, developed, or sponsored by the CHDO, and result in the development of rental units or homeownership. Development includes projects that have a construction component, either in the form of new construction or the rehabilitation of existing units.[Funded CHDO applicants for set-aside activities are eligible for a proportionate amount of the available operating expenses. The sum of all sub-allocations must not be less than the 15% requirement.] If an insufficient number of qualified applications are received by the deadline, the Department reserves the right to hold additional competitions in order to meet federal set-aside requirements.

(2) Special Needs Set-Aside. In accordance with the Consolidated Plan, funds will be available to eligible Applicants [applicants], as defined in §53.52(a) of this title (relating to Applicant Requirements), with a documented history of working with special needs populations and with relevant housing related experience. Applicants may submit applications for: Owner-Occupied Housing Assistance, Homebuyer Assistance, and Tenant-Based Rental Assistance[, Interim Construction Assistance, and Rental Housing Development]. If an insufficient number of qualified applications are received, the Department reserves the right to transfer funds remaining in accordance with paragraph (6) of this section regarding Redistribution [in the set-aside to another eligible activity].

(3) Other Set-Asides: In accordance with the Consolidated Plan, funds will be available to eligible Applicants, as defined in §53.52(a) of this title (relating to Applicant Requirements), for those eligible activities outlined under Set-Asides.

(4) Administrative Funds: In accordance with 24 CFR 92.207 up to 10% of a PJ's HOME allocation plus any program income received may be used for eligible and reasonable planning and administrative costs. Administrative and planning costs may be incurred by the PJ, State Recipient, Subrecipient, nonprofit entity or CHDO.

(5) CHDO Operating Expenses: In accordance with 24 CFR 92.208 up to 5% of a PJ's HOME allocation may be used for the operating expenses of CHDOs. CHDO Applicants awarded funds for set-aside activities may be eligible for operating expenses.

(6) [(3)] Redistribution. In an effort to commit HOME funds in a timely manner, the Department may reallocate funds set-aside in accordance with the Consolidated Plan, at [in] its own discretion, to other regions or activities if:

(A) [(1)] the Department fails to receive a sufficient number of applications from a particular region or Activity [activity],

(B) [(2)] no applications are submitted for a region, or

(C) [(3)] applications for a region or Activity [activity] do not meet eligibility requirements or [exceed the] minimum threshold [standards or] scores (when applicable) or are financially infeasible, as applicable.

(7) [(4)] Marginal Applications. When the remainder of the allocation within a region [or program set-aside in the Consolidated Plan] is insufficient to completely fund the next ranked application in the region or Activity [activity], it is within the discretion of the Department to:

(A) fund the next ranked application for the partial amount, reducing the scope of the application proportionally; [or]

(B) make necessary adjustments to fully fund the application; or

(C) [(B)] transfer the remaining funds to other regions or activities [programs].

(8) [(5)] HOME Demonstration Fund. The Department, with Board approval, may reserve HOME funds to combine and coordinate with other programs administered by the Department as outlined in the Consolidated Plan, or for housing activities the Department is permitted to fund under applicable law.

§53.58. Application Process.

(a) An Applicant must submit a completed application to be considered for funding, along with an application fee determined by the Department and outlined in the NOFA.[An eligible applicant must submit a completed application to be considered for funding, along with an application fee determined by the Department.] Applications containing false information and applications not received by the deadline will be disqualified.[Upon receipt, applications are reviewed for completeness. Incomplete applications (information not provided in the application as requested by the Department) and applications containing false information are disqualified.] Disqualified Applicants [applicants] are notified in writing. All applications must be received by the Department by 5:00 p.m. on the date identified in the NOFA, regardless of method of delivery.

(b) Administrative Deficiencies. If an application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the application, the Department staff may request clarification or correction of such Administrative Deficiencies including both threshold and/or scoring documentation. The Department staff may request clarification or correction in a deficiency notice in the form of a facsimile and a telephone call to the Applicant advising that such a request has been transmitted. If Administrative Deficiencies are not clarified or corrected to the satisfaction of the Department within three business days of the deficiency notice date, then five points shall be deducted from the application score for each additional day the deficiency remains unresolved. If deficiencies are not clarified or corrected within five business days from the deficiency notice

date, then the application shall be terminated. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period. An Applicant may not change or supplement an application in any manner after the filing deadline, except in response to a direct request from the Department.

§53.60. Process for Awards [~~Made by Competition~~].

(a) The Department will publish a NOFA in the *Texas Register*. The NOFA will establish a deadline for receiving applications and indicate the approximate amount of available funds.

(b) Selection Procedures for non-development activities, such as, Owner Occupied Housing Assistance, Homebuyer Assistance, and Tenant-Based Rental Assistance.

(1) Applications [~~The proposed program design in the application~~] must comply with all applicable HOME requirements or regulations established in 24 CFR Part 92[~~, as may be amended,~~] and in these rules. Applications [~~Applicants with program designs~~] that do not comply with such requirements are disqualified. Disqualified Applicants [~~applicants~~] are notified in writing.

(2) Applications are ranked from highest scores to lowest in their respective regions or Activity [~~activity~~] according to [~~the average of three~~]HOME Program scores. CHDO Set-Aside scores are ranked from highest to lowest in each CHDO-eligible activity on a statewide basis.

(3) Applications that meet or exceed a minimum score of 60% of the total HOME Program score established for the respective activities are considered for funding.

(4) In event of a tie between two or more Applicants, the Department reserves the right to determine which application will receive a recommendation for funding, or if all tied Applicants will receive a partial recommendation for funding, based on housing need factors and feasibility of the proposed project identified in the application.

[~~(4) Applicants will be notified in writing at least 7 days prior to the date of the Board meeting, including its committees, of the status of their application.~~]

(5) Applicants will be notified at least 7 calendar days prior to the date of the Board meeting of the status of their application.

[~~(5) Applications receiving a favorable staff recommendation are then presented to the Board for approval, pending the availability of HOME funds for each activity.~~]

(6) Applications receiving a favorable staff recommendation are then presented to the Board for approval, pending the availability of HOME funds for each Activity.

[~~(6) In event of a tie between two or more applicants, the Department, with Board approval, reserves the right to determine which application will receive funding based on housing need factors and feasibility of the proposed project identified in the application.~~]

(c) Selection Procedures for Development activities, such as, Single Family Housing Development and Rental Housing Development [~~Rental Housing Development and Interim Construction Assistance~~].

(1) Applications must comply with all applicable HOME requirements or regulations established in 24 CFR Part 92, and in these rules. [~~Applications are reviewed by the Department to ensure that the proposed rental housing project or the proposed interim construction program meets applicable HOME requirements.~~] Applications [~~with program designs~~] that do not comply with HOME requirements are disqualified. Disqualified Applicants [~~applicants~~] are notified in writing.

(2) Rental Housing Developments will undergo a review as follows:

(A) Threshold Evaluation. Applications submitted for Rental Housing Developments will be required to comply with the threshold criteria required under §50.9(f) of this title, as proposed, which are those required for the Housing Tax Credit Program.

(B) Scoring Evaluation. For an application to be scored, the application must demonstrate that the Development meets all of the Threshold Criteria requirements. Applications that satisfy the Threshold Criteria will then be scored and ranked according to the scoring criteria identified in the NOFA.

(C) Financial Feasibility Evaluation. After the application is scored, the Department will assign, as herein described, Developments for review for financial feasibility by the Department's Real Estate Analysis Division consistent with §53.56 of this title. The Department shall underwrite an application to determine the financial feasibility of the Development and an appropriate funding amount and terms. In making this determination, the Department will use the Underwriting Rules and Guidelines, §1.32 of this title, as proposed.

[~~(2) Applications that meet or exceed a minimum score of 60% of the total HOME Program scoring points established for each Rental Assistance and Interim Construction Assistance program are considered for further processing. Applicants not meeting or exceeding the minimum score established in this section are disqualified and are notified in writing.~~]

(3) Single Family Housing Developments will undergo a review as follows:

(A) For applications that meet or exceed a minimum score of 60% of the total HOME Program scoring points established for each Development Activity are considered for funding . Applicants not meeting or exceeding the minimum score established in this section are disqualified and are notified in writing. Development applications are ranked from highest to lowest scores according to HOME Program scores on a statewide basis.

(B) [~~(3)~~] Applications meeting [~~or exceeding~~] the [~~minimum~~] HOME Program requirements established in subparagraph (A) of this paragraph [~~§53.60(c)(2) of this title (relating to Process for Awards Made by Competition)~~] must receive an underwriting analysis by the Department. [~~A site visit may be may be conducted as part of the HOME Program feasibility and underwriting analysis. Applicants must receive recommendation for approval from the Department to be considered for HOME funding by the Board.~~]

(4) A site visit will be conducted as part of the HOME Program Development feasibility.

[~~(4) Applicants will be notified in writing at least seven days prior to the date of the Board meeting of the status of their application.~~]

(5) In event of a tie between two or more Applicants, the Department reserves the right to determine which application will receive a recommendation for funding, or if all tied Applicants will receive a partial recommendation for funding, based on housing need factors and feasibility of the proposed project identified in the application.

(6) Each Development application will be notified of its score in writing no later than seven calendar days after all applications received have been scored. Subsequently, the recommendation regarding their application will be made on the Department's web site at least

7 calendar days prior to the Board meeting at which the awards will be approved.

(7) [~~(5)~~] Applications receiving a favorable staff recommendation are then presented to the Board for approval, pending the availability of HOME funds for such Activity [~~activity~~].

[~~(6) In event of a tie between two or more applicants, the Department, with Board approval, reserves the right to determine which application will receive funding based on housing need factors and feasibility of the proposed project identified in the application.~~]

(8) [~~(7)~~] Board approval for the award of HOME [~~Rental Housing~~] Development Activity funds is conditional upon a completed loan closing and any other conditions deemed necessary by the Department.

(9) Applicants may appeal staff's decision regarding their applications in accordance with §1.7 of this title.

§53.61. General Selection Criteria.

At a minimum, the [~~The~~] following criteria are [~~is~~] utilized in evaluating the applications for HOME funds. The applicable criteria are [~~is~~] further delineated in the application guidelines and NOFA, which are part of the application package.

(1) Needs Assessment--Whether the proposed project meets the demographic, economic, and special need characteristics of the population residing in the target area and the need that the HOME program is designed to address, using qualitative and quantitative information, market studies, if appropriate, and other source documentation as delineated in the application guidelines, which are part of the application.

(2) Program Design--Whether the proposed project meets the needs identified in the needs assessment, whether the design is complete (including timeline for program implementation and service delivery), and whether the project fits within the community setting. Information required includes, but is not limited to: community involvement; support services and resources; scope of program; income and population targeting; marketing, fair housing and relocation plans, as applicable.

(3) Capability of Applicant--Whether the Applicant [~~applicant~~] has the capacity to administer and manage the proposed program/project, demonstrated through previous experience either by the Applicant [~~applicant~~], cooperating entity or key staff (including other contracted service providers), in program management, property management, acquisition, rehabilitation, construction, real estate finance counseling and training or other activities relevant to the proposed program, and the extent to which Applicant [~~applicant~~] has the capability to manage financial resources, as evidenced by previous experience, documentation of the Applicant [~~applicant~~] or key staff, and existing financial control procedures.

(4) Financial Design--Whether the proposed program budget includes eligible forms of matching contributions in accordance with 24 CFR 92.220, as may be amended[~~, and program leveraging~~].

§53.62. Program Administration.

(a) Agreement. Upon approval by the Board, Applicants [~~applicants~~] receiving HOME funds shall enter into, execute, and deliver to the Department all written agreements between the Department and Recipient, including land use restriction agreements and compliance agreements as required by the Department.

(b) Amendments. The Department, acting by and through its Executive Director or his/her designee, may authorize, execute, and deliver modifications and/or amendments to any HOME written agreement provided that:

(1) in the case of a modification or amendment to the dollar amount of the award, such modification or amendment does not increase the dollar amount by more than 25% of the original award or $50,000, whichever is greater; and

(2) in the case of all other modifications or amendments, such modification or amendment does not, in the estimation of the Executive Director, significantly decrease the benefits to be received by the Department as a result of the award.

(3) modifications [~~Modifications~~] and/or amendments that increase the dollar amount by more than 25% of the original award or $50,000, whichever is greater; or significantly decrease the benefits to be received by the Department, in the estimation of the Executive Director, will be presented to the Board for approval.

(c) Deobligation.

(1) The Department reserves the right to deobligate funds in the following situations:

(A) Recipient has any unresolved compliance issues on existing or prior contracts with the Department.

(B) Recipient fails to set-up programs/projects or expend funds in a timely manner.

(C) Recipient defaults on any agreement by and between Recipient and the Department.

(D) Recipient misrepresents any facts to the Department during the HOME application process, award of contracts, or administration of any HOME contract.

(E) Recipient's inability to provide adequate financial support to administer the HOME contract or withdrawal of significant financial support.

(F) Recipient is not in compliance with 24 CFR Part 92, [~~as may be amended,~~] or these rules.

(G) Recipient declines funds.

(H) Recipient fails to expend all funds awarded.

[~~(2) When the Department determines that funds are to be deobligated, the following procedures will apply:~~]

[~~(A) Recipient is notified in writing that the Department is recommending the deobligation of funds for the identified reasons defined in §53.62(c) of this title (relating to Program Administration).~~]

[~~(B) Recipient has 30 days from the date of the letter to respond to the notice.~~]

[~~(C) If the Department does not receive a response from the Recipient within 30 days or if the Recipient does not appeal the deobligation decision, the Recipient is notified in writing that the funds are deobligated and procedures to close the contract will begin.~~]

[~~(D) If the Recipient responds within 30 days, and requests to appeal the decision, the Department will take the following steps:~~]

[~~(i)~~ ~~The Department will review pertinent documentation; including the Recipient's response, investigation reports and findings.~~]

[~~(ii)~~ ~~If the Department determines, after the review, that the Recipient's funds should be deobligated, the Recipient is notified in writing of the Department's recommendations to deobligate funds.~~]

[(iii) The Recipient is notified of the date, location, and time of the Board meeting at which time a determination will be made by the Board.]

[(iv) The Department makes a recommendation to the Board for deobligating funds; and the Recipient may make an appeal to the Board at this time.]

[(v) Upon approval by the Board, the Recipient is notified in writing that the funds are deobligated and procedures to close the contract will begin.]

(2) [(3)] The Department, with approval of the Board, may elect to reassign funds following the Deobligation Policy, adopted by the Board on January 17, 2002, in the order prioritized as follows: [to the next funding cycle for award to new applicants or reallocate surrendered or deobligated funds to any of the following:]

(A) Successful appeals (as allowable under program rules and regulations), or

[(A) An entity within the same target area, to continue the program as originally designed; or]

(B) Disaster Relief (disaster declarations or documented extenuating circumstances such as imminent threat to health and safety), or

[(B) The Recipient with the highest expenditure rate for the same activity in the same region; or]

(C) Special Needs, or

[(C) The next ranked eligible applicant within the current funding cycle, if the applicant is prepared to start the program in a timely manner; or]

(D) Colonias, or

[(D) With Board approval, reallocated funds may be awarded to any other eligible applicant or recipient to administer any activity of the HOME Program.]

(E) Other projects/uses as determined by the Executive Director and/or Board including the next year's funding cycle for each respective program.

[(4) The amount of deobligated funds awarded to a Recipient may not exceed the maximum limits established in §53.53 of this title (relating to Application Limitations).]

(d) Waiver. Upon determination of good cause, the Department, upon approval of the Board, may waive all or any part of these rules that are within the discretion of the State.

(e) Additional Funds. In the event the Department receives additional funds from HUD, the Department, with Board approval, may elect to distribute funds to other Recipients.

§53.63. Community Housing Development Organization (CHDO) Certification.

(a) Definitions and Terms. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Applicant--A private nonprofit organization that has submitted a request for certification as a Community Housing Development Organization (CHDO) to the Department. An Applicant for the CHDO set aside must be a CHDO certified by the Department or as otherwise certified or designated as described in subsection (d) of this section.

(2) Articles of Incorporation--A document that sets forth the basic terms of a corporation's existence and is the official recognition of the corporation's existence. The documents must evidence that they have been filed with the Secretary of State.

(3) Bylaws--A rule or administrative provision adopted by a corporation for its internal governance. Bylaws are enacted apart from the articles of incorporation. Bylaws and amendments to bylaws must be formally adopted in the manner prescribed by the organization's articles or current bylaws by either the organization's board of directors or the organization's members, whoever has the authority to adopt and amend bylaws.

(4) Community--For urban areas, the term "community" is defined as one or several neighborhoods, a city, county, or metropolitan area. For rural areas, "community" is defined as one or several neighborhoods, a town, village, county, or multi-county area, but not the whole state.

(5) [Low to Moderate income,]Low income[, or Moderate income]--An annual income that does not exceed eighty percent (80%) of the median income for the area, with adjustments for family size, as defined by the U.S. Department of Housing and Urban Development (HUD).

(6) Memorandum of Understanding (MOU)--A written statement detailing the understanding between parties.

(7) Neighborhood--A geographic location designated in comprehensive plans, ordinances, or other local documents as a neighborhood, village, or similar geographical designation that is within the boundary but does not encompass the entire area of a unit of general local government; except that if the unit of general local government has a population under 25,000, the neighborhood may, but need not, encompass the entire area of a unit of general local government.

(8) Nonprofit organization--Any private, nonprofit organization (including a State or locally chartered, nonprofit organization) that:

(A) is organized under State or local laws,

(B) has no part of its net earnings inuring to the benefit of any member, founder, contributor, or individual,

(C) complies with standards of financial accountability acceptable to the Secretary of the United States Department of Housing and Urban Development, and

(D) has among its purposes significant activities related to the provision of decent housing that is affordable to low-income and moderate-income persons.

(9) Resolutions--Formal action by a corporate board of directors or other corporate body authorizing a particular act, transaction, or appointment. Resolutions must be in writing and state the specific action that was approved and adopted, the date the action was approved and adopted, and the signature of person or persons authorized to sign resolutions. Resolutions must be approved and adopted in accordance with the corporate bylaws.

(b) Application Procedures for Certification of CHDO. An Applicant requesting certification as a CHDO must submit an application for CHDO certification in a form prescribed by the Department. The CHDO application must be submitted with an application for HOME funding under the CHDO set aside. The application must include documentation evidencing the requirements of this subsection.

(1) An Applicant must have the following required legal status at the time of application to apply for certification as a CHDO:

(A) Organized as a private nonprofit organization under the Texas Nonprofit Corporation Act or other state not-for-profit/non-profit statute as evidenced by:

(i) Charter, or

(ii) Articles of Incorporation.

(B) The Applicant must be registered with the Secretary of State to do business in the State of Texas.

(C) No part of the private nonprofit organization's net earnings inure to the benefit of any member, founder, contributor, or individual, as evidenced by:

(i) Charter, or

(ii) Articles of Incorporation.

(D) The Applicant must have the following tax status:

(i) A current tax exemption ruling from the Internal Revenue Service (IRS) under Section 501(c)(3), a charitable, nonprofit corporation, or Section 501(c)(4), a community or civic organization, of the Internal Revenue Code of 1986, as evidenced by a certificate from the IRS that is dated 1986 or later. The exemption ruling must be effective on the date of the application and must continue to be effective while certified as a CHDO; or

(ii) Classification as a subordinate of a central organization non-profit under the Internal Revenue Code, as evidenced by a current group exemption letter, that is dated 1986 or later, from the IRS that includes the Applicant. The group exemption letter must specifically list the Applicant; and

(iii) A private nonprofit organization's pending application for 501(c)(3) or (c)(4) status cannot be used to comply with the tax status requirement under this subparagraph.

(E) The Applicant must have among its purposes the provision of decent housing that is affordable to low and moderate income people as evidenced by a statement in the organization's:

(i) Articles of Incorporation,

(ii) Charter,

(iii) Resolutions, or

(iv) Bylaws.

(F) The Applicant must have a clearly defined service area. The Applicant may include as its service area an entire community as defined in subsection (a)(4) of this section, but not the whole state. Private nonprofit organizations serving special populations must also define the geographic boundaries of its service areas. This subparagraph does not require a private nonprofit organization to represent only a single neighborhood.

(2) An Applicant must have the following capacity and experience:

(A) Conforms to the financial accountability standards of 24 CFR 84.21, "Standards of Financial Management Systems" as evidenced by:

(i) notarized statement by the Executive Director or chief financial officer of the organization in a form prescribed by the Department,

(ii) certification from a Certified Public Accountant, or

(iii) HUD approved audit summary.

(B) Has a demonstrated capacity for carrying out activities assisted with HOME funds, as evidenced by:

(i) resumes and/or statements that describe the experience of key staff members who have successfully completed projects similar to those to be assisted with HOME funds, or

(ii) contract(s) with consultant firms or individuals who have housing experience similar to projects to be assisted with HOME funds, to train appropriate key staff of the organization.

(C) Has a history of serving the community within which housing to be assisted with HOME funds is to be located as evidenced by:

(i) statement that documents at least one year of experience in serving the community, or

(ii) for newly created organizations formed by local churches, service or community organizations, a statement that documents that its parent organization has at least one year of experience in serving the community; and

(iii) The CHDO or its parent organization must be able to show one year of serving the community prior to the date the participating jurisdiction provides HOME funds to the organization. In the statement, the organization must describe its history (or its parent organization's history) of serving the community by describing activities which it provided (or its parent organization provided), such as, developing new housing, rehabilitating existing stock and managing housing stock, or delivering non-housing services that have had lasting benefits for the community, such as counseling, food relief, or child-care facilities. The statement must be signed by the president or other official of the organization.

(3) An Applicant must have the following organizational structure:

(A) The Applicant must maintain at least one-third of its governing board's membership for residents of low-income neighborhoods, other low-income community residents, or elected representatives of low-income neighborhood organizations in the Applicant's service area. Low-income neighborhoods are defined as neighborhoods where 51 percent or more of the residents are low-income. Residents of low-income neighborhoods do not have to be low income individuals themselves. If a low-income individual does not live in a low-income neighborhood as herein defined, the low-income individual must certify that he qualifies as a low-income individual. This certification is in addition to the affidavit required in clause (ii) of this subparagraph. For the purpose of this subparagraph, elected representatives of low-income neighborhood organizations include block groups, town watch organizations, civic associations, neighborhood church groups, Neighbor Works organizations and any organization composed primarily of residents of a low-income neighborhood as herein defined whose primary purpose is to serve the interest of the neighborhood residents. Compliance with this subparagraph shall be evidenced by:

(i) written provision or statement in the organizations By-laws, Charter or Articles of Incorporation,

(ii) affidavit in a form prescribed by the Department signed by the organization's Executive Director and notarized, and

(iii) current roster of all Board of Directors, including names and mailing addresses. The required one-third low-income residents or elected representatives must be marked on list as such.

(B) The Applicant must provide a formal process for low-income, program beneficiaries to advise the organization in all of

its decisions regarding the design, siting, development, and management of affordable housing projects. The formal process should include a system for community involvement in parts of the private nonprofit organization's service areas where housing will be developed, but which are not represented on its boards. Input from the low-income community is not met solely by having low-income representation on the board. The formal process must be in writing and approved or adopted by the private nonprofit organization, as evidenced by:

(i) organization's By-laws,

(ii) Resolution, or

(iii) written statement of operating procedures approved by the governing body. Statement must be original letterhead, signed by the Executive Director and evidence date of board approval.

(C) A local or state government and/or public agency cannot qualify as a CHDO, but may sponsor the creation of a CHDO. A private nonprofit organization may be chartered by a State or local government, but the following restrictions apply:

(i) The state or local government may not appoint more than one-third of the membership of the organization's governing body.

(ii) The board members appointed by the state or local government may not, in turn, appoint the remaining two-thirds of the board members.

(iii) No more than one-third of the governing board members may be public officials. Public officials include elected officials, appointed public officials, public employees, and individuals appointed by a public official. Elected officials include, but are not limited to, state legislators or any other statewide elected officials. Appointed public officials include, but are not limited to, members of any regulatory and/or advisory boards or commissions that are appointed by a State official. Public employees include, but are not limited to, employees of State governmental entities or departments of State government.

(iv) Public officials who themselves are low-income residents or representatives do not count toward the one-third minimum requirement of community representatives in subparagraph (A) of this paragraph.

(v) Compliance with clauses (i)-(iv) of this subparagraph shall be evidenced by:

(I) organization's By-laws,

(II) Charter, or

(III) Articles of Incorporation.

(D) If the Applicant is sponsored or created by a for-profit entity, the for-profit entity may not appoint more than one-third of the membership of the Applicant's governing body, and the board members appointed by the for-profit entity may not, in turn, appoint the remaining two-thirds of the board members, as evidenced by the Applicant's:

(i) By-laws,

(ii) Charter, or

(iii) Articles of Incorporation.

(E) An Applicant may be sponsored or created by a for-profit entity provided the for-profit entity's primary purpose does not include the development or management of housing, as evidenced in the for-profit organization's By-laws. If an Applicant is associated or has a relationship with a for-profit entity or entities, the Applicant must prove it is not controlled, nor receives directions from individuals, or entities seeking profit as evidenced by:

(i) organization's By-laws, or

(ii) Memorandum of Understanding (MOU).

(4) Religious organizations cannot qualify as a CHDO, but may sponsor the creation of wholly secular private nonprofit organizations. If Applicant is sponsored by a religious organization, the following restrictions apply.

(A) The Applicant must prove that it is not controlled by the religious organization.

(B) The developed housing must be used exclusively for secular purposes and the housing owned, developed or sponsored by the Applicant must be made available to all persons regardless of religious affiliations or beliefs.

(C) There are no limits on the proportion of the board that may be appointed by the religious organization.

(D) Compliance with these clauses (i)-(iii) of this subparagraph shall be evidenced by:

(i) organization's By-laws,

(ii) Charter, or

(iii) Articles of Incorporation.

(c) An application for Community Housing Development Organization (CHDO) Certification will only be accepted if submitted with an application to the Department for HOME funds. If all requirements under this [~~Section~~]§53.63 are met, the Applicant will be certified as a CHDO upon the award of HOME funds by the Department. A new application for CHDO certification must be submitted to the Department with each new application for HOME funds under the CHDO set aside.

(d) If an Applicant submits an application for CHDO certification for a service area that is located in a local Participating Jurisdiction, the Applicant must submit evidence of the local taxing jurisdiction or local Participating Jurisdiction certification or designation of the Applicant as a CHDO.

(e) In the case of an Applicant [~~applicant~~] applying for HOME funds (CHDO set-aside) from the Department to be used in a Participating Jurisdiction, where neither the Participating Jurisdiction nor the local taxing entity certifies CHDOs outside of the local HOME application process, the Certification process described in this section applies.

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 August 18, 2003.

TRD-200305284
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 475-3726

♦ ♦ ♦

10 TAC §53.59

(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 Housing and Community Affairs or in the Texas

Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306.

The proposed repeal affects no other code, article or statute.

§53.59. Process for Direct Awards.

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 August 21, 2003.

TRD-200305399
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 475-3726

♦ ♦ ♦

PART 6. OFFICE OF RURAL COMMUNITY AFFAIRS

CHAPTER 255. TEXAS COMMUNITY DEVELOPMENT PROGRAM
SUBCHAPTER A. ALLOCATION OF PROGRAM FUNDS

10 TAC §255.7

The Office of Rural Community Affairs (Office) proposes amendments to §255.7, concerning the allocation of Community Development Block Grant (CDBG) non-entitlement area funds under the Texas Community Development Program (TCDP).

The amendments are being proposed to establish the standards and procedures by which the Office and the Texas Department of Agriculture will allocate and distribute 2003 Main Street Program funds under the Texas Capital Fund. The amendments are being proposed to make changes to the application and selection criteria for the Main Street Program.

Robt. J. "Sam" Tessen, MS, Executive Director of the Office, 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. Tessen, MS, Executive Director of the Office, also has determined that for each year of the first five years the section is in effect, the public benefit as a result of enforcing the section will be the equitable allocation of CDBG non-entitlement area funds to eligible units of general local government in Texas. There will be no effect on any small businesses or micro-business. 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 Jerry Hill, General Counsel, Office of Rural Community Affairs, P.O. Box 12877, Austin, Texas 78711, telephone: (512) 936-6701. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register*.

The amendments are proposed under the §487.052 of the Government Code, which provides the executive committee with the authority to adopt rules concerning the implementation of the Office's responsibilities.

No other code, article, or statute is affected by the proposed amendments.

§255.7. Texas Capital Fund.

(a)-(g) (No change.)

(h) Application process for the main street program. The application and selection procedures consist of the following steps:

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

(3) TDA staff will then review the four highest ranking applications for eligibility and completeness in descending order based on the scoring. [~~Applications with 13 or more deficiencies will be considered ineligible. If that occurs than the next highest ranking application will be substituted. In those instances where the staff determines that the application has 12 or less deficiencies on the Application Checklist, unless an extension is granted, the applicant will be given 10 business days to rectify all deficiencies.~~] In the event the staff determines the application contains activities that are ineligible for funding, the application will be restructured or considered ineligible. The applicant will be notified of any deficiencies and given 10 business days to rectify all deficiencies. An application containing an excessive number of deficiencies, or deficiencies of a material nature (e.g., lack of financial commitments) may be declined. In any event a determination is made that an application contains activities that are ineligible for funding, the application will be restructured or declined and the application materials will be retained by TDA. An application resubmitted for future funding cycles will be competing with those applications submitted for that cycle. No preferential placement will be given an application previously submitted and not funded.

(4)-(6) (No change.)

(7) TDA staff prepares a project report and [~~with recommendations (for approval or denial) for credit committee and then credit committee~~] makes a recommendation for approval or denial to TDA's Commissioner or the Commissioner's designee [~~executive director~~] for the final decision.

(8) The Commissioner reviews the recommendation and, if approved, an award letter is sent to the applicant's chief elected official.[~~TDA executive director reviews the recommendation and announces the project selected for funding.~~]

[~~(9) TDA staff works with the recipient to execute the contract agreement. While the contract award must be based on the information provided in the application, TDA staff may negotiate some elements of the final contract agreement with the recipient.~~]

(9) [~~(10)~~] The contract is drafted and then reviewed by management and legal prior to two copies being mailed to award recipient. Upon receipt, unless an extension is granted, award recipient has 30 days to review and execute both copies. Once returned to TDA, the contract will be fully executed by the Commissioner or the Commissioner's designee [~~executive director~~] and then a single copy is returned to contractor.

(i) Scoring criteria for the main street program. There is a minimum 25-point threshold requirement. Applications will be reviewed for feasibility and placed in descending order based on the scoring criteria. There is a total of 100 points possible.

(1) (No change.)

(2) Project Feasibility (maximum 70 points). Measures the applicant's potential for a successful project. Each applicant must submit detailed and complete support documentation for each category. Compliance with the ten criteria for Main Street Recognition is required. First year Main Street Cities must receive prior approval from THC to apply and must submit the Main Street Criteria for Recognition Survey with the TCF application. The [~~ten~~] criteria include the following:

(A) Broad-based public support for commercial district revitalization--(5 points). Each letter of support is worth one-half of a point. To receive any points in this category, the applicant must submit a letter of support from the County Historical Commission. Show letters of support from the following:

(i) one (1) letter from the County Historical Commission

(ii) five (5) letters from merchants and/or property owners in the affected area

(iii) two (2) letters from civic organizations

(iv) two (2) letters from other local organizations that are stakeholders

(B) Infrastructure Project Plan--(5 points). Show the city's plan for dealing with an infrastructure project. Develop a plan for access to local business during the infrastructure project. Provide public notification to support the project.

(C) Identification of goals--(10 points). Identify long-term downtown infrastructure plan. List in broad terminology the goals of the project. Indicate in detail how the project is a component of the overall downtown infrastructure plan. How do the goals of this project tie into the overall goals of the city's Main Street program.

(D) ADA Compliance Goals--(10 points). Does the project address ADA accessibility issues. How will ADA issues be addressed in the project. If project does not address ADA compliance issues, is the Main Street District in compliance with Federal ADA standards.

(E) Adequate operating budget--(10 points). To be successful, a Main Street program must have the financial resources necessary to carry out its work plan. The size of a program's budget will change as the program matures and is likely to vary according to regional economic differences and community economic differences. Please attach a copy of your operating budget, plus any other funding you have accessed this year. If your budget information is included with other city departments, please separate yours from the others. Please also include the Main Street manager's salary and whether the position is staffed on a full-time or part-time basis.

(F) Historic Preservation Ethic and Preservation Impact - Main Street's Role--(10 points). Preservation is a major component of the Texas Historical Commission's Main Street program. Cities are eligible for the Texas Capital Fund grant based on their inclusion in the Texas Main Street program. The THC mission is "To protect and preserve the state's historic and prehistoric resources for the use, education, enjoyment and economic benefit of present and future generations." Therefore, in the interest of accomplishing our mission, please answer the following:

(i) Is the community a designated Certified Local Government?

(ii) Does the city have a preservation ordinance?

(iii) Does the city have a landmark Commission of a Preservation Review Board?

(iv) Does the city have a Main Street Low Interest Loan Program?

(v) Does the city have a Main Street Façade Improvements Grant Program?

(vi) Does the city have an active County Historical Commission? If so, please provide a copy of the minutes from the last meeting.

(vii) Does the city have a local marker program?

(viii) Does the city have a National Register District?

(ix) Does the city have any historical markers? If so, how many?

(x) Does the city have a recorded Texas historic landmark? If so, when was the last designation?

(xi) Does the city have Main Street design guidelines in place?

(xii) Does the city have a downtown survey?

(xiii) Does the city have a current building survey?

(xiv) Does the city have a preservation master plan?

(xv) Does the city have a historic driving or walking tour?

(xvi) Does the city have a Junior Main Street Board?

(xvii) List and building demolitions during the past five years. If you had any building demolitions in the past five years, what was the age of the buildings that were demolished?

(G) Project Impact - State Enterprise Zone--(5 points)

(H) Community Development Potential--(10 points). In this category scoring members rank the cities on the following factors:

(i) economic development need

(ii) potential for economic development

(iii) geographic distribution

(iv) feasibility of proposed Texas Capital Fund project

(v) community need for the project

(I) Local Main Street program training--(5 points). Have the Main Street manager and the Main Street board members completed the minimum amount of annual training required in your Main Street contract? For this category the points breakdown is as follows:

(i) Main Street manager completed training--3 points

(ii) Board completed training--2 points

[~~(A) Broad-based public support for commercial district revitalization--(10 points)~~]

[~~(B) Local Main Street program's organization's vision and mission-(5 points)~~]

[~~(C) Main Street work/marketing plan--(5 points)~~]

[~~(D) Historic preservation ethic--(10 points)~~]

[(E) Involvement of board of directors and committees--(10 points)]

[(F) Main Street operating budget--(5 points)]

[(G) Professional Main Street program manager experience--(10 points)]

[(H) Local Main Street program training--(5 points)]

[(I) Reinvestment statistics related to financial reinvestment, job creation, and new business creation--(5 points)]

[(J) Participation in the National Main Street Network--(5 points)]

(3) Applicant (maximum 30 points). There are four applicant scoring categories each worth 5 to 10 points.

(A) Applicant is recognized as a National Main Street city--(5 points)

(B) Minority Hiring (maximum 5 points). Measures applicant's hiring practices. Percentage of minorities presently employed by the applicant divided by the percentage of minority residents within the local community. (In the event that the following conditions apply: The applicant has seven or fewer non-seasonal, full-time employees; 5% or more of the applicant's population base is living in group quarters or institutions - the applicant is assigned the average score on this factor or the actual score, whichever is higher.)

(C) Leverage (maximum 10 points). A 20% cash match is required for the grant. Additional points will be given for additional matching funds. 10% additional match equals 5 points. 20% additional match equals 10 points. The additional match can be cash and in-kind.

(D) Main Street Reinvestment Statistics (maximum 10 points). Based on private reinvestment in the Main Street area per capita per year in the program. One point is given for each $10 of reinvestment per capita. If over $100 per capita, then the applicant receives the maximum 10 points.

[(3) Applicant (maximum 10 points).]

[(A) Applicant has not received a TCF main street grant--(5 points)]

[(B) Applicant has not received a TCF main street grant and the applicant has been an Official Texas Main Street City for more than 5 years--(10 points)]

[(4) Leverage (5 points). Score 5 points if matching dollars are greater than or equal to the following ratios based on two separate population categories:]

[(A) Applicant's population less than 5,000 persons--0.75:1]

[(B) Applicant's population equal to or greater than 5,000 persons--1.5:1]

[(5) Minority Hiring (maximum 5 points). Measures applicant's hiring practices. Percentage of minorities presently employed by the applicant divided by the percentage of minority residents within the local community. In the event 10% or less of the applicant's population base is composed of minority residents, the applicant has seven or fewer non-seasonal full-time employees, or 5% or more of the applicant's population base is living in quarters or institutions, the applicant is assigned the average score on this factor for all applicants for the previous program year or the score based on the actual figures, whichever is higher.]

[(6) Main Street Reinvestment Statistics (maximum 10 points). (Private Sector Reinvestment) Formulates amount based on per capita, per year in program.]

(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 August 15, 2003.

TRD-200305235
Robt. J. "Sam" Tessen, MS
Executive Director
Office of Rural Community Affairs
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 936-6710

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 463. APPLICATIONS AND EXAMINATIONS

22 TAC §463.13

The Texas State Board of Examiners of Psychologists proposes amendments to §463.13, concerning Requirements for Experienced Out-of-State Applicants. These amendments are being proposed to correct technical errors in the text of these rules.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Lee also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to make the rules easier for the licensees and public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed amendment does not affect other statutes, articles, or codes.

§463.13. Requirements for Experienced Out-of-State Applicants.

(a) An applicant who provides documentation that the applicant has been actively licensed and in good standing as a psychologist in another jurisdiction for at least 5 [years] consecutive years immediately preceding the filing of the application, must meet the following requirements, which are a substitute for Board rule §463.11:

(1) The applicant must have already obtained provisional licensure and must document that the applicant is a provisionally licensed psychologist in good standing.

(2) Supervised experience. The applicant must affirm that the applicant has received 3,000 hours of experience supervised by a psychologist licensed in the state where the supervision took place. At least half of these hours (1,500 hours) must have been completed after the doctoral degree was conferred or completed. The formal internship year may be met either before or after the doctoral degree was conferred or completed, as indicated on the official transcript.

(3) The applicant must document that the applicant has not received any disciplinary action by any other jurisdiction and that there is no pending action or complaint against the applicant in any other jurisdiction.

(b) Licensees holding the Certification of Professional Qualification in Psychology (CPQ) Credential Granted by the Association of State and Provincial Psychology Boards (ASPPB). An out-of-state licensee holding a CPQ credential granted by the ASPPB meets the requirements of Board rule §463.11. In addition, out-of-state licensees who hold a CPQ credential must meet requirements (a)(1) and (a)(3) listed above. The Board reserves the right to [~~too~~] accept or reject licensure for persons holding the CPQ credential.

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 August 12, 2003.

TRD-200305053
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 305-7700

♦ ♦ ♦

22 TAC §463.25

The Texas State Board of Examiners of Psychologists proposes amendments to §463.25, concerning Foreign Graduates. These amendments are being proposed to clarify that certified copies of foreign graduates' diplomas may be accepted during the application process.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Lee also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to make the rules easier for the licensees and public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed amendment does not affect other statutes, articles, or codes.

§463.25. Foreign Graduates.

(a) Prior to submitting an application for licensure, the potential applicant shall provide the Board with documents and evidence to establish that his/her formal education is equivalent to a masters or doctoral degree, as required by the Psychologists' Licensing Act and Rules and Regulations of the Board, granted by a United States university that is regionally accredited. The registrar of the University of Texas at Austin must certify that, after reviewing the required documentation, the degree is equivalent to a masters or doctoral degree granted from a regionally accredited educational institution. The potential applicant shall provide the Board with the following:

(1) An original or certified copy of a diploma or other certificate of graduation, which will be returned, and a photostatic copy of such a document, which shall be retained.

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

(b) (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 August 12, 2003.

TRD-200305054
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 305-7700

♦ ♦ ♦

CHAPTER 471. RENEWALS

22 TAC §471.2

(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 State Board of Examiners of Psychologists or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas State Board of Examiners of Psychologists proposes the repeal of §471.2, concerning Renewal Forms. The rule is being repealed in order to add a new rule to clarify information required on renewal forms.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Lee also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to make the rules easier for the licensees and public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The repeal is proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed repeal does not affect other statutes, articles, or codes.

§471.2. Renewal Forms.

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 August 12, 2003.

TRD-200305055
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 305-7700

♦ ♦ ♦

22 TAC §471.2

The Texas State Board of Examiners of Psychologists proposes new §471.2, concerning Renewal Forms. This new rule is being proposed to clarify information that is required on renewal forms.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Lee also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to make the rules easier for the licensees and public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The new rule is proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed new rule does not affect other statutes, articles, or codes.

§471.2. Renewal Forms.

Licensed psychological associates and provisionally licensed psychologists who do not practice in an exempt setting must include the name and license number of their supervisor on renewal forms. Licensed psychologists and licensed specialists in school psychology must list their supervisees on their renewal forms. Licensed psychologists must indicate on their renewal forms that they have updated their online profile information. All licensees should indicate their current employment setting on their renewal forms.

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 August 12, 2003.

TRD-200305056
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 305-7700

♦ ♦ ♦

CHAPTER 473. FEES

22 TAC §473.1

The Texas State Board of Examiners of Psychologists proposes amendments to §473.1, concerning Application Fees (Not Refundable). These amendments are being proposed in order to implement HB 2985 which requires Health Profession Council member agencies to raise initial application fees by $5 to fund a new Office of Patient Protection.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Lee also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to make the rules easier for the licensees and public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed amendment does not affect other statutes, articles, or codes.

§473.1. Application Fees (Not Refundable).

(a) Psychological Associate Licensure--$185 [~~$180~~]

(b) Provisionally Licensed Psychologist--$335 [~~$330~~]

(c) Licensure--$175 [~~$170~~]

(d) Reciprocity--$475 [~~$470~~]

(e) Licensed Specialist in School Psychology--$215 [~~$210~~]

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 August 12, 2003.

TRD-200305057
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 305-7700

♦ ♦ ♦

22 TAC §473.3

The Texas State Board of Examiners of Psychologists proposes amendments to §473.3, concerning Annual Renewal Fees (Not Refundable). These amendments are being proposed in order to implement HB 2985 which requires Health Profession Council member agencies to raise annual renewal fees by $1 to fund a new Office of Patient Protection.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Lee also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to make the rules easier for the licensees and public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed amendment does not affect other statutes, articles, or codes.

§473.3. Annual Renewal Fees (Not Refundable).

(a) Psychological Associate Licensure--$91 [~~$90~~]

(b) Psychological Associate Licensure over the age of 70--$16 [~~$15~~]

(c) Provisionally Licensed Psychologist--$86 [~~$85~~]

(d) Provisionally Licensed Psychologist over the age of 70--$16 [~~$15~~]

(e) Psychologist Licensure--$181 [~~$180~~]

(f) Psychologist Licensure over the age of 70--$16 [~~$15~~]

(g) Psychologist Health Service Provider Status--$21 [~~$20~~]

(h) Psychologist Health Service Provider status over the age of 70--No Fee

(i) Licensees Special in School Psychology--$34 [~~$33~~]

(j) Licensed Specialist in School Psychology over the age of 70--$14 [~~$13~~]

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 August 12, 2003.

TRD-200305058
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 305-7700

♦ ♦ ♦

PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 535. GENERAL PROVISIONS

SUBCHAPTER A. GENERAL PROVISIONS RELATING TO THE REQUIREMENT OF LICENSURE

22 TAC §535.1

The Texas Real Estate Commission (TREC) proposes amendments to Chapter 535 concerning provisions of the Real Estate License Act and §535.1 concerning when a real estate license is required. The amendment to Chapter 535 changes the title to General Provisions to more accurately reflect the content of the chapter. The amendments to §535.1 change the cites to the relevant statutory provisions in Chapter 1101, Texas Occupations Code. House Bill 2813, 77th Legislature (2001), added Chapter 1101, a nonsubstantive codification of The Real Estate License Act (the Act), and repealed Article 6573a, Texas Civil Statutes, effective June 1, 2003. The amendments are also proposed in connection with TREC's on-going review of its rules and are generally intended to update and to clarify the rules concerning general provisions relating to the requirements of licensure.

Loretta R. DeHay, general counsel, has determined that for the first five-year period the section is in effect there will be no fiscal implications for the state as a result of enforcing or administering the section. There are no anticipated fiscal implications for units of local government. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the section.

Ms. DeHay also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be clarification of the underlying statutory authority for the rule. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purposed and intent of the Act to insure compliance with the provisions of the Act.

The statute affected by this proposal is Texas Occupations Code, Chapter 1101.

No other statute, code or article is affected by the proposed amendments.

§535.1. License Required.

(a) Texas Occupations Code [~~Civil Statutes~~], Chapter 1101 [~~Article 6573a~~] (the Act) applies to persons acting as real estate brokers or salespersons while physically within this state, regardless of the location of the real estate involved or the residence of the person's customers or clients. For the purposes of the Act, a person conducting brokerage business from another state by mail, telephone, the Internet, e-mail or other medium is also considered acting within this state if all the prospective buyers, sellers, landlords, or tenants are legal residents of this state, and the real property concerned is located wholly or in part within this state.

(b) This section does not prohibit cooperative arrangements between non-resident brokers and Texas brokers pursuant to the Act, §1101.651(a)(2) [~~14(a)~~] and §535.131 of this title (relating to Unlawful Conduct: Splitting Fees).

(c) Unless otherwise exempted by the Act, a person must be licensed as a real estate broker or salesperson to show a broker's listings, solicit listings of real property, or perform any act defined as that of a real estate broker by the Act. An unlicensed person may be hired by a broker to act as a host or hostess at a property being offered for sale by the broker, provided the unlicensed person engages in no activity for which a license is required.

(d) The employees, agents or associates of a licensed broker, including a corporation or limited liability company licensed as a broker, must be licensed as real estate brokers or salespersons if they direct or supervise other persons who perform [~~in the performance of~~] acts for which a license is required. A license is not required for the performance of secretarial, clerical, or administrative tasks, such as training personnel, performing duties generally associated with office administration and personnel matters. Unlicensed employees, agents, or associates may not solicit business for the broker or hold themselves out as authorized to act as real estate brokers or salespersons.

(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 August 14, 2003.

TRD-200305200
Loretta DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 465-3900

♦ ♦ ♦

SUBCHAPTER B. DEFINITIONS

22 TAC §§535.12, 535.13, 535.16, 535.17, 535.21

The Texas Real Estate Commission (TREC) proposes amendments to §535.12 concerning general definitions, §535.13 concerning dispositions of real estate, §535.16 concerning listings, §535.17 concerning appraisals, and §535.21 concerning unimproved lot sales; listing publications. The amendments to §535.12, §535.13, §535.16, §535.17, and §535.21 change the cites to the relevant statutory provisions in Chapter 1101, Texas Occupations Code. House Bill 2813, 77th Legislature (2001), added Chapter 1101, a nonsubstantive codification of The Real Estate License Act (the Act), and repealed Article 6573a, Texas Civil Statutes, effective June 1, 2003. The amendments are also proposed in connection with TREC's on-going review of its rules and are generally intended to update and to clarify the rules concerning definitions.

Loretta R. DeHay, general counsel, has determined that for the first five-year period these sections are in effect there will be no fiscal implications for the state as a result of enforcing or administering the sections. There are no anticipated fiscal implications for units of local government. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the sections.

Ms. DeHay also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be clarification of the underlying statutory authority for the rules. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purposed and intent of the Act to insure compliance with the provisions of the Act.

The statute affected by this proposal is Texas Occupations Code, Chapter 1101.

No other statute, code or article is affected by the proposed amendments.

§535.12. General.

(a) (No change.)

(b) A person who owns property jointly may sell and convey title to his or her interest in the property, but the person must be licensed to act for compensation as an agent for the other owner unless otherwise exempted by Texas Occupations Code [~~Civil Statutes~~], Chapter 1101 [~~Article 6573a~~], (the Act).

§535.13. Dispositions of Real Estate.

(a) (No change.)

(b) Unless otherwise exempted by Texas Occupations Code [~~Civil Statutes~~], Chapter 1101 [~~Article 6573a~~] (the Act), a person who manages real property or collects rentals for an owner of real property and for a valuable consideration must be licensed if the person also rents or leases the property for the owner.

(c) (No change.)

(d) A real estate license is not required for an individual employed by a corporation or other business entity for the purpose of buying, [~~real property for the entity or~~] selling, or leasing real property for [~~owned by~~] the entity. An entity is considered to be an owner if it holds record title to the property or has an equitable title or right acquired by contract with the record title holder. A corporation or limited liability company is considered to be acting as a broker and is required to be licensed under the Act if it or its employee receives, or expects to receive, a valuable consideration from the record title holder for negotiating a sale or other disposition of the property.

(e) (No change.)

(f) Arranging for a person to occupy a vacant residential property is an act requiring a real estate license if the actor:

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

(3) is not exempted from the requirement of a license by the Act, §1101.005 [~~3~~].

§535.16. Listings.

(a) Trade associations or other organizations which provide a computerized listing service for their members, but which do not receive compensation when the real estate is sold would not be required to be licensed under Texas Occupations Code [~~Civil Statutes~~], Chapter 1101 [~~Article 6573a~~] (the Act).

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

§535.17. Appraisals.

(a) (No change.)

(b) Texas Occupations Code [~~Civil Statutes~~], Chapter 1101 [~~Article 6573a~~] (the Act) does not apply to appraisals performed by the employees of a financial institution or investment firm in connection with a contemplated loan or investment by their employers.

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

§535.21. Unimproved Lot Sales; Listing Publications.

(a) (No change.)

(b) A person may contract to advertise real estate for purchase, sale, lease or rental in a publication without being licensed under Texas Occupations Code [~~Civil Statutes~~], Chapter 1101 [~~Article 6573a~~], (the Act), unless payment of any fee or consideration the person receives is contingent upon the purchase, sale, lease, or rental of the property advertised in the publication. For the purposes of this section an advance fee is a contingent fee if the person is obligated to return the fee if the property is not purchased, sold, leased or rented. This section shall be narrowly construed to effectuate the purposes for which this section was adopted.

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 August 14, 2003.

TRD-200305201
Loretta DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 465-3900

♦ ♦ ♦

SUBCHAPTER C. EXEMPTIONS TO REQUIREMENTS OF LICENSURE

22 TAC §535.31

The Texas Real Estate Commission (TREC) proposes amendments to §535.31 concerning attorneys at law. The amendments to §535.31 change the cites to the relevant statutory provisions in Chapter 1101, Texas Occupations Code. House Bill 2813, 77th Legislature (2001), added Chapter 1101, a nonsubstantive codification of The Real Estate License Act (the Act), and repealed Article 6573a, Texas Civil Statutes, effective June 1, 2003. The amendments are also proposed in connection with TREC's on-going review of its rules and are generally intended to update and to clarify the rules concerning exemptions to requirements of licensure.

Loretta R. DeHay, general counsel, has determined that for the first five-year period the section is in effect there will be no fiscal implications for the state as a result of enforcing or administering the section. There are no anticipated fiscal implications for units of local government. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the section.

Ms. DeHay also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be clarification of the underlying statutory authority for the rule. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purposed and intent of the Act to insure compliance with the provisions of the Act.

The statute affected by this proposal is Texas Occupations Code, Chapter 1101.

No other statute, code or article is affected by the proposed amendments.

§535.31. Attorneys at Law.

A licensed attorney is exempt from the requirements of Texas Occupations Code [~~Civil Statutes~~], Chapter 1101 [~~Article 6573a~~], (the Act) but cannot sponsor real estate salespersons or serve as the designated officer or manager of a licensed corporation or limited liability company unless the attorney is also licensed as a real estate broker. This provision is not a waiver of the standards of eligibility and qualification elsewhere established in the Act.

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 August 14, 2003.

TRD-200305202
Loretta DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 465-3900

♦ ♦ ♦

SUBCHAPTER D. THE COMMISSION

22 TAC §535.41, §535.42

The Texas Real Estate Commission (TREC) proposes amendments to §535.41 concerning procedures, and §535.42 concerning jurisdiction and authority. The amendments change the cites to the relevant statutory provisions in Chapter 1101, Texas Occupations Code. House Bill 2813, 77th Legislature (2001), added

Chapter 1101, a nonsubstantive codification of The Real Estate License Act (the Act), and repealed Article 6573a, Texas Civil Statutes, effective June 1, 2003. The amendments are also proposed in connection with TREC's on-going review of its rules and are generally intended to update and to clarify the rules concerning general provisions relating to the commission.

Loretta R. DeHay, general counsel, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for the state as a result of enforcing or administering the sections. There are no anticipated fiscal implications for units of local government. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the sections.

Ms. DeHay also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be clarification of the underlying statutory authority for the rules. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purposed and intent of the Act to insure compliance with the provisions of the Act.

The statute affected by this proposal is Texas Occupations Code, Chapter 1101.

No other statute, code or article is affected by the proposed amendments.

§535.41. Procedures.

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

(d) Order of business.

(1) (No change.)

(2) Proceedings in contested cases will be conducted in accordance with the Administrative Procedure Act, Texas Government Code, Chapter 2001 [~~§§2001.001 et seq~~] and Chapter 533 of this title (relating to Practice and Procedure).

§535.42. Jurisdiction and Authority.

(a) (No change.)

(b) An employee of the commission specifically authorized by it pursuant to Texas Occupations Code [~~Civil Statutes~~], Chapter 1101 [~~Article 6573a~~], (the Act), §1101.151(b)(3) [~~§5(t)~~], to conduct hearings and render final decisions in contested cases may order issuance of a probationary license under §535.94 of this title (relating to Hearing on Application Disapproval: Probationary Licenses) and may suspend or revoke a license or reprimand or place on probation a licensee for a violation of the Act or a rule of the commission.

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 August 14, 2003.

TRD-200305203

Loretta DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 465-3900

♦ ♦ ♦

SUBCHAPTER E. REQUIREMENTS FOR LICENSURE

22 TAC §535.51, §535.53

The Texas Real Estate Commission (TREC) proposes amendments to §535.51 concerning general requirements, and §535.53 concerning corporations and limited liability companies. The amendments to §535.51 are proposed in connection with the passage of H.B. 1508 by the 78th Legislature (2003), increasing the maximum fee for application for salesperson's license to not more than $75. The amendment to §535.51 proposes to adopt by reference two revised application forms to reflect a salesperson application fee of $70 and a renewal application for broker license by a limited liability company to amend minor typographical errors in the form. The amendments to §535.53 change the cites to the relevant statutory provisions in Chapter 1101, Texas Occupations Code. House Bill 2813, 77th Legislature (2001), added Chapter 1101, a nonsubstantive codification of The Real Estate License Act, and repealed Article 6573a, Texas Civil Statutes, effective June 1, 2003. The amendments are also proposed in connection with TREC's on-going review of its rules and are generally intended to update and to clarify the rules concerning requirements for licensure.

Loretta R. DeHay, general counsel, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for the state as a result of enforcing or administering the sections. There are no anticipated fiscal implications for units of local government. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the sections.

Ms. DeHay also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be clarification of the underlying statutory authority for the rules and to update the application forms to reflect a change in fees, authorized by recent legislative amendments to the Act. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purposed and intent of the Act to insure compliance with the provisions of the Act.

The statute affected by this proposal is Texas Occupations Code, Chapter 1101.

No other statute, code or article is affected by the proposed amendments.

§535.51. General Requirements

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

(e) The commission adopts by reference the following forms approved by the commission which are published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188:

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

(5) Application for Real Estate Salesperson License, TREC Form SL-9 [~~8~~];

(6) Application for Late Renewal of Real Estate Salesperson License, TREC Form SLR-8 [~~7~~];

(7) (No change.)

(8) Application for Real Estate Broker License by a Limited Liability Company, TREC Form BLLLC-5 [~~4~~];

(9)-(10) (No change.)

§535.53. Corporations and Limited Liability Companies.

(a) For the purposes of qualifying for, maintaining, or renewing a license, a corporation or limited liability company must designate one person holding an active Texas real estate broker license to act for it. The corporation or limited liability company may not act as a broker during any period in which it has not designated a person to act for it who meets the requirements of Texas Occupations Code [~~Civil Statutes~~], Chapter 1101 [~~Article 6573a~~] (the Act). A broker may not act as a designated person at any time while the broker's license is inactive, expired, suspended or revoked.

(b) Section 1101.355 [~~6~~] of the Act applies only to corporations or limited liability companies which are created under the laws of this state, provided, however, that a corporation or limited liability company formed under the laws of a state other than Texas will be considered to be a Texas resident for purposes of this section if it is qualified to do business in Texas; its officers or managers, its principal place of business and all of its assets are located in Texas; and all of its officers and directors or managers and members are Texas residents.

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 August 14, 2003.

TRD-200305204
Loretta DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 465-3900

♦ ♦ ♦

SUBCHAPTER F. EDUCATION, EXPERIENCE, EDUCATIONAL PROGRAMS, TIME PERIODS AND TYPE OF LICENSE

22 TAC §§535.61 - 535.66

The Texas Real Estate Commission (TREC) proposes amendments to §535.61 concerning examinations, §535.62 concerning acceptable courses of study, §535.63 concerning education and experience requirements for a license, §535.64 concerning accreditation of schools and approval of courses and instructors; §535.65 concerning changes in ownership or operation of school; presentation of courses, advertising, and records, and §535.66 concerning payment of annual fee, audits, investigations and enforcement actions. The amendments change the cites to the relevant statutory provisions in Chapter 1101, Texas Occupations Code. House Bill 2813, 77th Legislature (2001), added Chapter 1101, a nonsubstantive codification of The Real Estate License Act (the Act), and repealed Article 6573a, Texas Civil Statutes effective June 1, 2003. The amendment to §535.64(g) is proposed in connection with the passage of H.B. 1508 by the 78th Legislature (2003), setting the maximum fee for application for real estate instructor and proposes to adopt by reference a revised application form to reflect an instructor application fee of $25. The amendment to §535.65(i) permits a school to provide a roster of students who take alternate delivery method courses 10 days after the end of the month in which the course was taken. The amendments are also proposed in connection with TREC's on-going review of its rules and are generally intended to update and to clarify the rules concerning education, experience, educational programs, time periods and type of license.

Loretta R. DeHay, general counsel, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for the state as a result of enforcing or administering the sections. There are no anticipated fiscal implications for units of local government. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the sections.

Ms. DeHay also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be clarification of the underlying statutory authority for the rules and to update a form to reflect a change in fees authorized by recent legislative amendments to the Act. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purposed and intent of the Act to insure compliance with the provisions of the Act.

The statute affected by this proposal is Texas Occupations Code, Chapter 1101.

No other statute, code or article is affected by the proposed amendments.

§535.61. Examinations.

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

(d) Applicants may use [~~slide rules or~~] silent, battery-operated, electronic, pocket sized calculators which are nonprogrammable. If a calculator has printout capability, the testing service must approve use of such calculator prior to the examination. Applicants may not use calculators with alphabetic keyboards.

(e)-(f) (No change.)

§535.62. Acceptable Courses of Study.

(a) Acceptable core real estate courses are those courses prescribed by Texas Occupations Code [~~Civil Statutes~~], Chapter 1101 [~~Article 6573a~~] (the Act), §1101.003 [~~7(a)~~] and by this section. Acceptable real estate related courses are those courses which have been determined to be acceptable by the commission. The commission will periodically publish lists of acceptable real estate related courses.

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

(d) A core real estate course also must meet each of the following requirements to be accepted.

(1) The course contained the content required by Texas Occupations Code [~~Civil Statutes~~], Chapter 1101 [~~Article 6573a~~], (the Act), §1101.003 [~~7(a)~~], or this section.

(2)-(9) (No change.)

(e) (No change)

(f) In addition to the courses of study specified in the Act, §1101.003 [~~7(a)~~], the following shall be considered core real estate courses.

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

§535.63. Education and Experience Requirements for a License.

(a) (No change.)

(b) Education and experience requirements for a broker license.

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

(3) Under the Texas Occupations Code [~~Civil Statutes~~], Chapter 1101 [~~Article 6573a~~] (the Act), §1101.357 [~~7(g)~~] a person who is the designated officer of a corporation or limited liability company which is licensed as a real estate broker in another state is deemed to be a licensed real estate broker in another state. The term "state" means one of the states, territories, and possessions of the United States and any foreign country or governmental subdivision thereof. A person licensed in another state may derive the required two years' experience from periods in which the person was licensed in two or more states. [~~A person whose real estate broker license is on inactive status is deemed to be a licensed real estate broker in another state.~~]

(4) The commission shall require not less than 18 semester hours (270 classroom hours) in courses reflecting course titles or course descriptions in the real estate disciplines including, but not limited to, the statutory subject areas identified in the Act, §1101.003 [~~7(a) and §7(j)~~]. The commission will publish periodically guidelines as to the acceptability of related courses. [~~Provided, however, that an applicant for a broker license who was licensed as a salesperson subject to the annual education requirements set forth in this Act must provide the commission satisfactory evidence of having completed 18 semester hours (270 classroom hours) of core real estate courses.~~]

(c) (No change.)

§535.64. Accreditation of Schools and Approval of Courses and Instructors.

(a) Application. A person desiring to offer educational programs or courses of study under approval of the commission pursuant to Texas Occupations Code [~~Civil Statutes~~], Chapter 1101 [~~Article 6573a~~], (the Act), §1101.301 [~~7(f)~~], shall file an application on forms adopted by the commission accompanied by the fee prescribed pursuant to §1101.152(a)(10) [~~11(9)~~] of the Act. The commission may request additional information from an applicant which the commission deems to be relevant and material to the consideration of an application.

(b) Standards for approval of application for accreditation. To be accredited as a school, the applicant must satisfy the commission as to the applicant's ability to administer courses with competency, honesty, trustworthiness and integrity. If the applicant proposes to employ another person, such as an independent contractor, to conduct or administer the courses, the other person must meet this standard as if the other person were the applicant. The applicant also must demonstrate that the applicant has sufficient financial resources to conduct its proposed operations on a continuing basis without risk of loss to students attending the school and that the proposed facilities will be adequate and safe for conducting classes. If the applicant is currently accredited, the applicant will be deemed to meet financial requirements imposed by this subsection once the applicant has provided the statutory bond or other security acceptable to the commission under Section 1101.301 [~~7(f)~~] of the Act and there are no unsatisfied final money judgments against the applicant; otherwise, the application will be subject to the financial review provisions of this section.

(c) (No change.)

(d) Approval of application for accreditation. If it determines that the applicant meets the standards for accreditation and has furnished the bond or other acceptable security required by the Act, §1101.302 [~~7(f)~~]), the commission shall approve the application and provide a written notice of the accreditation to the applicant. Unless surrendered or revoked for cause, the accreditation will be valid for a period of five years.

(e) (No change.)

(f) Disapproval of application. If it determines that an applicant does not meet the standards for accreditation, the commission shall disapprove the application in writing. An applicant may request a hearing before the commission on the disapproval by filing a written request for hearing within 10 days following the applicant's receipt of the notice of disapproval. Following the hearing, the commission shall issue an order which, in the opinion of the commission, is appropriate in the matter concerned. Venue for any hearing conducted under this section shall be in Travis County. The disapproval and hearing are subject to the Administrative Procedure Act, Texas Government Code, Chapter 2001 [~~§2001.001, et. seq.~~], and to Chapter 533 of this title (relating to Practice and Procedure).

(g) Forms. The Texas Real Estate Commission adopts by reference the following forms approved by the commission. These documents are published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

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

(4) Form ED 4-1 [~~0~~], Instructor Application;

(5)-(7) (No change.)

(h)-(k) (No change.)

(l) Disapproval of application. The commission may disapprove an application for approval of an instructor for failure to meet the standard imposed by subsection (g) of this section, failure to satisfy the commission as to the applicant's honesty, trustworthiness or integrity, or for any reason which would be a ground to suspend or revoke a real estate license. If an application is disapproved, the commission shall provide written notice to the applicant detailing the basis of the decision. An applicant may request a hearing before the commission by filing a written request for hearing within 10 days following the applicant's receipt of the notice of disapproval. Venue for any hearing conducted under this section is in Travis County. Appeals from application disapprovals will be conducted in the manner required by the Act, §1101.364 [~~10~~]. Hearings are subject to the Administrative Procedure

Act, Texas Government Code, Chapter 2001 [§2001.001, et. seq.], and to Chapter 533 of this title (relating to Practice and Procedure).

(m)-(o) (No change.)

§535.65. Changes in Ownership or Operation of School; Presentation of Courses, Advertising, and Records.

(a) Changes in Ownership or Operation. A school shall obtain the approval of the commission in advance of any material change in the operation of the school, including but not limited to, ownership, location of main office and any other locations where courses are offered, management, and course formats. A request for approval of a change of ownership will be considered as if each proposed new owner had applied for accreditation of the school, and each new owner must meet the standards imposed by §535.64 of this title (relating to Accreditation of Schools and Approval of Instructors). A school requesting approval of a change in ownership shall provide all of the following information or documents to the commission:

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

(5) a new bond in the amount of $10,000 for the proposed new owner(s), a statement from the bonding company indicating that the former bond will transfer to the proposed new owner(s), or other security acceptable to the commission under the Texas Occupations Code, Chapter 1101, (the Act), §1101.302 [7(f)].

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

(b)-(g) (No change.)

(h) Presentation of courses.

(1) A school shall present core real estate courses prescribed by the Act, §1101.003 [7(a)] and real estate related courses accepted by the commission in no less than 30 classroom hours of instruction. The school shall advertise and schedule a course for the full clock hours of time for which credit is awarded.

(2) (No change.)

(i) Course credit and records.

(1) Within ten days following the completion of other than an alternative delivery method [a] course, a school shall provide the commission with a class roster in a format approved by the commission. For an alternative delivery method course, a school shall provide a roster of those students completing the course within 10 days after the end of the month in which the student completed the course. The listing of students must be numbered and in alphabetical order, with each student's last name shown first, and must show after each student's name the final grade of either passed, failed, incomplete, or dropped, in language or symbols that can be correlated with these categories. The school shall explain any other grade concisely but clearly. The school shall list all instructors used in the course on the roster.

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

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

(j) (No change.)

§535.66. Payment of Annual Fee, Audits, Investigations and Enforcement Actions.

(a) Payment of annual fee. A school shall pay the fee prescribed by Section 1101.152(a)(11) [11(a)(10)] of Texas Occupations Code [Civil Statutes], Chapter 1101 [Article 6573a] (the Act) and by §535.101 of this title (relating to Fees) no later than the anniversary of the date of the school's accreditation. At least 30 days prior to the day the fee is due, the commission shall send a written notice to the school to pay the fee, but the school's obligation to pay the fee is not affected by any failure to receive the notice.

(b) (No change.)

(c) Complaints, investigations and hearings. The commission shall investigate complaints against schools or instructors which allege acts constituting violations of these sections. Complaints must be in writing, and the commission may not initiate an investigation or take action against a school or instructor based on an anonymous complaint. Complaints against a school or instructor received by any division of the commission will be referred to the enforcement division for appropriate resolution. Commission employees may file written complaints against a school or instructor if course completion rosters or other documents filed with the commission provide reasonable cause to believe a violation of these sections has occurred. The school or instructor named in the complaint will be provided with a copy of the complaint. Proceedings against schools and instructors will be conducted in the manner required by the Act, §1101.657 [17], the Administrative Procedure Act, Texas Government Code, Chapter 2001 [§2001, et. seq.], and Chapter 533 of this title (relating to Practice and Procedure). Venue for any hearing conducted under this section will be in Travis County.

(d)-(g) (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 August 14, 2003.

TRD-200305205
Loretta DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 465-3900

♦ ♦ ♦

SUBCHAPTER G. MANDATORY CONTINUING EDUCATION

22 TAC §§535.71 - 535.73

The Texas Real Estate Commission (TREC) proposes amendments to §535.71 concerning mandatory continuing education: approval of providers, courses and instructors, §535.72 concerning presentation of courses, advertising, and records, and §535.73 concerning compliance and enforcement. The amendments change the cites to the relevant statutory provisions in Chapter 1101, Texas Occupations Code. House Bill 2813, 77th Legislature (2001), added Chapter 1101, a nonsubstantive codification of The Real Estate License Act, and repealed Article 6573a, Texas Civil Statutes effective June 1, 2003. The amendments to §535.71 propose to adopt by reference MCE form 9-6 to change a cite referenced in the form to the relevant Occupations Code provision. The amendments to §535.72 propose to change two references to the updated form proposed by §535.71. The amendments are also proposed in connection with TREC's on-going review of its rules and are generally intended to update and to clarify the rules concerning mandatory continuing education.

Loretta R. DeHay, general counsel, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for the state as a result of enforcing or administering the sections. There are no anticipated fiscal implications for units of local government. There is no anticipated impact on

small businesses, micro businesses or local or state employment as a result of implementing the sections.

Ms. DeHay also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be clarification of the underlying statutory authority for the rule. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purposed and intent of the Act to insure compliance with the provisions of the Act.

The statute affected by this proposal is Texas Occupations Code, Chapter 1101.

No other statute, code or article is affected by the proposed amendments.

§535.71. Mandatory Continuing Education: Approval of Providers, Courses and Instructors.

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

(1) Act--The Real Estate License Act, Texas Occupations Code [~~Civil Statutes~~], Chapter 1101 [~~Article 6573a~~].

(2)-(11) (No change.)

(b) (No change.)

(c) The commission adopts by reference the following forms published and available from the commission, P.O. Box 12188, Austin, Texas, 78711-2188:

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

(8) MCE Form 9-6 [~~5~~] , Alternative Instructional Methods Reporting Form;

(9) MCE Form 10-1 [~~0~~] , MCE [~~Out of State Course~~] Credit Request For An Out of State Course;

(10)-(13) (No change.)

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

(f) To be approved as an instructor of any MCE course, a person must satisfy the commission as to the person's competency in the subject matter to be taught and ability to teach effectively. Except as provided in subsection (s) of this section and for instructors of single course offerings, if the person is not currently approved by the commission to teach the subject areas of the course, the person must submit Form ED 4-1 [~~0~~], Instructor Application, and meet the requirements of §535.64 (i) [~~(I)~~] of this title (relating to Accreditation of Schools and Approval of Courses and Instructors). A person who has received a credential as a certified real estate instructor (CREI), distinguished real estate instructor (DREI), an instructor of the Realtor Institute (GRI), or an instructor who has received a comparable credential from another organization as determined by the commission will be deemed to have met the requirements of §535.64 (i) [~~(I)~~] as regards teaching experience and education. The commission may also approve an instructor for a single offering of a course. The provider must submit an MCE Form 3C-1, MCE Single Course Offering Application, and provide a resume to show that the proposed instructor is qualified to teach the subject matter.

(g) (No change.)

(h) Fees shall be established by the commission in accordance with the provisions of the Act, §1101.152 [~~7A~~], at such times as the commission deems appropriate. Fees are not refundable and must be submitted in the form of a check or money order, or, in the case of state agencies, colleges or universities, in a form of payment acceptable to the commission.

(i) (No change.)

(j) An applicant may appeal a disapproval by filing with the commission a written request for a hearing within 10 days after the receipt of the notice of disapproval. Following the hearing, the commission may sustain or withdraw the disapproval or establish conditions for the approval of a provider, course or instructor. Proceedings involving applications shall be conducted in accordance with the Administrative Procedure [~~and Texas Register~~]Act, Texas Government Code, Chapter 2001 [~~Civil Statutes, Article 6252-13a~~]. Venue for any hearing conducted under this section shall be in Travis County.

(k) A course offered by a provider to satisfy all or part of the six hours of legal topics required by the Act, §1101.455 [~~7A~~], must include one or more of the legal topics listed in the Act or approved by the commission. The commission shall periodically publish lists of additional legal topics approved for MCE credit.

(l) A course must be devoted to one or more of the subjects specified under the course titles in the Act, §1101.003(1) and §1101.003(4)-(9) [~~7(a)(2)-(4) and §7(a)(7)-(10)~~], to real estate professionalism and ethics or to other subjects approved by the commission for MCE credit. MCE courses must be presentations of relevant issues and changes within the subject areas as they apply to the practice of real estate in the current market or topics which increase or support the licensee's development of skill and competence. Courses approved by the commission for core real estate course credit provided in the Act, §1101.356 and §1101.358 [~~7(d)-(e)~~], may be accepted for satisfying MCE requirements provided the student files a course completion certificate with the commission. MCE courses may be accepted by the commission as real estate related courses for satisfying the education requirements of §1101.356 and §1101.358 [~~7(d)-(e)~~], of the Act. Courses related to technology, such as the use of personal computers, must be primarily devoted to the application of technology to the practice of the licensee.

(m)-(o) (No change.)

(p) Correspondence courses. The commission may approve a provider to offer an MCE course by correspondence subject to the following conditions:

(1) (No change.)

(2) the content of the course must satisfy the requirements of the Act, §1101.455 [~~7A~~], and these sections;

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

(q)-(s) (No change.)

§535.72. Mandatory Continuing Education: Presentation of Courses, Advertising and Records.

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

(d) In a course offered by correspondence or alternative delivery method, the provider shall award the student credit for the course

upon completion of the course examination and all other requirements for credit and shall report the awarding of credit to the commission. Course credit must be reported either by the provider filing a completed MCE Form 9-6 [~~5~~], signed by the student, or submitting the information contained in MCE Form 9-6 [~~5~~] by electronic means acceptable to the commission. If the provider chooses to use an electronic reporting process, the process must ensure that only students who complete the course are reported to the commission as receiving course credit and that the process does not compromise the security of commission records.

(e)-(o) (No change.)

§535.73. Compliance and Enforcement.

(a) (No change.)

(b) Complaints received by the MCE section of the education division of the commission or by any other division of the commission shall be referred to the enforcement division for appropriate resolution. The provider or instructor named in the complaint shall be provided with a copy of the complaint. Proceedings involving MCE providers or instructors shall be conducted in accordance with the Administrative Procedure [~~and Texas Register~~] Act, Texas Government Code, Chapter 2001 [~~Article 6252-13a, Texas Civil Statutes~~] and the commission's general rules of practice and procedure. Venue for any hearing conducted under this section shall be in Travis County.

(c)-(f) (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 August 14, 2003.

TRD-200305206
Loretta DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 465-3900

♦ ♦ ♦

SUBCHAPTER I. LICENSES

22 TAC §535.91

The Texas Real Estate Commission (TREC) proposes amendments to §535.91 concerning renewal applications. The amendments to §535.91 propose to adopt by reference two new application renewal forms to modify and update the forms for clarity. The current renewal form is mailed to real estate salespersons and brokers to use for a timely renewal of their licenses. The commission proposes separate renewal forms for brokers and salespersons to provide more accurate and individualized information to each license type. The amendments also change the cites in the rule to the relevant statutory provisions in Chapter 1101, Texas Occupations Code. House Bill 2813, 77th Legislature (2001), added Chapter 1101, a nonsubstantive codification of The Real Estate License Act, and repealed Article 6573a, Texas Civil Statutes effective June 1, 2003.

Loretta R. DeHay, general counsel, has determined that for the first five-year period the section is in effect there will be no fiscal implications for the state as a result of enforcing or administering the section. There are no anticipated fiscal implications for units of local government. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the section.

Ms. DeHay also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be clarification of the underlying statutory authority for the rule and clarification of renewal forms. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purposed and intent of the Act to insure compliance with the provisions of the Act.

The statute affected by this proposal is Texas Occupations Code, Chapter 1101.

No other statute, code or article is affected by the proposed amendments.

§535.91. Renewal Applications.

(a) Each real estate license expires on the date shown on the face of the license certificate issued to the licensee. The licensee has the responsibility to apply for renewal of a license by making proper application, paying the fee set by the commission and completing mandatory continuing education (MCE) courses within the time periods required by the Act, §1101.455 [~~7A~~]. The commission shall mail a renewal application form for an active broker or an inactive licensee to the last known permanent mailing address of the broker or licensee as shown in the commission's computerized records. The commission shall mail a renewal application form for an active salesperson to the permanent mailing address of the salesperson's sponsoring broker. The commission shall mail the form three months before the expiration of the current license. Each licensee shall furnish a permanent mailing address to the commission and report all subsequent address changes within 10 days after a change of address. If a licensee fails to provide a permanent mailing address, the last known mailing address provided by the licensee will be deemed to be the licensee's permanent mailing address. Applications must be made on the current renewal application form approved by the commission accompanied by the required fee. Failure to receive a license renewal application form does not relieve a licensee of the obligation to obtain the appropriate form and to apply for renewal of a license. A licensee shall provide information requested by the commission in connection with an application to renew a license within 30 days after the commission requests the information. Failure to provide information requested by the commission in connection with a renewal application within the required time is grounds for disciplinary action under the Act, §1101.656 [~~15B(b)~~].

(b) The Texas Real Estate Commission adopts by reference Renewal Application Forms SR 1-0 and BR 1-0 [~~Form 1-3~~], approved by the commission in 2003 [~~2000~~]. These forms are [~~This form is~~] published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

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 August 14, 2003.

TRD-200305207
Loretta DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 465-3900

♦ ♦ ♦

SUBCHAPTER J. FEES

22 TAC §535.101

The Texas Real Estate Commission (TREC) proposes amendments to §535.101, concerning fees paid by licensees and applicants.

The amendments to §535.101 are proposed in connection with the passage of H.B. 1508 by the 78th Legislature (2003), increasing various fees, including setting a maximum fee of $75 for the filing of an original application for a real estate salesperson license, setting a maximum fee of $20 for preparing a license history, and setting a new maximum fee of $40 for the filing of a core or continuing education instructor application. Section 535.101 would be amended to reflect a $70 fee for a salesperson application, a $20 fee for preparing a license history certification, and a $25 fee for the filing of a core or continuing education instructor application that would be effective on or after November 1, 2003.

Alan Waters, Staff Services Director, has determined that for the first five-year period the section is in effect there will be fiscal implications for the state as a result of enforcing or administering the section. Increasing the original application for salesperson license fee to $70 will have a revenue neutral effect because the current $20 sponsorship fee required of a salesperson to go from inactive to active status once licensure is obtained from an original application will be eliminated by the amendment to Section 1101.152(c). Subsection (c) prohibits the commission from charging a fee to a salesperson or broker for filing a sponsorship request in conjunction with an inactive license issued to a salesperson. The fiscal impact of increasing the license history certification fee to $20 will be 800 license history certifications at an additional $10 each producing $8,000 additional revenue per fiscal year. Section 535.101(b)(14) proposes to set a fee of $25 for the filing of a core or continuing education instructor application. Mr. Waters estimates that the combined additional revenue per fiscal year will be $12,500 for 2004 (500 applications), $10,000 for 2005 (400 applications), $7,500 for 2006 (300 applications), $20,000 for 2007 (800 applications), and $20,000 for 2008 (800 applications). There are no anticipated fiscal implications for units of local government. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the section.

Ms. DeHay has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be conforming TREC rules to recent statutory changes to the Act. Mr. Waters has determined that the anticipated economic cost to persons who are required to comply with the proposed section is the payment of the required statutory increase in fees. The increase in fees will be an additional $20 for the filing of a salesperson application, an additional $10 for the filing of a license history certification, and a new fee of $25 for the filing of a core or continuing education instructor application.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purposed and intent of the Act to insure compliance with the provisions of the Act.

The statute affected by this proposal is Texas Occupations Code, Chapter 1101.

No other statute, code or article is affected by the proposed amendments.

§535.101. Fees.

(a) (No change.)

(b) The commission shall charge and collect the following fees:

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

(3) a fee of $<u>70</u> [~~50~~] for the filing of an original application for a real estate salesperson license;

(4)-(11) (No change.)

(12) a fee of $<u>20</u> [~~10~~] for preparing a license history; [~~and~~]

(13) a fee of $25 for the filing of an application for a moral character determination<u>; and</u> [~~.~~]

<u>(14) a fee of $25 for the filing of an instructor application.</u>

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 August 14, 2003.

TRD-200305208
Loretta DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 465-3900

♦ ♦ ♦

SUBCHAPTER K. PLACE OF BUSINESS

22 TAC §535.113

(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 Real Estate Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Real Estate Commission (TREC) proposes the repeal of §535.113, concerning display of licenses.

The repeal is proposed in connection with the passage of H.B. 1508 by the 78th Legislature (2003), which, in part, repealed the statutory provision that required a broker to display the broker's and the sponsored salespersons' licenses at the broker's place of business. Residential locators are still required to display their licenses.

Loretta R. DeHay, general counsel, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for the state as a result of enforcing or administering the repeal. There are no anticipated fiscal implications for units of local government. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the repeal.

Ms. DeHay also has determined that for each year of the first five years the repeal as proposed is in effect the public benefit anticipated as a result of enforcing the repeal will be to conform the rule to recent statutory changes. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The repeal is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purposed and intent of the Act to insure compliance with the provisions of the Act.

The statute affected by this proposal is Texas Occupations Code, Chapter 1101.

No other statute, code or article is affected by the proposed repeal.

§535.113. Display of Licenses.

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 August 14, 2003.

TRD-200305209
Loretta DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 465-3900

♦ ♦ ♦

CHAPTER 541. RULES RELATING TO THE PROVISIONS OF TEXAS OCCUPATIONS CODE, CHAPTER 53

22 TAC §541.1

The Texas Real Estate Commission (TREC) proposes amendments to chapter 541 concerning rules relating to the provisions of Texas Occupations Code Chapter 53 and §541.1 concerning criminal offense guidelines.

The amendments change the cites to the relevant statutory provisions of Chapter 53, a nonsubstantive codification of article 6252-13c, Texas Civil Statutes effective September 1, 1999. The amendments are also proposed in connection with TREC's on-going review of its rules and are generally intended to update and to clarify the rules concerning criminal offense guidelines.

Loretta R. DeHay, general counsel, has determined that for the first five-year period the section is in effect there will be no fiscal implications for the state as a result of enforcing or administering the section. There are no anticipated fiscal implications for units of local government. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the section.

Ms. DeHay also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be clarification of the underlying statutory authority for the rule. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purposed and intent of the Act to insure compliance with the provisions of the Act.

The statute affected by this proposal is Texas Occupations Code, Chapter 1101.

No other statute, code or article is affected by the proposed amendments.

§541.1. Criminal Offense Guidelines.

(a) For the purposes of Texas Occupations Code, Chapter 53 [~~Civil Statutes Article 6252-13c~~], the Texas Real Estate Commission considers the following felonies or misdemeanors to be criminal offenses which may be directly related to the duties and responsibilities of the occupation of real estate broker, real estate salesperson, easement or right-of-way agent, professional inspector, real estate inspector or apprentice inspector for the reason that the commission of the following criminal offenses tends to demonstrate inability to represent the interest of another with honesty, trustworthiness and integrity:

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

(b)-(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 August 14, 2003.

TRD-200305210
Loretta DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 465-3900

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 41. HEALTH CARE AND INSURANCE PROGRAMS

SUBCHAPTER A. RETIREE HEALTH CARE BENEFITS (TRS-CARE)

34 TAC §41.6

The Teacher Retirement System of Texas (TRS) proposes a new §41.6 concerning required contributions from public schools to the Retired School Employees Insurance Fund. The new section as proposed has been adopted on an emergency basis and is published in this issue of the *Texas Register*.

In accordance with House Bill 3459, 78th Legislature, Regular Session, and House Bill 1, 78th Legislature, Regular Session, the proposed new §41.6 sets forth the requirement that public schools shall contribute 0.4% of the salaries of active employees in the same manner that the public schools make their pension contributions. The proposed new section defines active employee and public school for the purposes of administering the new section. In addition, the proposed new section provides that TRS may take corrective action against a public school that fails to make the required contribution in accordance with the requirements set forth in the section.

Tony Galaviz, Chief Financial Officer, has determined that for each year of the first five years the proposed section will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the section as proposed. There will be no measurable effect on local employment or the local economy as a result of the proposal. Any economic costs to local governments required to comply with the proposed new rule are the result of the legislative enactment of House Bill 3459, 78th Legislature, Regular Session and House Bill 1, 78th Legislature, Regular Session.

Mr. Galaviz has also determined that the public benefit will be to provide notice to employers of the provisions relating to the required contribution and notice of the procedures for making the contribution to TRS. He has also determined that there will be no anticipated economic costs to the public, small businesses, or other persons who are required to comply with the section as proposed for each year of the first five years the section will be in effect.

Comments may be submitted in writing to Charles L. Dunlap, Executive Director, 1000 Red River, Austin, Texas 78701. To be considered, written comments must be received by TRS no later than 30 days after publication of the section for proposal.

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 and under the Insurance Code, Chapter 1575, §1575.052, which authorizes the board of trustees to adopt rules reasonably necessary to implement the chapter including procedures for contributions and deductions. The new section is also proposed under House Bill 3459, 78th Legislature, Regular Session, Section 54 and House Bill 1, 78th Legislature, Regular Session.

Other codes affected include Government Code, Chapter 825, §825.408; Insurance Code, Chapters 1551, 1575, and 1601; and Education Code, Chapter 8 and Chapter 12, Subchapter D.

§41.6. Required Contributions from Public Schools.

(a) On a monthly basis, each public school shall contribute 0.4% of the salary of each active employee to TRS for deposit in the Retired School Employees Insurance Fund. The public school shall make the contribution at the same time and in the same manner in which the public school delivers retirement contributions. Any waiver granted to a public school under Government Code §825.408(a) does not apply to the contribution under this section.

(b) For purposes of this section, "active employee" means a contributing member of TRS who is employed by a public school and is not entitled to coverage under a plan provided under Chapter 1551 or Chapter 1601, Insurance Code.

(c) For purposes of this section, "public school" means a school district; another educational district whose employees are TRS members; a regional education service center established under Chapter 8, Education Code; or an open-enrollment charter school established under Subchapter D, Chapter 12, Education Code.

(d) TRS may take corrective action against a public school that fails to make the required contribution in accordance with the requirements of this section, including but not limited to placement of a warrant hold with the Comptroller of Public Accounts.

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 August 18, 2003.

TRD-200305334
Charles Dunlap
Executive Director
Teacher Retirement System of Texas
Proposed date of adoption: November 21, 2003
For further information, please call: (512) 542-6115

♦ ♦ ♦

SUBCHAPTER C. TEXAS SCHOOL EMPLOYEES GROUP HEALTH (TRS-ACTIVECARE)

34 TAC §41.53

The Teacher Retirement System of Texas (TRS) proposes a new §41.53 concerning the 90-day waiting period for supplemental compensation payment to eligible active public school employees. The proposed new section implements a 90-day waiting period for the supplemental compensation offered to eligible employees of school districts, participating charter schools, other educational districts whose employees are members of TRS, and regional educational services who are hired on or after September 1, 2003, when the employee is not already a TRS member on the date of employment. The proposal has been adopted on an emergency basis and is published in this issue of the *Texas Register*.

In accordance with House Bill 3459, 78th Legislature, Regular Session, the proposed new section sets forth the requirement of a 90-day waiting period for an individual who begins employment on or after September 1, 2003, and is not a member of TRS (including through withdrawal of contributions) as of the date of employment, with an entity eligible to receive and hold in trust supplemental compensation. The new section provides that the date of eligibility for the supplemental compensation shall be determined by the process set forth in rule 34 TAC §25.34(c) (relating to Administration of Membership Waiting Period) and it describes the date of employment for the purpose of administering the section. In addition, the new section requires an entity to correct any report on which the entity has erroneously included an

individual who was not eligible or has failed to report an individual eligible for supplemental compensation.

Tony Galaviz, Chief Financial Officer, has determined that for each year of the first five years the proposed section will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the section as proposed. There will be no measurable effect on local employment or the local economy as a result of the proposal. Any economic costs to local governments required to comply with the proposed new rule are the result of the legislative enactment of House Bill 3459, 78th Legislature, Regular Session.

Mr. Galaviz has also determined that the public benefit will be to provide notice and clarification to employers of the provisions relating to the 90-day waiting period for supplemental compensation for affected employees. He has also determined that there will be no anticipated economic cost to the public, small businesses, or to the persons who are required to comply with the sections as proposed for each year of the first five years the section will be in effect.

Comments may be submitted in writing to Charles L. Dunlap, Executive Director, 1000 Red River, Austin, Texas 78701. To be considered, written comments must be received by TRS no later than 30 days after publication of the section for proposal.

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 and under Insurance Code, article 3.50-8, section 4, which authorizes TRS to adopt rules to implement the article. In addition, the new section is proposed under House Bill 3459, 78th Legislature, Regular Session, Section 57 that requires a waiting period for the supplemental compensation.

Insurance Code, article 3.50-8 or Insurance Code, Chapter 1580 is affected by the proposal.

§41.53. Waiting Period for Supplemental Compensation.

(a) For an individual who begins employment on or after September 1, 2003, with an entity eligible to receive and to hold in trust supplemental compensation under Insurance Code Article 3.50-8 or Insurance Code Chapter 1580 ("entity" or "entities") and that individual is not a member of TRS as of the date of employment, eligibility for supplemental compensation begins on the first calendar day after the end of a 90 calendar day waiting period.

(b) For purposes of this section, an individual who is not considered to be a TRS member includes an individual who previously terminated membership in the retirement system through withdrawal of contributions and did not resume membership prior to a date of employment that is on or after September 1, 2003.

(c) In determining the date of eligibility for supplemental compensation for an individual who is subject to the waiting period, an entity shall follow the process set out in §25.34(c) of this title (Relating to Administration of Membership Waiting Period).

(d) For the purpose of administering this section, the date of employment means the date on which an employee begins to perform service for an entity and the service is of a type that would otherwise qualify the individual for membership in the TRS pension plan, as provided under Chapter 25, Subchapter A, of this title, if the individual were not subject to the waiting period described in this section.

(e) On the 91st calendar day of employment, an individual who is otherwise qualified to receive supplemental compensation is eligible to receive the full monthly supplemental compensation distribution, starting with the first day of the calendar month in which the 91st day falls.

(f) An entity shall correct any report on which the entity has erroneously included an individual who was not eligible for supplemental compensation or has failed to report an individual who was eligible for supplemental compensation as required by §41.42(g) of this title (Relating to Payment of Supplemental Compensation). The entity may be subject to a change in funding as set out in §41.42(g) of this title (Relating to Supplemental Compensation).

(g) Upon request by TRS, an entity or an individual subject to this section shall provide copies of, or otherwise make available any information that TRS determines us necessary to administer 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 August 18, 2003.

TRD-200305335
Charles Dunlap
Executive Director
Teacher Retirement System of Texas
Proposed date of adoption: November 21, 2003
For further information, please call: (512) 542-6115

♦ ♦ ♦

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 12. SPECIAL NUTRITION PROGRAMS

The Texas Department of Human Services (DHS) proposes to repeal Subchapter A, concerning the Child and Adult Care Food Program, §§12.1-12.26; Subchapter B, concerning the Summer Food Service Program, §§12.101-12.123; Subchapter C, concerning the Special Milk Program, §§12.201-12.214; Subchapter D, concerning the School Breakfast Program, §§12.301-12.315; and Subchapter E, concerning the National School Lunch Program, §§12.401-12.415, in its Special Nutrition Programs chapter.

DHS proposes new rules in its Special Nutrition Programs chapter, consisting of Subchapter A, Child and Adult Care Food Program (CACFP), Division 1, Overview and Purpose, §§12.1-12.4; Division 2, Eligibility of Contractors and Facilities, §§12.11- 12.37; Division 3, Contractor Application Process, §§12.61-12.68; Division 4, Agreements, §§12.81-12.92; Division 5, Contractor Standards and Responsibilities, §§12.111-12.122; Division 6, Budgets, §§12.141-12.154; Division 7, Financial Management, §§12.161-12.165; Division 8, Reporting and Record Retention, §§12.171-12.183; Division 9, Meal Requirements, §§12.191-12.198; Division 10, Day Care Homes, §§12.211-12.233; Division 11, Start-Up and Expansion Payments, §§12.261-12.269; Division 12, Advance Payments, §§12.281-12.290; Division 13, Commodities and

Cash-in- Lieu Assistance, §§12.311-12.317; Division 14, Reimbursement, §§12.331-12.363; Division 15, Overpayments, §§12.381-12.383; Division 16, Program Reviews, Monitoring, and Management Evaluations, §§12.391-12.406; Division 17, Audits, §§12.421- 12.425; Division 18, Sanctions, Penalties, and Fiscal Action, §§12.441-12.472; Division 19, Denials and Termination, §§12.491-12.497; and Division 20, Appeals, §§12.511-12.520; Subchapter B, Summer Food Service Program (SFSP), Division 1, Overview and Purpose, §§12.601-12.603; Division 2, Eligibility of Sponsors and Facilities, §§12.611- 12.618; Division 3, Application Process, §§12.641-12.643; Division 4, Sponsor Standards and Responsibilities, §§12.651-12.662; Division 5, Budgets, §§12.681-12.684; Division 6, Food Service Management Companies, §§12.691-12.693; Division 7, Start-Up and Advance Payments, §§12.701-12.703; Division 8, Commodities, §12.711 and §12.712; Division 9, Reimbursement, §§12.721-12.735; Division 10, Program Reviews and Technical Assistance, §§12.751-12.753; Division 11, Audits, §§12.761-12.764; Division 12, Sanctions and Penalties, §§12.771-12.784; Division 13, Suspension and Termination, §12.801; and Division 14, Appeals, §§12.811-12.814; Subchapter C, Special Milk Program (SMP), Division 1, Overview and Purpose, §§12.871-12.873; Division 2, Contractor Eligibility, §12.881 and §12.882; Division 3, Contractor Participation Requirements and Responsibilities, §§12.901-12.903; Division 4, Reimbursement and Financial Management, §§12.921-12.929; Division 5, Program Reviews, Monitoring, and Management Evaluations, §12.941 and §12.942; Division 6, Audits, §§12.951-12.955; Division 7, Sanctions, Penalties, and Fiscal Action, §§12.971-12.985; Division 8, Suspension and Termination, §12.991; and Division 9, Appeals, §12.1001 and §12.1002; Subchapter D, School Breakfast Program (SBP), Division 1, Overview and Purpose, §§12.1051-12.1053; Division 2, Contractor Eligibility, §12.1071 and §12.1072; Division 3, Contractor Participation Requirements and Responsibilities, §§12.1091-12.1094; Division 4, Reimbursement and Financial Management, §§12.1101-12.1110; Division 5, Program Reviews, Monitoring, and Management Evaluations, §12.1121 and §12.1122; Division 6, Audits, §§12.1131-12.1135; Division 7, Sanctions, Penalties, and Fiscal Action, §§12.1151-12.1165; Division 8, Suspension and Termination, §12.1191; and Division 9, Appeals, §12.1201 and §12.1202; and Subchapter E, National School Lunch Program (NSLP), Division 1, Overview and Purpose, §§12.1251-12.1253; Division 2, Contractor Eligibility, §§12.1261-12.1264; Division 3, Contractor Participation Requirements and Responsibilities, §§12.1281-12.1284; Division 4, Reimbursement and Financial Management, §§12.1301-12.1312; Division 5, Program Reviews, Monitoring, and Management Evaluations, §12.1331 and §12.1332; Division 6, Audits, §§12.1341- 12.1345; Division 7, Sanctions, Penalties, and Fiscal Action, §§12.1361-12.1375; Division 8, Suspension and Termination, §12.1401; and Division 9, Appeals, §12.1411 and §12.1412.

The purpose of the repeals and new sections is to reorganize and rewrite the rules concerning DHS's special nutrition programs in plain language question-and-answer format. The rules cover administration, contractor and sponsor eligibility, program participation requirements, reimbursement methodology, audits, consequences of noncompliance with program requirements, and appeals for five nutritional assistance programs that DHS administers: CACFP, SFSP, SMP, SBP, and NSLP. The new rules correct references to federal citations and amend rules to reference program participation requirements in the federal regulations.

New §§12.460-12.470, 12.772-12.783, 12.974-12.984, 12.1154-12.1164, and 12.1364- 12.1374 add procedures, including time frames, for contractors or sponsors in all five programs to request an extension to a prescribed audit due date for audits required by 7 Code of Federal Regulations (CFR) Part 3052. New §12.65 and §12.691 remove current requirements for DHS to register or approve food service management companies in the CACFP and SFSP. New §§12.1002, 12.1202, and 12.1412 remove SMP, SBP, and NSLP contractors' right to appeal termination of their agreements if they fail to provide an audit that meets the single audit requirements in 7 CFR Part 3052. New §§12.984, 12.1164, and 12.1374 also remove those contractors' right to appeal a DHS decision to submit a late claim to the United States Department of Agriculture for a good cause determination. New §§12.1001, 12.1201, and 12.1411 state that contractors in the SMP, SBP, and NSLP do not have the right to appeal if DHS denies their contract applications; while new §§12.1002, 12.1202, and 12.1412 give them limited rights to appeal actions that affect their continued participation in the program or their claims for reimbursement.

Bobby Halfmann, Chief Financial Officer, has determined that, for the first five-year period the proposed sections are in effect, there are no fiscal implications for state or local government as a result of enforcing or administering the sections.

Judy Denton, Deputy Commissioner for Family Services, has determined that, for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections is increased program integrity in the appropriate use of public funds on the part of Special Nutrition Programs contractors through improved understanding of program requirements and regulations as a result of clearer rule statements. Additionally, contractors will have a standardized process to use for requesting an extension to their prescribed audit due dates; contractors participating in the CACFP and SFSP will not be restricted in their search for a food service management company and will benefit from the greater competition between companies vying to provide meal service for their facilities; and DHS will be in compliance with federal regulations and not jeopardize the receipt of federal funding for child nutrition programs. There is no adverse economic effect on small or micro businesses as a result of enforcing or administering the sections, because contractors participating in the NSLP, SBP, and SMP must be nonprofit organizations or governmental entities and do not fit the definition of a small or micro business. Contractors will not be adversely affected by the repeal of the requirement for food service management companies to be registered and approved in order to provide meal services in the CACFP and SFSP, because this change is an expansion of their benefits. Contractors subject to the single audit requirements in 7 CFR Part 3052 are nonprofit organizations or governmental entities and do not fit the definition of small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed sections. There is no anticipated effect on local employment in geographic areas affected by these sections.

Questions about the content of this proposal may be directed to Nancy Hill at (512) 420- 2578 in DHS's Special Nutrition Programs. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-274, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Under §2007.003(b) of the Government Code, DHS has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, DHS is not required to complete a takings impact assessment regarding these rules.

SUBCHAPTER A. CHILD AND ADULT CARE FOOD PROGRAM

40 TAC §§12.1 - 12.26

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

The repeals are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The repeals implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1. Program Purpose.
§12.2. Definitions of Program Terms.
§12.3. Eligibility of Contractors, Facilities, and Food Service Management Companies.
§12.4. Day Home Facilities.
§12.5. Application for Program Benefits--Contractors.
§12.6. Agreement.
§12.7. Budget.
§12.8. Financial Management.
§12.9. Reporting and Record Retention.
§12.10. Procurement Standards.
§12.11. Participant Eligibility for Free and Reduced-price Meals.
§12.12. Civil Rights/Nondiscrimination.
§12.13. Health Standards.
§12.14. Meal Requirements.
§12.15. Reimbursement Methodology.
§12.16. Advance Payments.
§12.17. Start-up and Expansion Funds.
§12.18. Commodities/Cash-in-Lieu.
§12.19. Program Reviews.
§12.20. Training/Technical Assistance.
§12.21. Rights and Responsibilities--Day Home Provider.
§12.22. Audits.
§12.23. Overpayments.
§12.24. Sanctions and Penalties.
§12.25. Denials and Terminations.
§12.26. Appeals.

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 August 13, 2003.

TRD-200305114
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER B. SUMMER FOOD SERVICE PROGRAM

40 TAC §§12.101 - 12.123

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

The repeals are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The repeals implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.101. Program Purpose.
§12.102. Definitions of Program Terms.
§12.103. Eligibility of Sponsors and Facilities.
§12.104. Application for Program Benefits.
§12.105. Agreements.
§12.106. Budget.
§12.107. Financial Management Systems.
§12.108. Record Retention.
§12.109. Procurement Standards.
§12.110. Food Service Management Companies.
§12.111. Participant Eligibility for Free and Reduced-Price Meals.
§12.112. Civil Rights and Nondiscrimination.
§12.113. Health Standards.
§12.114. Meal Requirements.
§12.115. Reimbursement Methodology.
§12.116. Advance Payments.
§12.117. Start-up Payments.
§12.118. Commodities.
§12.119. Program Reviews and Technical Assistance.
§12.120. Audits.
§12.121. Sanctions and Penalties.
§12.122. Denials and Terminations.
§12.123. Appeals.

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 August 13, 2003.

TRD-200305115
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER C. SPECIAL MILK PROGRAM

40 TAC §§12.201 - 12.214

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of

the Texas Department of Human Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The repeals implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.201. Program Purpose and Scope.
§12.202. Definitions.
§12.203. Administration.
§12.204. Reimbursement.
§12.205. Contractor Eligibility.
§12.206. Client Eligibility.
§12.207. Contractor Participation Requirements.
§12.208. Compliance Monitoring and Review.
§12.209. Fiscal Action.
§12.210. Management Evaluations.
§12.211. Procurement.
§12.212. Audits.
§12.213. Penalties.
§12.214. Contract Termination or Suspension.

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 August 13, 2003.

TRD-200305116
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER D. SCHOOL BREAKFAST PROGRAM

40 TAC §§12.301 - 12.315

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

The repeals are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The repeals implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.301. Program Purpose and Scope.
§12.302. Definitions.
§12.303. Administration.
§12.304. Reimbursement.
§12.305. Contractor Eligibility.
§12.306. Client Eligibility.
§12.307. Contractor Participation Requirements.
§12.308. Compliance Monitoring and Review.
§12.309. Fiscal Action.
§12.310. Management Evaluations.
§12.311. Procurement.
§12.312. Audits.
§12.313. Educational Prohibitions.
§12.314. Penalties.
§12.315. Contract Termination or Suspension.

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 August 13, 2003.

TRD-200305117
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER E. NATIONAL SCHOOL LUNCH PROGRAM

40 TAC §§12.401 - 12.415

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

The repeals are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The repeals implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.401. Program Purpose and Scope.
§12.402. Definitions.
§12.403. Administration.
§12.404. Reimbursement.
§12.405. Contractor Eligibility.
§12.406. Client Eligibility.
§12.407. Contractor Participation Requirements.
§12.408. Compliance Monitoring and Review.
§12.409. Fiscal Action.
§12.410. Management Evaluations.
§12.411. Procurement.
§12.412. Audits.
§12.413. Educational Prohibitions.
§12.414. Penalties.
§12.415. Contract Termination or Suspension.

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 August 13, 2003.

TRD-200305118
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER A. CHILD AND ADULT CARE FOOD PROGRAM (CACFP)
DIVISION 1. OVERVIEW AND PURPOSE

40 TAC §§12.1 - 12.4

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1. What is the purpose of the Child and Adult Care Food Program (CACFP)?
The CACFP integrates nutritious meals with organized nonresidential child and adult care services.

§12.2. What do certain words and terms in this subchapter mean?
(a) The following words and terms, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise:

(1) CACFP--Child and Adult Care Food Program.

(2) CFR--The Code of Federal Regulations.

(3) Contractor--Refers to an "institution" as defined in 7 CFR §226.2.

(4) DHS--The Texas Department of Human Services.

(5) Participant--Has the definition in 7 CFR §226.2. In the CACFP At Risk Afterschool Snack program, that definition is expanded to include:

(A) individuals 18 years old or younger;

(B) individuals who turn 19 during the regular school year; and

(C) individuals who are determined to be mentally or physically disabled, regardless of age.

(6) Publicly funded program--Any program or grant funded by public funds, including federal, state, or local government funds.

(7) Program year--A period beginning October 1 of any year and ending September 30 of the following year.

(8) U.S.C.--United States Code.

(9) USDA--The United States Department of Agriculture.

(b) Other terms used in this subchapter are defined in 7 CFR §226.2; 7 CFR Parts 3015, 3016, 3017, 3018, 3019, and 3052; and applicable Office of Management and Budget circulars as required by USDA's Food and Nutrition Service.

§12.3. How is the CACFP authorized?
The National School Lunch Act (42 U.S.C §1766), as amended, authorizes federal assistance to states that administer the CACFP. In the state of Texas, DHS administers the CACFP.

§12.4. How may DHS use the CACFP federal assistance?
DHS may use the assistance to help start, maintain, and expand nonprofit food services for children and adults enrolled for care in nonresidential facilities or institutions.

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 August 13, 2003.

TRD-200305119
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 2. ELIGIBILITY OF CONTRACTORS AND FACILITIES

40 TAC §§12.11 - 12.37

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.11. What requirements must contractors and facilities meet in order to be eligible to participate in the CACFP?
Contractors and facilities must meet the requirements stated in Section 17(a)(2)(B) of the National School Lunch Act (42 U.S.C. §1766), as amended, and 7 CFR §§226.2, 226.6, 226.15-226.19a, and 226.23.

§12.12. Must contractors and facilities be licensed or approved in order to participate in the CACFP?
Yes. All contractors and facilities must be licensed or approved by federal, state, or local authorities to provide child or adult care.

§12.13. Who is the licensing authority in Texas?
(a) The Texas Department of Protective and Regulatory Services licenses and registers child care centers and day care homes.

(b) DHS or the Texas Department of Mental Health and Mental Retardation must license adult day care centers.

§12.14. Are there any exceptions to the licensing requirements?
Yes.

(1) Facilities operated by federal and Indian tribal governments are not required to be licensed or approved by DHS, the Texas Department of Protective and Regulatory Services (PRS), or the Texas Department of Mental Health and Mental Retardation. The federal agency or Indian tribal government that has oversight of the facility must license or approve the facility.

(2) Emergency shelters and participants in the CACFP At Risk Afterschool Snack program are not required to be licensed if PRS has determined that facility to be exempt from state licensing requirements. That facility must provide documentation obtained from PRS to demonstrate that the facility is exempt from state licensing requirements.

§12.15. When must a contractor submit copies of its license or registration?

DHS requires each contractor to submit copies of current licensure or registration to operate a day care facility:

(1) annually;

(2) when the contractor applies to participate in the CACFP; and

(3) when the contractor receives a renewed or amended license or registration.

§12.16. Must a contractor comply with training requirements in order to be eligible to participate in the CACFP?

Yes. Each contractor must participate in training related to the operation of the CACFP as DHS prescribes. See also §69.202 of this title (relating to Procurement).

§12.17. Must a nonprofit contractor have tax-exempt status in order to be eligible to participate in the CACFP?

Yes. Nonprofit organizations must submit one or more of the following documents at the time of application to demonstrate that the organization has tax- exempt status:

(1) a letter from the Internal Revenue Service stating that the organization has been granted tax-exempt status under the Internal Revenue Code of 1986;

(2) proof of participation in another federal program that requires tax-exempt status; or

(3) proof that the institution is a public entity.

§12.18. Must a proprietary for-profit organization or a sponsored for-profit facility meet specific eligibility requirements in order to be eligible to participate in the CACFP?

Yes. A proprietary for-profit organization or a sponsored for-profit facility must meet the eligibility requirements stated in 7 CFR §226.15.

§12.19. Are there any exceptions to the eligibility requirements stated in 7 CFR §226.15 for a proprietary for-profit child care center or a for-profit sponsored child care facility?

Yes. A proprietary for-profit child care center or a for-profit sponsored child care facility may apply to participate in the CACFP according to the Free/Reduced-Price Expanded Eligibility Pilot criterion.

§12.20. What is the Free/Reduced-Price Expanded Eligibility Pilot criterion?

In the month before the month in which the application is submitted, at least 25% of the enrollment or licensed capacity of the center or facility for which the contractor is making application must be eligible for free or reduced-price meal benefits according to the National School Lunch Act (42 U.S.C. §1766), as amended.

§12.21. Must a renewing contractor show compliance with the single audit requirements in 7 CFR Part 3052 in order to participate in the CACFP?

Yes. Nonprofit organizations that expend $300,000 dollars or more in federal financial participation during the organization's fiscal year must obtain an organization-wide or program-specific audit in accordance with the single audit requirements in 7 CFR Part 3052 and Division 17 of this subchapter (relating to Audits).

§12.22. How does a contractor demonstrate compliance with the single audit requirements when applying to participate in the CACFP?

A contractor must submit one or more of the following items with its completed CACFP application:

(1) a copy of the contractor's audit for a specific contractor fiscal year that DHS has found to be compliant with the single audit requirements;

(2) a completed DHS Single Audit Identification Data form assuring that the contractor will submit an audit compliant with the single audit requirements as stated in 7 CFR Part 3052 by the prescribed audit due date; or

(3) evidence that the contractor is not subject to the single audit requirements in 7 CFR Part 3052.

§12.23. Must child care facilities distribute information about other programs?

Yes. Contractors that provide child care or sponsor child care facilities must distribute materials relating to the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) to their child care facilities as required by DHS and ensure that WIC materials are distributed to the parents of children enrolled in each child care facility.

§12.24. Are there any exceptions to the requirement regarding distribution of materials?

Contractors are not required to distribute materials noted in §12.23 of this chapter (relating to Must child care facilities distribute information about other programs?) to outside- school-hours centers or to the parents of children enrolled in outside-school-hours centers.

§12.25. Must an organization satisfy specific requirements in order to be eligible to participate in the CACFP as a day care home sponsor?

Yes. To be eligible to participate in the CACFP as a day care home sponsor, an applicant must:

(1) provide documentation that verifies that each day care home provides child care to at least one nonresidential child;

(2) enter into a sponsorship agreement with an eligible day care home according to Division 4 of this subchapter (relating to Agreements);

(3) demonstrate that its governing authority is aware of and understands the responsibilities and liabilities it incurs through its association with the operation the CACFP;

(4) submit a comprehensive financial statement showing all expenditures by and sources of income to its organization as a whole during the three years preceding the program year for which application is made;

(5) submit a performance bond in an amount equal to the value of the contractor's projected annual level of reimbursement as determined by DHS, if the applicant is a non-governmental entity with fewer than three years of administrative and financial history;

(6) designate the primary physical location at which the applicant can be contacted, where all program records will be maintained, and where essential program management functions will be conducted;

(7) submit a uniform set of management information each month, as described in §12.182 of this chapter (relating to What management information must a day care home sponsor submit each month?), in fixed length, ASCII-Text (Standard Data File) format;

(8) demonstrate the ability to perform according to the standards specified in §12.64 of this subchapter (relating to Because of its status as a nonprofit, is there any information a sponsor is required to include in its application to meet Internal Revenue Service requirements?); and

(9) demonstrate proof of tax-exempt status on at least an annual basis by providing a copy of the organization's most recent Internal Revenue Service (IRS) Form 990 (Return of Organization Exempt From Income Tax) as submitted to the IRS.

§12.26. Where must a contractor obtain a performance bond?

A contractor must get the performance bond from a company designated in United States Treasury Circular 570 as certified to issue bonds for federally funded programs.

§12.27. How often must an organization submit a performance bond?
If an organization is subject to the bonding requirement, it must submit a new performance bond or Continuation Certificate with renewal applications until DHS grants relief from this requirement.

§12.28. Must the dollar amount of the performance bond be adjusted?
Yes. Each year, the organization must adjust the amount of the bond based on changes in the rates of reimbursement and administrative payments.

§12.29. What happens if an organization has fewer than three years of administrative and financial history?

(a) Contractors subject to the bonding requirement that have, at the time of application or reapplication, fewer than three but more than two years of administrative and financial history, may request relief from the bonding requirement after 12 months of successful program participation.

(b) Contractors with fewer than two but more than one year of administrative and financial history may request relief from the bonding requirement after 24 months of successful program participation.

(c) Contractors with less than one year of administrative and financial history may request relief from the bonding requirement after 36 months of successful program participation.

(d) DHS grants relief from the bonding requirement based on the schedule outlined in subsections (a)-(c) of this section and the contractor's successful program operation.

§12.30. When must a representative of the organization make records available at the primary physical location?
Contractors must make program records available to DHS during normal business hours, which are 8:00 a.m. to 5:00 p.m., Monday through Friday.

§12.31. When must a representative of the organization be available at the primary physical location?
An appropriate representative of the contractor must be available to DHS staff and providers during normal business hours.

§12.32. How must a contractor make itself available to DHS and providers?
A contractor is considered available to DHS and providers if one of the following conditions exists:

(1) the contractor's representative can be contacted by telephone at the primary business location during normal business hours; or

(2) the contractor has established a procedure that allows DHS staff and day care homes to leave a voice message at the primary business location and the contractor to return the call not later than 24 hours from the time the voice message was left.

§12.33. What must happen if a contractor's primary physical location changes?
A contractor must notify DHS in advance of its intent to change its primary physical location.

§12.34. How do contractors and facilities qualify to participate in the CACFP At Risk Afterschool Snack program?
Contractors and facilities must:

(1) qualify to participate in the CACFP according to the regulations stated in this chapter;

(2) operate an after school program that:

(A) provides individuals with regularly scheduled activities in an organized, structured, and supervised environment, including weekends and holidays, during the regular school year;

(B) includes educational or enrichment activities;

(C) is located in a geographical area served by a school in which 50% or more of the children enrolled are eligible for free or reduced-price school meals; and

(D) is not comprised of an organized athletic program engaged in interscholastic or community level competitive sports, including youth sports leagues; and

(3) meet state or local licensing requirements as applicable, and meet state or local health and safety standards.

§12.35. Are supervised athletic activities ever allowed in the CACFP At Risk Afterschool Snack program?
After school programs that include supervised athletic activity are allowed in the CACFP At Risk Afterschool Snack program as long as the programs are open to all and do not limit membership for reasons other than space, security, or licensing requirements.

§12.36. What information must contractors that operate or sponsor the participation of one or more emergency shelters provide to demonstrate that they qualify to participate in the CACFP as an emergency shelter?
These contractors must provide documentation that shows that:

(1) the contractor's primary purpose is to provide temporary housing and meals to children and their parents or guardians; and

(2) the facility meets all applicable state and local health, sanitation, and safety standards.

§12.37. Are there any conditions that would make a contractor ineligible to participate in the CACFP?
Yes. A contractor becomes ineligible to participate in the CACFP if it:

(1) has permitted a member of its governing body, an agent, a consultant, or an employee to enter a child care facility when children are present and any of these persons have been convicted of:

(A) a felony or misdemeanor classified as an offense against the person or the family, or as public indecency; or

(B) a felony violation of any statute intended to control the possession or distribution of a substance included in the Texas Controlled Substances Act;

(2) has permitted a member of its governing body, an agent, a consultant, or an employee to engage in any activity related to the administration of the CACFP and any of these persons have been convicted of an activity involving fraudulent conduct, including cases in which adjudication is deferred;

(3) sponsors the participation of a day care home which, after being afforded due process by a contractor in accordance with Division 20 of this subchapter (relating to Appeals), has been terminated for cause in accordance with Division 19 of this subchapter (relating to Denials and Terminations), including program abuse, deficient program operation, and fraudulent activities, unless DHS has granted prior approval; or

(4) fails to correct any noncompliance with or violation of the conditions and requirements in paragraphs (1)-(3) of 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 August 13, 2003.

TRD-200305120
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 3. CONTRACTOR APPLICATION PROCESS

40 TAC §§12.61 - 12.68

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.61. Must a contractor submit an application to participate in the CACFP?

Yes. A contractor must submit a completed application for participation to DHS.

§12.62. What must a contractor do if the information on its application changes from what was originally submitted?

A contractor must submit an amended application when changes occur.

§12.63. What criteria does DHS use to approve or deny applications for participation?

DHS approves or denies applications for participation according to 7 CFR §§226.6, 226.15- 226.19a, and 226.23; Section 17(a)(2)(B) of the National School Lunch Act (42 U.S.C. §1766), as amended; and this chapter.

§12.64. Because of its status as a nonprofit, is there any information a sponsor is required to include in its application to meet Internal Revenue Service requirements?

Yes. Each nonprofit day care home sponsor must include in its application sufficient detail to demonstrate that it will operate according to the following standards:

(1) The majority of the governing body must be composed of members of the community who are not financially interested in the sponsor's activities and who are not related parties. For the purpose of this section:

(A) Majority means 50% plus one.

(B) Individuals who are not financially interested in the activities of the organization means individuals other than the employees of the organization or sponsored day care homes.

(C) A related party is an individual who is related within the second degree by consanguinity or third degree by affinity to any member of the board of directors or employee of the sponsoring organization.

(2) Members of the governing body may not vote on decisions relating to their own compensation or that of a related party.

(3) The governing body must make decisions about compensation of employees and other parties providing services to the organization.

(4) No person receiving compensation for services under CACFP may receive compensation for services from any other sponsoring organization.

(5) A sponsoring organization must accept any qualified day care home, consistent with its capacity to provide services to sponsored providers.

§12.65. What information must a contractor submit in its program application?

(a) A contractor must submit all information required by 7 CFR §§226.6, 226.15-226.19a, and 226.23; Section 17(a)(2)(B) of the National School Lunch Act (42 U.S.C. §1766), as amended; and this chapter. Contractors are informed of the specific information needed when they receive an application packet.

(b) Contractors must provide sufficient information to show how they will:

(1) conduct pre-approval visits of food service management companies (FSMC) before awarding a contract to determine their suitability and capacity to provide food service according to 7 CFR §226.21 and Division 16 of this subchapter (relating to Program Reviews, Monitoring, and Management Evaluations);

(2) review the FSMC and ensure that program deficiencies discovered during a review or by other means are corrected according to Division 16 of this subchapter; and

(3) terminate the FSMC's contract for failure to comply with program requirements according to Division 19 of this subchapter (relating to Denials and Terminations).

§12.66. Does DHS conduct pre-approval visits to child care contractors applying to participate in the CACFP?

Yes. DHS conducts pre-approval visits of private nonprofit or private for-profit child care organizations to determine if the contractor can successfully operate the CACFP according to the requirements of 7 CFR Part 226 and this chapter.

§12.67. What happens if a contractor's application is incomplete?

The contractor must submit its completed application to DHS within 30 days of the date of the written request for additional information. Otherwise, DHS denies the application.

§12.68. Can a contractor reapply if its application is denied?

Yes.

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 August 13, 2003.

TRD-200305121
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 4. AGREEMENTS

40 TAC §12.81 - 12.92

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.81. Is a contractor required to enter into an agreement with DHS in order to participate in the CACFP?

Yes. According to 7 CFR §§226.6, 226.15-226.19a, and 226.23, a contractor must enter into an agreement with DHS.

§12.82 What is the nature of this agreement?

This agreement is a legally binding document that specifies the rights and responsibilities of both the contractor and DHS.

§12.83. Is a facility required to enter into an agreement with a sponsoring organization to participate in the CACFP?

Yes. According to 7 CFR §§226.6, 226.15-226.19a, and 226.23, a facility must enter into an agreement with a sponsoring organization.

§12.84. Is this also a legally binding document that specifies the rights and responsibilities of both the sponsor and facility?

Yes.

§12.85. Must a contractor that purchases meals from a food service management company (FSMC) or school food authority (SFA) enter into a contract with that entity?

Yes. According to 7 CFR §§226.6, 226.17, 226.19, 226.19a, 226.21, and 226.22, contractors must enter into an agreement with that FSMC or SFA.

§12.86. What is the term of this agreement?

The agreement is for a maximum of 12 consecutive months.

§12.87. How may this agreement be extended?

DHS can grant contractors up to two 12-month extensions beyond the ending date of the original food service management company (FSMC) agreement, as long as there is no change in scope of service to the original FSMC contract.

§12.88. Can an extension last more than 12 months?

No agreement extension can exceed 12 consecutive months.

§12.89. What information must a contractor include in its agreement?

The agreement must contain:

(1) the beginning and ending dates of the agreement;

(2) conditions and restrictions governing the awarding of an extension to the original food service management company (FSMC) agreement;

(3) the unit price per meal;

(4) a requirement that the FSMC provide special diets the contractor specifies for medical or religious reasons;

(5) a description of the method the FSMC will use to transport food;

(6) a requirement that the FSMC will ensure that all meals meet USDA meal pattern requirements;

(7) a requirement that the FSMC will maintain all records specified by USDA, DHS, or the contractor;

(8) an assurance that the FSMC will:

(A) provide USDA, DHS, the contractor, or a designated representative access at a reasonable time to all FSMC facilities and records; and

(B) allow the records to be reviewed and copied as deemed necessary to complete a review, audit, or other evaluation of compliance with program and contract requirements;

(9) a requirement that the FSMC must correct program deficiencies by a specified date;

(10) a statement that the agreement is subject to the availability of federal funds;

(11) a statement that the agreement may be canceled by either party upon 30 days written notice, by mutual consent, for failure to correct program deficiencies by the date specified by the contractor, or immediately if client health and safety are at risk;

(12) a requirement that the contractor and FSMC perform according to state and federal laws and rules;

(13) a requirement that the FSMC provide the contractor monthly billing records by a specified date;

(14) a requirement that the FSMC comply with, and provide documentation of compliance with, all relevant state and local health standards;

(15) a requirement that the FSMC participate in any evaluation study DHS mandates; and

(16) a requirement that the FSMC may not subcontract for any portion of the food service agreement without specific, written permission of the contractor.

§12.90. What happens if an FSMC does not provide a contractor with monthly billing records by the specified date?

Failure to provide billing records may result in nonpayment or termination of the agreement.

§12.91. Can an organization have more than one agreement with DHS to participate as a CACFP day care home contractor, child care center contractor, or adult day care center contractor?

No.

§12.92. What if the organization is legally distinct from a current CACFP contractor?

Any organization that is legally distinct from a current CACFP contractor, but that can be identified through the organization's board of directors or personnel as essentially the same organization as a current CACFP contractor, cannot have a separate CACFP contract.

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 August 13, 2003.

TRD-200305122
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 5. CONTRACTOR STANDARDS AND RESPONSIBILITIES

40 TAC §§12.111 - 12.122

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.111. Must a contractor follow specific procurement guidelines to obtain food, supplies, and other goods and services for the CACFP?

Yes. A contractor must obtain these items in accordance with 7 CFR §§226.2, 226.6, 226.21, and 226.22, and 7 CFR Part 3015.

§12.112. How must a contractor obtain the title to, use, and dispose of equipment used in the operation of the CACFP?

A contractor must obtain the title to, use, and dispose of equipment according to 7 CFR §226.24 and 7 CFR Part 3015.

§12.113. Under what standards must a child care or adult day care center contractor determine a participant's eligibility for free and reduced-price meals?

A child care or adult day care center contractor must determine a participant's eligibility according to 7 CFR §§226.2, 226.6, 226.13, 226.15, 226.17-226.19a, and 226.23.

§12.114. How must DHS and child care or adult day care center contractors verify the eligibility of program participants for free and reduced-price meals?

DHS and child care or adult day care center contractors must verify eligibility of program participants for free and reduced- price meals according to 7 CFR §§226.2, 226.6, 226.13, 226.15, and 226.23.

§12.115. Are there any restrictions on the type of meals that an adult day care center contractor can claim for reimbursement?

Yes.

(1) An adult day care center contractor may claim reimbursement only for meals served to participants who are enrolled in the contractor's adult day care center and who reside in the community in their own homes alone, or with spouses, children, or guardians.

(2) An adult day care center contractor cannot claim reimbursement for meals served to enrolled participants who live in residential institutions and attend the adult day care center during the day.

§12.116. Can a contractor consider individuals who live in residential institutions and attend the adult day care center during the day as "enrolled" on the center's claim forms?

No. This includes individuals who are institutionalized on a temporary basis for respite care and crisis intervention.

§12.117. Is a contractor who is approved to operate the CACFP At Risk Afterschool Snack program required to provide snacks free of charge to its participants?

Yes. A contractor who is approved to operate the CACFP At Risk Afterschool Snack program must provide an after school snack free of charge to all eligible participants attending an after school program.

§12.118. Will contractors be discriminated against in the CACFP?

DHS administers the CACFP without regard to race, color, national origin, sex, age, disability, religion, or political beliefs. DHS fully complies with the nondiscrimination requirements of 7 CFR §§226.6, 226.22, and 226.23, and 7 CFR Parts 15, 15(a), and 15(b).

§12.119. Is a contractor required to prevent discrimination against participants in its CACFP operations?

Yes. A contractor must strictly adhere to and enforce the nondiscrimination requirements of 7 CFR §225.6, the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act.

§12.120. Are contractors and facilities required to ensure that health, safety, and sanitation standards are enforced?

Yes. Contractors and facilities must comply with the health standards published in 7 CFR §226.6 and §226.20, DHS licensing minimum standards, and applicable rules issued by the Texas Department of Health.

§12.121. Must a contractor provide training and technical assistance to its center or sponsored facility staff?

Yes. A contractor must provide training and technical assistance DHS deems reasonable and necessary to its center or sponsored facility staff according to 7 CFR §§226.6, 226.16, and 226.18-19a.

§12.122. Can a contractor implement a change to its approved management plan before DHS approves the change?

No. DHS must approve all changes to a contractor's approved management plan before the contractor can implement the changes.

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 August 13, 2003.

TRD-200305123
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 6. BUDGETS

40 TAC §§12.141 - 12.154

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.141. How must a contractor submit an administrative budget for DHS approval?

A contractor must submit its administrative budget for DHS approval according to 7 CFR §§226.6, 226.7, and 226.15.

§12.142. What information must a day care home sponsor include when submitting its budget?

A day care home sponsor must submit a budget that demonstrates the sponsor's ability to maintain a balanced budget and demonstrates that all required program functions are financed using program funds or are otherwise provided at no cost to the program.

§12.143. What are the program functions that should be included in a budget?

The required program functions include:

(1) training;

(2) monitoring;

(3) financial management; and

(4) record keeping/reporting.

§12.144. What should the contractor do if the required program functions are provided at no cost to the program?

The contractor must identify the source and amount of funding or non-cash resources allocated to perform the required program functions.

§12.145. How must a contractor manage payment of costs that are not allowable uses of program funds?

A contractor must document how costs that are not allowable uses of program funds will be paid, including the source and amount of funds used to pay the unallowable costs.

§12.146. How does DHS handle adjustments to the budget?

DHS considers adjustments to the budget as amendments to the application, which DHS must approve or deny.

§12.147. When must a contractor submit its budget to DHS?

A contractor must submit written justification for its original budget and for any amendments to DHS for approval before the planned effective date of the contract or the amendments, as provided in §12.122 of this chapter (relating to Can a contractor implement a change to its approved management plan before DHS approves the change?).

§12.148. Will DHS approve a budget adjustment retroactively?

No.

§12.149. What happens if a day care home sponsor operates at a deficit?

That sponsor must submit an amended budget to DHS.

§12.150. What happens if a day care home sponsor exceeds the allowable amounts calculated under 7 CFR §226.12?

That sponsor must submit one or more of the following at DHS's request:

(1) documentation providing the source and amount of income to support the additional expenses;

(2) a revised administrative budget reflecting reduced costs; or

(3) a statement explaining how the excess administrative costs will be handled.

§12.151. How must a contractor report donations on its budget?

A contractor must report donations at zero value on its budget.

§12.152. How does DHS determine the limits of a day care home sponsor's budget?

DHS considers the size of the program, staff duties, and economic conditions of the locale.

§12.153. What part of the budget can DHS limit?

DHS can establish upper limits for salaries, overhead, and other administrative costs. All administrative costs must be necessary, reasonable, allowable, and appropriately documented.

§12.154. What budget information must a contractor provide when it applies for start- up or expansion funds?

A day care home contractor must submit a budget that shows how the funds will be used according to 7 CFR §226.12. See also Division 11 of this subchapter (relating to Start-Up and Expansion Payments).

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 August 13, 2003.

TRD-200305124
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 7. FINANCIAL MANAGEMENT

40 TAC §§12.161 - 12.165

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.161. Is a contractor required to implement a particular financial management system?

A contractor must implement the financial management system DHS mandates, according to 7 CFR §§226.6, 226.7, 226.10, 226.11, 226.13, and 226.16, and 7 CFR Parts 3016 and 3019.

§12.162. Must a contractor maintain financial management system records related to its participation in the CACFP?

A contractor must maintain records supporting the financial management system according to Division 8 of this subchapter (relating to Reporting and Record Retention).

§12.163. Is a Day Activity and Health Services (DAHS) center that participates in the CACFP required to report any reimbursement it receives while taking part in the CACFP?

Yes. While participating in the CACFP, a DAHS center must report all reimbursements on its annual DAHS Cost Report.

§12.164. Can a contractor use CACFP funds to assist eligible unlicensed or unregistered potential day care homes to become licensed or registered?

A contractor can use CACFP funds, including administrative reimbursements and start-up and expansion funds for allowable costs, to assist eligible unlicensed or unregistered potential day care homes to become licensed or registered for the purpose of participating in the CACFP. See Division 11 of this subchapter (relating to Start-Up and Expansion Payments).

§12.165. Can a contractor use CACFP funds to assist potential day care homes to become licensed or registered if those providers have previously received CACFP funds?

No. A contractor must not use CACFP funds to assist potential day care homes to become licensed or registered if those day care homes have previously received CACFP funds.

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 August 13, 2003.

TRD-200305125
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 8. REPORTING AND RECORD RETENTION

40 TAC §§12.171 - 12.183

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.171. How must a contractor submit reports to DHS?

A contractor must submit reports and keep financial and supporting documents, statistical records, and any other records of services for which the contractor submits a claim, in the manner and detail DHS prescribes.

§12.172. What information must a contractor keep to support reports submitted to DHS?

A contractor must keep records of its eligibility and application for program participation and compliance with all requirements relating to:

(1) financial management of the program;

(2) determination of program participant eligibility;

(3) eligibility of meals;

(4) licensing or registration of each of its facilities;

(5) composition and activities of the governing body;

(6) the actions and conduct of employees;

(7) personnel documents;

(8) procurement;

(9) USDA-donated commodities;

(10) monitoring and reviews, including pre-approval visits;

(11) training and technical assistance;

(12) denials and terminations of facilities;

(13) appeals;

(14) civil rights; and

(15) health, safety, and sanitation standards.

§12.173. How long must a contractor maintain records and documents pertaining to the CACFP?

A contractor must maintain all CACFP-related records and documents for a minimum of three years and 90 days after the end of the program fiscal year.

§12.174. How long must a contractor maintain program-related documentation if litigation, claims, audits, or investigations involving these records occur before the end of three years and 90 days?

A contractor must maintain CACFP-related documents for a minimum of three years and 90 days after the end of the program fiscal year and until all litigation, claims, audits, or investigation findings are resolved.

§12.175. When is litigation, a claim, an audit, or an investigation finding resolved?

These actions are considered resolved when a final order is issued in litigation or DHS and the contractor sign a written agreement .

§12.176. Must a contractor provide access to its facilities and records?

Yes. Contractors and facilities must allow access to the facilities and records according to 7 CFR §§226.6, 226.16, and 226.18

§12.177. How must a sponsoring organization with more than one approved facility maintain records?

A sponsoring organization with more than one approved facility must maintain separate records for each facility or maintain the records in a way that makes the information for each facility easy to identify and retrieve.

§12.178. Can a sponsoring organization maintain CACFP records with other program records?

No. A sponsoring organization must maintain CACFP records separately from other program records.

§12.179. Must a sponsoring organization ensure that facilities maintain certain records daily?

Yes. A sponsoring organization must ensure that its facilities keep program records that include:

(1) a daily count of all participants in attendance; and

(2) the full proper name of each participant in attendance.

§12.180. What forms must a contractor use to administer the CACFP?

A contractor must use DHS forms to operate and administer the CACFP unless DHS indicates otherwise.

§12.181. What is the authority for maintaining and submitting records?

Unless otherwise indicated in §12.111 and §12.112 of this chapter (relating to Must a contractor follow specific procurement guidelines to obtain food, supplies, and other goods and services for the CACFP? and How must a contractor obtain the title to, use, and dispose of equipment used in the operation of the CACFP?), a contractor must maintain and submit records according to 7 CFR §§226.6, 226.7, 226.10, 226.11, 226.13, 226.15-226.20, 226.22, and 226.23.

§12.182. What management information must a day care home sponsor submit each month?

A day care home sponsor must submit:

(1) individual day care home information as follows:

(A) name, address, and telephone number of the provider and of caregivers that assist the provider in providing child care;

(B) license/registration information;

(C) status of participation (active/inactive);

(D) social security number of the provider and of caregivers that assist the provider in providing child care;

(E) language spoken;

(F) approved meal service;

(G) approved days of operation;

(H) operation of shifts;

(I) contract effective date;

(J) number of income-eligible children;

(K) day care home's tier determination;

(L) basis for day care home's tier I determination (geographic location or day care home provider's income); and

(M) effective dates of day care home's tier determination;

(2) provider payment information as follows:

(A) month and year claimed for payment;

(B) payment type, whether regular or adjusted;

(C) amount of claim;

(D) date claim was paid;

(E) check number of claim payment;

(F) total attendance for claim month;

(G) names of children in attendance for whom meals were claimed;

(H) number of meals, by type of meal and reimbursement category (tier I or tier II), claimed for each child for the claim month;

(I) number of meals, by type of meal and reimbursement category (tier I or tier II), disallowed for each child for the claim month;

(J) reason for disallowed meals, by type of meal, for each child for the claim month;

(K) dollar amount for disallowed meals, by type of meal, for the claim month;

(L) total meals, by type of meal, for which payment was made for the claim month;

(M) number of tier I and tier II children enrolled who were used to determine claiming percentages or blended rates;

(N) number of tier I and tier II children in attendance who were used to determine claiming percentages or blended rates;

(O) beginning and ending dates for claiming percentages or blended rate calculations; and

(P) total number of days food service was provided in tier I, tier II, and tier II mix homes;

(3) participant (child) information as follows:

(A) name, address, and telephone number;

(B) work telephone number(s) for parents/guardians;

(C) status of participation (active/inactive);

(D) sex;

(E) date of birth;

(F) foster child status;

(G) resident child status;

(H) income eligibility of child;

(I) disability status;

(J) date enrolled/removed from care;

(K) days and hours in care; and

(L) name of parent/guardian; and

(4) provider monitoring visit information as follows:

(A) number of monitoring visits;

(B) anticipated date of monitoring visits;

(C) actual dates of monitoring visits;

(D) type of meal observed;

(E) number of children observed eating meals; and

(F) type of visit (regular or follow-up).

§12.183. In what form must this information be submitted?

The information must be submitted in fixed-length, ASCII-text (Standard Data File) format.

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 August 13, 2003.

TRD-200305126
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 9. MEAL REQUIREMENTS

40 TAC §§12.191 - 12.198

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.191. Must a contractor ensure that all meals served and claimed for reimbursement satisfy the CACFP program requirements?
Yes. A contractor must ensure that all meals claimed, including meals purchased from a food service management company, meet the requirements of 7 CFR §§226.2, 226.6, 226.13, and 226.15-226.20, and 7 CFR Appendix A to Part 226.

§12.192. How much time can elapse between meals?
(a) A minimum of three hours must elapse between the beginning of one meal service and the beginning of another.

(b) A minimum of four hours must elapse between the beginning of lunch and the beginning of supper when no afternoon snack is served.

(c) Two hours must elapse between the beginning of meals and the beginning of snacks.

(d) The following table illustrates the time allotted for meal duration and the time that must elapse between meal services:
Figure: 40 TAC §12.192(d)

§12.193. How long can individual meal times last?
(a) The duration of the meal service must not exceed two hours for lunch and supper and one hour for breakfast and supplements, except that in day care homes the duration of breakfast must not exceed two hours.

(b) Service of suppers must begin after 5:00 p.m. but not later than 7:00 p.m. and must end no later than 8:00 p.m.

§12.194. Are there any exceptions?
Yes. Infants under one year of age may be fed whenever necessary.

§12.195. Can a day care home sponsor require the use of pre-planned pre-printed menus?
No. A day care home sponsor must not require any day care home to use pre-planned pre-printed menus.

§12.196. Can a day care home sponsor provide pre-planned pre-printed menus as a training tool only?
Yes.

§12.197. Can a day care home use pre-planned menus?
Yes. A day care home can use only pre-planned menus that it has developed for its own use as long as it records the meal components at the time of meal service.

§12.198. Can a contractor claim reimbursement for meals served to eligible program participants during field trips?

Yes. A contractor has the option to claim meals served to eligible program participants during a field trip as long as all CACFP requirements are met and the field trip complies with the applicable standards set by the licensing/approval authority for the child or adult care facility.

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 August 13, 2003.

TRD-200305127
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 10. DAY CARE HOMES

40 TAC §§12.211 - 12.233

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.211. What materials must a day home sponsor submit in order for a day care home to be approved to participate in the CACFP?

A day home sponsor must submit a correct and complete Day Care Home Application, Agreement Between Sponsor and Day Care Home Provider, and supporting documentation as DHS prescribes in the application package.

§12.212. Is there a time frame by which a day home sponsor must submit application materials in order for a day care home to be approved to participate in the CACFP in a given month?

Yes. A day care home sponsor must submit the required application materials to DHS by the 25th of the month in which the sponsor wants the day care home's participation to begin.

§12.213. What constitutes a complete and correct Day Care Home Application?

In order for the Day Care Home Application to be considered complete and correct, the day care home provider must accurately provide all information requested on the application. Both the day care home provider and the day home sponsor representative must sign and date the application.

§12.214. Is there any information on the Day Care Home Application that DHS can complete or correct on behalf of the provider?

(a) DHS can correct information on the application with verbal confirmation from the day home sponsor with the exception of these items:

(1) provider's choice for distributing income applications and receiving reimbursement;

(2) provider's declaration relating to fraud in the CACFP;

(3) provider's signature and date of signature; and

(4) day home sponsor's representative's signature and date of signature.

(b) DHS must return the Day Care Home Application to the day home sponsor to obtain corrections to any of the items listed in subsection (a) of this section. The Day Care Home Application is not considered complete and correct until all requested information is accurately provided.

§12.215. What constitutes a complete and correct Agreement Between Sponsor and Day Care Home Provider?

In order for the Agreement Between Sponsor and Day Care Home Provider to be considered complete and correct, the day care home provider must accurately provide all information requested on the agreement. Both the day care home provider and the day home sponsor representative must sign and date the Agreement Between Sponsor and Day Care Home Provider.

§12.216. Is there any information on the Agreement Between Sponsor and Day Care Home Provider that DHS can complete or correct on behalf of the provider?

Yes. DHS can correct the Program Number with verbal confirmation from the day home sponsor. DHS must return the agreement to the day home sponsor to obtain corrections to any other information requested on the agreement. The agreement is not considered complete and correct until all requested information is accurately provided.

§12.217. How does DHS determine the date a day care home can participate in the CACFP?

DHS will not approve a day care home to participate in the CACFP before the latest of the following:

(1) the date of the provider's registration or license;

(2) the date the sponsor conducts the day care home's preapproval visit;

(3) the effective date of the Agreement Between Sponsor and Day Care Home Provider;

(4) the latest date that the Agreement Between Sponsor and Day Care Home Provider is signed by the day care home or the sponsor;

(5) the date of participation assigned by DHS;

(6) the first day of the month in which DHS receives a complete and correct Agreement Between Sponsor and Day Care Home Provider and Day Care Home Application; or

(7) the date a day care home enrolls a non-residential child for child care.

§12.218. Which days of the week does DHS approve as meal service days for day care homes?

DHS approves CACFP applications for day care homes to provide meal service for weekdays (Monday through Friday) and for weekends (Saturday and/or Sunday).

§12.219. Can a day care home that is currently participating in the CACFP under one sponsor sign an agreement to participate with a different sponsor?

Yes. A day care home that is participating in the CACFP under one sponsor can sign an agreement once each program year to participate with a different sponsor. A day care home that participates under one sponsor may not enter into an agreement to participate with a different sponsor before June 1 each program year.

§12.220. Can a day care home change sponsors more than once during the program year?

A day care home can enter into an agreement with a different sponsor at any time during the program year only if:

(1) the day care home sends a letter to DHS requesting the transfer and explaining why there is good cause to transfer to a different sponsor; and

(2) DHS determines that good cause exists and approves the transfer.

§12.221. What is good cause for transferring?

Good or just cause for transferring from the sponsorship of one contractor to another during the program year is limited to either of the following conditions:

(1) A sponsor denies a provider access to the program.

(2) A sponsor reduces the level of benefit a provider receives under the program.

§12.222. Can a day care home participate with more than one sponsor in the same month?

No.

§12.223. Can a day care home provider that participates in the CACFP actively take part in any sponsor's day-to-day operations, either full- or part-time?

No.

§12.224. Can a day care home provider be a board member of a sponsoring organization?

Yes. A day care home provider can be a board member if it is not engaged in day-to-day operations of the sponsoring organization.

§12.225. Can a day care home provider that has been found guilty of committing fraud in the CACFP still participate in the CACFP?

No. If a day care home provider has been found guilty, even if adjudication is deferred, the day care home's sponsoring organization must terminate the day care home's participation according to Division 19 of this subchapter (relating to Denials and Terminations).

§12.226. Is a day care home required to attend program-related training to qualify to participate in the CACFP?

Yes. Each day care home must participate in sponsor-provided program-related training DHS deems reasonable and necessary.

§12.227. Does DHS limit the number of day care homes that a new contractor may sponsor?

Yes. DHS uses the contractor's management plan to determine the number of day care homes that a new sponsoring organization can sponsor.

§12.228. If DHS limits the number of day care homes that a newly approved contractor can sponsor, how can the contractor gain additional homes?

The contractor must submit a written request to sponsor additional day care homes. DHS approves sponsorship of additional day care homes only if the contractor provides evidence of administrative and financial capability.

§12.229. Does DHS limit the number of day care homes that a contractor currently participating in the CACFP may sponsor?

DHS may limit the number of day care homes a participating contractor may sponsor in the CACFP if that organization's staffing pattern and management plan indicate insufficient ability to administer more day care homes. DHS may also limit the number of day care homes an organization can sponsor according to §12.455 and §12.457 of this chapter (relating to What happens if DHS determines during the follow-up review that the day care home sponsor has not corrected all instances of program noncompliance identified in the initial review? and What happens if, during a review or an audit, DHS cites a day care home sponsor for deficiencies in administrative or financial capabilities because the sponsor has too many day care homes?).

§12.230. Does DHS approve additional day care homes for contractors already participating in the CACFP?

If DHS has limited the number of day care homes, any additional day care homes over the limit must be approved. DHS approves additional day care homes if a contractor demonstrates that it is capable of administering more day care homes.

§12.231. How does DHS notify a contractor that its total number of day care homes has been limited?

DHS notifies the contractor in writing of all adjustments to the number of day care homes that may be sponsored.

§12.232. On what does DHS base its adjustment?

DHS bases its adjustment on the contractor's administrative and financial capability.

§12.233. In addition to the provisions of 7 CFR §226.13 and §226.18, what other guidelines must a contractor that sponsors day care homes follow?

A contractor that sponsors day care homes must not allow any officer, agent, consultant, contractor, or any other employee to:

(1) solicit donations or fees from providers;

(2) require providers to engage in any kind of business on the sponsoring organization's behalf; or

(3) accept gratuities, favors, or anything of monetary value from providers.

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 August 13, 2003.

TRD-200305128
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 11. START-UP AND EXPANSION PAYMENTS

40 TAC §§12.261 - 12.269

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.261. What are start-up and expansion payments?

Start-up and expansion payments are defined in 7 CFR §226.2.

(1) Start-up payments consist of financial assistance made available to a sponsoring organization for its administrative expenses associated with developing or expanding a food service program in day care homes and initiating successful CACFP operations. Start-up payments may include administrative expenses associated with outreach and recruitment of unlicensed family or group day care homes and the allowable licensing-related expenses of such homes.

(2) Expansion payments consist of financial assistance made available to a sponsoring organization for its administrative expenses associated with expanding a food service program to day care homes located in low-income or rural areas. Expansion payments may include administrative expenses associated with outreach and

recruitment of unlicensed family or group day care homes and the allowable licensing-related expenses of such homes.

§12.262. Which contractors are eligible to request start-up and expansion payments?

(a) Start-up payments are available to contractors that sponsor or want to sponsor day care homes.

(b) Expansion payments are available only to contractors that have sponsored day care homes for at least one year at the time of application.

§12.263. How does a contractor apply to receive start-up and expansion payments?

A contractor must contact DHS to request an application for start-up and expansion payments.

§12.264. How does DHS issue start-up payments to contractors that sponsor or want to sponsor day care homes?

DHS issues start-up payments according to 7 CFR §§226.2, 226.6, 226.7, and 226.12, and written guidance from USDA.

§12.265. How does DHS issue expansion payments to day care home sponsors?

DHS issues expansion payments to day care home sponsors according to 7 CFR §§226.2, 226.6, 226.7, and 226.12.

§12.266. How does DHS determine the amount of expansion payments issued to a day care home sponsor?

DHS uses the formula "D x R x 2," in which:

(1) "D" is the number of day care homes the sponsoring organization intends to recruit (up to 50);

(2) "R" is the monthly rate per home for one to 50 homes in effect at the time of the application for expansion payments; and

(3) "2" is two months.

§12.267. How must a day care home sponsor use expansion payments?

A sponsor of day care homes must use expansion payments according to 7 CFR §226.2 and §226.12 and written guidance from USDA.

§12.268. How must a day care home sponsor use start-up payments?

A day care home sponsor must use start-up payments to develop or expand a food service program in day care homes according to 7 CFR §226.2 and §226.12 and written guidance from USDA.

§12.269. Can start-up or expansion payments awarded to day care home sponsors be used to recruit day care homes that are already participating with another DHS-approved sponsoring organization?

No.

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 August 13, 2003.

TRD-200305129
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 12. ADVANCE PAYMENTS

40 TAC §§12.281 - 12.290

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.281. Does DHS issue and monitor advance payments to contractors according to a specific procedure?

Yes. DHS issues and monitors advance payments to eligible contractors according to 7 CFR §§226.2, 226.6, 226.7, 226.10, and 226.16.

§12.282. How must a contractor account for advance funds?

A contractor must account for advance funds according to 7 CFR §§226.2, 226.6, 226.7, 226.10, and 226.16.

§12.283. How does DHS issue advance payments to a contractor that has a claim history?

DHS issues monthly advance payments based on the contractor's most recent claim received and processed.

§12.284. How does DHS issue advance payments to a contractor that does not have a claim history?

DHS issues an advance payment based on the amount of reimbursement the contractor is projected to earn during the month for which the advance is to be issued.

§12.285. How does DHS estimate advance payment amounts?

DHS estimates advance payment amounts based on one or both of the following:

(1) the number of day care homes participating; and/or

(2) the number of participants enrolled and served approved meals.

§12.286. Does DHS issue retroactive advances?

No.

§12.287. What happens if USDA does not provide sufficient funds for DHS to pay both advance payments and claims for reimbursement in full?

DHS pays claims for reimbursement only.

§12.288. How does DHS recoup advance payments?

DHS recoups advance payments from the reimbursement claim for the month for which the advance is issued.

§12.289. What happens if the advance payment exceeds the reimbursement earned in the month for which the advance is issued?

DHS deducts the excess amount from subsequent advances issued or claims paid.

§12.290. What happens if a contractor who sponsors day care homes does not comply with program requirements?

DHS denies or suspends advance payments to that contractor according to Division 18 of this subchapter (relating to Sanctions, Penalties, and Fiscal Action).

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 August 13, 2003.

TRD-200305130
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 13. COMMODITIES AND CASH-IN-LIEU ASSISTANCE

40 TAC §§12.311 - 12.317

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.311. Does DHS provide commodity assistance to contractors?
DHS provides USDA-donated foods or cash-in-lieu of commodities according to 7 CFR §§226.5, 226.6, 226.15, and 226.20.

§12.312. How does DHS determine whether to issue commodities or cash-in-lieu of commodities?
DHS conducts an annual survey to determine each contractor's preference according to 7 CFR §226.6. If the majority chooses cash-in-lieu of commodities, then DHS issues cash-in-lieu of commodities to all eligible contractors.

§12.313. If a day care home sponsor chooses to distribute bonus commodities to its day care homes, how does it determine the number of commodities to distribute to each day care home?
A day care home sponsor must distribute the bonus commodities based on the number of children the day care home keeps.

§12.314. Who covers the costs of distributing bonus commodities?
A day care home sponsor that chooses to distribute bonus commodities can pass on to the day care homes any costs it may incur for distributing bonus commodities.

§12.315. Can a sponsoring organization include administrative costs associated with the distribution of bonus commodities in its CACFP costs?
Yes.

§12.316. What does DHS require of a day care home sponsoring organization before that organization can submit charges to its day care homes?
Day care home sponsoring organizations must:

(1) submit a detailed bonus cost allocation plan to DHS that DHS must approve; and

(2) obtain the day care home's written consent.

§12.317. Are facilities or centers required to receive bonus commodities?
No.

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 August 13, 2003.

TRD-200305131
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 14. REIMBURSEMENT

40 TAC §§12.331 - 12.363

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.331. Under what authority does DHS reimburse a contractor for its participation in the CACFP?
DHS reimburses a contractor according to 7 CFR §§226.2, 226.4, 226.6, 226.7, 226.9-226.19a, and 226.23; 7 CFR Part 3015; and Section 17(a)(2)(B) of the National School Lunch Act (42 U.S.C. §1766), as amended.

§12.332. Under what authority must contractors reimburse facilities?
Contractors must reimburse facilities according to 7 CFR §§226.2, 226.4, 226.6, 226.7, 226.9-226.19a, and 226.23; 7 CFR Part 3015; and Section 17(a)(2)(B) of the National School Lunch Act (42 U.S.C. §1766), as amended.

§12.333. How does DHS assign reimbursement rates for contractors?
DHS assigns reimbursement rates for contractors according to the option in 7 CFR §226.9(b)(3).

§12.334. What options does DHS use to reimburse contractors?
DHS reimburses contractors according to the options in 7 CFR §226.9(c)(1). DHS does not use the option described in 7 CFR §226.9(d).

§12.335. How does DHS compute reimbursement for approved child care centers, outside-school-hours care centers, adult day care centers, and day care homes?
DHS computes reimbursement according to 7 CFR §226.13 and the option in 7 CFR §226.11(c)(3).

§12.336. What are Title III benefits?
Title III benefits include all benefits provided under Part C of the Older Americans Act (OAA), including commodities (or cash-in-lieu of commodities) authorized by the OAA and provided by the U.S. Department of Health and Human Services.

§12.337. Can independent adult day care centers and contractors that sponsor adult day care centers claim reimbursement for meals supported by Title III of the Older Americans Act?
No. These adult day care centers and contractors must ensure that the meals for which they claim reimbursement are not supported by Title III of the Older Americans Act.

§12.338. If a contractor uses a food service management company to prepare the meals served at the adult day care center, who is responsible for ensuring that neither Title III funds nor commodities were used in the meals?
The contractor must ensure that neither Title III funds nor commodities are used in the meals prepared for use in the CACFP.

§12.339. How many snacks can a CACFP At Risk Afterschool Snack program contractor claim for reimbursement?
A CACFP At Risk Afterschool Snack program contractor can submit a claim for reimbursement for one snack per child per day.

§12.340. What are the requirements for submitting a claim for reimbursement for a snack?
The snack must meet CACFP snack requirements and be served to eligible program participants.

§12.341. What rate does DHS use to reimburse contractors who operate the CACFP At Risk Afterschool Snack program?

DHS reimburses CACFP At Risk Afterschool Snack contractors for eligible snacks at the free rate of reimbursement.

§12.342. Can a contractor be reimbursed for after school snacks served to participants in an approved At Risk Afterschool program in addition to the meals provided in traditional child care?

No. A contractor cannot claim reimbursement for At Risk Afterschool program snacks served to participants who have already received the maximum number of reimbursable meals under the CACFP.

§12.343. What is the maximum number of reimbursable meals under the CACFP?

A participating contractor is eligible to be reimbursed for either:

(1) two meals and one snack per child per day; or

(2) two snacks and one meal per child per day.

§12.344. Are there any exceptions?

Emergency shelters participating in the CACFP may claim up to three meals per child in residence at the shelter per day.

§12.345. How many meals can a contractor that sponsors or operates emergency shelters for homeless children include in a claim for reimbursement?

A contractor may claim either:

(1) three meals (breakfast, lunch, and supper) per child per day;

(2) two meals (breakfast, lunch, or supper) and one snack per child per day; or

(3) two snacks and one meal (breakfast, lunch, or supper) per child per day.

§12.346. Are there any meals for which emergency shelters for homeless children contractors cannot claim reimbursement?

Emergency shelters for homeless children contractors cannot claim reimbursement for meals served:

(1) in private family quarters, except meals served to infants from birth to age 11 months; or

(2) to nonresidential children.

§12.347. Must a contractor claim reimbursement within a specific time period?

A contractor must ensure that claims for reimbursement are postmarked or received by DHS no later than 60 days after the end of the claim month.

§12.348. Who is responsible for the accuracy of the information submitted on the contractor's claim for reimbursement?

DHS holds the persons designated on the contractor's DHS Certificate of Authority form accountable for the accuracy of the information submitted on the claim for reimbursement.

§12.349. Will DHS pay a claim for reimbursement if it is received or postmarked later than 60 days after the end of the claim month?

DHS will not pay a claim that is received or postmarked after the deadline unless USDA finds that good cause beyond the contractor's control delayed the submission of the claim.

§12.350. How does DHS process a claim received later than 60 days after the end of the claim month(s)?

DHS notifies the contractor that it may submit a written request for payment demonstrating that good cause beyond the contractor's control caused the claim to be received by DHS or postmarked after the deadline.

§12.351. What happens if DHS finds that good cause did not exist?

DHS notifies the contractor that its request is not approved and will not be forwarded to USDA for consideration.

§12.352. What happens if DHS finds that good cause beyond the contractor's control existed?

DHS forwards the request to USDA with a recommendation to pay the claim.

§12.353. What happens if USDA finds that good cause existed?

DHS pays the claim.

§12.354. What happens if USDA finds that good cause did not exist?

DHS may grant an exception and pay a late claim as long as the contractor:

(1) requests an exception in writing; and

(2) has not been granted an exception in the 36 months preceding the month for which a request for an exception is submitted.

§12.355. Does a contractor have the option not to submit a request for payment of a late claim based on good cause?

Yes.

§12.356. If a contractor chooses not to submit a request for payment of a late claim based on good cause, can a contractor still be reimbursed for that claim?

DHS may grant an exception and pay a late claim as long as the contractor:

(1) requests an exception in writing; and

(2) has not been granted an exception in the 36 months preceding the month for which a request for an exception is submitted.

§12.357. What guidelines must a contractor use when serving second meals?

A contractor must serve second meals according to 7 CFR §226.20(j).

§12.358. How must a contractor claim reimbursement for second meals?

A contractor must claim reimbursement for second meals according to 7 CFR §226.20(j).

§12.359. Can a contractor that serves meals family style claim reimbursement for second meals?

No.

§12.360. Can a day care home claim CACFP reimbursement for meals served to another day care home provider's own children when both providers participate in the CACFP?

No.

§12.361. Can the day care home provider's own child be considered a nonresidential child for the purpose of claiming reimbursement for a meal service at the day care home of another provider?

The provider's own child can be considered a nonresidential child by another day care home provider for the purpose of claiming reimbursement only if the following conditions are met:

(1) The child is enrolled for child care at the substitute facility.

(2) The provider for whom substitute care is being provided does not claim reimbursement for any meals served during the period of substitute care.

§12.362. What age group of children must an emergency shelter or homeless site serve in order to be eligible to participate as a contractor in the CACFP?

Emergency shelters must provide meal benefits to residential children age 12 and under.

§12.363. Are there any exceptions?

Emergency shelters must also provide meal benefits to children of migrant workers age 15 or younger and children with disabilities regardless of age.

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 August 13, 2003.

TRD-200305132
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 15. OVERPAYMENTS

40 TAC §§12.381 - 12.383

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.381. How does DHS manage overpayment of claims for reimbursement, advance payments, start-up, and expansion fund payments?

DHS manages overpayment according to 7 CFR §§226.6-226.8, 226.10, and 226.12-226.14; and §69.209 of this title (relating to Recoupment of Improper Payments).

§12.382. What happens to program funds that a day care home sponsor recovers from a day care home?

The day care home sponsor must return the funds to DHS.

§12.383. Can a day care home sponsor use CACFP funds to recruit day care homes?

No. A day care home sponsor must not use CACFP funds to recruit day care homes before the June 1st preceding the CACFP program year for which the new agreement will be effective, unless the day care home is not already participating in the program with an approved sponsoring organization.

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 August 13, 2003.

TRD-200305133
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 16. PROGRAM REVIEWS, MONITORING, AND MANAGEMENT EVALUATIONS

40 TAC §§12.391 - 12.406

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.391. Is a contractor required to monitor its own program operations?

Yes. A contractor must monitor its own program operations according to 7 CFR §226.15 and §226.16, except that DHS does not use the averaging option described in 7 CFR §226.16(d)(4)(iii).

§12.392. Does DHS conduct periodic visits to CACFP contractors?

Yes. DHS conducts periodic visits to private nonprofit and private for-profit contractors that DHS determines through the program review process and technical assistance sessions to have demonstrated potential for noncompliance with CACFP requirements.

§12.393. How does DHS determine which contractors to visit?

DHS determines through the program review process and technical assistance sessions which contractors have demonstrated a potential to not comply with program requirements.

§12.394. Does DHS require sponsors of day care homes to verify participation of the children in their day care homes?

Yes. Every federal fiscal year, DHS randomly selects at least 10% of the day care homes of each sponsor participating in the CACFP to verify the participation of the children claimed.

§12.395. How must a day care home sponsor verify the participation of the children claimed?

A day care home sponsor must verify that the children for whom meals are being claimed for reimbursement are enrolled for and receiving child care services and are participating in the program.

§12.396. How must a day care home sponsor verify a child's enrollment in a day care home?

For each provider selected, the sponsor must contact the family of each child reported as enrolled for child care and participating in the program, excluding the day care home provider, during a test period established by DHS.

§12.397. Can a contractor verify the participation of children in day care homes even if the day care home is neither randomly selected for verification by DHS nor requires additional verification of participation after being randomly selected by DHS?

Yes. A contractor may verify the participation of children in day care homes regardless of whether its day care homes were randomly selected by DHS.

§12.398. How does a day care home sponsor conduct reviews of day care homes?

A day care home sponsor must conduct reviews according to 7 CFR §226.16.

§12.399. How does a center sponsor conduct reviews of its sponsored facilities?

A center sponsor must conduct reviews according to 7 CFR §226.16.

§12.400. What type of monitoring reviews must a day care home sponsor conduct?

A day care home sponsor must conduct a minimum of one scheduled (announced in advance) and two unscheduled (unannounced) monitoring reviews of each of their day care homes each 12 months.

§12.401. Must the day care home sponsor observe a meal service during each monitoring review?

Yes. For new day care homes, the home's first four-week review and either of the next two reviews must include the observation of the breakfast, lunch, or supper service. For day care homes in their second or later year of participation, the sponsor is required to observe at least two main meals (breakfast, lunch, or supper). Only one review per year per day care home may include the observation of a snack (supplement) rather than a main meal.

§12.402. What happens if the day care home sponsor cannot confirm program participation?

The day care home sponsor must make an unannounced follow-up review within two weeks of the initial review.

§12.403. When must a day care home sponsor conduct monitoring reviews of day care homes that participate on weekends?

A day care home sponsor that participates on weekends must conduct at least one of its three monitoring reviews on Saturday or Sunday.

§12.404. How does a contractor that sponsors the participation of child and adult care centers conduct monitoring reviews of its sponsored facilities?

(a) A contractor that sponsors child and adult care centers must conduct reviews according to 7 CFR §226.16. See also §12.405 of this chapter (relating to Is a contractor that uses a food service management company (FSMC) contract required to monitor contracts with the FSMC?).

(b) A center sponsor must also observe a meal service during each of the reviews.

§12.405. Is a contractor that uses a food service management company (FSMC) contract required to monitor contracts with the FSMC?

Yes. Each contractor that sponsors the participation of child and adult care centers must:

(1) conduct a pre-approval visit to each food preparation site and the administrative offices of the FSMC before awarding a contract for food service;

(2) review the FSMC, including each food preparation site and administrative offices, at least once per contract period;

(3) review the FSMC meal preparation and delivery system, including sanitation and food preparation practices, transportation of food, record keeping, and compliance with state and local health requirements;

(4) maintain written verification of monitoring visits, including the date of the visit and all findings; and

(5) require the FSMC to take the appropriate action to correct all deficiencies discovered during the review within a reasonable amount of time.

§12.406. What happens if the health and well being of a program participant is at risk because of program deficiencies identified during an FSMC review?

The contractor must immediately terminate the FSMC contract for cause.

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 August 13, 2003.

TRD-200305134

Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 17. AUDITS

40 TAC §§12.421 - 12.425

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.421. Are contractors and sponsored facilities that participate in the CACFP subject to audit?
Yes.

(1) Contractors and sponsored facilities are subject to audit requirements according to 7 CFR §226.7 and §226.8; 7 CFR Parts 3015 and 3052; and §69.208 of this title (relating to Methods for Auditing Contracts).

(2) A contractor participating in the CACFP as a private nonprofit organization or a public entity is subject to the single audit requirements according to 7 CFR §226.8 and 7 CFR Part 3052.

§12.422. Are certain contractors exempt from the single audit requirements?
Yes. A contractor that is a military installation or a private, for-profit organization is not subject to the single audit requirements. DHS conducts the audits of contractors that are private, for-profit organizations.

§12.423. When is an audit considered acceptable?
The contractor has not fulfilled the audit requirement until DHS determines that the audit is acceptable according to the requirements of the Single Audit Act.

§12.424. How is a contractor informed of its obligation to comply with the single audit requirements?

(a) DHS notifies the contractor in writing, upon approval of its application to participate in the CACFP, that it is subject to the single audit requirements in 7 CFR Part 3052. The notification includes the date by which the contractor must submit an acceptable audit to DHS.

(b) DHS also provides the contractor with at least two written notices reminding the contractor when its audit must be submitted to DHS.

(1) DHS issues one notice by regular mail no later than six months after the end of the contractor's fiscal year for which the audit is due.

(2) DHS issues a subsequent notice by certified and regular mail eight months after the end of the contractor's fiscal year for which the audit is due. This notice also informs the contractor that failure to submit the audit to DHS by the required due date will result in adverse action, up to and including placement into the Serious Deficiency Process, termination of its agreement, and placement of the organization and each responsible principal on the National Disqualified List.

§12.425. Does DHS reimburse a contractor for the cost of obtaining a single audit?
DHS reimburses contractors for eligible audit expenses according to 7 CFR §226.8(b).

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 August 13, 2003.

TRD-200305135
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 18. SANCTIONS, PENALTIES, AND FISCAL ACTION

40 TAC §12.441 - 12.472

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.441. Does DHS investigate and resolve program deficiencies, program irregularities, and evidence of violations of criminal law or civil fraud statutes?

Yes. DHS investigates and resolves program deficiencies, program irregularities, and evidence of violations of criminal law or civil fraud statutes according to 7 CFR §§226.6, 226.8, 226.10, and 226.14.

§12.442. What does DHS do if a contractor fails to comply with the CACFP requirements in 7 CFR Part 226 and this subchapter?

DHS imposes sanctions against any contractor according to 7 CFR §226.6 and Division 19 of this subchapter (relating to Denials and Terminations), up to and including:

(1) placement into the Serious Deficiency Process;

(2) termination;

(3) debarment; and

(4) placement on the National Disqualified List.

§12.443. What does DHS do if DHS learns that a contractor has submitted false information on its program application?

DHS takes action according to 7 CFR §226.6 and Division 19 of this subchapter (relating to Denials and Terminations), up to and including:

(1) placement into the Serious Deficiency Process;

(2) denial or termination;

(3) debarment; and

(4) placement of the institution and all responsible principals on the National Disqualified List.

§12.444. What happens to eligible day care home providers or centers when their sponsoring organization is disqualified?

DHS notifies that contractor's eligible providers or centers that they may transfer to another approved sponsor. Centers may also apply directly to DHS as an independent center.

§12.445. What happens if a contractor fails to attend mandatory DHS training?

DHS takes action according to 7 CFR §226.6 and Division 19 of this subchapter (relating to Denials and Terminations), up to and including:

(1) placement into the Serious Deficiency Process;

(2) termination;

(3) debarment; and

(4) placement of the institution and all responsible principals on the National Disqualified List.

§12.446. What happens if a day care home sponsor fails to properly monitor or train providers when program violations related to monitoring or training of providers identified during an administrative review exceed a tolerance level of one provider or 10% of the providers sampled, whichever amount is greater?

DHS:

(1) places the day care home sponsor in the Serious Deficiency Process;

(2) denies administrative reimbursements for the test month of the review for any provider who was not monitored or trained according to program requirements;

(3) requires the contractor to submit a plan describing how it will correct the program noncompliance; and

(4) conducts a follow-up review within 90 days after notifying the contractor of the review findings to determine if the sponsor is complying with program requirements.

§12.447. What happens if DHS determines during the follow-up review that the day care home sponsor has not corrected all program noncompliances identified in the initial review?

(a) If DHS determines during the follow-up review that the day care home sponsor has not corrected all instances of program noncompliance identified in the initial review, DHS:

(1) denies administrative reimbursements beginning the months following the month of the initial review through the month of the follow-up review for any provider who was not monitored or trained according to program requirements;

(2) establishes a cap on the number of day care homes the contractor may sponsor, not to exceed the number of day care homes sponsored at the time of review;

(3) rescinds or denies approval for advance payments; and

(4) continues the Serious Deficiency Process by notifying the sponsor that if the contractor fails to demonstrate at the second follow-up review that all serious deficiencies DHS identifies have been or will be corrected, DHS proposes to:

(A) terminate its agreement;

(B) disqualify the organization, responsible principals, and responsible individuals;

(C) release the contractor's eligible providers to transfer to another approved sponsor; and

(D) debar individuals responsible for the deficiencies.

(b) DHS conducts a second follow-up review no later than 45 days after notifying the contractor of the findings of the initial follow-up review to determine if the sponsor complies with requirements for paying providers according to program requirements.

§12.448. What happens after the second follow-up review if the day care home sponsor fails to demonstrate that all serious deficiencies identified by DHS have been or will be corrected?

DHS notifies the contractor that as a result of failure to correct all instances of noncompliance with the requirements for monitoring and training providers:

(1) the contractor's agreement is terminated, in whole or in part, according to 7 CFR §226.6 and Division 19 of this subchapter (relating to Denials and Terminations);

(2) the contractor, responsible principals, and responsible individuals have been placed on the National Disqualified List;

(3) the contractor's eligible providers have been released to transfer to another approved sponsor; and

(4) individuals responsible for the deficiencies are debarred.

§12.449. What happens if a day care home sponsor fails to ensure that a claim is submitted only for eligible meals served to eligible children?

If DHS determines during an initial review of the sponsor for the contract year that the sponsor has failed to ensure that claims are submitted only for eligible meals served to eligible children, DHS:

(1) denies administrative reimbursements for any day care home provider that does not have eligibility or enrollment forms containing required information; and

(2) requires the contractor to submit:

(A) an amended claim for reimbursement to remove all ineligible meals for the test month; and

(B) a plan describing how the program noncompliance will be corrected.

§12.450. What happens if DHS determines during the test month of the initial review that 10% or more of the meals sampled and claimed for reimbursement fail to meet program requirements?

DHS:

(1) places the day care home sponsor in the Serious Deficiency Process; and

(2) conducts a follow-up review not later than 90 days after notifying the contractor of the review findings to determine if the sponsor is in compliance with requirements for ensuring claims are submitted only for eligible meals served to eligible children.

§12.451. What happens if DHS determines during the follow-up review that 10% or more of the meals sampled and claimed for reimbursement for the test month fail to meet program requirements?

(a) DHS:

(1) denies administrative reimbursements for the months following the month of the initial review through the month of the follow-up review for any day care home that does not have eligibility or enrollment forms containing required information;

(2) establishes a cap on the number of day care homes the contractor may sponsor, not to exceed the number of day care homes sponsored at the time of the review;

(3) rescinds or denies approval for advance payments; and

(4) continues in the Serious Deficiency Process by notifying the sponsor that if the contractor fails to demonstrate at the second follow-up review that all serious deficiencies DHS identified have been or will be corrected, DHS proposes to:

(A) terminate its agreement;

(B) disqualify the organization, responsible principals, and responsible individuals;

(C) release the contractor's eligible providers to transfer to another approved sponsor; and

(D) debar individuals responsible for the deficiencies.

(b) If the contractor fails to demonstrate at the second follow-up review that all serious deficiencies identified by DHS have been or will be corrected, DHS conducts a second follow-up review no later than 45 days after notifying the contractor of the findings of the initial follow-up review to determine if the sponsor complies with requirements ensuring that claims are submitted only for eligible meals served to eligible children.

§12.452. What happens even if less than 10% of all meals claimed for the test month of the follow-up are ineligible?

The sponsor:

(1) cannot claim reimbursement for any ineligible meals for the test month;

(2) cannot receive administrative reimbursement for any day care home that does not have eligibility or enrollment forms containing the required information; and

(3) must submit a plan describing how the program noncompliance will be corrected.

§12.453. What happens during the second follow-up review if the day care home sponsor fails to demonstrate that all serious deficiencies identified by DHS have been or will be corrected?

DHS notifies the contractor that as a result of failure to correct all instances of noncompliance:

(1) the contractor's agreement is terminated, in whole or in part, according to 7 CFR §226.6 and Division 19 of this subchapter (relating to Denials and Terminations);

(2) the contractor, responsible principals, and responsible individuals have been placed on a National Disqualified List;

(3) the contractor's eligible providers have been released to transfer to another approved sponsor; and

(4) all individuals responsible for the deficiencies are debarred.

§12.454. What happens if a day care home sponsor fails to disburse program funds to providers according to program requirements when program violations related to the disbursement of program funds to providers identified during an administrative review exceed a tolerance level of one provider or 10% of the providers sampled, whichever amount is greater?

DHS:

(1) places the day care home sponsor in the Serious Deficiency Process;

(2) requires the contractor to submit an amended claim to remove all providers that have not been issued program funds according to program requirements from its reimbursement claim for the test month;

(3) requires the contractor to submit a plan describing how the program noncompliance will be corrected; and

(4) conducts a follow-up review within 90 days after notifying the contractor of the review findings to determine if the contractor complies with program requirements.

§12.455. What happens if DHS determines during the follow-up review that the day care home sponsor has not corrected all instances of program noncompliance identified in the initial review?

(a) DHS:

(1) denies administrative reimbursement for the months following the month of the initial review through the month of the

follow-up review for any provider that was not issued program funds according to program requirements;

(2) establishes a cap on the number of day care homes the contractor can sponsor, not to exceed the number of day care homes sponsored at the time of the review;

(3) rescinds or denies approval for advance payments; and

(4) continues in the Serious Deficiency Process by notifying the sponsor that if the contractor fails to demonstrate at the second follow-up review that all serious deficiencies identified by DHS have been or will be corrected, DHS proposes to:

(A) terminate its agreement;

(B) disqualify the organization, responsible principals, and responsible individuals;

(C) release the contractor's eligible providers to transfer to another approved sponsor; and

(D) debar individuals responsible for the deficiencies.

(b) If the contractor fails to demonstrate at the second follow-up review that all serious deficiencies identified by DHS have been or will be corrected, DHS conducts a second follow-up review no later than 45 days after notifying the contractor of the findings of the initial follow-up review to determine if the sponsor complies with requirements for paying providers according to program requirements.

§12.456. What happens after the second follow-up review if the day care home sponsor fails to demonstrate that all serious deficiencies identified by DHS have been or will be corrected?

DHS notifies the contractor that as a result of failure to correct all instances of noncompliance relating to the disbursement of provider funds:

(1) the contractor's agreement is terminated, in whole or in part, according to 7 CFR §226.6 and Division 19 of this subchapter (relating to Denials and Terminations);

(2) the contractor, responsible principals, and responsible individuals have been placed on the National Disqualified List;

(3) the contractor's eligible providers have been released to transfer to another approved sponsor; and

(4) all individuals responsible for the deficiencies are debarred.

§12.457. What happens if, during a review or an audit, DHS cites a day care home sponsor for deficiencies in administrative or financial capabilities because the sponsor has too many day care homes?

DHS:

(1) places a cap on the number of day care homes the organization may sponsor;

(2) identifies the number of day care homes the sponsor can properly administer and immediately notifies the sponsor; and

(3) gives the sponsor 10 days to submit a plan to DHS to reduce the number of day care homes to the level of the approved cap.

§12.458. Can a day care home sponsor that is deficient in program operations add day care homes?

No. DHS does not approve additional day care homes for a day care home sponsor identified through audit or review as deficient in program operations until the organization submits to DHS an acceptable plan to correct the deficiency.

§12.459. What does DHS do if a contractor that is subject to the single audit requirements fails to submit an audit as required?

DHS places the contractor into the Serious Deficiency Process according to 7 CFR §226.6 and Division 19 of this subchapter (relating to Denials and Terminations).

§12.460. What does DHS do if a contractor fails to accomplish the required corrective action and permanently correct the serious deficiency regarding its single audit?

DHS informs the contractor in writing of its proposal to terminate the contractor's agreement and disqualify the organization and each responsible principal according to 7 CFR §226.6 and Divisions 19 and 20 of this subchapter (relating to Denials and Terminations and Appeals).

§12.461. Can a contractor appeal this action?

Yes.

§12.462. If a contractor subject to the single audit requirements fails to obtain and submit an acceptable audit by the specified due date and DHS either conducts the audit or arranges for an audit to be conducted by a third party, who must pay for the audit?

The contractor must pay for this audit.

§12.463. Can DHS extend the deadline by which a contractor must submit an audit?

Yes. DHS may extend the time by which a contractor must submit an audit if DHS determines such an extension is justified according to 7 CFR §3052.400.

§12.464. How must a contractor request an extension of its audit deadline?

A contractor must submit a written request for an extension. The request must:

(1) be postmarked or received by DHS no later than 30 calendar days before the prescribed audit deadline; and

(2) clearly identify the circumstances that prevent the contractor from submitting its audit by the prescribed audit deadline.

§12.465. Is DHS required to grant a contractor an extension of its audit deadline?

No. DHS grants an extension of the audit due date only if:

(1) the contractor's written request for an extension is postmarked or received by DHS no later than 30 calendar days before the audit due date; and

(2) DHS determines the reason the audit cannot be submitted by the due date demonstrates good cause beyond the contractor's control.

§12.466. How is a new audit due date determined?

(a) If DHS reviews the contractor's request for an extension of the audit due date and determines the new audit due date requested by the contractor is reasonable, DHS will approve the new audit due date requested by the contractor.

(b) If DHS determines the new date requested by the contractor is not reasonable, DHS will assign another audit due date.

§12.467. How is the contractor informed of the decision regarding the extension of its audit due date?

DHS informs the contractor in writing whether the contractor's request for an extension of its audit due date is approved. If the request is approved, DHS includes the new audit due date in the notice to the contractor.

§12.468. Can a contractor request more than one extension?

Yes. Each extension request must:

(1) be submitted in writing;

(2) be postmarked or received by DHS no later than 30 calendar days before the prescribed audit deadline;

(3) clearly identify the circumstances that prevent the contractor from submitting its audit by the prescribed audit deadline; and

(4) specify the new desired audit due date.

§12.469. What does DHS do if DHS does not receive an audit by the specified deadline and an extension of the deadline has not been granted?
DHS places the contractor into the Serious Deficiency Process according to 7 CFR §226.6 and Division 19 of this subchapter (relating to Denials and Terminations).

§12.470. Must a contractor repay any overpayments identified through an audit finding?
Yes.

§12.471. What happens if a day care home sponsor determines during a monitoring review or by other means that a provider has been seriously deficient in its operation of the CACFP?
A sponsor must deal with a seriously deficient provider according to 7 CFR §226.16 and §226.18.

§12.472. What happens if a day care home sponsor conducts two or more unannounced monitoring reviews in a 12-month period and cannot confirm that children are enrolled for child care and participating in the program?

(a) The sponsor must implement a corrective action plan to ensure it can effectively monitor the provider's participation in the program.

(b) A sponsor may suspend the participation of a day care home without a corrective action plan according to 7 CFR §226.16 if the local health or licensing official cites the day care home for serious health or safety 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 August 13, 2003.

TRD-200305136
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 19. DENIALS AND TERMINATION

40 TAC §§12.491 - 12.497

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.491. What criteria does DHS use to deny applications and to terminate agreements for participation in the CACFP when a contractor fails to meet eligibility requirements?

(a) DHS denies applications and terminates agreements, in whole or in part, according to 7 CFR §§226.6, 226.14-226.19a, 226.23, and 226.25; 7 CFR Part 3015; and Section 17(a)(2)(B) of the National School Lunch Act (42 U.S.C. §1766), as amended.

(b) DHS denies an application and terminates an agreement, in whole or in part, with a contractor if:

(1) the contractor has permitted any individual identified in §12.37 of this chapter (relating to Are there any conditions that would make a contractor ineligible to participate in the CACFP?) to enter the facility when children are present; and

(2) the contractor has permitted any individual identified in §12.37 of this chapter to engage in any activity related to the administration of the CACFP.

§12.492. How does DHS notify a contractor of its denial of an application or proposal to terminate an agreement?
DHS notifies contractors according to 7 CFR §226.6 and this division.

§12.493. Does DHS deny an application for participation or terminate an agreement when a contractor subject to the bonding requirement identified in 7 CFR §226.6 and Division 2 of this subchapter (relating to Eligibility of Contractors and Facilities) fails to comply with that requirement?
Yes. DHS denies participation and terminates an agreement if a contractor does not submit and maintain in good standing a performance bond in the amount established by DHS.

§12.494. Can a contractor request relief from the bonding requirement?
A contractor can request relief from the bonding requirement only if it has no outstanding financial obligation to DHS.

§12.495. What criteria must a day care home sponsor use to deny or terminate agreements with a day care home?
A day care home sponsor denies or terminates agreements with a day care home according to 7 CFR §226.6 and §226.16, and this division.

§12.496. How does a day care home sponsor notify a day care home participating in the CACFP of its proposal to terminate the day care home's participation in the program?
A day care home sponsor must notify the day care home of its plans according to 7 CFR §226.6 and §226.16, and this division.

§12.497. Does DHS terminate an agreement with a contractor or deny the application of a contractor that has failed to permanently correct a serious deficiency in the administration of the CACFP?
Yes. DHS terminates an agreement, in whole or in part, and denies an application of a contractor who has been identified as seriously deficient according to program requirements as described in 7 CFR §226.6; and Divisions 2-5, 18, and 19 of this subchapter (relating to Eligibility of Contractors and Facilities; Contractor Application Process; Agreements; Contractor Standards and Responsibilities; Sanctions, Penalties, and Fiscal Action; and Denials and Termination).

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 August 13, 2003.

TRD-200305137
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 20. APPEALS

40 TAC §§12.511 - 12.520

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.511. How does DHS conduct contractor and day care home appeals?

DHS conducts appeals according to 7 CFR §226.6 and §226.16; Chapter 79, Subchapter Q, of this title (relating to Formal Appeals); and Section 17(d) of the National School Lunch Act (42 U.S.C. §1766), as amended.

§12.512. How does DHS conduct food service management company appeals?

DHS conducts appeals according to 7 CFR §226.6 and Chapter 79, Subchapter Q, of this title (relating to Formal Appeals).

§12.513. Who conducts appeals based on federal audits?

Contractors appealing actions DHS takes that are based on the findings of federal audits must request a hearing to be conducted by USDA.

§12.514. How must participants appeal a contractor's denial of their eligibility for free and reduced-price meal benefits?

Participants must request an appeal for a contractor's denial of their eligibility for free and reduced-price meal benefits according to the procedures the contractor provides them as required by 7 CFR §226.23.

§12.515. Can a contractor appeal a DHS decision not to request a USDA determination of good cause for submission of a late claim?

Yes.

§12.516. How does a contractor request an appeal?

A contractor can request an appeal according to procedures that DHS provides as required by 7 CFR §226.6(k).

§12.517. Can a contractor appeal if USDA decides that a late claim is ineligible for payment?

No.

§12.518. Who is responsible for creating appeal procedures for sponsored day care homes?

A contractor that sponsors day care homes must develop appeal procedures according to 7 CFR §226.6(l) and §226.16 and submit them to DHS for approval.

§12.519. When is a contractor required to provide a day care home with appeal procedures?

A contractor must provide appeal procedures to each day care home when:

(1) the day care home enrolls in the CACFP; and

(2) the contractor takes an adverse action on the day care home provider.

§12.520. What is an adverse action?

An adverse action is any action that denies or reduces program benefits to the day care home.

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 August 13, 2003.

TRD-200305138
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER B. SUMMER FOOD SERVICE PROGRAM (SFSP)

DIVISION 1. OVERVIEW AND PURPOSE

40 TAC §§12.601 - 12.603

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.601. What is the purpose of the Summer Food Service Program (SFSP)?

The SFSP provides nutritious meals to children in low-income areas during long school vacations when they do not have access to school lunch or breakfast.

§12.602. What do certain words and terms in this subchapter mean?

(a) The following words and terms, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise:

(1) CFR--The Code of Federal Regulations.

(2) DHS--The Texas Department of Human Services.

(3) SFSP--Summer Food Service Program.

(4) U.S.C.--United States Code.

(5) USDA--The United State Department of Agriculture.

(b) Other terms used in this subchapter are defined in 7 CFR §225.2.

§12.603. How is the SFSP authorized?

The SFSP is authorized by the National School Lunch Act (42 U.S.C. §1766), as amended.

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 August 13, 2003.

TRD-200305139
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 2. ELIGIBILITY OF SPONSORS AND FACILITIES

40 TAC §§12.611 - 12.618

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.611. How do sponsors qualify to participate in the SFSP?

Sponsors must meet the definitions in 7 CFR §225.2 and the requirements in 7 CFR §§225.6, 225.14, and 225.15; and 7 CFR Parts 15, 15(a), and 15(b).

§12.612. Are public school districts required to participate in the SFSP?

Public school districts in which 60% or more of the enrolled children are eligible to receive free meal benefits in the National School Lunch Program (NSLP) must operate directly or arrange for the operation of the SFSP in their districts according to the Human Resources Code, §33.024.

§12.613. If public schools are approved to participate in the National School Lunch Program, are they eligible to participate in the SFSP?

Yes.

§12.614. Are any sponsors required to submit proof of tax-exempt status?

Nonprofit organizations must submit a formal determination from the United States Internal Revenue Service (IRS) stating that the sponsor has been granted tax-exempt status under the United States Internal Revenue Code of 1986, as amended, or proof of participation in another federally funded program that requires an IRS determination of tax-exempt status.

§12.615. Can a college or university participate as an SFSP sponsor on a year-round basis?

Yes. Colleges and universities can participate on a year-round basis if they also sponsor National Youth Sports Program drug awareness activities during the academic year.

§12.616. Does DHS approve applications from potential sponsors that do not provide year-round service to the communities they propose to serve?

DHS may approve the application of an otherwise eligible applicant that does not provide a year-round service to the community it proposes to serve if any of the following conditions exist:

(1) The community is a residential camp.

(2) The applicant proposes to provide a food service to the children of migrant workers.

(3) Failure to approve the application would deny the program to an area in which poor economic conditions exist.

(4) A significant number of needy children would not otherwise have reasonable access to the SFSP.

§12.617. Does DHS use a priority system when approving applicants that propose to serve the same area or the same enrolled children?

Yes. DHS determines on a case-by-case basis which sponsor or sponsors it will select to serve the needy children in an area according to 7 CFR §225.6.

§12.618. What documentation is a sponsor required to submit to show compliance with the Single Audit Act?

A sponsor must submit one of the following forms of documentation:

(1) a copy of an audit from a specific fiscal year that DHS has found compliant with the single audit requirements;

(2) a completed DHS Single Audit Identification Data form assuring that the contractor will submit an audit compliant with the single audit requirements as stated in 7 CFR Part 3052 by the prescribed audit due date; or

(3) evidence that the contractor is not subject to the single audit requirements according to 7 CFR Part 3052.

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 August 13, 2003.

TRD-200305140
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 3. APPLICATION PROCESS

40 TAC §§12.641 - 12.643

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.641. How does a sponsor apply to participate in the SFSP?

A sponsor must submit a completed application and all necessary supporting documentation to DHS by June 15 of the fiscal year for which the application is intended according to 7 CFR §225.6(b).

§12.642. What must a sponsor do if the information in its application changes?

A sponsor must submit an amendment when information in its application changes.

§12.643. What criteria does DHS use to approve or deny applications?

DHS approves or denies applications and subsequent amendments according to 7 CFR §225.6.

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 August 13, 2003.

TRD-200305141
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 4. SPONSOR STANDARDS AND RESPONSIBILITIES

40 TAC §§12.651 - 12.662

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.651. What are the rights and responsibilities of a sponsor that participates in the SFSP?

A sponsor must enter into an agreement with DHS to participate in the SFSP according to 7 CFR §225.6. This agreement is a legally binding document that specifies the rights and responsibilities of both the sponsor and DHS.

§12.652. Must a sponsor implement a particular financial management system?

Yes. A sponsor must implement the financial management system DHS mandates and maintain records supporting its participation according to 7 CFR §225.9 and 7 CFR Parts 3015, 3016, and 3019.

§12.653. Must a sponsor maintain records and documents related to its participation in the SFSP?

Yes. A sponsor must maintain financial documents, statistical records, and all other records of services for which it submits a claim in the manner and detail DHS prescribes.

§12.654. How long must a sponsor maintain records and documents pertaining to the program?

A sponsor must maintain all records and documents for the longer of three years and 90 days after the end of the program fiscal year to which they pertain or until all litigation, claims, audits, and investigation findings are resolved.

§12.655. When is litigation, a claim, an audit, or an investigation finding considered resolved?

DHS considers these actions resolved when a final order is issued in litigation or DHS and the sponsor sign a written agreement.

§12.656. Must a sponsor permit DHS to access its facilities and records?

Yes. A sponsor must allow DHS, USDA, and their representatives to inspect the sponsor's facilities and to audit, examine, and copy the sponsor's records during normal business hours.

§12.657. How must a sponsor procure foods, supplies, equipment, and other goods and services for the SFSP?

A sponsor must procure foods, supplies, equipment, and other goods and services for the SFSP according to 7 CFR §225.17.

§12.658. Must a sponsor manage its meal service according to any specific guidelines?

Yes. A sponsor must manage its meal service according to 7 CFR §225.16.

§12.659. How does a sponsor determine a participant's eligibility for free or reduced-price school meals?

A sponsor must determine eligibility according to 7 CFR §§225.2, 225.6, 225.13, 225.15, 225.17-225.19, and 245.6a.

§12.660. Must a sponsor comply with specific health standards when operating its food service?

Yes. A sponsor must comply with the health standards in 7 CFR §§225.6, 225.7, and 225.16.

§12.661. Must a sponsor prevent discrimination against participants in its SFSP operations?

Yes. A sponsor must strictly adhere to and enforce the nondiscrimination requirements of 7 CFR §225.6, the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act.

§12.662. Will a sponsor be discriminated against in the SFSP?

DHS administers the SFSP without regard to race, color, national origin, sex, age, disability, religion, or political beliefs. DHS complies with the nondiscrimination requirements of 7 CFR §225.3 and §225.7, and 7 CFR Parts 15, 15(a), and 15(b).

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 August 13, 2003.

TRD-200305142
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 5. BUDGETS

40 TAC §§12.681 - 12.684

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.681. How must a sponsor submit an administrative budget for DHS approval?

A sponsor must submit its administrative budget for DHS approval according to 7 CFR §225.6.

§12.682. Can a sponsor adjust its approved budget?

Yes. However, since a sponsor's approved budget is part of its application, an adjustment to that budget is an application amendment that DHS must approve or deny.

§12.683. When must a sponsor submit budget information to DHS?

A sponsor must submit written justification for its original budget and for any amendments to DHS for approval before the planned effective date of the contract or amendment.

§12.684. Will DHS approve a budget adjustment retroactively?

No.

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 August 13, 2003.

TRD-200305143
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 6. FOOD SERVICE MANAGEMENT COMPANIES

40 TAC §§12.691 - 12.693

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.691. Can a sponsor contract with a food service management company or school food authority to obtain meals?

Yes.

§12.692. How does a sponsor contract for the services of a food service management company (FSMC) or school food authority (SFA)?

A sponsor must contract the services of an FSMC or SFA according to 7 CFR §225.6 and §225.15.

§12.693. If a sponsor purchases meals from a food service management company, must it establish a special account for operating costs?

No. DHS does not require sponsors to establish a special account for operating costs.

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 August 13, 2003.

TRD-200305144
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 7. START-UP AND ADVANCE PAYMENTS

40 TAC §§12.701 - 12.703

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.701. Does DHS provide start-up payments to sponsors?

No. DHS does not exercise the option to issue start-up payments according to 7 CFR §225.9.

§12.702. Does DHS provide advance payment to sponsors before the end of the month in which the costs will be incurred?

Yes. DHS provides advance payment according to 7 CFR §§225.5, 225.6, and 225.9.

§12.703. Is there a limit to the amount of an advance payment?

No. DHS allows sponsors to request advances without a specific limit according to 7 CFR §§225.5, 225.6, and 225.9.

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 August 13, 2003.

TRD-200305145
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 8. COMMODITIES

40 TAC §12.711, §12.712

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.711. Does DHS provide commodity assistance to sponsors?

Yes. DHS provides commodity assistance to sponsors according to 7 CFR §225.9.

§12.712. How must a sponsor use these commodities?

A sponsor must use these commodities according to 7 CFR §225.9.

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 August 13, 2003.

TRD-200305146
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 9. REIMBURSEMENT

40 TAC §§12.721 - 12.735

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.721. Must a sponsor follow specific guidelines when claiming reimbursement?

Yes. When claiming reimbursement, a sponsor must comply with 7 CFR §225.9.

§12.722. Under what authority does DHS reimburse sponsors in the SFSP?

DHS reimburses sponsors according to USDA guidance and annually established rates of reimbursement according to 7 CFR §225.9 and the National School Lunch Act (42 U.S.C. §1766), as amended.

§12.723. Does DHS reimburse the cost of meals served to adults performing labor necessary for the operation of the SFSP?

Yes. The cost of meals served to adults who perform labor necessary for the operation of the SFSP is an allowable program cost according to 7 CFR §225.9(d).

§12.724. Does DHS provide supplemental reimbursement for meals served to children?

Subject to the availability of funds appropriated by the Texas Legislature, DHS may provide supplemental reimbursement for eligible meals served to eligible children by approved SFSP sponsors.

§12.725. Is there a specific deadline by which a sponsor must submit a claim for reimbursement?
A sponsor must ensure that claims for reimbursement are postmarked or received by DHS no later than 60 days after the end of the claim month.

§12.726. When must a sponsor combine two consecutive months of service on a single claim for reimbursement?
A sponsor that operates fewer than 10 days in the final month of service must combine the final month with the immediately preceding month to create a single claim.

§12.727. Is there a specific deadline by which a sponsor must submit a claim for reimbursement of two consecutive months of service?
A sponsor must ensure that the claim for reimbursement is postmarked or received by DHS no later than 60 days after the last day of meal service covered by the claim.

§12.728. Will DHS pay a claim for reimbursement if it is received or postmarked later than 60 days after the end of the claim month?
DHS will not pay a claim that is received or postmarked after the deadline unless USDA finds that good cause beyond the sponsor's control delayed the submission of the claim.

§12.729. How does DHS handle a claim received later than 60 days after the end of the claim month(s)?
DHS notifies the sponsor that it may submit a written request for payment demonstrating that good cause beyond the sponsor's control caused the claim to be received by DHS or postmarked after the deadline.

§12.730. What happens if DHS finds that good cause did not exist?
DHS notifies the sponsor that its request is not approved and will not be forwarded to USDA for consideration.

§12.731. What happens if DHS finds that good cause beyond the sponsor's control existed?
DHS forwards the request to USDA with a recommendation to pay the claim.

§12.732. What happens if USDA finds that good cause existed?
DHS pays the claim.

§12.733. What happens if USDA finds that good cause did not exist?
DHS may grant an exception and pay a late claim as long as the sponsor:

(1) requests an exception in writing; and

(2) has not been granted an exception in the 36 months preceding the month for which a request for an exception is submitted.

§12.734. Does a sponsor have the option not to submit a request for payment of a late claim based on good cause?
Yes.

§12.735. If a sponsor chooses not to submit a request for payment of a late claim based on good cause, can a sponsor still be reimbursed for that claim?
DHS may grant an exception and pay a late claim as long as the sponsor:

(1) requests an exception in writing; and

(2) has not been granted an exception in the 36 months preceding the month for which a request for an exception is submitted.

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 August 13, 2003.

TRD-200305147
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 10. PROGRAM REVIEWS AND TECHNICAL ASSISTANCE

40 TAC §§12.751 - 12.753

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.751. Does DHS monitor a sponsor's activities?
Yes. DHS monitors a sponsor's activities according to 7 CFR §225.7.

§12.752. Is a sponsor required to administer and monitor its program operations?
Yes. A sponsor must administer and monitor its program operations according to 7 CFR §225.15.

§12.753. Is a sponsor required to conduct reviews of its facilities?
Yes. A sponsor must conduct reviews of its facilities according to 7 CFR §225.15.

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 August 13, 2003.

TRD-200305148
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 11. AUDITS

40 TAC §§12.761 - 12.764

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.761. Is a sponsor that participates in the SFSP subject to audit?
A sponsor that participates in the SFSP is subject to the single audit requirements according to 7 CFR §225.10 and 7 CFR Part 3052.

§12.762. Are certain sponsors exempt from the single audit requirements?
Yes. A sponsor that is a military installation is not subject to the single audit requirements according to 7 CFR Part 3052.

§12.763. When is an audit considered acceptable?

The sponsor has not fulfilled the audit requirement until DHS determines that the audit the sponsor submitted is acceptable according to the requirements of the Single Audit Act.

§12.764. How is a sponsor informed of its obligation to comply with the single audit requirements?

(a) DHS notifies the sponsor in writing, upon approval of its application to participate in the SFSP, that it is subject to the single audit requirements in 7 CFR Part 3052. The notification includes the date by which the sponsor must submit an acceptable audit to DHS.

(b) DHS also provides the sponsor with at least two written notices reminding the sponsor when its audit must be submitted to DHS.

(1) DHS issues one notice by regular mail no later than six months after the end of the sponsor's fiscal year for which the audit is due.

(2) DHS issues a subsequent notice by certified and regular mail eight months after the end of the sponsor's fiscal year for which the audit is due. This notice also informs the sponsor that failure to submit the audit to DHS by the required due date will result in adverse action, up to and including termination of their agreement.

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 August 13, 2003.

TRD-200305149
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 12. SANCTIONS AND PENALTIES

40 TAC §§12.771 - 12.784

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.771. Does DHS investigate irregularities in or complaints about a sponsor's operation of the SFSP?

DHS investigates irregularities in and complaints about a sponsor's operation of the SFSP and sanctions sponsors that do not meet requirements according to 7 CFR §225.11 and §225.12.

§12.772. What does DHS do if a sponsor that is subject to single audit requirements fails to submit an audit as required?

If DHS does not receive an audit by the established deadline, DHS notifies the sponsor by both certified mail, return receipt requested, and by standard United States Postal Service first-class mail that:

(1) the sponsor failed to submit an audit as required; and

(2) DHS intends to terminate the sponsor's agreement, in whole or in part, effective the first day of the month following the established deadline.

§12.773. Can a sponsor appeal this action?

Yes. A sponsor can appeal this action according to Chapter 79 of this title (relating to Legal Services) and 7 CFR §225.13.

§12.774. What does DHS do if extenuating circumstances prevent a sponsor from conducting an audit as required?

If DHS determines that there are extenuating circumstances, DHS may conduct an audit, either directly or through a third party.

§12.775. Who must pay for this audit?

The sponsor must pay for this audit.

§12.776. What does DHS do if a sponsor submits an audit that does not meet the single audit requirements as specified in 7 CFR Part 3052?

If a sponsor submits an unacceptable audit, DHS:

(1) notifies the sponsor of the audit's specific deficiencies;

(2) advises the sponsor of its right to appeal such a determination; and

(3) advises the sponsor that it has 30 calendar days from the date of the notification to submit an acceptable audit to DHS.

§12.777. Can DHS extend the deadline by which a sponsor must submit an audit?

Yes. DHS may extend the time within which a sponsor must submit an audit if DHS determines such an extension is justified according to 7 CFR §3052.400.

§12.778. How must a sponsor request an extension of its audit deadline?

A sponsor must submit a written request for an extension. The request must:

(1) be postmarked or received by DHS no later than 30 calendar days before the prescribed audit deadline;

(2) include a justification that demonstrates good cause beyond the sponsor's control for why the audit cannot be submitted by the prescribed due date; and

(3) specify the new desired audit due date.

§12.779. Is DHS required to grant a sponsor an extension of its audit deadline?

No. DHS grants an extension of the audit due date only if:

(1) the sponsor's written request for an extension is postmarked or received by DHS no later than 30 calendar days before the audit due date; and

(2) DHS determines the reason the audit cannot be submitted by the due date demonstrates good cause beyond the sponsor's control.

§12.780. How is a new audit due date determined?

(a) If DHS reviews the sponsor's request for an extension of the audit due date and determines the new audit due date requested by the sponsor is reasonable, DHS will approve the new audit due date requested by the sponsor.

(b) If DHS determines the new date requested by the sponsor is not reasonable, DHS will assign another audit due date.

§12.781. How is the sponsor informed of the decision regarding the extension of its audit due date?

DHS informs the sponsor in writing whether the sponsor's request for an extension of its audit due date is approved. If the request is approved, DHS includes the new audit due date in the notice to the sponsor.

§12.782. Can a sponsor request more than one extension?

Yes. Each extension request must:

(1) be submitted in writing;

(2) be postmarked or received by DHS no later than 30 calendar days before the prescribed audit deadline;

(3) clearly identify the circumstances that prevent the sponsor from submitting its audit by the prescribed audit deadline; and

(4) specify the new desired audit due date.

§12.783. What does DHS do if DHS does not receive an audit by the specified deadline and an extension of the deadline has not been granted?

DHS notifies the sponsor by both certified mail, return receipt requested, and by standard United States Postal Service first class mail that:

(1) the sponsor failed to submit an audit as required; and

(2) DHS intends to terminate the sponsor's agreement, in whole or in part, effective the first day of the month following the prescribed audit due date.

§12.784. Can a sponsor participate in any of the Special Nutrition Programs if DHS terminates its participation in the SFSP for failing to comply with the single audit requirements as stated in 7 CFR Part 3052?

A sponsor must submit an acceptable audit for each outstanding audit year and comply with the single audit requirements according to 7 CFR Part 3052 to be eligible to participate in any of the Special Nutrition Programs.

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 August 13, 2003.

TRD-200305150
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 13. SUSPENSION AND TERMINATION

40 TAC §12.801

The new section is proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new section implements the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.801. What regulations does DHS use to deny an application for participation in the SFSP and to terminate an agreement between DHS and a sponsor?

DHS denies applications and terminates agreements, in whole or in part, according to 7 CFR §§225.6, 225.11, and 225.18; and 7 CFR Part 3015.

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 August 13, 2003.

TRD-200305151
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 14. APPEALS

40 TAC §§12.811 - 12.814

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.811. How does a sponsor or food service management company (FSMC) appeal an adverse action by DHS?

A sponsor or FSMC can appeal any adverse action by submitting a written request for a hearing according to 7 CFR §225.13.

§12.812. When must a sponsor or food service management company (FSMC) submit an appeal?

According to 7 CFR §225.13(b)(2), a sponsor or FSMC must submit a written request for an appeal hearing within 10 days of receiving a notice of adverse action taken by DHS.

§12.813. If DHS declines to forward a late claim to USDA for a determination of good cause, can a sponsor appeal this decision?

A sponsor can appeal a DHS decision not to request a USDA determination of good cause for submission of a late claim, according to Division 9 of this subchapter (relating to Reimbursement).

§12.814. Can a sponsor appeal a USDA decision that a late claim is ineligible for payment?

No.

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 August 13, 2003.

TRD-200305152
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER C. SPECIAL MILK PROGRAM (SMP)

DIVISION 1. OVERVIEW AND PURPOSE

40 TAC §§12.871 - 12.873

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.871. What is the purpose of the Special Milk Program (SMP)?

The Child Nutrition Act of 1966, as amended, established the SMP to encourage the consumption of fluid milk by children according to 7 CFR Parts 215 and 245.

§12.872. What do certain words and terms in the subchapter mean?

(a) The following words and terms, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise:

(1) CFR--The Code of Federal Regulations.

(2) DHS--The Texas Department of Human Services.

(3) SMP--Special Milk Program.

(4) USDA--The United States Department of Agriculture.

(b) Other terms used in this subchapter are defined in 7 CFR §215.2 and §245.2.

§12.873. How is the SMP administered in Texas?

(a) DHS administers the SMP in nonprofit private schools, nonprofit private residential child care institutions, summer camps, and nonprofit nonresidential child care facilities according to 7 CFR Parts 215, 245, and 3015; USDA Food and Nutrition Service (FNS) instructions; and other requirements specified by FNS.

(b) The Texas Department of Agriculture administers the SMP in public schools.

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 August 13, 2003.

TRD-200305153
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 2. CONTRACTOR ELIGIBILITY

40 TAC §12.881, §12.882

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.881. How does a contractor qualify to participate in the SMP?

A contractor must meet the definitions and requirements of a school or child care institution according to 7 CFR §215.2 and §215.7.

§12.882. What information must a contractor submit when applying to participate in the SMP?

A contractor must submit a complete application to participate in the SMP according to the requirements of 7 CFR Parts 215 and 245, in addition to one of the following items to demonstrate compliance with single audit requirements:

(1) a copy of an audit for a specific contractor fiscal year that DHS has found compliant with the single audit requirements;

(2) a completed DHS Single Audit Identification Data form assuring that the contractor will submit an audit compliant with the single audit requirements as stated in 7 CFR Part 3052 by the prescribed audit due date; or

(3) evidence that the contractor is not subject to the single audit requirements in 7 CFR Part 3052.

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 August 13, 2003.

TRD-200305154
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 3. CONTRACTOR PARTICIPATION REQUIREMENTS AND RESPONSIBILITIES

40 TAC §§12.901 - 12.903

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.901. What are the rights and responsibilities of a contractor that participates in the SMP?

A contractor must enter into an agreement with DHS to participate in the SMP. This agreement is a legally binding document that specifies the rights and responsibilities of both the contractor and DHS according to 7 CFR Parts 215, 245, 3015, 3019, 3052, 15, 15(a), and 15(b).

§12.902. Is a contractor that participates in the SMP subject to federal and state procurement guidelines?

Yes. A contractor participating in the SMP must comply with federal and state procurement guidelines stated in 7 CFR §215.14a.

§12.903. How does a contractor determine if an individual is eligible to participate and receive benefits in the SMP?

A contractor determines an individual's eligibility to participate in and receive benefits from the SMP according to 7 CFR §§245.3, 245.5, 245.6, and 245.9.

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 August 13, 2003.

TRD-200305155
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 4. REIMBURSEMENT AND FINANCIAL MANAGEMENT

40 TAC §§12.921 - 12.929

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.921. How does DHS reimburse a contractor for its participation in the SMP?

DHS reimburses a contractor according to the guidelines and annually established rates of reimbursement as stipulated in 7 CFR §§215.8-215.10.

§12.922. Will DHS pay a claim for reimbursement if it is received or postmarked later than 60 days after the end of the claim month?

DHS will not pay a claim that is received or postmarked after the deadline unless the USDA finds that good cause beyond the contractor's control delayed the submission of the claim.

§12.923. How does DHS process a claim received later than 60 days after the end of the claim month(s)?

DHS notifies the contractor that it may submit a written request for payment demonstrating that good cause beyond the contractor's control caused the claim to be received by DHS or postmarked after the deadline.

§12.924. What happens if DHS finds that good cause did not exist?

DHS notifies the contractor that its request is not approved and will not be forwarded to USDA for consideration.

§12.925. What happens if DHS finds that good cause beyond the contractor's control existed?

DHS forwards the request to USDA with a recommendation to pay the claim.

§12.926. What happens if USDA finds that good cause existed?

DHS pays the claim.

§12.927. What happens if USDA finds that good cause did not exist?

DHS may grant an exception and pay a late claim as long as the contractor:

(1) requests an exception in writing; and

(2) has not been granted an exception in the 36 months preceding the month for which a request for an exception is submitted.

§12.928. Does a contractor have the option not to submit a request for payment of a late claim based on good cause?

Yes.

§12.929. If a contractor chooses not to submit a request for payment of a late claim based on good cause, can a contractor still be reimbursed for that claim?

DHS may grant an exception and pay a late claim as long as the contractor:

(1) requests an exception in writing; and

(2) has not been granted an exception in the 36 months preceding the month for which a request for an exception is submitted.

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 August 13, 2003.

TRD-200305156
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 5. PROGRAM REVIEWS, MONITORING, AND MANAGEMENT EVALUATIONS

40 TAC §12.941, §12.942

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.941. How does DHS ensure that a contractor complies with SMP requirements?

DHS monitors contractor compliance according to 7 CFR §215.11 and §245.11.

§12.942. Does the USDA conduct management evaluations of contractors operating the SMP?

Yes. The USDA Food and Nutrition Service and the United States Office of Inspector General (OIG) may visit contractor operations. The OIG may audit any contractor's records and operations according to 7 CFR §215.13.

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 August 13, 2003.

TRD-200305157
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 6. AUDITS

40 TAC §§12.951 - 12.955

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.951. Must a contractor that participates in the SMP conduct audits?

Yes. A contractor participating in the SMP must conduct audits according to 7 CFR §220.15, 7 CFR Part 3052, and the applicable Office of Management and Budget (OMB) circulars as required by USDA's Food and Nutrition Service.

§12.952. Must a contractor that participates in the SMP comply with the requirements of the Single Audit Act?

Yes. An institution participating in the SMP is subject to the requirements of the Single Audit Act as contained in Office of Management and Budget Circular A-133.

§12.953. Are certain contractors not subject to the requirements of the Single Audit Act?

Yes. A contractor that is a federal entity, such as a military installation or an Indian reservation, is not subject to the Single Audit Act.

§12.954. When is an audit considered acceptable?

The contractor has not fulfilled the audit requirement until DHS determines that the audit the contractor submitted is acceptable according to the requirements of the Single Audit Act.

§12.955. How is a contractor informed of its obligation to comply with the single audit requirements?

(a) DHS notifies the contractor in writing, upon approval of its application to participate in the SMP, that it is subject to the single audit requirements in 7 CFR Part 3052. The notification includes the date by which the contractor must submit an acceptable audit to DHS.

(b) DHS also provides the contractor with at least two written notices reminding the contractor when its audit must be submitted to DHS.

(1) DHS issues one notice by regular mail no later than six months after the end of the contractor's fiscal year for which the audit is due.

(2) DHS issues a subsequent notice by certified and regular mail eight months after the end of the contractor's fiscal year for which the audit is due. This notice also informs the contractor that failure to submit the audit to DHS by the required due date will result in adverse action, up to and including termination of their agreement.

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 August 13, 2003.

TRD-200305158
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 7. SANCTIONS, PENALTIES, AND FISCAL ACTION

40 TAC §§12.971 - 12.985

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.971. How does DHS penalize a contractor who is found guilty of embezzling, willfully misapplying, stealing, or obtaining by fraud any funds, assets, or property, whether received directly or indirectly from DHS?

DHS imposes penalties according to 7 CFR §215.6 and §215.12.

§12.972. Does DHS take fiscal action against a contractor that fails to comply with the program requirements specified in 7 CFR Parts 215 and 245?

Yes. DHS takes fiscal action according to 7 CFR §215.12 and §215.13.

§12.973. Does DHS investigate irregularities in or complaints about a contractor's operation of the SMP?

Yes. DHS investigates irregularities in or complaints about a contractor's operation of the SMP according to 7 CFR §215.12.

§12.974. What does DHS do if a contractor that is subject to single audit requirements fails to submit an audit as required?

If DHS does not receive an audit before the established deadline, DHS notifies the contractor by both certified mail, return receipt requested, and by standard United States Postal Service first-class mail that:

(1) the contractor failed to submit an audit as required; and

(2) DHS intends to terminate the contractor's agreement, in whole or in part, effective the first day of the month following the established deadline.

§12.975. What does DHS do if extenuating circumstances prevent a contractor from conducting an audit as required?

If DHS determines that there are extenuating circumstances, DHS may conduct an audit, either directly or through a third party.

§12.976. Who must pay for this audit?

The contractor must pay for this audit.

§12.977. What does DHS do if a contractor submits an audit that does not meet the single audit requirements specified in 7 CFR Part 3052?

If a contractor submits an unacceptable audit, DHS:

(1) notifies the contractor of the audit's specific deficiencies;

(2) advises the contractor of its right to appeal such a determination; and

(3) advises the contractor that it has 30 calendar days from the date of the notification to submit an acceptable audit to DHS.

§12.978. Can DHS extend the deadline by which a contractor must submit an audit?

Yes. DHS may extend the time within which a contractor must submit an audit if DHS determines such an extension is justified according to 7 CFR §3052.400.

§12.979. How must a contractor request an extension of its audit deadline?

A contractor must submit a written request for an extension. The request must:

(1) be postmarked or received by DHS no later than 30 calendar days before the prescribed audit deadline;

(2) include a justification that demonstrates good cause beyond the contractor's control for why the audit cannot be submitted by the prescribed due date; and

(3) specify the new desired audit due date.

§12.980. Is DHS required to grant a contractor an extension of its audit deadline?

No. DHS grants an extension of the audit due date only if:

(1) the contractor's written request for an extension is postmarked or received by DHS no later than 30 calendar days before the audit due date; and

(2) DHS determines the reason the audit cannot be submitted by the due date demonstrates good cause beyond the contractor's control.

§12.981. How is a new audit due date determined?

(a) If DHS reviews the contractor's request for an extension of the audit due date and determines the new audit due date requested by the contractor is reasonable, DHS will approve the new audit due date requested by the contractor.

(b) If DHS determines the new date requested by the contractor is not reasonable, DHS will assign another audit due date.

§12.982. How is the contractor informed of the decision regarding the extension of its audit due date?

DHS informs the contractor in writing whether the contractor's request for an extension of its audit due date is approved. If the request is approved, DHS includes the new audit due date in the notice to the contractor.

§12.983. Can a contractor request more than one extension?

Yes. Each extension request must:

(1) be submitted in writing;

(2) be postmarked or received by DHS no later than 30 calendar days before the prescribed audit deadline;

(3) clearly identify the circumstances that prevent the contractor from submitting its audit by the prescribed audit deadline; and

(4) specify the new desired audit due date.

§12.984. What does DHS do if DHS does not receive an audit by the specified deadline and an extension of the deadline has not been granted?

DHS notifies the contractor by both certified mail, return receipt requested, and by standard United States Postal Service first- class mail that:

(1) the contractor failed to submit an audit as required; and

(2) DHS intends to terminate the contractor's agreement, in whole or in part, effective the first day of the month following the prescribed audit due date.

§12.985. Can a contractor participate in any of the Special Nutrition Programs if DHS terminates its participation in the SMP for failing to comply with the single audit requirements?

A contractor must submit an acceptable audit for each outstanding audit year and comply with the single audit requirements according to 7 CFR Part 3052 to be eligible to reapply to participate in any of the Special Nutrition Programs.

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 August 13, 2003.

TRD-200305159
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 8. SUSPENSION AND TERMINATION

40 TAC §12.991

The new section is proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new section implements the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.991. How does DHS terminate or suspend a contract?

DHS terminates or suspends contracts according to 7 CFR §215.7 and §215.15.

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 August 13, 2003.

TRD-200305160
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 9. APPEALS

40 TAC §12.1001, §12.1002

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1001. Does a contractor applying to participate in the SMP have the right to appeal the denial of its contract application?

No.

§12.1002. Does a contractor participating in the SMP have the right to appeal any action that affects its continued participation in the SMP or affects its claim for reimbursement?

A contractor participating in the SMP has limited appeal rights.

(1) The only adverse action that an SMP contractor may appeal is an adjustment to its claim for reimbursement required as a direct result of a finding from an administrative review conducted by DHS or USDA.

(2) The contractor requests an appeal for such action according to 7 CFR §215.11 and Chapter 79 of this title (relating to Legal Services).

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 August 13, 2003.

TRD-200305161
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER D. SCHOOL BREAKFAST PROGRAM (SBP)

DIVISION 1. OVERVIEW AND PURPOSE

40 TAC §§12.1051 - 12.1053

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1051. What is the purpose of the School Breakfast Program (SBP)?

The Child Nutrition Act of 1966, as amended, established the SBP to initiate, maintain, and expand nonprofit breakfast programs in schools according to 7 CFR Parts 220 and 245.

§12.1052. What do certain words and terms in this subchapter mean?

(a) The following words and terms, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise:

(1) CFR--The Code of Federal Regulations.

(2) DHS--The Texas Department of Human Services.

(3) SBP--School Breakfast Program.

(4) USDA--The United States Department of Agriculture.

(b) Other terms used in this subchapter are defined in 7 CFR §220.2 and §245.2.

§12.1053. How is the SBP administered in Texas?

(a) DHS administers the SBP in nonprofit private schools and nonprofit residential child care institutions according to 7 CFR Parts 220, 245, and 3015; USDA Food and Nutrition Service (FNS) instructions; and other requirements specified by FNS.

(b) The Texas Department of Agriculture administers the SBP in public schools.

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 August 13, 2003.

TRD-200305162
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 2. CONTRACTOR ELIGIBILITY

40 TAC §12.1071, §12.1072

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1071. How does a contractor qualify to participate in the SBP?

A contractor must meet the definitions and requirements of a school and provide breakfast to children according to 7 CFR §220.2.

§12.1072. What information must a contractor submit when applying to participate in the SBP?

A contractor must submit a complete application to participate in the SBP according to the requirements of 7 CFR Parts 220 and 245, in addition to one of the following items to demonstrate compliance with single audit requirements:

(1) a copy of an audit for a specific contractor fiscal year that DHS has found compliant with the single audit requirements;

(2) a completed DHS Single Audit Identification Data form assuring that the contractor will submit an audit compliant with the single audit requirements as stated in 7 CFR Part 3052 by the prescribed audit due date; or

(3) evidence that the contractor is not subject to the single audit requirements in 7 CFR Part 3052.

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 August 13, 2003.

TRD-200305163
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 3. CONTRACTOR PARTICIPATION REQUIREMENTS AND RESPONSIBILITIES

40 TAC §§12.1091 - 12.1094

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1091. What are the rights and responsibilities of a contractor that participates in the SBP?

A contractor must enter into an agreement with DHS to participate in the SBP. This agreement is a legally binding document that specifies the rights and responsibilities of both the contractor and DHS according to 7 CFR Parts 220, 245, 3015, 3052, 3019, 15, 15(a), and 15(b).

§12.1092. Does DHS impose any special curriculum or educational conditions or restrictions as a requirement for participation in the SBP?

No. DHS does not impose any special curriculum or educational requirements according to 7 CFR §220.17.

§12.1093. Is a contractor that participates in the SBP subject to federal and state procurement guidelines?

Yes. A contractor participating in the SBP must comply with federal and state procurement guidelines stated in 7 CFR §220.16.

§12.1094. How does a contractor determine if an individual is eligible to participate and receive benefits in the SBP?

A contractor determines an individual's eligibility to participate and receive benefits in the SBP according to 7 CFR §§245.3, 245.5, 245.6, and 245.9.

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 August 13, 2003.

TRD-200305164
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 4. REIMBURSEMENT AND FINANCIAL MANAGEMENT

40 TAC §§12.1101 - 12.1110

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1101. How does DHS reimburse a contractor for its participation in the SBP?

DHS reimburses each contractor according to the guidelines and annually established rates of reimbursement as stipulated in 7 CFR §§220.9-220.11.

§12.1102. Does DHS make advance payments?

No.

§12.1103. Will DHS pay a claim for reimbursement if it is received or postmarked later than 60 days after the end of the claim month?

DHS will not pay a claim that is received or postmarked after the deadline unless the USDA finds that good cause beyond the contractor's control delayed the submission of the claim.

§12.1104. How does DHS process a claim received later than 60 days after the end of the claim month(s)?

DHS notifies the contractor that it may submit a written request for payment demonstrating that good cause beyond the contractor's control caused the claim to be received by DHS or postmarked after the deadline.

§12.1105. What happens if DHS finds that good cause did not exist?

DHS notifies the contractor that its request is not approved and will not be forwarded to USDA for consideration.

§12.1106. What happens if DHS finds that good cause beyond the contractor's control existed?

DHS forwards the request to USDA with a recommendation to pay the claim.

§12.1107. What happens if USDA finds that good cause existed?

DHS pays the claim.

§12.1108. What happens if USDA finds that good cause did not exist?

DHS may grant an exception and pay a late claim as long as the contractor:

(1) requests an exception in writing; and

(2) has not been granted an exception in the 36 months preceding the month for which a request for an exception is submitted.

§12.1109. Does a contractor have the option not to submit a request for payment of a late claim based on good cause?

Yes.

§12.1110. If a contractor chooses not to submit a request for payment of a late claim based on good cause, can a contractor still be reimbursed for that claim?

DHS may grant an exception and pay a late claim as long as the contractor:

(1) requests an exception in writing; and

(2) has not been granted an exception in the 36 months preceding the month for which a request for an exception is submitted.

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 August 13, 2003.

TRD-200305165
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 5. PROGRAM REVIEWS, MONITORING, AND MANAGEMENT EVALUATIONS

40 TAC §12.1121, §12.1122

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1121. How does DHS ensure that a contractor complies with SBP requirements?

DHS monitors contractor compliance according to 7 CFR §245.11 and 7 CFR Part 220.

§12.1122. Does the USDA conduct management evaluations of contractors operating the SBP?

Yes. The USDA Food and Nutrition Service and the United States Office of Inspector General (OIG) may visit contractor operations. The OIG may audit any contractor's records and operations according to 7 CFR §220.15.

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 August 13, 2003.

TRD-200305166
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 6. AUDITS

40 TAC §§12.1131 - 12.1135

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1131. Must a contractor that participates in the SBP conduct audits?
Yes. A contractor participating in the SBP must conduct audits according to 7 CFR §220.15, 7 CFR Part 3052, and the applicable Office of Management and Budget (OMB) circulars as required by USDA's Food and Nutrition Service.

§12.1132. Must a contractor that participates in the SBP comply with the requirements of the Single Audit Act?
Yes. An institution participating in the SBP is subject to the requirements of the Single Audit Act as contained in Office of Management and Budget Circular A-133.

§12.1133. Are certain contractors not subject to the requirements of the Single Audit Act?
Yes. A contractor that is a federal entity, such as a military installation or an Indian reservation, is not subject to the Single Audit Act.

§12.1134. When is an audit considered acceptable?
The contractor has not fulfilled the audit requirement until DHS determines that the audit the contractor submitted is acceptable according to the requirements of the Single Audit Act.

§12.1135. How is a contractor informed of its obligation to comply with the single audit requirements?

(a) DHS notifies the contractor in writing, upon approval of its application to participate in the SBP, that it is subject to the single audit requirements in 7 CFR Part 3052. The notification includes the date by which the contractor must submit an acceptable audit to DHS.

(b) DHS also provides the contractor with at least two written notices reminding the contractor when its audit must be submitted to DHS.

(1) DHS issues one notice by regular mail no later than six months after the end of the contractor's fiscal year for which the audit is due.

(2) DHS issues a subsequent notice by certified and regular mail eight months after the end of the contractor's fiscal year for which the audit is due. This notice also informs the contractor that failure to submit the audit to DHS by the required due date will result in adverse action, up to and including termination of their agreement.

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 August 13, 2003.

TRD-200305167
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 7. SANCTIONS, PENALTIES, AND FISCAL ACTION

40 TAC §§12.1151 - 12.1165

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1151. How does DHS penalize a contractor who is found guilty of embezzling, willfully misapplying, stealing, or obtaining by fraud any funds, assets, or property, whether received directly or indirectly from DHS?
DHS imposes penalties according to 7 CFR §220.6 and §220.18.

§12.1152. Does DHS take fiscal action against a contractor that fails to comply with the program requirements specified in 7 CFR Parts 220 and 245?
Yes. DHS takes fiscal action according to 7 CFR §220.13 and §220.14.

§12.1153. Does DHS investigate irregularities in or complaints about a contractor's operation of the SBP?
DHS investigates irregularities in or complaints about a contractor's operation of the SBP according to 7 CFR §220.13.

§12.1154. What does DHS do if a contractor that is subject to single audit requirements fails to submit an audit as required?
If DHS does not receive an audit before the established deadline, DHS notifies the contractor by both certified mail, return receipt requested, and by standard United States Postal Service first-class mail that:

(1) the contractor failed to submit an audit as required; and

(2) DHS intends to terminate the contractor's agreement, in whole or in part, effective the first day of the month following the established deadline.

§12.1155. What does DHS do if extenuating circumstances prevent a contractor from conducting an audit as required?
If DHS determines that there are extenuating circumstances, DHS may conduct an audit, either directly or through a third party.

§12.1156. Who must pay for this audit?
The contractor must pay for this audit.

§12.1157. What does DHS do if a contractor submits an audit that does not meet the single audit requirements specified in 7 CFR Part 3052?
If a contractor submits an unacceptable audit, DHS:

(1) notifies the contractor of the audit's specific deficiencies;

(2) advises the contractor of its right to appeal such a determination; and

(3) advises the contractor that it has 30 calendar days from the date of the notification to submit an acceptable audit to DHS.

§12.1158. Can DHS extend the deadline by which a contractor must submit an audit?

Yes. DHS may extend the time within which a contractor must submit an audit if DHS determines such an extension is justified according to 7 CFR §3052.400.

§12.1159. How must a contractor request an extension of its audit deadline?

A contractor must submit a written request for an extension. The request must:

(1) be postmarked or received by DHS no later than 30 calendar days before the prescribed audit deadline;

(2) include a justification that demonstrates good cause beyond the contractor's control for why the audit cannot be submitted by the prescribed due date; and

(3) specify the new desired audit due date.

§12.1160. Is DHS required to grant a contractor an extension of its audit deadline?

No. DHS grants an extension of the audit due date only if:

(1) the contractor's written request for an extension is postmarked or received by DHS no later than 30 calendar days before the audit due date; and

(2) DHS determines the reason the audit cannot be submitted by the due date demonstrates good cause beyond the contractor's control.

§12.1161. How is a new audit due date determined?

(a) If DHS reviews the contractor's request for an extension of the audit due date and determines the new audit due date requested by the contractor is reasonable, DHS will approve the new audit due date requested by the contractor.

(b) If DHS determines the new date requested by the contractor is not reasonable, DHS will assign another audit due date.

§12.1162. How is the contractor informed of the decision regarding the extension of its audit due date?

DHS informs the contractor in writing whether the contractor's request for an extension of its audit due date is approved. If the request is approved, DHS includes the new audit due date in the notice to the contractor.

§12.1163. Can a contractor request more than one extension?

Yes. Each extension request must:

(1) be submitted in writing;

(2) be postmarked or received by DHS no later than 30 calendar days before the prescribed audit deadline;

(3) clearly identify the circumstances that prevent the contractor from submitting its audit by the prescribed audit deadline; and

(4) specify the new desired audit due date.

§12.1164. What does DHS do if DHS does not receive an audit by the specified deadline and an extension of the deadline has not been granted?

DHS notifies the contractor by both certified mail, return receipt requested, and by standard United States Postal Service first- class mail that:

(1) the contractor failed to submit an audit as required; and

(2) DHS intends to terminate the contractor's agreement, in whole or in part, effective the first day of the month following the prescribed audit due date.

§12.1165. Can a contractor participate in any of the Special Nutrition Programs if DHS terminates its participation in the SBP for failing to comply with the single audit requirements?

A contractor must submit an acceptable audit for each outstanding audit year and comply with the single audit requirements according to 7 CFR Part 3052 to be eligible to reapply to participate in any of the Special Nutrition Programs.

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 August 13, 2003.

TRD-200305168
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 8. SUSPENSION AND TERMINATION

40 TAC §12.1191

The new section is proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new section implements the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1191. How does DHS terminate or suspend a contract?

DHS terminates or suspends contracts according to 7 CFR §220.7 and §220.18.

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 August 13, 2003.

TRD-200305169
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 9. APPEALS

40 TAC §12.1201, §12.1202

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1201. Does a contractor applying to participate in the SBP have the right to appeal the denial of its contract application?

No.

§12.1202. Does a contractor participating in the SBP have the right to appeal any action that affects its continued participation in the SBP or affects its claim for reimbursement?

A contractor participating in the SBP has limited appeal rights.

(1) The only adverse action that an SBP contractor may appeal is an adjustment to its claim for reimbursement required as a direct result of a finding from an administrative review conducted by DHS or USDA.

(2) The contractor requests an appeal for such action according to 7 CFR §220.13 and Chapter 79 of this title (relating to Legal Services).

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 August 13, 2003.

TRD-200305170
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER E. NATIONAL SCHOOL LUNCH PROGRAM (NSLP)

DIVISION 1. OVERVIEW AND PURPOSE

40 TAC §§12.1251 - 12.1253

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1251. What is the purpose of the National School Lunch Program (NSLP)?

The National School Lunch Act established the NSLP as a measure of national security to safeguard the health and well being of the nation's children and to encourage the domestic consumption of nutritious agricultural commodities and other food. The NSLP also provides an adequate supply of food and other facilities for the establishment, maintenance, operation, and expansion of nonprofit school lunch programs according to 7 CFR Parts 210 and 245.

§12.1252. What do certain words and terms in this subchapter mean?

(a) The following words and terms, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise:

(1) CFR--The Code of Federal Regulations.

(2) DHS--The Texas Department of Human Services.

(3) NSLP--National School Lunch Program.

(4) USDA--The United States Department of Agriculture.

(b) Other terms used in this subchapter are defined in 7 CFR §210.2 and §245.2.

(c) For the purposes of the Afterschool Care Snack program, the term "child" as defined in 7 CFR Part 210 is expanded to include individuals:

(1) through age 18, including children of migrant workers;

(2) who turn 19 during the school year; or

(3) who are determined to be mentally or physically disabled, regardless of age.

§12.1253. How is the NSLP administered in Texas?

(a) DHS administers the NSLP in nonprofit private schools and nonprofit residential child care institutions according to 7 CFR Parts 210, 245, and 3015; USDA's Food and Nutrition Service (FNS) instructions, and other requirements specified by FNS.

(b) The Texas Department of Agriculture administers the NSLP in public schools.

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 August 13, 2003.

TRD-200305171
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 2. CONTRACTOR ELIGIBILITY

40 TAC §12.1261 - 12.1264

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1261. How does a contractor qualify to participate in the NSLP?

A contractor must meet the definitions and requirements of a school and provide lunches to children according to 7 CFR §210.2.

§12.1262. What information must a contractor submit when applying to participate in the NSLP?

A contractor must submit a complete application to participate in the NSLP according to the requirements of 7 CFR Parts 210 and 245, in addition to one of the following items to demonstrate compliance with single audit requirements:

(1) a copy of an audit for a specific contractor fiscal year that DHS has found compliant with the single audit requirements;

(2) a completed DHS Single Audit Identification Data form assuring that the contractor will submit an audit compliant with the single audit requirements as stated in 7 CFR Part 3052 by the prescribed audit due date; or

(3) evidence that the contractor is not subject to the single audit requirements in 7 CFR Part 3052.

§12.1263. Must a school food authority (SFA) meet any specific requirements in order to be eligible to administer an Afterschool Care Snack program in the NSLP?

In order to administer an Afterschool Care Snack program in the NSLP, an SFA must operate the lunch component of the NSLP and retain final administrative and financial responsibility for the program.

§12.1264. What documentation must a school food authority (SFA) provide to demonstrate that an Afterschool Care Snack program facility has been determined exempt from state licensing requirements?

An SFA must provide written documentation from the Texas Department of Protective and Regulatory Services (PRS) stating that PRS has determined that the particular after school snack program facility is exempt from state licensing requirements.

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 August 13, 2003.

TRD-200305172
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 3. CONTRACTOR PARTICIPATION REQUIREMENTS AND RESPONSIBILITIES

40 TAC §§12.1281 - 12.1284

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1281. What are the rights and responsibilities of a contractor that participates in the NSLP?

(a) A contractor must enter into an agreement with DHS to participate in the NSLP. This agreement is a legally binding document that specifies the rights and responsibilities of both the sponsor and DHS as stated in 7 CFR Parts 210, 245, 3015, 3019, 3052, 15, 15(a), and 15(b).

(b) If a contractor operates an after school program, the contractor must agree, if approved, to sponsor or operate a program that:

(1) provides free snacks to all eligible children participating in an Afterschool Care Snack program operated in an area served by a school in which 50% or more of the enrolled children are eligible for free or reduced-price meals;

(2) charges no more than $.15 per snack served to children eligible for reduced-price meals if operating a site located in an area served by a school in which fewer than 50% of the enrolled children are eligible for free or reduced-price meals;

(3) provides children with regularly scheduled activities in an organized, structured, and supervised environment after their school day has ended, excluding weekends and holidays;

(4) includes educational or enrichment activities; and

(5) meets state or local licensing requirements as applicable, or otherwise meets state or local health and safety standards.

(c) The contractor must ensure that the program:

(1) is not comprised of an organized athletic program engaged in interscholastic or community level competitive sports; and

(2) does not limit membership for reasons other than space security. Where applicable, licensing requirements may include supervised athletic activities in their program.

§12.1282. Does DHS impose any special curriculum or educational conditions or restrictions as a requirement for participation in the NSLP?

No. DHS does not impose any special curriculum or educational requirements according to 7 CFR §210.27.

§12.1283. Is a contractor that participates in the NSLP subject to federal and state procurement guidelines?

Yes. A contractor participating in the NSLP must comply with federal and state procurement guidelines stated in 7 CFR §210.21.

§12.1284. How does a contractor determine if an individual is eligible to participate and receive benefits in the NSLP?

A contractor determines an individual's eligibility to participate and receive benefits in the NSLP according to 7 CFR §§245.3, 245.5, 245.6, and 245.9.

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 August 13, 2003.

TRD-200305173
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 4. REIMBURSEMENT AND FINANCIAL MANAGEMENT

40 TAC §§12.1301 - 12.1312

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1301. How does DHS reimburse a contractor for its participation in the NSLP?

DHS reimburses each contractor according to the guidelines and annually established rates of reimbursement as stipulated in 7 CFR §210.7 and §210.8.

§12.1302. Does DHS make advance payments?

No.

§12.1303. Can a school participating in an approved after school program claim reimbursement for snacks?

Yes. A school participating in an approved after school program can claim reimbursement for one snack per child per day served to a child who attends the after school program at that school.

§12.1304. How does DHS determine the rate of reimbursement for eligible snacks served in an after school program?

(a) DHS reimburses the contractor at the free rate for all eligible snacks served at an after school site located in an area served by a

school where 50% or more of enrolled children are eligible for free or reduced price meals.

(b) At sites where fewer than 50% of the enrolled children are eligible for free or reduced-price meals, the contractor must document the eligibility of participating children and claim reimbursement for snacks based on the eligibility category (free, reduced-price, and paid) of program participants.

§12.1305. Will DHS pay a claim for reimbursement if it is received or postmarked later than 60 days after the end of the claim month?

DHS will not pay a claim that is received or postmarked after the deadline unless USDA finds that good cause beyond the contractor's control delayed the submission of the claim.

§12.1306. How does DHS process a claim received later than 60 days after the end of the claim month(s)?

DHS notifies the contractor that it may submit a written request for payment demonstrating that good cause beyond the contractor's control caused the claim to be received by DHS or postmarked after the deadline.

§12.1307. What happens if DHS finds that good cause did not exist?

DHS notifies the contractor that its request is not approved and will not be forwarded to USDA for consideration.

§12.1308. What happens if DHS finds that good cause beyond the contractor's control existed?

DHS forwards the request to USDA with a recommendation to pay the claim.

§12.1309. What happens if USDA finds that good cause existed?

DHS pays the claim.

§12.1310. What happens if USDA finds that good cause did not exist?

DHS may grant an exception and pay a late claim as long as the contractor:

(1) requests an exception in writing; and

(2) has not been granted an exception in the 36 months preceding the month for which a request for an exception is submitted.

§12.1311. Does a contractor have the option not to submit a request for payment of a late claim based on good cause?

Yes.

§12.1312. If a contractor chooses not to submit a request for payment of a late claim based on good cause, can a contractor still be reimbursed for that claim?

DHS may grant an exception and pay a late claim as long as the contractor:

(1) requests an exception in writing; and

(2) has not been granted an exception in the 36 months preceding the month for which a request for an exception is submitted.

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 August 13, 2003.

TRD-200305174
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 5. PROGRAM REVIEWS, MONITORING, AND MANAGEMENT EVALUATIONS

40 TAC §12.1331, §12.1332

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1331. How does DHS ensure that a contractor complies with NSLP requirements?

DHS monitors contractor compliance according to 7 CFR §210.18 and §245.11.

§12.1332. Does USDA conduct management evaluations of contractors operating the NSLP?

Yes. The USDA Food and Nutrition Service and the United States Office of Inspector General (OIG) may visit contractor operations. The OIG may audit any contractor's records and operations according to 7 CFR §210.19 and §210.30.

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 August 13, 2003.

TRD-200305175
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 6. AUDITS

40 TAC §§12.1341 - 12.1345

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1341. Must a contractor that participates in the NSLP conduct audits?

Yes. A contractor participating in the NSLP must conduct audits according to 7 CFR §210.22 and 7 CFR Part 3052.

§12.1342. Must a contractor that participates in the NSLP comply with the requirements of the Single Audit Act?

Yes. An institution participating in the NSLP is subject to the requirements of the Single Audit Act as contained in Office of Management and Budget Circular A-133.

§12.1343. Are certain contractors not subject to the requirements of the Single Audit Act?

Yes. A contractor that is a federal entity, such as a military installation or an Indian reservation, is not subject to the Single Audit Act.

§12.1344. When is an audit considered acceptable?

The contractor has not fulfilled the audit requirement until DHS determines that the audit the contractor submitted is acceptable according to the requirements of the Single Audit Act.

§12.1345. How is a contractor informed of its obligation to comply with the single audit requirements?

(a) DHS notifies the contractor in writing, upon approval of its application to participate in the NSLP, that it is subject to the single audit requirements in 7 CFR Part 3052. The notification includes the date by which the contractor must submit an acceptable audit to DHS.

(b) DHS also provides the contractor with at least two written notices reminding the contractor when its audit must be submitted to DHS.

(1) DHS issues one notice by regular mail no later than six months after the end of the contractor's fiscal year for which the audit is due.

(2) DHS issues a subsequent notice by certified and regular mail eight months after the end of the contractor's fiscal year for which the audit is due. This notice also informs the contractor that failure to submit the audit to DHS by the required due date will result in adverse action, up to and including termination of their agreement.

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 August 13, 2003.

TRD-200305176
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 7. SANCTIONS, PENALTIES, AND FISCAL ACTION

40 TAC §§12.1361 - 12.1375

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1361. How does DHS penalize a contractor who is found guilty of embezzling, willfully misapplying, stealing, or obtaining by fraud any funds, assets, or property, whether received directly or indirectly from DHS?

DHS imposes penalties according to 7 CFR §210.26.

§12.1362. Does DHS take fiscal action against a contractor that fails to comply with the program requirements specified in 7 CFR Parts 210 and 245?

Yes. DHS takes fiscal action according to 7 CFR §§210.18, 210.19(c), and 210.24.

§12.1363. Does DHS investigate irregularities in or complaints about a contractor's operation of the NSLP?

Yes. DHS investigates irregularities in or complaints about a contractor's operation of the NSLP according to 7 CFR §210.19.

§12.1364. What does DHS do if a contractor that is subject to single audit requirements fails to submit an audit as required?

If DHS does not receive an audit before the established deadline, DHS notifies the contractor by both certified mail, return receipt requested, and by standard United States Postal Service first-class mail that:

(1) the contractor failed to submit an audit as required; and

(2) DHS intends to terminate the contractor's agreement, in whole or in part, effective the first day of the month following the established deadline.

§12.1365. What does DHS do if extenuating circumstances prevent a contractor from conducting an audit as required?

If DHS determines that there are extenuating circumstances, DHS may conduct an audit, either directly or through a third party.

§12.1366. Who must pay for this audit?

The contractor must pay for this audit.

§12.1367. What does DHS do if a contractor submits an audit that does not meet the single audit requirements specified in 7 CFR Part 3052?

If a contractor submits an unacceptable audit, DHS:

(1) notifies the contractor of the audit's specific deficiencies;

(2) advises the contractor of its right to appeal such a determination; and

(3) advises the contractor that it has 30 calendar days from the date of the notification to submit an acceptable audit to DHS.

§12.1368. Can DHS extend the deadline by which a contractor must submit an audit?

Yes. DHS may extend the time within which a contractor must submit an audit if DHS determines such an extension is justified according to 7 CFR §3052.400.

§12.1369. How must a contractor request an extension of its audit deadline?

A contractor must submit a written request for an extension. The request must:

(1) be postmarked or received by DHS no later than 30 calendar days before the prescribed audit deadline;

(2) include a justification that demonstrates good cause beyond the contractor's control for why the audit cannot be submitted by the prescribed due date; and

(3) specify the new desired audit due date.

§12.1370. Is DHS required to grant a contractor an extension of its audit deadline?

No. DHS grants an extension of the audit due date only if:

(1) the contractor's written request for an extension is postmarked or received by DHS no later than 30 calendar days before the audit due date; and

(2) DHS determines the reason the audit cannot be submitted by the due date demonstrates good cause beyond the contractor's control.

§12.1371. How is a new audit due date determined?

(a) If DHS reviews the contractor's request for an extension of the audit due date and determines the new audit due date requested by

the contractor is reasonable, DHS will approve the new audit due date requested by the contractor.

(b) If DHS determines that the new date requested by the contractor is not reasonable, DHS will assign another audit due date.

§12.1372. How is the contractor informed of the decision regarding the extension of its audit due date?

DHS informs the contractor in writing whether the contractor's request for an extension of its audit due date is approved. If the request is approved, DHS includes the new audit due date in the notice to the contractor.

§12.1373. Can a contractor request more than one extension?

Yes. Each extension request must:

(1) be submitted in writing;

(2) be postmarked or received by DHS no later than 30 calendar days before the prescribed audit deadline;

(3) clearly identify the circumstances that prevent the contractor from submitting its audit by the prescribed audit deadline; and

(4) specify the new desired audit due date.

§12.1374. What does DHS do if DHS does not receive an audit by the specified deadline and an extension of the deadline has not been granted?

DHS notifies the contractor by both certified mail, return receipt requested, and by standard United States Postal Service first- class mail that:

(1) the contractor failed to submit an audit as required; and

(2) DHS intends to terminate the contractor's agreement, in whole or in part, effective the first day of the month following the prescribed audit due date.

§12.1375. Can a contractor participate in any of the Special Nutrition Programs if DHS terminates its participation in the NSLP for failing to comply with the single audit requirements?

A contractor must submit an acceptable audit for each outstanding audit year and comply with the single audit requirements according to 7 CFR Part 3052 to be eligible to reapply to participate in any of the Special Nutrition Programs.

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 August 13, 2003.

TRD-200305177
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 8. SUSPENSION AND TERMINATION

40 TAC §12.1401

The new section is proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new section implements the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1401. How does DHS terminate or suspend contracts?
DHS terminates or suspends contracts according to 7 CFR §210.9 and §210.25.

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 August 13, 2003.

TRD-200305178
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

DIVISION 9. APPEALS

40 TAC §12.1411, §12.1412

The new sections are proposed under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The new sections implement the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

§12.1411. Does a contractor applying to participate in the NSLP have the right to appeal the denial of its contract application?
No.

§12.1412. Does a contractor participating in the NSLP have the right to appeal any action that affects its continued participation in the NSLP or affects its claim for reimbursement?
A contractor participating in the NSLP has limited appeal rights.

(1) The only adverse action that an NSLP contractor may appeal is an adjustment to its claim for reimbursement required as a direct result of a finding from an administrative review conducted by DHS or USDA.

(2) The contractor requests an appeal for such action according to 7 CFR §210.18 and §210.19 and Chapter 79 of this title (relating to Legal Services).

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 August 13, 2003.

TRD-200305179
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

PART 3. TEXAS COMMISSION ON ALCOHOL AND DRUG ABUSE

CHAPTER 141. GENERAL PROVISIONS

40 TAC §§141.11, 141.21, 141.31, 141.51 - 141.55, 141.61, 141.62, 141.71

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Commission on Alcohol and Drug Abuse (TCADA) proposes the repeal of Chapter 141, concerning General Provisions.

Sections 141.11, 141.21, and 141.31 establish the process for receiving public comment during board meetings; and contain information on TCADA's Statewide Planning Advisory Committee, approval authority for contracts, legislative budget requests, and agency budgets.

Sections 141.51 - 141.55 delineate the process for filing claims against TCADA and how those claims will be handled. Also included is information on timetable for contested case hearings and mediation.

Sections 141.61, 141.62, and 141.71 pertain to TCADA's procurement process.

The repeal of Chapter 141 is proposed because TCADA is adopting new rules. The new rules will be reorganized to provide a more functional and logical framework that is more closely aligned with the other agencies operating under the Health and Human Services Commission.

Thomas F. Best, General Counsel, has determined that there will be no fiscal implications for state or local government for the first five-year period the repeal is in effect.

Mr. Best has also determined that for each year of the first five years the repeal is in effect the anticipated public benefit will be reduced duplicative information which should reduce cost and greater clarity regarding expectations TCADA has for individuals and organizations providing substance abuse services in Texas so that concentration on quality of care issues and service outcomes results. There will be no effect on small businesses and there is no anticipated economic cost to current providers.

Comments on the proposal may be submitted to Albert Ruiz, Texas Commission on Alcohol and Drug Abuse, P.O. Box 80529, Austin, Texas 78708-0529. Comments may also be submitted electronically to *rules.revisions@tcada.state.tx.us* or faxed to (512) 821-4419. All comments must be received no later than 30 days from the date the proposal is published in the *Texas Register*.

The repeal of Chapter 141 is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides the commission with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission when funding services and §461.0141 which provides the commission with authority to adopt rules regarding purchase of services. The repeal is also proposed under Texas Health and Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The codes affected by the proposed repeal are Chapters 461 and 464 of the Texas Health and Safety Code.

§141.11. Public Comment and Requests.

§141.21. Statewide Planning Advisory Committee.

§141.31. Approval Authority.

§141.51. Notice of Claim.

§141.52. Agency Counterclaim.

§141.53. Timetable for Negotiations and Contested Case Hearings.

§141.54. Conduct of Negotiations.

§141.55. Mediation.

§144.61. Procurement.

§141.62. Procurement Protests.

§141.71. Training and Education.

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 August 15, 2003.

TRD-200305246
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

CHAPTER 141. GENERAL PROVISIONS

The Texas Commission on Alcohol and Drug Abuse (TCADA) proposes new Chapter 141, §§141.101, 141.201 - 141.205, 141.301, 141.302, 141.401, and 141.501 - 141.503, pertaining to General Provisions. TCADA has submitted its proposal to repeal the existing Chapter 141 to the Texas Register for publication in the this issue.

The new Chapter 141 has been reorganized to provide a more functional and logical framework. It includes definitions that will apply across all chapters of TCADA rules. These definitions have been restructured and, in some cases, rewritten. New definitions were added as appropriate due to changes in other proposed rules.

The proposed new rules contain general provisions relating to the general operations of TCADA. These provisions include language relating to contract claims, procurement, public comment, approval authority, and training and education of employees. Language regarding advisory committees has not been carried forward from the previous rules. Provisions of former Chapter 146 (relating to Interagency Agreements) are now included in this proposed Chapter 141 as Subchapter D.

No significant changes were made to former §§141.31, 141.51 - 141.54, 141.61, 141.62, and 141.71, which deal with claims against TCADA. However, these sections have been renumbered.

Thomas F. Best, General Counsel, has determined that there will be no significant fiscal impact for state or local government for the first five-year period the new rules are in effect.

The Commission does not anticipate that the adoption of the new rules will have a significant effect on small businesses or a significant economic cost to current licensees.

Mr. Best has also determined that for each year of the first five years the new rules are in effect the anticipated public benefit

will be more efficient use of resources, reduced administrative and regulatory burden on regulated entities, and greater clarity regarding expectations TCADA has for individuals and organizations providing substance abuse services in Texas. The resulting increased concentration on quality of care issues and service outcomes results will benefit all recipients of services and the general public.

Comments on the proposal may be submitted to Albert Ruiz, Texas Commission on Alcohol and Drug Abuse, P.O. Box 80529, Austin, Texas 78708-0529. Comments may also be submitted electronically to *rules.revisions@tcada.state.tx.us* or faxed to (512) 821-4418. All comments must be received by October 15, 2003.

To ensure consideration, comments must clearly specify the particular section of the rule to which they apply. General comments should be labeled as such. Comments should include proposed alternative language as appropriate.

SUBCHAPTER A. DEFINITIONS

40 TAC §141.101

The new rule is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health and Safety Code §461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rule is also proposed under Texas Health and Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rule is the Texas Health and Safety Code, Chapters 461 and 464.

§141.101. Definitions.

The following words and terms, when used in Chapters 141, 142, 144, 147, 148, 150, and 153 of this title shall have the following meanings, unless the context clearly indicates otherwise:

(1) Abuse--An intentional, knowing, or reckless act or omission by provider personnel, a counselor, applicant for counselor licensure, or counselor intern that causes or may cause death, emotional harm or physical injury to a participant or client. Abuse includes without limitation the following:

(A) any sexual activity between provider personnel, a counselor, applicant for counselor licensure, or counselor intern and a participant or client;

(B) corporal punishment;

(C) nutritional deprivation or sleep deprivation;

(D) efforts to cause fear;

(E) the use of any form of communication to threaten, curse, shame, or degrade a participant or client;

(F) restraint that does not conform with Chapter 148 of this title (relating to Standard of Care);

(G) coercive or restrictive actions taken in response to a participant or client's request for discharge or refusal of medication or treatment that are illegal or not justified by the participant or client's condition; and

(H) any other act or omission classified as abuse by Texas law, including but not limited to, TEX. FAMILY CODE ANN. §261.001 (Vernon 1996) and TEX. HUM. RES. CODE ANN. §48.002 (Vernon Supp. 2003).

(2) Administrative Discharge--A discharge report processed by the Commission for a client whose last admission date and/or last billing end date exceeds 50 days.

(3) Administrative Follow-up--A report processed by the Commission if 90 days for non-detoxification clients or 40 days for detoxification clients have elapsed from the client's last discharge date and the client has not been readmitted to the same provider within 60 days (non-detoxification clients) or ten days (detoxification clients).

(4) Administrative Hearing--An appeals hearing conducted by the State Office of Administrative Hearings (SOAH).

(5) Administrative Law Judge (ALJ)--An individual appointed by the chief administrative law judge of SOAH under TEX. GOV'T CODE ANN. §2003.041 (Vernon 2000) to preside over a contested case proceeding.

(6) Administrative Procedure Act (APA)--TEX. GOV'T CODE ANN. ch. 2001 (Vernon 2000), as amended.

(7) Adolescent--An individual 13 through 17 years of age whose disabilities of minority have not been removed by marriage or judicial decree.

(8) Adult--An individual 18 years of age or older, or an individual under the age of 18 whose disabilities of minority have been removed by marriage or judicial decree.

(9) Advanced Practice Nurse--A registered nurse currently licensed in Texas who is approved by the Texas State Board of Nurse Examiners to engage in advanced practice.

(10) Agency--TCADA.

(11) Alternative Activities--A strategy that gives participants and their families the opportunity to take part in educational, cultural, recreational, skill-building, and work-oriented substance-free activities. Activities under this strategy are designed to encourage and foster bonding with peers, family and community.

(12) Applicant--A person who has submitted an application for an initial license to provide chemical dependency counseling or treatment, renewal of a license, or certification or approval for provision of an offender education program. For funding purposes, an applicant is a person who has submitted a proposal or application to provide substance abuse services in response to a solicitation issued by the Commission.

(13) Assessment--An ongoing process through which the counselor collaborates with the client and others to gather and interpret information necessary for developing and revising a treatment plan and evaluating client progress toward achievement of goals identified in the treatment plan, resulting in comprehensive identification of the client's strengths, weaknesses, and problems/needs.

(14) ATOD--Alcohol, tobacco and other drugs collectively.

(15) Authorized Representative--An attorney authorized to practice law in the State of Texas or, if authorized by applicable law, a person designated in writing by a party to represent the party.

(16) Behavioral Health Integrated Provider System (BHIPS)--The Commission's Internet-based computer system for

contracted service providers that offers contractors the tools to meet State and Federal requirements for reporting, including capturing required client and billing data.

(17) Block Grant--Substance Abuse Prevention and Treatment Block Grant, 42 U.S.C. 300x-21, et seq.

(18) Brief Interventions--Practices designed to initiate a resolution of a problem and motivate an individual to begin to do something about his or her substance abuse. Brief interventions are described in "Brief Interventions and Brief Therapies for Substance Abuse" (Treatment Improvement Protocol 34), published by the United States Department of Health and Human Services Center for Substance Abuse Treatment (CSAT).

(19) Brief Therapy--A systematic, focused process that relies on client engagement, and rapid implementation of change strategies. Brief therapies are described in "Brief Interventions and Brief Therapies for Substance Abuse" (Treatment Improvement Protocol 34), published by CSAT.

(20) Business Day--A weekday on which State offices are open.

(21) Center for Substance Abuse Prevention (CSAP) Prevention Strategies--

(A) Community-Based Process--A strategy designed to enhance the ability of the community to provide effective prevention, intervention, and treatment services for ATOD problems and HIV infection through community mobilization and empowerment. Activities include multi-agency coordination and collaboration, networking, and development of written agreements among community organizations.

(B) Environmental and Social Policy--A strategy designed to establish or change written and unwritten community standards, codes, and attitudes, thereby influencing incidence and prevalence of substance abuse in the general population. It includes activities that center on legal and regulatory initiatives and those that relate to the service and action-oriented initiatives.

(C) Information Dissemination--A strategy that provides awareness and knowledge of ATOD problems and/or HIV infection and their harmful effects on individuals, families, and communities. It also gives the general population information about available programs and services. Information dissemination is characterized by one-way communication from the source to the audience, with limited contact between the two. Information is disseminated through written communications and/or in-person community presentations.

(D) Prevention Education and Skills Training--A curriculum-based strategy designed to develop decision-making, problem solving, and other life skills. It also provides accurate information about the harmful effects of ATOD use, abuse and addiction pertinent to the needs of the target population. The basis of activities under this strategy is interaction between the educator/facilitator and the participants. These activities are aimed to increase protective factors, foster resiliency, decrease risk factors and affect critical life and social skills relative to substance abuse and/or HIV risk of the participant and/or family members.

(E) Problem Identification and Referral--A strategy that provides services designed to ensure access to appropriate levels and types of services needed by youth or adult participants.

(F) Alternative Activities--A strategy that gives participants and their families the opportunity to take part in educational, cultural, recreational, skill-building, and work-oriented substance-free activities. Activities under this strategy are designed to encourage and foster bonding with peers, family and community.

(22) Chemical Dependency--In addition to the statutory provisions defining chemical dependency as abuse of, dependence on, or addiction to alcohol or a controlled substance (as defined by TEX. HEALTH & SAFETY CODE ch. 481 (Vernon 2001) and related statutory provisions in TEX. HEALTH & SAFETY CODE ch. 461, 464 (Vernon 2001), the Commission also defines chemical dependency as substance-related disorders as that term is used in the most recent published edition of the Diagnostic and Statistical Manual of Mental Disorders (See DSM).

(23) Chemical Dependency Counseling--See Practice of Chemical Dependency Counseling.

(24) Chemical Dependency Counselor--See Licensed Chemical Dependency Counselor (LCDC).

(25) Chemical Dependency Counselor Intern--A person registered with the Commission who is pursuing a course of training in chemical dependency counseling at a registered clinical training institution.

(26) Chemical Dependency Treatment--A planned, structured, and organized chemical dependency program designed to initiate and promote a person's chemical-free status or to maintain the person free of illegal drugs. It includes, but is not limited to, the application of planned procedures to identify and change patterns of behavior related to or resulting from substance-related disorders that are maladaptive, destructive, or injurious to health, or to restore appropriate levels of physical, psychological, or social functioning.

(27) Child--For purposes of reporting abuse and neglect, a child is an individual under the age of 18 whose disabilities of minority have not been removed by marriage or judicial decree. For all other purposes in these rules, child shall mean an individual under the age of 13.

(28) Child Abuse and Neglect--Any act or omission that constitutes abuse or neglect of a child under the age of 18 by a person responsible for a child's care, custody, or welfare as defined in the TEX. FAM. CODE §261.001 (Vernon 1996).

(29) Client--An individual who receives or has received services, including admission authorization or assessment or referral, from a chemical dependency treatment provider, counselor, counselor intern, or applicant for licensure as a counselor, or from an organization where the counselor, intern or applicant is working on a paid or voluntary basis.

(30) Client Data Systems (CDS) Forms--CDS forms consist of the admission/transfer admission report, discharge report, and follow-up report.

(31) Clinical Evaluation--A systematic approach to screening and assessment.

(32) Clinical Training Institution (CTI)--An individual or legal entity registered with the Commission to supervise a counselor intern.

(33) Cognizant Agency--The Federal or State agency responsible for reviewing, negotiating, and approving an organization's indirect cost rate. TCADA has not been designated as a cognizant agency.

(34) Commission--Texas Commission on Alcohol and Drug Abuse and its branches, divisions, departments, and employees.

(35) Consenter--The individual legally responsible for giving informed consent for a client. Unless otherwise provided by law, a legally competent adult is his or her own consenter and the consenter for an adolescent or child is the parent, guardian, or conservator. Texas law allows a person 16 or 17 years of age to consent to his or her own treatment.

(36) Contested Case--A proceeding, including but not restricted to licensing, in which the legal rights, duties, or privileges of a party are to be determined by the Commission after an opportunity for adjudicative hearing.

(37) Contractor--Person funded by the Commission to provide substance abuse services unless otherwise specified.

(38) Cost Reimbursement--A payment mechanism used for prevention and intervention services in which funds are provided to carry out approved activities based on an approved budget.

(39) Counseling--A collaborative process that facilitates the client's progress toward mutually determined treatment goals and objectives. Counseling includes methods that are sensitive to individual client characteristics and to the influence of significant others, as well as the client's cultural and social context. Competence in counseling is built upon the understanding of, appreciation of, and ability to appropriately use the modalities of care for individuals, groups, families, couples, and significant others.

(40) Counselor--A qualified credentialed counselor.

(41) Crisis Intervention--Actions designed to intervene in situations which require immediate attention to avert potential harm to self or others. Services include face-to-face individual, family, or group interviews/interactions and/or telephone contacts to identify needs.

(42) Days--Calendar days, unless otherwise specified.

(43) Digital Authentication Key--Identification data (that includes user identification and a time stamp) that is digitally stamped on electronic documents identifying the specific user that created the document. The identification data shall be controlled by a unique user ID and an encrypted password.

(44) Direct Care Staff--Staff responsible for providing treatment, care, supervision, or other direct client services that involve face-to-face contact with a client.

(45) Discharge--Formal, documented termination of services.

(46) Document (noun)--A written or electronic record.

(47) Diagnostic and Statistical Manual of Mental Disorders (DSM)--The Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association. The current version is the Fourth Edition. Any reference to DSM shall constitute a reference to the most recent edition then published.

(48) Driving While Intoxicated (DWI)--The offense of driving while intoxicated as defined in the TEX. PEN. CODE ANN. ch. 49 (Vernon 2003).

(49) Elderly--A person 65 years of age or older.

(50) Emergency Behavioral Health Condition--Any condition, without regard to the nature or cause of the condition, which in the opinion of a prudent lay person possessing an average knowledge of medicine and health, requires immediate intervention and/or medical attention without which an individual would present a danger to themselves or others or which renders individuals incapable of controlling, knowing or understanding the consequences of their actions.

(51) Encryption--A method that allows secure transmittal of information along the Internet by encoding the transmitted data using a mathematical formula that scrambles the data. Without a corresponding "decoder," the transmission would be unusable.

(52) Executive Director--The chief administrative officer or designee of the Texas Commission on Alcohol and Drug Abuse.

(53) Exploitation--The illegal or improper use of a client or participant, or their resources, for monetary or personal benefit, profit, or gain by provider personnel, a staff member, volunteer, or other individual working under the auspices of a provider or by a counselor, counselor intern or applicant for counselor licensure or any other act or omission classified as exploitation by Texas law including, but not limited to, TEX. FAM. CODE §261.001 (Vernon 1996) and TEX. HUM. RES. CODE §48.002 (Vernon Supp. 2003).

(54) Facility--See Treatment Facility.

(55) Family--The children, parents, brothers, sisters, other relatives, foster parents, guardians, and/or significant others who perform the roles and functions of family members in the lives of clients or participants.

(56) Fiscal Year--The Commission's fiscal year, September 1 - August 31, unless otherwise specified.

(57) Gender Specific--Therapy, education and/or program components that are designed to address emotional, developmental, rehabilitative, health and/or other issues that are specific to the gender of the client.

(58) Graduate--An individual who has successfully completed the 270 hours of education, 300 hour practicum, and 4,000 hours of supervised work experience and who is still registered with the Commission as a counselor intern.

(59) Health Insurance Portability and Accountability Act of 1996 (HIPAA)--Pub. L. No. 104-191, 45 C.F.R. pts. 160 and 164.

(60) Human Immunodeficiency Virus (HIV)--The virus that causes Acquired Immune Deficiency Syndrome (AIDS). Infection is determined through a testing and counseling process overseen by the Texas Department of Health (TDH). Being infected with HIV is not necessarily equated with having a diagnosis of AIDS, which can only be diagnosed by a physician using criteria established by the National Centers for Disease Control and Prevention.

(61) HIV Antibody Counseling and Testing--A structured counseling session performed by Prevention Counseling and Partner Elicitation (PCPE) counselors registered with TDH. It promotes risk reduction behavior for those at risk of infection with HIV and other sexually transmitted diseases and offers testing for HIV infection.

(62) HIV Early Intervention Services--

(A) appropriate pretest counseling for HIV and AIDS;

(B) testing individuals with respect to such disease, including tests to confirm the presence of the disease, tests to diagnose the extent of the deficiency in the immune system, and tests to provide information on appropriate therapeutic measures for preventing and treating the deterioration of the immune system and for preventing and treating conditions arising from the disease;

(C) appropriate post-test counseling; and

(D) providing the therapeutic measures described in subparagraph (B) of this paragraph.

(63) Indicated Population--The population who may already be experimenting with drugs or who exhibit other problem-related behaviors.

(64) Individual Service Day--A day on which a specific client receives services.

(65) Intake--The process for gathering information about a prospective client and giving a prospective client information about treatment and services.

(66) Intervention--The interruption of the onset or progression of chemical dependency in the early stages. Intervention strategies target indicated populations.

(67) Intervention Counseling--Interactions to assist individuals, families, and groups to identify, understand, and resolve issues and problems related to ATOD use within a specific number of sessions or within a certain time frame. It is intended to intervene in problem situations and high-risk behaviors, which, if not addressed, may escalate to substance abuse or cause communicable disease. Such interactions should not include determining whether a person is in need of treatment. The use of the term "counseling" does not carry the same meaning as defined in paragraph (38) of this section.

(68) Key Performance Measures--Measures that reflect the services that are critical to the program design and intended outcomes of the program. Key performance measures are specified for all Commission-funded programs.

(69) Knowledge, Skills, and Attitudes (KSAs)--The knowledge, skills, and attitudes of addictions counseling as defined by CSAT Technical Assistance Publication (TAP 21) "Addictions Counseling Competencies: the Knowledge, Skills, and Attitudes of Professional Practice."

(70) License--The whole or part of any agency permit, certificate, approval, registration, or similar form of permission authorized by law.

(71) Licensed Chemical Dependency Counselor (LCDC)--A counselor licensed by the Texas Commission on Alcohol and Drug Abuse pursuant to TEX. OCC. CODE ch. 504 (Vernon 2002).

(72) Licensed Health Professional--A physician, physician assistant, advanced practice nurse, registered nurse, or licensed vocational nurse authorized to practice in the State of Texas.

(73) Licensee--Any individual or person to whom the agency has issued any permit, certificate, approved registration, or similar form of permission authorized by law.

(74) Licensing--The agency process relating to the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(75) Life Skills Training (Treatment)--A structured program of training, based upon a written curriculum and provided by qualified staff designed to help clients with social competencies such as communication and social interaction, stress management, problem solving, decision making, and management of daily responsibilities.

(76) Mechanical Restraint--

(A) The application of a device restricting the movement of the whole or a portion of an individual's body to control physical activity. Only commercially available devices specifically designed for the safe and comfortable restraint of humans may be used as mechanical restraints.

(B) Despite their commercial availability, the following types of devices may not be used to implement restraint:

(i) those with metal wrist or ankle cuffs;

(ii) those with rubber bands, rope, cord, or padlocks or key locks as fastening devices;

(iii) long ties (e.g., leashes); or

(iv) bed sheets.

(C) The following devices may be utilized to implement restraint.

(i) Anklets--A cloth or leather band fastened around the ankle or leg and secured to a stationary object (e.g., bed or chair frame). Acceptable fasteners include Velcro and buckles. The device must not be secured so tightly as to interfere with vital functions, including circulation, or so loose as to permit chafing of the skin. Padding on the inside of the device, which aids in preventing chafing, is required.

(ii) Belts--A cloth or leather band fastened around the waist. The belt may either be attached to a stationary object (e.g., chair frame) or used for securing the arms to the sides of the body. The device must not be secured so tightly as to interfere with vital functions, including breathing and circulation.

(iii) Chair restraint--A well-padded stabilized chair that supports all body parts and prevents the individual's voluntary egress from the chair without assistance (e.g., table top chair, Geri-chair). Mechanical restraint devices (e.g., wristlets, anklets) are attached or may be easily attached to restrict movement. The devices must not be secured so tightly as to interfere with vital functions, including breathing and circulation.

(iv) Ties--A length of cloth or leather used to secure approved mechanical restraints (i.e., mittens, wristlets, arm splints, belts, anklets, vests, etc.) to a stationary object (i.e., bed or wheelchair frame) or to other approved mechanical restraints. Ties must not be secured so tightly as to interfere with vital functions, including breathing and circulation.

(v) Wristlets--A cloth or leather band fastened around the wrist or arm and secured to a stationary object (e.g., bed or chair frame, waist belt). Acceptable fasteners include Velcro and buckles. The device must not be secured so tightly as to interfere with vital functions, including circulation or so loose as to permit chafing of the skin. Padding on the inside of the device, which aids in preventing chafing, is required.

(77) Medication Error--Medication not given according to the written order by the prescribing professional or as recommended on the medication label. Medication errors include without limitation, duplicate doses, missed doses, and doses of the wrong amount or drug.

(78) Minor--A person under the age of 18.

(79) Neglect--A negligent act or omission by provider personnel, a staff member, volunteer, or other individual working under the auspices of a provider, or by a counselor, applicant for counselor licensure, or counselor intern that causes or may cause death, physical injury, or substantial emotional harm to a participant or client. Examples of neglect include, but are not limited to:

(A) failure to provide adequate nutrition, clothing, or health care;

(B) failure to provide a safe environment free from abuse;

(C) failure to maintain adequate numbers of appropriately trained staff;

(D) failure to establish or carry out an appropriate individualized treatment plan; and

(E) any other act or omission classified as neglect by the Texas law including, but not limited to, TEX. FAM. CODE §261.001 (Vernon 1996) and TEX. HUM. RES. CODE §48.002 (Vernon Supp. 2003).

(80) Offender Education Program--An Alcohol Education Program for Minors, Drug Offender Education Program, DWI Education Program, or DWI Intervention Program approved by the Commission under Chapter 153 of this title (relating to Offender Education Programs).

(81) OMB--United States Office of Management and Budget.

(82) On Duty--Present, ready, awake and able to perform job duties at the physical locations where services are provided.

(83) Outcome--The results of a service on clients or participants or the service delivery system itself.

(84) Outreach--Activities directed toward finding individuals who might not use services due to lack of awareness or active avoidance.

(85) Participant--An individual who is receiving prevention or intervention services.

(86) Party--A person or agency formally named or admitted as a party.

(87) Person--An individual, corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity.

(88) Personal Restraint--Physical contact to control or restrict an individual's physical movement or actions. See also Mechanical Restraint.

(89) Personnel--The members of the governing body of a provider and, without limitation, its staff, employees, contractors, consultants, agents, representatives, volunteers, or other individuals working for or on behalf of the provider through a formal or informal agreement.

(90) Pleading--A written document submitted by a party, or a person seeking to participate in a case as a party, which requests procedural or substantive relief, makes claims, alleges facts, makes legal argument, or otherwise addresses matters involved in the case.

(91) Practice of Chemical Dependency Counseling Services--Providing or offering to provide chemical dependency counseling services involving the application of the principles, methods, and procedures of the chemical dependency counseling profession as defined by the activities listed in the domains of TAP 21 "Addictions Counseling Competencies: the Knowledge, Skills, and Attitudes of Professional Practice" published by CSAT.

(92) Prevention-A proactive process that uses multiple strategies to preclude the illegal use of alcohol, tobacco and other drugs and to foster safe, healthy, drug-free environments.

(93) Private Practice--The individual practice of a private, licensed health care practitioner who personally renders individual or group services within the scope of the practitioner's license and in the practitioner's offices. To qualify to be engaged in private practice, the individual licensed health care practitioner must not hold him/herself out as an organized program, or a part thereof, that provides counseling or treatment. This definition does not prohibit the sharing of office space or administrative support staff.

(94) Program--A specific type of service delivered to a specific population, at a specific location.

(95) Proprietary School--An organization approved and regulated by the Texas Workforce Commission under 40 TAC Chapter 807 (2003) (relating to Proprietary Schools) that offers a course of study in chemical dependency counseling.

(96) Protective Factors--Characteristics within individuals and social systems which may inoculate or protect persons against risk factors and strengthen their determination to reject or avoid substance abuse.

(97) Provider--A person that performs or offers to perform substance abuse services. The term includes but is not limited to, a qualified credentialed counselor, applicant for counselor licensure, and counselor intern.

(98) Qualified Credentialed Counselor (QCC)--A licensed chemical dependency counselor or one of the practitioners listed below who is licensed and in good standing in the State of Texas and has at least 1,000 hours of documented experience treating substance-related disorders:

(A) licensed professional counselor (LPC);

(B) licensed master social worker (LMSW);

(C) licensed marriage and family therapist (LMFT);

(D) licensed psychologist;

(E) licensed physician;

(F) licensed physician's assistant;

(G) certified addictions registered nurse (CARN); or

(H) advanced practice nurse recognized by the Board of Nurse Examiners as a clinical nurse specialist or nurse practitioner with a specialty in psych-mental health (APN-P/MH).

(99) Qualified Mental Health Professional--A qualified mental health professional as defined in the 25 TAC §401.583(15) (2003).

(100) Recovery Maintenance--A level of treatment designed to maintain and support a client's continued recovery.

(101) Referral--The process of identifying appropriate services and providing the information and assistance needed to access them.

(102) Residential Site--A physical location owned, leased, or operated by a provider where clients reside in a supervised treatment environment.

(103) Respondent--A person against whom the Commission seeks an administrative, civil or criminal remedy for non-compliance with law and rules governing substance abuse services.

(104) Restraint--See Personal and Mechanical Restraint.

(105) Retaliate--Actions taken to punish or discourage a person, including a participant or client, who reports a violation of these rules or cooperates with an investigation, inspection, or intimidation proceeding by the Commission. Such actions include, but are not limited to, suspension or termination of employment, demotion, discharge, transfer, discipline, abuse, neglect, restriction of privileges, harassment, or discrimination.

(106) Risk Factor--A characteristic or attribute of an individual, group, or environment associated with an increased probability of certain disorders, addictive diseases, or behaviors.

(107) Risk Management--The process of identifying, evaluating and taking steps to minimize the risk associated with any activity, function, or process.

(108) Rules--An agency statement of general applicability that implements, or prescribes law or policy by defining general standards of conduct, rights, or obligations of persons, or describes the procedure or practice requirements that prescribe the manner in which public business before an agency may be initiated, scheduled, or conducted, or interprets or clarifies law or agency policy. The term includes the amendment or repeal of a prior rule but does not include statements concerning only the internal management or organization of the agency and does not affect private rights or procedures. This definition includes regulations. Any reference to the rules herein shall mean Commission rules currently in effect unless otherwise specified.

(109) Screening--The process through which a qualified staff, client or participant, and available significant others determine the most appropriate initial course of action, given the individual's needs and characteristics and the available resources within the community. In a treatment program, screening includes determining whether an individual is appropriate and eligible for admission to a particular program.

(110) Seclusion--Confinement of an individual for a period of time in a hazard-free room or other area in which direct observation can be maintained and from which egress is prevented.

(111) Selective Program--A prevention program designed to target subsets of the total population that are deemed to be at higher risk for substance abuse by virtue of membership in a particular population segment. Risk groups may be identified on the basis of biological, psychological, social or environmental risk factors, and targeted groups may be defined by age, gender, family history, place of residence, or victimization by physical and/or sexual abuse. Selective prevention programs target the entire subgroup regardless of the degree of individual risk.

(112) Services--Substance abuse services.

(113) Service Coordination--Administrative, clinical, and evaluative activities that bring the client, treatment services, community agencies, and other resources together to focus on issues and needs identified in the treatment plan. Service coordination, which includes care management and client advocacy, establishes a framework of action for the client to achieve specified goals. It involves collaboration with the client and significant others, coordination of treatment and referral services, liaison activities with community resources and managed care systems, client advocacy, and ongoing evaluation of treatment progress and client needs.

(114) Sexual Exploitation--A pattern, practice, or scheme of conduct by provider personnel or other individual working under the auspices of a provider, or by a counselor, intern, or applicant that involves a client or participant and can reasonably be construed as being for the purpose of sexual arousal or gratification or sexual abuse. It may include sexual contact, a request for sexual contact, or a representation that sexual contact or exploitation is consistent with, a part of or, a condition of receiving services. It is not a defense to sexual exploitation of a client, or participant if it occurs:

(A) with consent of the client or participant;

(B) outside of the delivery of services; or

(C) off of the premises used for the delivery of substance abuse services; or

(D) after the client or participant is no longer receiving services, unless it occurred two years after the client or participant stopped receiving services.

(115) Signature--Authentication of a record that meets the criteria established in §148.507 of this title (relating to General Documentation Requirements).

(116) Staff--Individuals working for a person in exchange for money or other compensation.

(117) State Office of Administrative Hearings (SOAH)--The agency to which contested cases are referred by the Commission.

(118) Substance Abuse--A maladaptive pattern of substance use leading to clinically significant impairment or distress, as defined by the most recently published version of the DSM.

(119) Substance Abuse Education--A planned, structured presentation of information provided by qualified staff, which is related to substance abuse or substance dependence, allows for discussion of the material presented and is relevant to the client or participant's goals.

(120) Substance Abuse Services (Services)--A comprehensive term intended to describe activities undertaken to address any substance-related disorder as well as prevention activities. The term includes the provision of screening, assessment, referral, treatment for chemical dependency and chemical dependency counseling.

(121) Substance-Related Disorders--Defined by the most recently published version of the DSM.

(122) TCADA--Texas Commission on Alcohol and Drug Abuse

(123) Texas Public Information Act--TEX. GOV'T CODE ANN. ch. 552 (Vernon 2000).

(124) Therapeutic Services for Women--Education, services and/or therapy to address: parenting, reproductive and general health, self-esteem, physical and sexual abuse, mental health, child development and self-sufficiency.

(125) Toxic Inhalant--A gaseous substance that is inhaled by a person to produce a desired physical or psychological effect and that may cause personal injury or illness to the inhaler.

(126) Treatment--See Chemical Dependency Treatment.

(127) Treatment Facility--

(A) a public or private hospital;

(B) a detoxification facility;

(C) a primary care facility;

(D) an intensive care facility;

(E) a long-term care facility;

(F) an outpatient care facility;

(G) a community mental health center;

(H) a health maintenance organization;

(I) a recovery center;

(J) a halfway house;

(K) an ambulatory care facility; or

(L) any other facility that offers or purports to offer treatment.

(128) Treatment Planning--A collaborative process through which the provider and client develop desired treatment outcomes and identify the strategies for achieving them. At a minimum, the treatment plan addresses the identified substance use disorder(s), as well as issues related to treatment progress, including relationships with family and significant others, employment, education, spirituality, health concerns, and legal needs.

(129) Unethical Conduct--Conduct prohibited by the ethical standards adopted by state or national professional organizations or by rules established by a profession's state licensing agency.

(130) Unit Rate--A payment mechanism in which a specified rate of payment is made in exchange for a specified unit of service.

(131) Universal Population--Universal prevention programs are delivered to large groups without any prior screening for substance abuse risk. A prevention program designed to address an entire population with messages and programs aimed at preventing or delaying the use and abuse of alcohol, tobacco, and other drugs.

(132) Utilization Review--The process of evaluating the necessity, appropriateness and efficiency of the use of chemical dependency treatment services, procedures and facilities.

(133) Youth--Individuals between the ages of 13 through 17. See also Young Adult in Chapters 147 and 148 of this title (relating to Contract Program Requirements and Standard of Care).

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 August 18, 2003.

TRD-200305312
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER B. CLAIMS AGAINST THE COMMISSION

40 TAC §§141.201 - 141.205

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health and Safety Code §461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rules are also proposed under Texas Health and Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the new rules are Chapters 461 and 464 of the Texas Health and Safety Code.

§141.201. Notice of Claim.

(a) For purposes of this Subchapter, the term contractor shall also have the meaning given that term in TEX. GOV'T CODE ANN. ch. 2260 (Vernon 2000).

(b) To file a claim of breach of contract under TEX. GOV'T CODE ANN. ch. 2260 (Vernon 2000), the contractor must deliver written notice of the claim to the Commission's executive director.

(c) The notice must be signed by the contractor's authorized representative and delivered by hand, certified mail return receipt requested, or other verifiable delivery service.

(d) The claim must specifically describe:

(1) the nature of the alleged breach of contract, including the date of the event which forms the basis of the claim and the contract provision(s) breached;

(2) the damages claimed, including the amount and the method used to calculate them; and

(3) the legal basis for filing the claim, including the relationship between the alleged breach and the damages claimed.

(e) The contractor must submit supporting documentation with the notice of claim.

(f) The notice must be delivered no later than 180 days after the date of the event that forms the basis of the claim.

(g) Any amount(s) owed by the contractor shall be deducted from the total damages claimed. This includes amounts owed for work not performed or work not performed in substantial compliance with the terms of the contract. The total amount of damages (after deduction of amount owed by contractor) may not exceed the contracted amount or include consequential or similar damages, exemplary damages, any damages based on an unjust enrichment theory, attorney's fees or home office overhead.

§141.202. Agency Counterclaim.

(a) The Commission may file a counterclaim of breach of contract.

(b) Written notice of counterclaim must be delivered to the authorized representative of the contractor who signed the notice of claim of breach of contract.

(c) The notice must be delivered by hand, certified mail return receipt requested, or other verifiable delivery service.

(d) The notice must specifically describe:

(1) the nature of the counterclaim;

(2) the damages or offsets, including the amount and the method used to calculate them; and

(3) the legal theory supporting the counterclaim.

(e) The notice of counterclaim must be delivered to the contractor no later than 90 calendar days after receipt of notice of the claim.

§141.203. Timetable for Negotiations and Contested Case Hearings.

(a) The Commission's executive director must examine the contractor's claim and the Commission's counterclaim, if any, and initiate negotiations.

(b) Except as provided in subsection (c) of this section, negotiations shall begin no more than 60 calendar days following the latest of:

(1) the date of termination of the contract;

(2) the completion date in the original contract; or

(3) the date the notice of claim of breach of contract is received by the Commission.

(c) The Commission may delay the negotiations until the 181st calendar day after the date of the event giving rise to the claim of breach of contract. The Commission shall give the contractor written notice of the delay and notify the contractor when it is ready to begin negotiations.

(d) The parties must complete the negotiations as a prerequisite to a contested case hearing no later than 270 days after the Commission receives the notice of claim of breach of contract. The negotiation period may be extended through a written agreement signed by the authorized representatives of each party.

(e) The parties may agree to mediate the dispute at any time before the 270th day after the Commission receives the notice of claim of breach of contract, or before the expiration of any extension agreed to in writing by the parties.

(f) If negotiations fail to resolve the dispute, the case may be submitted to the State Office of Administrative Hearings (SOAH).

(1) The contractor may file a request for contested case hearing with the Commission if a complete settlement agreement has not been reached 270 calendar days after the date the claim is delivered to the Commission, or after the expiration of any extension agreed to in writing by the parties.

(2) The parties may agree to submit the case to SOAH before the 270th day if they have reached a partial settlement or if an impasse has been reached in the negotiations and proceeding to a contested case hearing would serve the interests of justice.

(3) The parties may continue to negotiate or mediate after a request for contested case hearing is referred to the SOAH.

§141.204. Conduct of Negotiations.

(a) Any limitations on the settlement authority of the representatives participating in the negotiations must be disclosed by the parties as soon as possible. To the extent possible, the parties shall select negotiators who are knowledgeable about the dispute and who are in a position to reach agreement or can credibly recommend approval of an agreement.

(b) Negotiation may be conducted by any method, technique, or procedure authorized under the contract or agreed upon by the parties. The contractor and the Commission may conduct negotiations with the assistance of one or more neutral third parties.

(c) The parties may choose to mediate the dispute according to §141.205 of this title (relating to Mediation).

(d) To facilitate meaningful negotiation, the parties must exchange relevant documentation that supports their claims, defenses, counterclaims or positions.

(e) Any settlement reached during the negotiation must be put in writing and signed by representatives of the contractor and the Commission. The agreement must describe any procedures that must be followed to secure final approval.

(f) The final settlement must be documented in writing and signed by representatives of the contractor and the Commission with authority to bind the respective party. If the settlement does not resolve all issues raised by the claim and counterclaim, the agreement must specifically identify the issues that are not resolved.

(g) Unless the contractor and the Commission agree otherwise, each party shall be responsible for its own costs.

§141.205. Mediation.

(a) The contractor and the Commission may agree to mediate a claim through an impartial third party. Mediation is a forum in which an impartial person facilitates communication between parties to promote reconciliation, settlement, or understanding, but does not impose his own judgment on the issues.

(b) The mediation shall be governed by the provisions of the Governmental Dispute Resolution Act, TEX. GOV'T CODE ANN. ch. 2009 (2003).

(c) The Commission and the contractor shall select an impartial third party that is acceptable to both. The impartial third party must:

(1) possess the qualifications required under TEX. CIV. PRAC. & REM. CODE ANN. §154.052 (Vernon 1997);

(2) be subject to the standards and duties prescribed by TEX. CIV. PRAC. & REM. CODE ANN. §154.053 (Vernon 1997); and

(3) have the qualified immunity prescribed by TEX. CIV. PRAC. & REM. CODE ANN. §154.055 (Vernon 1997), if applicable.

(d) A mediation conducted under this section is confidential in accordance with TEX. GOV'T CODE ANN. §2009.054 (Vernon 2000).

(e) A final settlement agreement signed by the Commission under this section is subject to or excepted from required disclosure in accordance with TEX. GOV'T CODE ANN. ch. 552 (Vernon 2000).

(f) Unless the contractor and the Commission agree otherwise, the costs of the mediator shall be divided equally between the parties and each party shall be responsible for its own costs.

(g) Any limitations on the settlement authority of the representatives participating in the negotiations must be disclosed by the parties before mediation begins.

(h) Any settlement reached during the mediation must be put in writing and signed by representatives of the contractor and the Commission. The agreement must describe any procedures that must be followed to secure final approval.

(i) The final settlement must be documented in writing and signed by representatives of the contractor and the Commission with authority to bind the respective party. If the settlement does not resolve all issues raised by the claim and counterclaim, the agreement must specifically identify the issues that are not resolved.

(j) If mediation does not resolve the claim to the satisfaction of the contractor, the contractor may file a request that the claim be referred to SOAH pursuant to TEX. GOV'T CODE ANN. ch. 2260 (Vernon 2000). The request for referral must be filed according to the timetable described in §141.203 of this title (relating to Timetables for Negotiations and Contested Case Hearings).

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 August 18, 2003.

TRD-200305311
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER C. PROCUREMENT

40 TAC §141.301, §141.302

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health and Safety Code §461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rules are also proposed under Texas Health and Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the new rules are Chapters 461 and 464 of the Texas Health and Safety Code.

§141.301. Procurement.

(a) The Commission shall procure all goods and services in compliance with 1 TAC Chapter 391 (2003).

(1) Procurements will be classified as either formal or informal, based on the estimated dollar value of the transaction. Dollar thresholds will be established in Commission policies and procedures, and the methodology will be reviewed annually.

(2) The Commission may use a waiver process as defined in 1 TAC Chapter 391 (2003) for procurements below $100,000. The waiver process may be used in the presence of unique circumstances related to that procurement action. All waivers will be approved by the executive director.

(3) Procurement of prevention, intervention, treatment and related support services shall be conducted as described in Chapter 144 of this title (relating to Contract Administrative Requirements).

(b) The Commission requires compliance with the Historically Underutilized Businesses rules published by the Texas Building and Procurement Commission in 1 TAC Chapter 111 (2003).

(c) Procurement personnel, vendors, contractors, and suppliers will adhere to standards of conduct established in Commission policies and procedures. These standards shall be at least as restrictive as standards of conduct for State officers and employees under applicable State and Federal law.

§141.302. Procurement Protests.

(a) An offeror may request an informal review of a tentative purchase award if:

(1) the offeror was not selected in a competitive procurement;

(2) the procurement was a sole source or emergency procurement; or

(3) the procurement was made under an executive director waiver.

(b) The protest must be limited to issues relating to the offeror's qualifications, the suitability of the goods or services offered by the offeror, or alleged irregularities in the procurement process.

(c) A procurement review request must be submitted in writing and received by the Commission no later than 30 calendar days after the date of the award, except for protests alleging irregularities involving standards of conduct on the part of Commission employees or selected vendors, which must be received by the Commission no later than 90 calendar days after the date of the award.

(d) The protest process shall be carried out in accordance with Commission policies and procedures, which include documentation standards.

(e) A procurement protest shall not be conducted as a contested case under the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 (Vernon 2000).

(f) The Commission shall not award a contract for a protested procurement until the Commission has provided the protesting offeror with a written response. The Commission may waive this requirement for exigent circumstances or when an award required by State or Federal law must be completed by a particular date.

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 August 18, 2003.

TRD-200305310
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER D. MEASURING THE EFFECTIVENESS OF THE STATE'S SUBSTANCE ABUSE PREVENTION SERVICES

40 TAC §141.401

The new rule is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The new rule is also proposed under Texas Health and Safety Code §461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rule is also proposed under Texas Health and Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the new rule is Chapters 461 and 464 of the Texas Health and Safety Code.

§141.401. Interagency Agreement.

(a) Texas Commission on Alcohol and Drug Abuse, Texas Juvenile Probation Commission, Texas Youth Commission and Texas Department of Protective and Regulatory Services have agreed on the following criteria as measures of a substance abuse prevention program's effectiveness. According to Acts 1999, 76th Leg., ch. 1051, §§1 - 3, all funded substance abuse prevention programs shall:

(1) target problems that are specific to a given community or school.

(A) The provider shall determine what population(s) the program is designed to serve: universal, selective or indicated.

(i) Universal programs reach the general population (such as all students in a school).

(ii) Selective programs target a subset of the general population which is at high risk for substance abuse (such as children of drug users).

(iii) Indicated programs are designed for those who may already be experimenting with drugs or who exhibit other problem-related behaviors.

(B) The program shall identify and describe the primary and secondary target populations including specific information about:

(i) age, gender, and ethnicity;

(ii) risk and protective factors;

(iii) patterns of substance use;

(iv) social and cultural characteristics;

(v) knowledge, beliefs, values, and attitudes; and,

(vi) needs.

(C) The program shall identify long-range goals which:

(i) address identified risks, needs and/or problems of the primary and secondary target populations;

(ii) are designed to enhance protective factors;

(iii) clearly describe behavioral and/or societal changes to be achieved; and

(iv) are realistic in relation to available resources.

(D) The program shall establish objectives for each contract period that are linked to the goals. Objectives must be realistic, outcome oriented, measurable and time-specific.

(2) provide social services to children who have a family member with a drug addiction.

(A) The program shall identify needs that cannot be met by the program and help the participant access appropriate support systems and community resources. The program shall maintain a current list of referral resources, including other services provided by the organization.

(B) The program shall provide information, referrals and follow-up for participant and/or family needs that cannot be met by the program.

(3) use strategies that are appropriate for children and adolescents of different ages. The program design, content, communications and materials shall:

(A) be available in the primary language of the target population;

(B) be appropriate to the literacy level, gender, race, ethnicity, sexual orientation, age and developmental level of the target population; and

(C) recognize the cultural identification (context) of the family unit.

(4) Provide continuity in services and intervention strategies for all grade levels as stipulated in any contracts the program enters into with the agencies in this interagency agreement.

(A) The substance abuse prevention program shall be designed to build on and support other related prevention and intervention efforts in the community. The program shall secure and maintain the support of key decision makers and leaders and shall establish formal linkages and coordinate with other community resources.

(B) Each substance abuse prevention program that provides activities within this strategy shall work with other service providers, organizations, individuals and families to promote substance abuse services and improve the community's ability to prevent substance abuse and related problems.

(C) The program must use existing community services and resources effectively to enhance the substance abuse prevention program.

(D) The program must establish formal linkages with other service providers to build a continuum of substance abuse services in the community. The program shall document active participation in collaborations to support community resource development.

(E) The program shall provide information, referrals and follow-up for participant and/or family needs that cannot be met by the program.

(b) In addition, according to Acts 1999, 76th Leg., ch. 1051, §3, each agency shall require the substance abuse prevention program to submit an annual report that describes the program's effectiveness in meeting established criteria.

(1) The program shall perform self-evaluation to verify, document and quantify program activities and effectiveness.

(2) The program shall submit a written evaluation report using the format specified by the funding agency at the end of each contract period.

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 August 18, 2003.

TRD-200305309
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER E. MISCELLANEOUS PROVISIONS

40 TAC §§141.501 - 141.503

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health and Safety Code §461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rules are also proposed under Texas Health and Safety Code, §464.009, which provides TCADA with

the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the new rules is Chapters 461 and 464 of the Texas Health and Safety Code.

§141.501. Public Comment and Requests.

At its public meetings, the Commission may receive public comment from any person on any issue which is not otherwise provided for by rule or procedure. The Commission may limit public comment to five minutes per person. The Commission shall maintain a list of visitors attending public meetings.

§141.502. Approval Authority.

(a) The executive director and the executive director's designees shall have authority to enter into contracts or approve vouchers for payment from funds appropriated to the Commission.

(b) The Commission members shall approve budget requests to be submitted to the legislature and shall approve the agency's budget of appropriated funds and funds from other sources.

§141.503. Training and Education.

Commission policy establishes eligibility requirements and employee obligations for training and education supported by the agency.

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 August 18, 2003.

TRD-200305308
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

CHAPTER 142. INVESTIGATIONS AND HEARINGS

40 TAC §§142.11, 142.21, 142.31, 142.32

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Commission on Alcohol and Drug Abuse (TCADA) proposes the repeal of Chapter 142, concerning Investigations and Hearings.

Sections 142.11, 142.21, 142.31, and 142.32 contain definitions and information regarding complaints and investigations, procedures for contested cases for counselor and facility licenses, and administrative.

The repeal of Chapter 142 is proposed because TCADA is adopting new rules. The new rules will be reorganized to provide a more functional and logical framework that is more closely aligned with the rules of other agencies operating under the Health and Human Services Commission and the State Office of Administrative Hearings.

Thomas F. Best, General Counsel, has determined that there will be no fiscal implications for state or local government for the first five-year period the repeal is in effect.

Mr. Best, has also determined that for each year of the first five years the repeal is in effect the anticipated public benefit will be reduced duplicative information and greater clarity regarding expectations TCADA has for individuals and organizations providing substance abuse services in Texas so that more concentration on quality of care issues and service outcomes results. There will be no effect on small businesses and there is no anticipated economic cost to current providers.

Comments on the proposal may be submitted to Albert Ruiz, Texas Commission on Alcohol and Drug Abuse, P.O. Box 80529, Austin, Texas 78708-0529. Comments may also be submitted electronically to *rules.revisions@tcada.state.tx.us* or faxed to (512) 821-4419. All comments must be received no later than 30 days from the date the proposal is published in the *Texas Register*.

The repeal of Chapter 142 is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions and Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities. The repeal is also proposed under Chapter 504 of the Texas Occupations Code, which provides TCADA authority to establish procedures for the licensure of chemical dependency counselors.

The codes affected by the proposed repeal are Chapters 461 and 464 of the Texas Health and Safety Code and Chapter 504 of the Texas Occupations Code.

§142.11. Definitions.
§142.21. Complaints and Investigations.
§142.31. Procedure for Contested Cases for Counselor and Facility Licenses.
§142.32. Administrative Penalties For Licensed Facilities and Counselors.

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 August 15, 2003.

TRD-200305258
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

CHAPTER 143. FUNDING

40 TAC §§143.1 - 143.3, 143.11 - 143.15, 143.17, 143.21, 143.22

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Commission on Alcohol and Drug Abuse (TCADA) proposes the repeal of Chapter 143, concerning Funding.

Sections 143.1 - 143.3 contain information regarding the applicability of Chapter 143, allocation of funds, and service procurement plan.

Sections 143.11 - 143.15 and §§143.17, 143.21 and 143.22 pertain to TCADA's development of selection criteria for its request for proposals, application criteria, funding decisions, and alternative competition processes.

The repeal of Chapter 143 is proposed because TCADA is adopting new rules. The new rules will be reorganized to provide a more functional and logical framework and will be more closely aligned with the rules of other agencies operating under the Health and Human Services Commission.

Thomas F. Best, General Counsel, has determined that there will be no fiscal implications for state or local government for the first five-year period the repeal is in effect.

Mr. Best has also determined that for each year of the first five years the repeal is in effect the anticipated public benefit will be reduced duplicative information and greater clarity regarding expectations TCADA has for individuals and organizations providing substance abuse services in Texas so that more concentration on quality of care issues and service outcomes results. There will be no effect on small businesses and there is no anticipated economic cost to current providers.

Comments on the proposal may be submitted to Albert Ruiz, Texas Commission on Alcohol and Drug Abuse, P.O. Box 80529, Austin, Texas 78708-0529. Comments may also be submitted electronically to *rules.revisions@tcada.state.tx.us* or faxed to (512) 821-4419. All comments must be received no later than 30 days from the date the proposal is published in the *Texas Register*.

The repeal is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures followed by TCADA when funding services and §461.0141 which provides TCADA with the authority to adopt rules regarding purchase of services.

The code affected by the proposed repeal is the Texas Health and Safety Code, Chapter 461.

§143.1. Applicability.

§143.2. Allocation of Funds.

§143.3. Service Procurement Plan.

§143.11. Selection Criteria.

§143.12. Notice.

§143.13. Request for Proposals (RFP).

§143.14. Application.

§143.15. Application Criteria.

§143.17. Funding Decisions.

§143.21. Alternative Competition.

§143.22. Other Funding Processes.

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 August 15, 2003.

TRD-200305245
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

CHAPTER 144. CONTRACT REQUIREMENTS

The Texas Commission on Alcohol and Drug Abuse (TCADA) proposes the repeal of Chapter 144, concerning Contract Requirements.

Sections 144.1, 144.11, and 144.21 of Subchapter A--General Provisions of the existing rule contain information on programs affected by Chapter 144, waivers, and definitions.

Sections 144.101, 144.103 - 144.109, 144.121, 144.123, 144.124, 144.131-144.134, 144.141, 144.142, and 144.145 of Subchapter B--Contract Administration pertain to contract provisions, specifically TCADA requirements for reporting organizational and personnel changes, matching awards, financial eligibility, third party payment, and reporting. Sections also contains information on cost reimbursement and billing for treatment services, applicability of Federal and State regulations, program income, indirect cost, subcontracting, and contract closeout.

Sections 144.201, 144.204, 144.211 - 144.216 of Subchapter C--Program Oversight pertain to commission oversight, specifically on-site reviews, independent audit report requirements, and audit report desk reviews.

Sections 144.311, 144.313, and 144.321 - 144.327 of Subchapter D--Organizational contain general requirements for funded providers, including requirements for establishing and maintaining effective internal programmatic and financial controls, policies and procedures.

Sections 144.401, 144.411 - 144.418, 144.441 - 144.447, 144.451 - 144.456, 144.458, 144.460, and 144.462 of Subchapter E--Prevention and Intervention pertain to funded programs providing prevention or intervention services.

Sections 144.501, 144.511, 144.521 - 144.523, 144.525, 144.526, 144.532, 144.541 - 144.543, 144.545, 144.551 - 144.553 of Subchapter F--Treatment pertain to programs funded to provide treatment services.

The repeal of Chapter 144 is proposed because TCADA is adopting new rules. The new rules will be reorganized to provide a more functional and logical framework that is more closely aligned with the other agencies operating under the Health and Human Services Commission.

Thomas F. Best, General Counsel, has determined that there will be no fiscal implications for state or local government for the first five-year period the repeal is in effect.

Mr. Best has also determined that for each year of the first five years the repeal is in effect the anticipated public benefit will be better protection of public funds, reduced duplicative information and greater clarity regarding expectations TCADA has for individuals and organizations providing substance abuse services in Texas so that more concentration on quality of care issues and service outcomes results. There will be no effect on small businesses and there is no anticipated economic cost to current providers.

Comments on the proposal may be submitted to Albert Ruiz, Texas Commission on Alcohol and Drug Abuse, P.O. Box 80529, Austin, Texas 78708-0529. Comments may also be submitted electronically to *rules.revisions@tcada.state.tx.us* or faxed to (512) 821-4419. All comments must be received no later than 30 days from the date the proposal is published in the *Texas Register*.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §§144.1, 144.11, 144.21

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides the commission with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission when funding services and §461.0141 which provides the commission with authority to adopt rules regarding purchase of services. The repeal is also proposed under Texas Health and Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed repeal is Texas Health and Safety Code Chapters 461 and 464.

§144.1. Applicability.

§144.11. Waivers.

§144.21. Definitions.

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 August 15, 2003.

TRD-200305244
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER B. CONTRACT ADMINISTRATION

40 TAC §§144.101, 144.103 - 144.109, 144.121, 144.123, 144.124, 144.131 - 144.134, 144.141, 144.142, 144.145

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides the commission with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission when funding services and §461.0141 which provides the commission with authority to adopt rules regarding purchase of services. The repeal is also proposed under Texas Health and Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed repeal is Texas Health and Safety Code Chapters 461 and 464.

§144.101. General Contract Provisions.
§144.103. Organizational and Personnel Changes.
§144.104. Matching Awards.
§144.105. Financial Eligibility and Third Party Payment.
§144.106. Payment Requirements.
§144.107. Reporting.
§144.108. Cost Reimbursement for Treatment Services.
§144.109. Billing for Treatment Services.
§144.121. Application of Federal and State Regulations.
§144.123. Program Income.
§144.124. Indirect Cost.
§144.131. Expenditures Requiring Prior Approval.
§144.132. Equipment and Supplies.
§144.133. Travel.
§144.134. Minor Remodeling.
§144.141. Procurement of Goods and Services.
§144.142. Subcontracting.
§144.145. Contract Closeout.

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 August 15, 2003.

TRD-200305243
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER C. PROGRAM OVERSIGHT

40 TAC §§144.201, 144.204, 144.211 - 144.216

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides the commission with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission when funding services and §461.0141 which provides the commission with authority to adopt rules regarding purchase of services. The repeal is also proposed under Texas Health and Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed repeal is Texas Health and Safety Code Chapters 461 and 464.

§144.201. Commission Oversight.
§144.204. On-Site Reviews.

§144.211. Independent Audit Report.
§144.212. Auditor Qualifications.
§144.213. Independent Audit Report Requirements.
§144.214. Independent Audit Report Submission.
§144.215. Corrective Action Plan.
§144.216. Audit Report Desk Reviews.

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 August 15, 2003.

TRD-200305242
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER D. ORGANIZATIONAL

40 TAC §§144.311, 144.313, 144.321 - 144.327

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides the commission with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission when funding services and §461.0141 which provides the commission with authority to adopt rules regarding purchase of services. The repeal is also proposed under Texas Health and Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed repeal is Texas Health and Safety Code Chapters 461 and 464.

§144.311. General Requirements.
§144.313. Management and Organization.
§144.321. Policies and Procedures.
§144.322. Documentation and Records.
§144.323. Commission Logo and Slogan.
§144.324. Limiting Barriers.
§144.325. Complaints and Reports.
§144.326. Staffing.
§144.327. Standards of Conduct.

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 August 15, 2003.

TRD-200305241
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER E. PREVENTION AND INTERVENTION

40 TAC §§144.401, 144.411 - 144.418, 144.441 - 144.447, 144.451 - 144.456, 144.458, 144.460, 144.462

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal of is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides the commission with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission when funding services and §461.0141 which provides the commission with authority to adopt rules regarding purchase of services. The repeal is also proposed under Texas Health and Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed repeal is Texas Health and Safety Code Chapters 461 and 464.

§144.401. Applicability.
§144.411. Program Design and Implementation.
§144.412. Program Self-Evaluation.
§144.413. Performance and Activity Measures.
§144.414. Performance Measure Review.
§144.415. Participant Rights.
§144.416. Tobacco Products.
§144.417. Staff Training.
§144.418. Transportation.
§144.441. Information Dissemination.
§144.442. Prevention Education and Skills Training.
§144.443. Alternative Activities.
§144.444. Problem Identification and Referral.
§144.445. Community-Based Process.
§144.446. Environmental and Social Policy.
§144.447. Intervention Services.
§144.451. Youth Prevention Programs.
§144.452. Youth Intervention Programs.
§144.453. Community Coalitions.
§144.454. Prevention Training Services.
§144.455. Prevention Resource Centers.
§144.456. Outreach, Screening, Assessment, and Referral Services.
§144.458. Pregnant Postpartum Intervention Programs.
§144.460. HIV Early Intervention Services (HEI).
§144.462. HIV Outreach Services.

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 August 15, 2003.

TRD-200305240
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER F. TREATMENT

40 TAC §§144.501, 144.511, 144.521 - 144.523, 144.525, 144.526, 144.532, 144.541 - 144.543, 144.545, 144.551 - 144.553

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides the commission with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission when funding services and §461.0141 which provides the commission with authority to adopt rules regarding purchase of services. The repeal is also proposed under Texas Health and Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed repeal is Texas Health and Safety Code Chapters 461 and 464.

§144.501. Applicability.
§144.511. Program Plan and Implementation.
§144.521. Client Eligibility.
§144.522. Priority Populations.
§144.523. Waiting List and Interim Services.
§144.525. Admission Determination and Placement.
§144.526. Length of Stay Guidelines.
§144.532. Core Program Requirements.
§144.541. Specialized Treatment Services for Females.
§144.542. Additional Requirements for Women and Children's Residential Programs.
§144.543. Pharmacotherapy Services.
§144.545. Family Services.
§144.551. Performance Measure Review.
§144.552. Select Performance Measure Definitions.
§144.553. Client Record Documentation.

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 August 15, 2003.

TRD-200305239
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

CHAPTER 145. FAITH BASED CHEMICAL DEPENDENCY PROGRAMS

40 TAC §§145.11, 145.21 - 145.25

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Commission on Alcohol and Drug Abuse (TCADA) proposes the repeal of Chapter 145, concerning Faith-Based Chemical Dependency Programs.

Section 145.11 and §§145.21 - 145.25 contain definitions and information on registering and exempting Faith-Based Programs from TCADA licensure and process for revoking Faith-Based exemption.

The repeal of Chapter 145 is proposed because TCADA is adopting new rules. The new rules will be reorganized to provide a more functional and logical framework that is more closely aligned with the other agencies operating under the Health and Human Services Commission.

Thomas F. Best, General Counsel, has determined that there will be no fiscal implications for state or local government for the first five-year period the repeal is in effect.

Mr. Best has also determined that for each year of the first five years the repeal is in effect the anticipated public benefit will be more efficient use of resources, reduced duplicative information and greater clarity regarding expectations TCADA has for individuals and organizations providing substance abuse services in Texas so that more concentration on quality of care issues and service outcomes results. There will be no effect on small businesses and there is no anticipated economic cost to current providers.

Comments on the proposal may be submitted to Albert Ruiz, Texas Commission on Alcohol and Drug Abuse, P.O. Box 80529, Austin, Texas 78708-0529. Comments may also be submitted electronically to *rules.revisions@tcada.state.tx.us* or faxed to (512) 821-4419. All comments must be received no later than 30 days from the date the proposal is published in the *Texas Register*.

The repeal is proposed under the Texas Health and Safety Code, Chapter 464, which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules licensing chemical dependency treatment facilities.

The code affected by the proposed repeal is the Texas Health and Safety Code, Chapter 464.

§145.11. Definitions.
§145.21. Exemption for Faith-Based Programs.
§145.22. Registration for Exempt Faith-Based Programs.
§145.23. Admission.
§145.24. Advertisement.
§145.25. Revocation of Exemption.

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 August 15, 2003.

TRD-200305238
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

CHAPTER 146. INTERAGENCY AGREEMENTS

40 TAC §146.21

(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 on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Commission on Alcohol and Drug Abuse (TCADA) proposes the repeal of Chapter 146, concerning Interagency Agreements.

Section 146.21 contains information about criteria for measuring the effectiveness of substance abuse prevention programs.

The repeal of Chapter 146 is proposed because TCADA is adopting new rules. The new rules will be reorganized to provide a more functional and logical framework that is more closely aligned with the other agencies operating under the Health and Human Services Commission.

Thomas F. Best, General Counsel, has determined that there will be no fiscal implications for state or local government for the first five-year period the repeal is in effect.

Mr. Best has also determined that for each year of the first five years the repeal is in effect the anticipated public benefit will be more efficient use of resources, reduced duplicative information and greater clarity regarding expectations TCADA has for individuals and organizations providing substance abuse services in Texas so that more concentration on quality of care issues and service outcomes results. There will be no effect on small businesses and there is no anticipated economic cost to current providers.

Comments on the proposal may be submitted to Albert Ruiz, Texas Commission on Alcohol and Drug Abuse, P.O. Box 80529, Austin, Texas 78708-0529. Comments may also be submitted electronically to *rules.revisions@tcada.state.tx.us* or faxed to (512) 821-4419. All comments must be received no later than 30 days from the date the proposal is published in the *Texas Register*.

The repeal is proposed under the Texas Health and Safety Code, §461.012(a)(15) which authorizes TCADA to adopt rules governing its functions, including rules that prescribe the policies and procedures followed by TCADA in administering its programs.

The code affected by the proposed repeal is the Texas Health and Safety Code, Chapter 461.

§146.21. Criteria Established to Measure the Effectiveness of Substance Abuse Prevention Programs.

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 August 15, 2003.

TRD-200305237
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

CHAPTER 147. CONTRACT PROGRAM REQUIREMENTS

The Texas Commission on Alcohol and Drug Abuse (TCADA) proposes new Chapter 147, §§147.101 - 147.117, 147.201 - 147.204, 147.301 - 147.304, 147.401, 147.402, 147.501, 147.502, 147.601 - 147.604, and 147.701, pertaining to Contract Program Requirements. TCADA has submitted its proposal to repeal the existing Chapter 147 to the Texas Register for publication in this issue.

The new Chapter 147 incorporates portions of other existing rules concerning the delivery of program services funded by TCADA. Narcotics treatment programs, HIV, women's services, prevention/intervention and outreach, screening, assessment, and referral (OSAR) services are affected by these changes.

Most of the funding specific rules for Commission funded prevention programs, formerly found in Chapter 144--Contract Requirements, and 148--Facility Licensure, have been moved to the proposed new Chapter 147. These rules set out specific program requirements for program selection, target population, reporting, evaluation, and each of the six Center for Substance Abuse Prevention (CSAP) strategies.

The proposed new rules also take into account the new capacity and outcome measures requirement of the Performance Partnership Grant (PPG), which CSAP and Substance Abuse and Mental Health services Administration (SAMSHA) is proposing for fiscal year 2005. As a result, requirements pertaining to capacity management and outcome measures are included in the proposed rules.

Thomas F. Best, General Counsel, has determined that there will be no significant fiscal impact on state or local government for the first five-year period the new rules are in effect.

Mr. Best has also determined that for each year of the first five years the new rules are in effect the anticipated public benefit will be clarified expectations for funded providers and greater capability to effectively measure and manage capacity and outcomes.

As a result of adoption of the new rules, there will be no significant marginal effect on small businesses and there is no significant marginal economic cost to current providers.

Comments on the proposal may be submitted to Albert Ruiz, Texas Commission on Alcohol and Drug Abuse, P.O. Box 80529, Austin, Texas 78708-0529. Comments may also be submitted electronically to *rules.revisions@tcada.state.tx.us* or faxed to (512) 821-4418. All comments must be received no later than October 15, 2003.

To ensure consideration, comments must clearly specify a particular section of the rule. Comments should include proposed alternative language as appropriate.

SUBCHAPTER A. PREVENTION AND INTERVENTION

40 TAC §§147.101 - 147.117

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission with the authority to adopt rules governing the functions of the Commission, including rules that prescribe the policies and procedures followed by the Commission when funding services and §461.0141 which provides the Commission with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health and Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rules is Texas Health and Safety Code Chapters 461 and 464.

§147.101. Applicability and Definitions.

(a) The rules in this subchapter apply only to funded programs providing prevention or intervention services.

(b) All funded programs must also comply with Chapter 148 of this title (relating to General Provisions).

(c) The words and terms used in this chapter shall have meanings set forth in Chapter 141 (2003) of this title, unless the context clearly indicates otherwise. The following definition is specific to prevention and intervention: Young Adults--Individuals aged 18 - 21 served by Commission-funded youth services prevention providers. Prevention providers may bill and report individuals aged 18 - 21 as youth if all other requirements are met.

§147.102. Program Design and Implementation.

(a) The provider shall determine what population(s) the program is designed to serve: universal, selective or indicated.

(b) The program shall identify and describe the primary and secondary target populations including specific information about:

(1) age, gender, and ethnicity;

(2) risk and protective factors;

(3) patterns of substance use;

(4) social and cultural characteristics;

(5) knowledge, beliefs, values, and attitudes; and

(6) needs.

(c) The program shall identify goals which:

(1) address identified risks, needs and/or problems of the primary and secondary target populations;

(2) are designed to enhance protective factors;

(3) clearly describe behavioral and/or societal changes to be achieved; and

(4) are realistic in relation to available resources.

(d) The program shall establish objectives that are linked to the goals. Objectives must be measurable, have outcome and family strategies where appropriate.

(e) The program design shall be based on a logical, conceptually sound framework to connect the prevention or intervention effort with the intended result of preventing alcohol, tobacco, and other drug problems. Curricula selected shall be evidence based and appropriate for the target population served. The program shall maintain the fidelity of the program design.

(f) In order to carry out the program design, the program shall incorporate a combination of some or all of the Center for Substance and Prevention's (CSAP) prevention strategies. All youth prevention programs (YPP) and youth intervention programs (YPI) must at a minimum conduct prevention education and skills training as a core strategy.

(g) The program shall be designed to build on and support related prevention and intervention efforts in the community. The program shall establish formal linkages and coordinate with other community resources.

(h) The program shall be appropriately structured to implement the program design. The prevention effort shall be consistent with the availability of personnel, resources, and realistic opportunities for implementation.

(i) The program design, content, communications, and materials shall:

(1) be available in the primary language of the target population;

(2) be appropriate to the literacy level, gender, race, ethnicity, sexual orientation, age, and developmental level of the target population; and

(3) recognize the cultural context of the family unit.

§147.103. Key Performance and Activity Measures.

The program shall track and appropriately document the key performance and activity measures defined for the target populations and the services provided as outlined in the contract. The program must maintain adequate documentation to substantiate the reported numbers.

§147.104. Performance Measure Review.

(a) Programs will be held to specific key performance measures as stated in the contract.

(b) The Commission shall review actual performance on key measures and notify the program in writing if the program failed to achieve the expected level of performance.

(c) If the program fails to achieve the expected level of performance, the program shall respond within 30 days from the postmark date of the Commission's written notification with a timeframe in which the deficiencies will be resolved. The program must resolve the noted deficiencies or be subject to sanctions as described in the contract.

(d) The Commission shall take at least one of the following actions in response to performance deficiencies:

(1) notify the program in writing that timeframe for resolving deficiencies has been approved;

(2) specify additional conditions to include manual pay;

(3) impose contract restrictions or sanctions or terminate the contract.

§147.105. Staff Training.

(a) During the first six months of employment, all direct service prevention and intervention staff shall receive a total of 16 hours of training (or document 16 hours of equivalent training), with a minimum of three hours in each of the following areas:

(1) cultural competency;

(2) risk and protective factors/building resiliency;

(3) child development and/or adolescent development, as appropriate; and

(4) strategies for strengthening families.

(b) Staff shall have specific training in the curriculum implemented for prevention education/skills training before facilitating the curriculum independently.

(c) In subsequent years, all direct services prevention staff shall receive eight hours of prevention training related to the program design.

§147.106. Information Dissemination.

(a) Each program that provides activities within this strategy shall disseminate information about these topics as appropriate for the target population:

(1) the nature and extent of alcohol, tobacco, and other drug use, abuse, and addiction;

(2) human immunodeficiency syndrome (HIV) infection, tuberculosis (TB), Hepatitis, and sexually transmitted diseases (STDs); and/or

(3) information about available services and resources.

(b) The information shall be accurate and current.

(c) The information shall be accessible and understandable to the target population in terms of:

(1) content; and

(2) mode, time, and location of delivery.

(d) The program shall document the number of individuals receiving written information/literature.

(e) For presentations, documentation shall include, as applicable:

(1) date, time, and duration of activity;

(2) location of activity;

(3) staff/volunteers conducting activity;

(4) purpose and goal of activity;

(5) number of participants; and

(6) demographics of participants.

§147.107. Prevention Education and Skills Training.

(a) Education and skills training must be designed to affect critical life and social skills and include decision-making, refusal skills, critical analysis and systematic judgment abilities.

(b) The activities must include extensive interaction between the leader and the participants.

(c) Activities shall be conducted according to a written, time-specific curriculum, which is based on proven, effective principles.

(d) Each program that provides activities within this strategy must help participants gain knowledge and/or skills needed to access assistance or help with a problem.

(e) Documentation shall include, as applicable:

(1) date, time, and duration of activity;

(2) location of activity;

(3) staff/volunteers conducting activity;

(4) purpose and goal of activity;

(5) number of participants; and

(6) demographics of participants.

§147.108. Alternative Activities.

(a) Each program that provides activities within this strategy shall provide alternative activities designed to assist participants in:

(1) mastering new skills;

(2) developing/maintaining relationships;

(3) bonding with peers, family, school , and community;

(4) building cultural understanding, and honoring diversity; and

(5) identifying activities which offset the attraction to fill needs met by alcohol, tobacco and other drug use.

(b) Alternative activities shall be planned and conducted to complement the existing program design and proposed outcomes.

(c) Documentation shall include, as applicable:

(1) date, time, and duration of activity;

(2) location of activity;

(3) staff/volunteers conducting activity;

(4) purpose and goal of activity;

(5) number of participants; and

(6) demographics of participants.

§147.109. Problem Identification and Referral.

(a) General requirements. Each program will provide components to identify those who have indulged in illegal use of tobacco or alcohol and those individuals who can have indulged in first use of illicit drugs in order to assess if their behavior can be reversed through education. Required components include screening, referral, and follow-up. This strategy does not include any activity designed to determine if a person is in need of treatment.

(b) Screening. The screening process shall be designed to identify warning signs for alcohol, tobacco, and/or other drug abuse. The screening shall also identify STD/HIV risk factors as appropriate.

(c) Referral. The program shall maintain a current list of referral resources, including other services provided by the organization.

(d) Follow-up. The program shall conduct and document follow-up on referrals to ensure that the participant has presented for services.

(e) Documentation. The program shall maintain documentation of each screening which includes:

(1) date of the screening;

(2) zip code of the individual screened;

(3) demographics of the individual screened;

(4) referrals made; and

(5) any follow-up contacts.

§147.110. Community-Based Process.

(a) Each program that provides activities within this strategy shall work with other service providers, organizations, individuals, and families to effectively promote substance abuse services and improve the community's ability to prevent substance abuse and related problems.

(b) The program must establish formal linkages with other service providers to build a continuum of substance abuse services in the community. The program shall document active participation in collaborations to support community resource development.

(c) When the program coordinates services with another provider, there must be a written agreement that is renewed annually (by signature or other documented contact) and includes:

(1) names of the providers entering into the agreement;

(2) services or activities each provider will provide;

(3) signatures of authorized representatives; and

(4) dates of action and expiration.

(d) Documentation of community-based process activities shall include, as applicable:

(1) date, time, and duration of activity;

(2) key contact persons/providers involved;

(3) purpose and goal of activity;

(4) further action steps needed; and

(5) action or change achieved.

§147.111. Environmental and Social Policy.

(a) Each program that provides activities within this strategy shall take steps to influence the incidence and prevalence of substance abuse through:

(1) legal and regulatory strategies; or

(2) service and action-oriented activities.

(b) Activities must involve members of the community and other key stakeholders who will be impacted by the outcome.

(c) Efforts must be systematic and sustained.

(d) Documentation shall include, as applicable:

(1) date, time, and duration of activity;

(2) key contact persons/providers involved;

(3) purpose and goal of activity;

(4) further action steps needed; and

(5) action or change achieved.

(e) Documentation of minors and tobacco presentations shall document:

(1) content; and

(2) mode, time, and location of delivery.

(f) The program shall document the number of persons receiving written information/literature.

(g) For presentations, documentation shall include, as applicable:

(1) date, time, and duration of activity;

(2) location of activity;

(3) staff/volunteers conducting the activity;

(4) purpose and goal of activity;

(5) number of participants; and

(6) demographics of participants.

§147.112. Intervention Services.

(a) Each program that provides activities within this strategy shall provide indicated prevention services to individual participants who are showing early warning signs of substance use or abuse and/or exhibiting other high risk problem behaviors. Family members may also be involved in these services.

(b) The program shall determine the needs of the participant (and family members) in a culturally appropriate, face-to-face screening. The screening shall gather information to identify the participant's risk and protective factors in five domains: individual, family, school, peer relationships, and community. Should the participant and/or family member need a more intensive level of services, the invention service provider facilitates their access to the needed service.

(1) Information about the individual shall include:

(A) age, gender, culture and ethnicity;

(B) individual assets;

(C) ATOD use; and

(D) legal issues.

(2) Information about the family as permitted by law shall include:

(A) structure;

(B) functioning; and

(C) family history of ATOD use.

(3) School information shall include:

(A) literacy level;

(B) academic performance; and

(C) behavioral functioning issues.

(4) Information about peer relationships shall include:

(A) ATOD use;

(B) gang or club involvement;

(C) legal issues; and

(D) social functioning.

(5) Information about the community shall include:

(A) economic status;

(B) general environment;

(C) criminal activity; and

(D) availability of ATOD.

(c) The staff person and the participant (and family members, if appropriate) shall develop an intervention plan to address identified needs. The plan shall include:

(1) behavioral goals;

(2) timelines for completing the goals; and

(3) recommended indicated services.

(d) Intervention services shall be conducted through confidential face-to-face contacts with participants and/or family members.

(e) Intervention services for each participant shall be documented, including:

(1) the screening;

(2) the intervention plan;

(3) documentation of each session, including a summary of the session and progress toward or away from identified goals;

(4) referrals and follow-ups; and

(5) an exit summary which includes a description of the results achieved and participant status at closure.

§147.113. Youth Prevention Programs.

(a) The goal of youth prevention programs shall be to preclude the onset of the use of alcohol, tobacco and other drugs by youth and to foster the development of social and physical environments that facilitate healthy, drug-free lifestyles.

(b) Youth prevention programs shall offer universal and/or selective prevention strategies to youth and their families.

§147.114. Youth Intervention Programs.

(a) The goal of youth intervention prevention programs shall be to prevent or interrupt the use of alcohol, tobacco and other drugs by youth who are showing early warning signs of substance use or abuse and/or exhibiting other high-risk problem behaviors in order to halt the progression and escalation of use, abuse, and related problems.

(b) Youth programs shall offer indicated prevention strategies to youth and their families.

(c) The program shall provide information, referrals, and follow-up for participant and/or family needs that cannot be met by the program. These referrals must be documented.

(d) If a participant shows signs of established substance abuse or dependency and appears to be in need of more intensive services, the program shall facilitate access to treatment assessment and placement. The program may continue to provide indicated prevention services on an interim basis to a participant who has been referred to treatment.

(e) The program may also provide crisis intervention services to participants and their families to intervene in situations which may or may not involve alcohol and drug use, and which may escalate if immediate attention is not provided.

(1) Crisis intervention may be offered through telephone contacts and/or face- to-face individual, family, and group interventions.

(2) Crisis intervention services must be documented.

(3) Crisis intervention services in the context of an indicated prevention program may be provided by non-licensed staff who are qualified to perform these functions.

§147.115. Community Coalitions.

(a) Community coalitions shall implement strategies designed to accomplish the following goals:

(1) to prevent and reduce substance use and abuse among youth in each community served;

(2) to strengthen collaboration in communities and support the existing community-based prevention and treatment infrastructure; and

(3) to increase citizen participation and greater commitment among all sectors of the community toward reducing substance use and abuse. Community coalitions shall include (or document attempts to recruit) one or more representatives from each of these areas:

(A) youth;

(B) parents;

(C) businesses;

(D) media;

(E) schools;

(F) community organizations serving youth;

(G) faith-based groups;

(H) civic and/or volunteer groups;

(I) health care professionals;

(J) State, local or tribal governmental agencies with expertise in substance abuse;

(K) other organizations involved in reducing substance abuse;

(L) law enforcement; and

(M) recovery community.

(b) Community coalitions shall implement community-based processes and environmental and social policy strategies in the community.

(c) Community coalitions, other than Statewide Incentive Grant (SIG) recipients, shall not provide or subcontract for the provision of individual direct services, including prevention education and skills training, alternative activities or problem identification and referral.

§147.116. Prevention Resource Centers.

(a) The goal of each prevention resource center shall be to increase the effectiveness and visibility of prevention of alcohol, tobacco and other drug use and abuse within the region it is funded to serve through information dissemination, community education, and identification of training resources and best practices in prevention.

(b) Each prevention resource center shall provide universal prevention strategies to the region it serves.

(c) Identified target groups shall include at a minimum: prevention professionals and volunteers; community leaders; teachers; school counselors and educational administrators; children and adolescents; parents and families; communities at large; local news media within the region served; and other persons in need of training in the area of alcohol, tobacco and other drugs.

(d) The following services are required of all funded prevention resource centers:

(1) prevention needs assessment and resource identification;

(2) prevention information marketing efforts;

(3) prevention training and referral to resources;

(4) prevention materials clearinghouse accessible to persons served in their region;

(5) regional coordination/networking; and

(6) regional prevention resource center web site and toll-free number.

(e) Each program shall submit reports as directed by the Commission.

§147.117. Pregnant and Parenting Adult and Adolescent Female Prevention Services.

In addition to the standards set forth in Chapter 148 of this title (relating to Standard of Care), prevention providers serving pregnant, post-partum female populations shall comply with the following standards of care:

(1) provide outreach and prevention services in prenatal clinics, hospitals, WIC offices, and other sites where adult and adolescent women may be seeking reproductive health care;

(2) utilize evidence based curricula for education on substance use, abuse and the effects of ATOD upon the fetus to women seeking services;

(3) identify pregnant women who are at high risk due to their use of ATOD or who are at high risk due to the use of ATOD by others and provide motivational counseling to reduce risk, provide education on reproductive health, fetal and child development, parenting, and family violence;

(4) provide referral of children and family members for substance prevention and/or treatment services;

(5) coordinate with other services and resources to include continuing care for pregnant, post-partum and parenting women;

(6) provide referral of infants and children 0 - 3 for early childhood intervention screening; and

(7) provide family service coordination for medical, perinatal, pediatric, WIC and other services that promote the health and well being of the individual.

(8) PPI programs shall comply with §147.112 (a), (b)(1) and (2), and (c) - (e) of this title (relating to Intervention Services),

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 August 18, 2003.

TRD-200305319
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER B. STANDARDS OF CARE FOR HIV PROGRAMMING

40 TAC §§147.201 - 147.204

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission with the authority to adopt rules governing the functions of the Commission, including rules that prescribe the policies and procedures followed by the Commission when funding services and §461.0141 which provides the Commission with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health and Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rules is Texas Health and Safety Code Chapters 461 and 464.

§147.201. Applicability.

The rules in this subchapter apply only to funded programs providing HIV services.

§147.202. HIV Required Services.

(a) Programs receiving TCADA HIV funds shall provide comprehensive HIV services to HIV infected persons with substance abuse problems and persons at risk of being infected as a result of substance abuse related activity and their families and/or significant others. HIV services shall include the following components:

(1) access to HIV antibody counseling and testing. Staff who perform HIV antibody counseling and testing must be currently registered as a Prevention Counseling and Partner Elicitation (PCPE) counselor with the Texas Department of Health.

(2) access to screening for TB and STDs.

(3) counseling to help change behaviors associated with risk of infection.

(b) Programs shall establish annual written service agreements with a comprehensive community resource network of related health, social service providers, and Texas Department of Health (TDH)-sponsored community or regional planning groups.

§147.203. Minimum Operational Requirements for HIV Outreach Programs.

(a) HIV outreach programs identify substance abusers who may or may not be seeking treatment and provide them with information, activities, referrals, and education directed toward informing drug users about the relationship between drug use (especially injecting drug activity) and communicable diseases. The target population is specific to:

(1) injecting drug users at risk of HIV infection;

(2) women, adolescents, and ethnic minority drug users at risk of infection from HIV and other communicable diseases through drug use or unprotected sexual activities; and

(3) other drug users at risk of HIV and other communicable diseases.

(b) HIV outreach service programs shall use outreach models that are scientifically sound. Unless the Commission approves another model in writing, programs shall use one or more of the following models:

(1) The Indigenous Leader Model: Intervention Manual, Wiebel, W. and Levin, L.B., February 1992

(2) The National Institute on Drug Abuse (NIDA) Standard Intervention Model for Injection Drug Users: Intervention Manual, National AIDS Demonstration Research (NADR) program, National Institute on Drug Abuse, February, 1992; and,

(3) AIDS Intervention program for Injecting Drug Users: Intervention Manual, Rhodes, R., Humfleet, G.L., et al., February, 1992.

(c) HIV outreach services shall be delivered at times and locations that meet the needs of the target population.

(d) Commission-funded HIV outreach programs shall refer all persons found to be HIV-infected to Commission-funded HIV early intervention programs.

§147.204. Minimum Operational Requirements for HIV Early Intervention (HEI) Programs.

(a) Programs shall develop and implement strategies to identify HIV infected individuals by increasing awareness of HEI services

within the target populations. Targets for such efforts should include HIV outreach programs, other HIV service organizations, substance abuse treatment programs, and related health organizations.

(b) Programs shall implement service coordination for HIV infected individuals, which accommodates needs associated with treatment for HIV and substance abuse services. Programs are linked as a network to all other HEI providers in the system.

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 August 18, 2003.

TRD-200305320
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER C. NARCOTIC TREATMENT PROGRAMS PROVIDING PHARMACOTHERAPY SERVICES

40 TAC §§147.301 - 147.304

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission with the authority to adopt rules governing the functions of the Commission, including rules that prescribe the policies and procedures followed by the Commission when funding services and §461.0141 which provides the Commission with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health and Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rules is Texas Health and Safety Code Chapters 461 and 464.

§147.301. Applicability.

The rules in this subchapter apply only to funded Narcotic Treatment programs providing pharmacotherapy services.

§147.302. Program Objectives.

The ultimate objective for funding pharmacotherapy services is that this addicted population can have active lives, hold responsible jobs, succeed in school, care for families and have no greater incidence of psychopathology or general medical problems that their drug-free peers. Pharmacotherapy services are provided to substance abusing/dependent persons who are addicted to opioids/narcotics. Services include methadone administration and LAAM administration or other drugs that might be approved by the Federal Drug Administration (FDA) for therapy and approved by the Commission for payment. Narcotic treatment programs providing pharmacotherapy services should work to foster de-stigmatization, encourage the development of new clinical strategies and treatment strategies, promote individualized treatment planning, and ensure client rights.

§147.303. Required Services.

(a) Service components, modalities and delivery systems.

(1) Programs shall provide to staff and clients basic substance abuse/HIV/STDs/TB information. The information should include routes of transmission, methods of prevention, high-risk behaviors, occupational precautions, and behaviors in violation of Texas laws.

(2) Methadone/LAAM dosage levels should be conducted by a trained physician based on data that is adequate for each individual client.

(3) Programs shall provide or offer through a memorandum of understanding (MOU) with an appropriate service provider, high-risk prenatal care, proper dietary/nutrition requirements, ongoing individual, family, or group counseling, and parenting classes in conjunction with methadone treatment.

(4) Programs must ensure that methadone/LAAM clients have access to inpatient, residential or outpatient treatment for medical, surgical, psychiatric, and non-opiate chemical dependency conditions without interruption of pharmacotherapy services.

(b) Program design and implementation must address client's access to a full continuum of care to include substance free treatment for ATOD.

(c) Identify those services and/or collaborative arrangements that address co-occurring psychiatric and substance abuse disorders requirements.

(d) Treatment plans must address, if applicable:

(1) client's abuse or dependence on other substances;

(2) employment counseling and support.

§147.304. Minimum Operational Requirements.

(a) All narcotic treatment programs providing pharmacotherapy services shall maintain certification and licensure compliance with applicable statutes and regulations adopted by: Texas Department of Health; Center for Substance Abuse Treatment; and the Drug Enforcement Agency.

(b) Narcotic treatment programs providing pharmacotherapy shall ensure that clients served in programs funded by the Commission receive at least six face to face individual chemical dependency counseling sessions, specifically, one per week, during the initial 45 days of treatment. After the initial 45 days of continuous treatment, the client shall receive at least one face to face individualized counseling session every two weeks. After one year of continuous treatment, the client shall receive at least one individual counseling session each month.

(c) For all methadone clients, including those admitted on or after September 1, 2002, the maximum duration of methadone services under a contract shall be 18 months. The executive director of the Commission may grant exceptions to this restriction upon application by the contractor. Any request for exception must be justified by documentation showing that the client needs additional methadone services. The executive director may consider whether the client has a documented medical, physical or mental health condition, which would prevent gainful and sustainable employment. If the need for continued services is due to a medical or physical condition, the assessment to justify extended services must be performed by a licensed health professional as defined by §141.101(72) of this title (relating to Definitions). If it is a result of a mental health condition, the assessment must be conducted by a qualified mental health professional as defined by §141.101(99) of this title (relating to Definitions). The assessment of the client's condition must be in direct consultation with a physician licensed by, and in good standing with, the Texas State Board of Medical Examiners.

(d) All narcotic treatment programs providing pharmacotherapy shall adopt policies and procedures that conform with §144.418(b) of this title (relating to Capacity Reporting) and §147.700 of this title (relating to Waiting Lists and Interim Services).

(e) All narcotic treatment programs providing pharmacotherapy shall complete a client fee assessment on each Commission-funded client every six months.

(f) All direct care employees shall receive annual training that includes: symptoms of opiate withdrawal; drug urine screens; current standards of pharmacotherapy; and poly-drug addiction.

(g) The narcotic treatment program providing pharmacotherapy shall ensure that each individual who requests and is in need of treatment for intravenous drug abuse is admitted to an appropriate program not later than 21 days after making the request. Interim services must be provided within 48 hours.

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 August 18, 2003.

TRD-200305321
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER D. OUTREACH, SCREENING, ASSESSMENT AND REFERRAL (OSAR) SERVICES

40 TAC §147.401, §147.402

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission with the authority to adopt rules governing the functions of the Commission, including rules that prescribe the policies and procedures followed by the Commission when funding services and §461.0141 which provides the Commission with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health and Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rules is Texas Health and Safety Code Chapters 461 and 464.

§147.401. Applicability.

The rules in this subchapter apply only to funded outreach, screening, assessment and referral (OSAR) services.

§147.402. Standards for Outreach, Screening, Assessment and Referral Service Provision.

(a) OSARs shall provide screening and assessment, brief interventions, and referral services to individuals with potential substance use disorders.

(b) Screening shall include determination of financial and clinical eligibility for Commission-funded services.

(c) Services shall be offered at times and in locations that facilitate access for target populations, including off-site locations.

(d) Screening and emergency response shall be available 24 hours a day, seven days a week. Screening and assessment shall be conducted by qualified staff using the Commission's Behavioral Health Integrated Provider System (BHIPS).

(e) Screening and assessment shall be sufficient to determine the problem severity, service needs, and stage of change. All clients referred for treatment shall have a DSM diagnosis.

(f) Services shall be provided by qualified staff with skills in motivational interviewing and other engagement techniques.

(g) If an individual is eligible and motivated for Commission-funded services, the OSAR shall arrange for admission to the appropriate service based on client needs and preferences.

(h) The OSAR shall provide brief interventions to help individuals move through the stages of change to a state of readiness to address substance use problems. Brief intervention may be provided as pre-treatment or interim services or as an independent service.

(i) Individuals who are not eligible for TCADA-funded services shall be referred to alternative service providers consistent with their needs and financial resources.

(j) Screening and assessment shall, when appropriate, address the family as a unit and referrals shall be provided for family members, including prevention services for children.

(k) The program shall maintain a resource directory on file that contains current information about local referral resources, including location and contact information, services offered, and eligibility criteria.

(l) OSARs shall coordinate client care across the continuum of care.

(1) A care plan shall be developed for individuals entering Commission-funded services.

(2) The OSAR shall facilitate timely placement into an appropriate level of service.

(3) The OSAR shall provide long-term service coordination for high-severity clients, including:

(A) participating in evaluating treatment;

(B) facilitating intensity of services as determined by client needs and progress;

(C) participating in transfer and discharge planning;

(D) conducting post-discharge follow-up;

(E) providing long-term monitoring; and

(F) offering brief interventions when needed to maintain stability.

(m) OSARs shall coordinate with Commission-funded providers to ensure a seamless episode of care and maximize use of available resources.

(n) OSARs shall promote community awareness of available services through outreach with emphasis on increasing access for priority populations.

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 August 18, 2003.

TRD-200305322
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER E. TREATMENT PERFORMANCE STANDARDS

40 TAC §147.501, §147.502

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission with the authority to adopt rules governing the functions of the Commission, including rules that prescribe the policies and procedures followed by the Commission when funding services and §461.0141 which provides the Commission with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health and Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rules is Texas Health and Safety Code Chapters 461 and 464.

§147.501. Applicability.
The rules in this subchapter apply only to funded treatment programs.

§147.502. Select Performance Measure Definitions.

(a) Minimum Duration of Retention in Treatment Reporting Requirement. This reporting requirement applies to intensive residential, supportive residential and outpatient programs except for pharmacotherapy programs. For a client to have completed the minimum threshold of retention in treatment, the client record must document the client-specific information that supports the reason for discharge listed on the discharge report in BHIPS. A client will be considered to have completed the minimum duration of retention in treatment if:

(1) In intensive or supportive residential program, the client's length of stay is at least 14 days.

(2) In outpatient programs, the client has attended at least 14 individual or group sessions.

(3) The discharge summary or transfer note shall indicate whether the client has successfully completed the minimum duration of retention in treatment according to the above criteria and must be signed by a qualified credentialed counselor (QCC).

(b) Abstinence. This measure applies to all programs except for pharmacotherapy programs and detoxification programs. Abstinence is the percent of clients who report no use of alcohol or drugs in the past 30 days when contacted 60 days after discharge from the treatment program.

(c) Referral Rate. This measure applies to detoxification programs. Referral rate is the percentage of clients who have completed detoxification treatment and are transferred continuing substance abuse treatment as defined below.

(d) Completion of Detoxification Treatment. The client record must record that both the following criteria have been met. Levels of toxic substances and withdrawal symptoms have been sufficiently reduced so that the client is medically stable and able to participate in a less intensive level of treatment. A statement to this effect must be signed by the medical director or designee of the program in the discharge summary or transfer note. A discharge plan or discharge note must be completed prior to discharge or transfer in accordance with §148.805 of this title (relating to Discharge).

(e) Referral. For a client to have been transferred from detoxification to continuing substance abuse treatment, the client records must indicate that one of the following criteria has been met.

(1) The client has been discharged from the program and referred to a less intensive level of treatment in another facility, and the program has conducted follow-up to determine the results of the referral. The referral and follow-up must be documented in the client record.

(2) The client has been transferred to a less intensive level of treatment within the organization. The client record must include a transfer note to document the transfer.

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 August 18, 2003.

TRD-200305323
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER F. TREATMENT FOR PREGNANT AND POST PARTUM WOMEN WITH DEPENDENT CHILDREN

40 TAC §§147.601 - 147.604

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission with the authority to adopt rules governing the functions of the Commission, including rules that prescribe the policies and procedures followed by the Commission when funding services and §461.0141 which provides the Commission with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health and Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rules is Texas Health and Safety Code Chapters 461 and 464.

§147.601. Applicability.
The rules in this subchapter apply only to funded treatment programs for pregnant and post partum women with dependent children.

§147.602. Purpose of Program.
The Commission shall provide awards or contracts to public and nonprofit private entities for the purpose of providing to pregnant and postpartum women and their children, including children in the custody of the court or the State, treatment for substance abuse through programs in which, during the course of receiving treatment:

(1) the women reside in facilities provided by the programs;

(2) the minor children of the women reside with the women in such facilities, if the women so request; and

(3) the services described in this section are available to or on behalf of the women.

§147.603. Availability of Services.

(a) A program will ensure:

(1) treatment services and each supplemental service will be available through the program, either directly or through agreements with other public or nonprofit private entities; and

(2) the services will be made available to each woman admitted to the program.

(b) A provider shall provide or arrange for transportation to all services required and not provided at the facility.

§147.604. Individualized Plan of Services.

A funding agreement for an award for provision of services under this subchapter shall contain the following requirements:

(1) In providing authorized services for an eligible woman, the program shall, in consultation with the women, prepare an individualized plan for the provision to the woman of the services.

(2) Treatment services under the plan will include:

(A) individual, group, and family counseling, as appropriate, regarding substance abuse; and

(B) follow-up services to assist the woman in preventing a relapse into such abuse.

(3) Treatment services provided shall be gender specific.

(4) Required supplemental services for eligible women shall include:

(A) prenatal and postpartum health care, and

(B) referrals for necessary hospital services

(5) For the infants and children of the woman:

(A) pediatric health care, including treatment for any perinatal effects of maternal substance abuse and including screenings regarding the physical and mental development of the infants and children; immunizations;

(B) counseling and other mental health services, in the case of children; and

(C) comprehensive social services.

(6) Therapeutic interventions for children in custody of women in treatment shall address their development needs and issues of sexual abuse and neglect.

(7) Supervision of children shall be provided during periods in which the woman is engaged in therapy or in other necessary health or rehabilitative activities.

(8) Training in parenting shall be provided.

(9) Counseling on HIV and on acquired immune deficiency syndrome (AIDS), STDs and TB shall be provided.

(A) Clients shall be given the opportunity for pre- and post-test counseling on HIV and AIDS.

(B) Clients with a positive test for HIV shall be referred, when possible, to a Commission HEI/HIV coordinator to be considered for services.

(C) Clients shall be offered testing for tuberculosis upon request.

(D) Clients shall be offered testing for sexually transmitted disease.

(10) Counseling on domestic violence and sexual abuse shall be provided.

(11) Counseling on obtaining employment, including the importance of graduating from a secondary school or GED course, shall be provided.

(12) Reasonable efforts shall be made to preserve and support the family units of the women, including promoting the appropriate involvement of parents and others, and counseling the children of the women.

(A) In cases when the State has custody of the minor child, all efforts will be made to participate in a family reunification plan with the custodial agency.

(B) The provider will work with the court and the client to meet the conditions of the court to reunite the family.

(13) Planning for and counseling to assist reentry into society shall be provided, both before and after discharge, including referrals to any public or nonprofit private entities in the community involved that provide services appropriate for the women and the children of the women.

(14) Service coordination shall be provided, to include:

(A) assessing the extent to which authorized services are appropriate for the women and their children;

(B) in the case of the services that are appropriate, ensuring that the services are provided in a coordinated manner; and

(C) assistance in establishing eligibility for assistance under Federal, State, and local programs providing health services, mental health services, housing services, employment services, educational services, or social services.

(15) The program shall provide outreach services in the community involved to identify women who are engaging in substance abuse and to encourage the women to undergo treatment for such abuse.

(16) A program providing services will:

(A) be operated at a location that is accessible to low-income pregnant and postpartum women; and

(B) provide authorized services in the language and the cultural context that is most appropriate.

(17) A funded program shall provide for continuing education in treatment services for the individuals who will provide treatment in the program to be operated by the program pursuant to such subsection.

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 August 18, 2003.

TRD-200305324
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER G. CAPACITY MANAGEMENT AND INTERIM SERVICES

40 TAC §147.701

The new rule is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission with the authority to adopt rules governing the functions of the Commission, including rules that prescribe the policies and procedures followed by the Commission when funding services and §461.0141 which provides the Commission with authority to adopt rules regarding purchase of services. The new rule is also proposed under Texas Health and Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rule is Texas Health and Safety Code Chapters 461 and 464.

§147.701. Waiting List and Interim Services.

The following provisions apply to all funded treatment services:

(1) The program shall maintain a waiting list or other organized and documented system to track eligible individuals who have been screened but cannot be treated immediately because of insufficient capacity. Eligible individuals who cannot enter treatment due to other circumstances may be placed on the waiting list, but the provider shall not hold empty beds or slots for anticipated clients for more than 48 hours.

(2) The program shall establish criteria that place members of the priority populations at the top of the waiting list.

(3) When individuals are placed on a waiting list, they shall also be referred to an entity that can provide testing, counseling, and treatment for HIV, TB and STDs.

(4) The program shall consult the State's facility capacity management system to facilitate prompt placement in an appropriate treatment program within a reasonable geographic area.

(5) The program shall implement written procedures to maintain contact with individuals waiting for admission.

(6) When a program does not have capacity to admit an injecting drug user or pregnant female, the program shall place the individual in another treatment facility or provide reasonable access to interim services (when another treatment facility is not available).

(A) Interim services shall be offered within 48 hours.

(B) Interim services shall include counseling and education about HIV and TB, including the risks of needle-sharing, the risks of transmission to sexual partners and infants, and steps that can be taken to prevent transmission. Referrals for HIV or tuberculosis treatment shall be provided if necessary. For pregnant females, interim services shall also include counseling about the effects of alcohol and drug use on the fetus and referrals for prenatal care.

(C) The program shall maintain documentation of interim services provided.

(7) The program shall ensure that each individual who requests and is in need of treatment for intravenous drug abuse is admitted to an appropriate program not later than 21 days after making the request. Interim services must be provided within 48 hours as described in paragraph (6)(A) of this section.

(8) Capacity management may be handled through a centralized intake system.

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 August 18, 2003.

TRD-200305325
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

CHAPTER 148. FACILITY LICENSURE

The Texas Commission on Alcohol and Drug Abuse (TCADA) proposes the repeal of Chapter 148, concerning Facility Licensure.

Section 148.1 of Subchapter A--Definitions defines terms.

Sections 148.11, 148.21 - 148.28 and 148.31 of Subchapter B--Licensure Information state the purpose of the chapter and contain information on licensure requirements; procedures for applying for and renewing a license; and reporting changes in status. Sections also contain information pertaining to licensure fees and establish grounds for taking action against a licensee.

Sections 148.101 - 148.103, 148.105, 148.106, 148.111 - 148.113, and 148.115 of Subchapter C--Facility Management establish requirements for documenting an organization's staffing structure; policies, procedures and licensure rules; compliance with Americans with Disabilities Act; client records; significant incident reports; and client transportation.

Sections 148.201 - 148.203 and §148.205 of Subchapter D--Personnel and Staff Development establish requirements for hiring practices, use of students and volunteers, and staff training.

Sections 148.301 - 148.303, 148.311 - 148.313, 148.315, and 148.316 of Subchapter E--Client Rights contains information on client rights and requirements for establishing procedures for handling client grievances and investigating cases of suspected abuse, neglect, or exploitation. Sections also establish standards for appropriate use of client labor, restraint and seclusion, and searches.

Sections 148.401, 148.403, 148.405, 148.406, 148.411 - 148.413, 148.421 - 148.424, and 148.426 of Subchapter F--Program Services establish requirements for adolescent programs, correctional facilities, court commitment services; and establish standards for providing and documenting individualized client treatment.

Sections 148.501 - 148.504 of Subchapter G--Medication establish standards for storing and administering medication.

Sections 148.601 - 148.607 of Subchapter H--Residential Physical Plant Requirements establish physical plant standards and establish requirements for emergency evacuation procedures, and inspections of fire systems.

The repeal of Chapter 148 is proposed because of extensive changes to the existing rules. TCADA staff incorporated portions of other existing rules relating to standards of care for substance

abuse services into a new Chapter 148 in an effort to improve the consistency of substance abuse services in the state and to comply with the legislative mandate that TCADA develop model program standards for substance abuse services.

The proposed new rules, which will be published in this issue of the *Texas Register* will address standards of care applicable to all providers, facility licensure information and requirements, personnel practices and development, client rights, specific requirements for different types of program services, information on food and nutrition relating to facilities, correctional facilities, court commitment services, screening and assessment, medication, and residential physical plant requirements.

Thomas F. Best, General Counsel, has determined that there will be no fiscal implications for state or local government for the first five-year period the repeal is in effect.

Mr. Best has also determined that for each year of the first five years the repeal is in effect the anticipated public benefit will be more efficient use of resources, reduced duplicative information and greater clarity regarding expectations TCADA has for individuals and organizations providing substance abuse services in Texas so that more concentration on quality of care issues and service outcomes results. There will be no effect on small businesses and there is no anticipated economic cost to current providers.

Comments on the proposal may be submitted to Albert Ruiz, Texas Commission on Alcohol and Drug Abuse, P.O. Box 80529, Austin, Texas 78708-0529. Comments may also be submitted electronically to *rules.revisions@tcada.state.tx.us* or faxed to (512) 821-4419. All comments must be received no later than 30 days from the date the proposal is published in the *Texas Register*.

SUBCHAPTER A. DEFINITIONS

40 TAC §148.1

(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 on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows when funding services and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The repeal is also proposed under Texas Health and Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed repeal is the Texas Health and Safety Code, Chapters 461 and 464.

§148.1. Definitions.

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 August 15, 2003.

TRD-200305257

Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER B. LICENSURE INFORMATION

40 TAC §§148.11, 148.21 - 148.28, 148.31

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows when funding services and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The repeal is also proposed under Texas Health and Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed repeal is the Texas Health and Safety Code, Chapters 461 and 464.

§148.11. Purpose.
§148.21. License Required.
§148.22. Variances.
§148.23. New Licensure Application.
§148.24. Licensure Renewal.
§148.25. Changes in Status.
§148.26. Closure.
§148.27. Licensure Review.
§148.28. Licensure Fees.
§148.31. Action Against a License.

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 August 15, 2003.

TRD-200305256
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER C. FACILITY MANAGEMENT

40 TAC §§148.101 - 148.103, 148.105, 148.106, 148.111 - 148.113, 148.115

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas

Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows when funding services and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The repeal is also proposed under Texas Health and Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed repeal is the Texas Health and Safety Code, Chapters 461 and 464.

§148.101. Facility Organization.
§148.102. Policies, Procedures, and Licensure Rules.
§148.103. Standards of Conduct.
§148.105. General Environment.
§148.106. Required Postings.
§148.111. General Documentation Requirements.
§148.112. Client Records.
§148.113. Significant Incident Reports.
§148.115. Client Transportation.

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 August 15, 2003.

TRD-200305255
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER D. PERSONNEL AND STAFF DEVELOPMENT

40 TAC §§148.201 - 148.203, 148.205

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows when funding services and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The repeal is also proposed under Texas Health and Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed repeal is the Texas Health and Safety Code, Chapters 461 and 464.

§148.201. Hiring Practices.
§148.202. Students and Other Volunteers.
§148.203. Staff Training.
§148.205. Training Requirements Relating to Abuse, Neglect, and Unprofessional or Unethical Conduct.

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 August 15, 2003.

TRD-200305254
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER E. CLIENT RIGHTS

40 TAC §§148.301 - 148.303, 148.311 - 148.313, 148.315, 148.316

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows when funding services and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The repeal is also proposed under Texas Health and Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed repeal is the Texas Health and Safety Code, Chapters 461 and 464.

§148.301. Client Bill of Rights.
§148.302. Client Grievances.
§148.303. Client Abuse, Neglect, and Exploitation.
§148.311. Program Rules.
§148.312. Client Labor.
§148.313. Use of Restraint and Seclusion.
§148.315. Responding to Emergencies.
§148.316. Searches.

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 August 15, 2003.

TRD-200305253
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER F. PROGRAM SERVICES

40 TAC §§148.401, 148.403, 148.405, 148.406, 148.411 - 148.413, 148.421 - 148.424, 148.426

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows when funding services and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The repeal is also proposed under Texas Health and Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed repeal is the Texas Health and Safety Code, Chapters 461 and 464.

§148.401. Requirements Applicable to All Programs (Residential and Outpatient).
§148.403. General Staffing Requirements (Residential and Outpatient).
§148.405. Additional Requirements for Level I (Residential or Outpatient Detoxification).
§148.406. Additional Requirements for Level II, III, and IV Residential Services.
§148.411. Additional Requirements for Adolescent Programs (Residential and Outpatient).
§148.412. Correctional Facilities.
§148.413. Court Commitment Services.
§148.421. Screening and Admission Authorization.
§148.422. Intake and Consent to Treatment.
§148.423. Initial Assessment.
§148.424. Treatment Planning and Implementation.
§148.426. Discharges.

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 August 15, 2003.

TRD-200305252
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER G. MEDICATION

40 TAC §§148.501 - 148.504

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows when funding services and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The repeal is also proposed under Texas Health and Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed repeal is the Texas Health and Safety Code, Chapters 461 and 464.

§148.501. General Provisions for Medication.
§148.502. Medication Storage.
§148.503. Medication Inventory and Disposal.
§148.504. Administration of Medication.

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 August 15, 2003.

TRD-200305251
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER H. RESIDENTIAL PHYSICAL PLANT REQUIREMENTS

40 TAC §§148.601 - 148.607

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows when funding services and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The repeal is also proposed under Texas Health and Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed repeal is the Texas Health and Safety Code, Chapters 461 and 464.

§148.601. General Physical Plant Provisions.
§148.602. Required Inspections.
§148.603. Emergency Evacuation.
§148.604. Exits.
§148.605. Space, Furniture and Supplies.
§148.606. Fire Systems.
§148.607. Other Physical Plant Requirements.

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 August 15, 2003.

TRD-200305250
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

CHAPTER 148. STANDARD OF CARE

The Texas Commission on Alcohol and Drug Abuse (TCADA) proposes new Chapter 148, §§148.101 - 148.103, 148.201 - 148.218, 148.301, 148.401 - 148.409, 148.501 - 148.510, 148.601 - 148.603, 148.701 - 148.708, 148.801 - 148.805, 148.901 - 148.911, 148.1001 - 148.1004, 148.1101 - 148.1104, 148.1201 - 148.1207, 148.1301, 148.1401, and 148.1501 - 148.1506 pertaining to Standards of Care. TCADA has submitted its proposal to repeal the existing Chapter 148 to the Texas Register for publication in this issue.

The new Chapter 148 incorporates portions of existing rules relating to standards of care for substance abuse services. The new rules are designed to ensure consistent and efficient delivery of substance abuse services in the state. These standards are applicable to the provision of services throughout the state as a function of TCADA licensure without regard to whether a licensee is funded by TCADA. These rules also include a standard of care for all programs, whether licensed or not, and include guidelines for prevention programs. These rules are proposed pursuant to the legislative mandate that TCADA develop model program standards for substance abuse services, contained in §461.0128 of the Texas Health and Safety Code.

The proposed new rules contain information on facility licensure requirements, personnel practices and development, client rights, specific requirements for different types of program services, as well as information on food and nutrition, correctional facilities, court commitment services, screening and assessment, medication, and residential physical plant requirements. Additionally, the new rules contain requirements that licensees initiate a quality management process for self evaluation.

The new rules clarify requirements for reporting incidents, staff training, and program services. The new rules adopt terminology to accurately reflect the treatment continuum. The detoxification provisions of the new rules are improved to clarify general requirements as well as require 24-hour staff coverage in all residential detoxification programs. Screening, admission, consent and assessment processes have been revised.

Thomas F. Best, General Counsel, has determined that there will be no significant fiscal impact on state or local government for the first five-year period the new rules are in effect.

Thomas F. Best has also determined that for each year of the first five years the new rules are in effect the anticipated public benefit will be more efficient use of resources, reduced administrative and regulatory burden on regulated entities, and greater clarity regarding expectations TCADA has for individuals and organizations providing substance abuse services in Texas. The resulting increased concentration on quality of care issues and service outcomes results will benefit all recipients of services and the general public.

The new rules require new licensees to have liability insurance. The cost for such insurance will vary geographically and is based upon the type and amount of services delivered. Additionally, the cost of such insurance will depend on the size of an organization and its claim history. Cost estimates for liability insurance coverage for a specific entity are widely available from the marketplace.

The new rules require licensees to have a bond to cover the cost of storage for client records. The estimated actual cost for storage of client records will depend on the size of the facility and the volume of client records. Additionally, the cost will vary geographically. Cost estimates for such storage are widely available in the marketplace. The average total costs for a secure storage facility sufficient to store the estimated client records for a mid-sized treatment facility in central Texas for 5 years is estimated to be $5,000. The bond required to cover this potential liability should be significantly less expensive.

The new rules require additional training for staff. Training costs will vary depending upon the type of training involved. Additionally, training costs will vary geographically. Training is estimated to be less than $15 per hour. TCADA believes that many of its licensees already comply with the requirements of the new rules in this regard. To the extent that this is true, there will be no additional cost of compliance.

The new rules require additional hours of service to clients in some circumstances. The economic impact associated with compliance with the new rule will depend upon the type of service and the funding source of the provider. In some circumstances unit rate and cost reimbursement payment mechanisms will ensure that there will be no economic impact or minimal economic impact. In other circumstances, providers may incur some additional costs depending upon existing staff utilization rates, availability of excess staff, facility capacity, and number of clients requiring service.

The new rules require annual reporting of certain information. The Commission believes that the information requested is already in the possession of those subject to this rule and that the reporting of that information on an annual basis will impose no measurable additional financial cost.

Except as described above, the Commission does not anticipate that the adoption of the new rules will have a significant effect on small businesses or a significant economic cost to current providers.

Comments on the proposal may be submitted to Albert Ruiz, Texas Commission on Alcohol and Drug Abuse, P.O. Box 80529, Austin, Texas 78708-0529. Comments may also be submitted electronically to *rules.revisions@tcada.state.tx.us* or faxed to (512) 821-4418. All comments must be received by October 15, 2003.

To ensure consideration, comments must clearly specify the particular section of the rule to which they apply. General comments should be labeled as such. Comments should include proposed alternative language as appropriate.

SUBCHAPTER A. DEFINITIONS

40 TAC §§148.101 - 148.103

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health & Safety Code

§461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rules are also proposed under Texas Health & Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rules is the Texas Health and Safety Code, Chapters 461 and 464.

§148.101. Definitions.

The words and terms used in this chapter shall have meanings set forth in 40 TEX. ADMIN. CODE ch. 141 (2003), of this title (relating to General Provisions) unless the context clearly indicates otherwise.

§148.102. Purpose.

The purpose of these rules is to ensure that individuals seeking substance abuse services are offered an efficient, effective, and appropriate continuum of services that will enable them to lead a normal life as a productive member of society. These rules further serve to protect the health, safety, and welfare of those receiving substance abuse services.

§148.103. Scope of Rule.

(a) All providers shall comply with the provisions of Subchapter B in all matters related to the provision of services.

(b) Providers who offer or purport to offer chemical dependency treatment and are not exempt from licensure under TEX. HEALTH & SAFETY CODE ANN. ch. 464 (Vernon 2001) are also required to comply with the provisions of Subchapter D through Subchapter N.

(c) Providers who engage in prevention or intervention activities shall also comply with the requirements of Subchapter C, and §148.703 of this title (relating to Abuse, Neglect and Exploitation).

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 August 18, 2003.

TRD-200305288
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER B. STANDARD OF CARE APPLICABLE TO ALL PROVIDERS

40 TAC §§148.201 - 148.218

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health & Safety Code §461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rules are also proposed under Texas Health & Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rules is the Texas Health and Safety Code, Chapters 461 and 464.

§148.201. General Standard.

The provider shall provide adequate and appropriate services consistent with best practices and industry standards. The provider shall maintain objectivity. The provider shall respect each individual's dignity, and shall not engage in any action that may cause injury and shall always act with integrity in providing Services.

§148.202. Scope of Practice.

The provider shall recognize the limitations of their ability and shall not offer services outside the provider's scope of practice or use techniques that exceed their professional competence. The provider shall not make any claim, directly or by implication, that they possess professional qualifications or affiliations that they do not possess.

§148.203. Competence and Due Care.

Providers shall plan, supervise adequately, and evaluate any activity for which they are responsible. Providers shall render services carefully and promptly. Providers shall follow the technical and ethical standards related to the provision of services, strive continually to improve personal competence and quality of service delivery, and discharge their professional responsibility to the best of their abilities. Providers are responsible for assessing the adequacy of their own competence for the responsibility to be assumed. Services shall be designed and administered as to do no harm to recipients. The provider shall always act in the best interest of the individual being served. The provider shall terminate any professional relationship that is not beneficial, or is in any way detrimental, to the individual being served.

§148.204. Appropriate Services.

Services should be appropriate for the individual's needs and circumstances, including age and developmental level, and should be culturally sensitive. Providers shall possess an understanding of the cultural norms of the individuals receiving services. Services shall be respectful and non exploitative.

§148.205. Accuracy.

The provider shall report information fairly, professionally, and accurately when providing services and when communicating with other professionals, the Commission, and the general public. Each provider shall document and assign credit to all contributing sources used in published material or public statements. Providers shall not misrepresent either directly or by implication professional qualifications or affiliations.

§148.206. Documentation.

The provider shall maintain required documentation of services provided and related transactions including financial records.

§148.207. Discrimination.

The provider shall not discriminate against any individual on the basis of gender, race, religion, age, national origin, disability (physical or mental), sexual orientation, economic condition, medical condition, including HIV diagnosis or because an individual is perceived as being HIV infected.

§148.208. Access to Services.

The provider shall provide access to services, including providing information about other services and alternative providers, taking into account an individual's financial constraints and special needs.

§148.209. Location.
The provider shall not offer or provide services in settings or locations that are inappropriate, or harmful to individuals served or others.

§148.210. Confidentiality.
The provider shall protect the privacy of individuals served and shall not disclose confidential information without express written consent, except as permitted by law. The provider shall remain knowledgeable of, and obey, all State and Federal laws and regulations relating to confidentiality of records relating to the provision of services. The provider shall not discuss or divulge information obtained in clinical or consulting relationships except in appropriate settings and for professional purposes that demonstrably relate to the case. Confidential information acquired during delivery of services shall be safeguarded from illegal or inappropriate use, access and disclosure or from loss, destruction or tampering. These safeguards shall protect against verbal disclosure, prevent unsecured maintenance of records, or recording of an activity or presentation without appropriate releases.

§148.211. Environment.
The provider shall provide an appropriate, safe, clean, and well-maintained environment.

§148.212. Communications.
The provider shall inform the individual receiving services about all relevant and important aspects of the service relationship.

§148.213. Exploitation.
The provider shall not exploit relationships with individuals receiving services for personal or financial gain of the provider or its personnel. The provider shall not charge exorbitant or unreasonable fees for any service. The provider shall not pay or receive any commission, consideration, or benefit of any kind related to the referral of an individual for services.

§148.214. Duty to Report.
When a provider or its personnel have knowledge of unethical conduct or practice on the part of a person or provider, they have a responsibility to report the conduct or practices to appropriate funding or regulatory bodies or to the public. Any provider or provider personnel who receive an allegation or have reason to suspect that an individual has been, is, or will be subject to abuse, neglect or exploitation by any provider shall immediately inform TCADA's investigations division. The provider shall also take immediate action to prevent or stop the abuse, neglect, or exploitation and provide appropriate care and treatment. The provider shall report allegations of child abuse or neglect to the Texas Department of Protective and Regulatory Services as required by the TEX. FAM. CODE ANN. §261.101 (Vernon 1996). The provider shall report allegations of abuse, neglect or exploitation of an elderly or disabled individual to the Texas Department of Protective and Regulatory Services as required by the TEX. HUM. RES. CODE ANN. §48.051 (Vernon Supp. 2003). If the allegation involves sexual exploitation, the service provider shall comply with reporting requirements listed in the TEX. CIV. PRAC. & REM. CODE ANN. §81.006 (Vernon 1997).

§148.215. Impaired Providers.
Providers should recognize the effect of impairment on professional performance and should be willing to seek needed treatment. Where there is evidence of impairment in a colleague, a provider should be supportive of assistance or treatment.

§148.216. Ethics.
Providers shall adhere to established professional codes of ethics. These codes of ethics define the professional context within which the provider works, in order to maintain professional standards and safeguard the client or participant. Provider and all of its personnel shall protect consumers and act in an ethical manner at all times.

§148.217. Specific Acts Prohibited.

In addition to the provider's general duty to provide services in a professional manner, the following acts are specifically prohibited and shall constitute a violation of these rules.

(1) Providers shall not provide services, interact with individuals receiving services, or perform any job duties while under the influence or impaired by the use of alcohol, or mood altering substances, including prescription medications not used in accordance with a physician's order.

(2) Providers shall not commit an illegal, unprofessional or Unethical act (including acts constituting abuse, neglect, or exploitation).

(3) Providers shall not assist or knowingly allow another person to commit an illegal, unprofessional, or unethical act.

(4) Providers shall not falsify, alter, destroy or omit significant information from required reports and records or interfere with their preservation.

(5) Providers shall not retaliate against anyone who reports a violation of these rules or cooperates during a review, inspection, investigation, hearing, or other related activity.

(6) Providers shall not interfere with Commission reviews, inspections, investigations, hearings, or related activities. This includes taking action to discourage or prevent someone else from cooperating with the activity.

(7) Providers shall not enter into a personal or business relationship of any type with an individual receiving services until at least two years after the last date an individual receives services from the provider.

(8) Providers shall not discourage, intimidate, harass, or retaliate against individuals who try to exercise their rights or file a grievance.

(9) Providers shall not restrict, discourage, or interfere with any communication with law enforcement, an attorney, or with the Commission for the purposes of filing a grievance.

(10) Providers shall not allow unqualified persons or entities to provide services.

(11) Provider shall not hire or utilize known sex offenders in adolescent programs or programs that house children.

(12) Providers shall prohibit clients and participants from using tobacco products on the program site. Staff and other adults (volunteers, clients, participants and visitors) shall not use tobacco products in the presence of adolescent clients.

§148.218. Standards of Conduct

(a) The facility and all of its personnel shall protect clients' rights and provide competent services.

(b) Any person associated with the facility that receives an allegation or has reason to suspect that a person associated with the facility has been, is, or will be engaged in illegal, Unethical, or unprofessional conduct shall immediately inform the Commission's investigations division and the facility's chief executive officer or designee. If the allegation involves the chief executive officer, it shall be reported to the Commission and the facility's governing body.

(c) The facility and its personnel shall comply with TEX. HEALTH & SAFETY CODE ANN. ch. 164 (Vernon 2001)(relating to Treatment Facilities Marketing and Admission Practices).

(d) The facility shall have written policies on staff conduct that complies 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 August 18, 2003.

TRD-200305287
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER C. STANDARDS FOR EVIDENCE-BASED PREVENTION PROGRAMS

40 TAC §148.301

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health & Safety Code §461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rules are also proposed under Texas Health & Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rule is the Texas Health and Safety Code, Chapters 461 and 464.

§148.301. Standards for Evidence-Based Prevention Programs.

As is appropriate, prevention providers shall implement programs and provide services that incorporate the following principles.

(1) Programs are designed to enhance protective factors and move toward reversing or reducing known risk factors. Program providers are trained in risk factor and protective factor theory and research.

(2) Programs are provided in a way that preserves the protective factors inherent in each culture and individual.

(3) Prevention programs are age, developmentally and culturally appropriate.

(4) Programs determine the level of risk of the target population. More intense prevention programs are required for target populations with a recognized higher level of risk.

(5) Programs implement evidence-based prevention programs appropriate for the target population(s) using universal, selective and indicated criteria. Programs have proven Outcomes for the target population and are implemented with integrity and fidelity.

(6) When an evidence-based program is adapted to address the specific nature of the drug use or abuse problem in the local community, care is taken to adapt the program appropriately. The adaptation does not affect the integrity and fidelity of the program as it was designed.

(7) Programs teach skills to resist drugs when offered, strengthen personal commitments against drug use, and increase social competency. social competency skills, as they relate to reinforcement of attitudes against drug use, include skills related to communications, peer relationships, self-efficacy, and assertiveness.

(8) Programs for adolescents include interactive methods, such as peer discussion groups, in addition to lecture-style teaching techniques.

(9) Programs include a component which targets parents or caregivers. The parent/caregiver component reinforces what the youth participants are learning, such as facts about drugs and their harmful effects. This component opens opportunities for family discussions about use of legal and illegal substances and family policies related to their use.

(10) Programs are long-term, over the school career, including the repetition necessary to reinforce the original prevention goals. School-based efforts directed at elementary and middle school students, for example, include booster sessions to help with critical transitions from middle to high school.

(11) Community programs that include media campaigns and policy changes, such as new regulations that restrict access to alcohol, tobacco, or other drugs, are accompanied by school and family interventions.

(12) Community programs strengthen norms against drug use in all drug abuse prevention settings, including the family, the school, and the community.

(13) Schools offer opportunities to reach all populations and serve as important settings for specific sub-populations at risk for drug abuse, such as children with behavior problems or learning disabilities and those who are at risk of leaving school before graduation.

(14) Programs should use formal and informal structures to receive and incorporate input from service recipients in the development, implementation and evaluation of prevention services.

(15) Programs are evaluated to determine outcomes and impact on the participants.

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 August 18, 2003.

TRD-200305286
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER D. FACILITY LICENSURE INFORMATION

40 TAC §§148.401 - 148.409

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The

new rules are also proposed under Texas Health & Safety Code §461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rules are also proposed under Texas Health & Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rules is the Texas Health and Safety Code, Chapters 461 and 464.

§148.401. License Required.

(a) A facility providing or offering chemical dependency treatment in Texas shall have a license issued by the Commission unless it is:

(1) a facility maintained or operated by the Federal government or its agencies;

(2) a facility directly operated by the State of Texas;

(3) a chemical dependency treatment program approved by the Texas Department of Health within a licensed general hospital, specialty hospital, or private psychiatric facility;

(4) a pharmacotherapy program licensed by the Texas Department of Health;

(5) an educational program for intoxicated drivers;

(6) an individual who personally provides support services to chemically dependent individuals but does not offer or purport to offer chemical dependency treatment;

(7) the private practice of a licensed health care practitioner or licensed chemical dependency counselor who personally renders individual or group services within the scope of the practitioner's license and in the practitioner's office;

(8) a religious organization registered under Subchapter O of this title (relating to Faith-Based Chemical Dependency Treatment Programs); or

(9) a 12-step or similar self-help chemical dependency recovery program:

(A) that does not offer or purport to offer a chemical dependency treatment program;

(B) that does not charge program participants; and

(C) in which program participants may maintain anonymity.

(b) The facility shall have a License for each physical location at which it provides residential services or outpatient services.

(c) A license is not transferable to a separate legal entity or to a different physical address.

§148.402. Variances.

(a) The Commission's executive director or designee may grant a temporary variance to a facility or group of facilities.

(b) To be eligible for a variance, a facility shall show:

(1) an alternative method is used to meet the intent of the rule; and

(2) the variance will not jeopardize the health, safety, or welfare of clients or compromise substance abuse services.

(c) The Commission's executive director or designee will determine if an alternative is equivalent to the written rule and when it will be accepted during licensure reviews.

(d) A variance cannot be granted for a statutory requirement.

(e) The grounds for, and term of, the variance shall be set forth in writing.

§148.403. New Licensure Application.

(a) An applicant for initial licensure shall submit a complete licensure application, operational plan as described in §148.502 of this title (relating to Operational Plan, Policies and Procedures), items outlined on the new applicant checklist, proof of liability insurance, and an application fee.

(b) Within 45 days of receipt of the application, the Commission will notify the applicant that the application is materially complete or specify the additional information required.

(c) The applicant shall submit all requested materials and correct any deficiencies identified by the Commission within specified time frames.

(d) If an on-site inspection is necessary, the Commission will conduct the inspection within 45 days of receiving a materially complete application packet. The Commission will notify the provider of any deficiencies identified during an on-site inspection within 30 days, and the provider shall provide evidence of sufficient corrective action within the timeframe specified in the inspection report.

(e) The Commission will issue the license within 45 days of receiving all required evidence of compliance and all required fees.

(f) If an applicant fails to provide evidence of compliance within six months from the date the application is received, the application will be denied. Six months after the date of denial, the applicant may reapply by submitting a new application and application fee.

(g) The applicant shall not provide chemical dependency treatment before receiving written notice of licensure approval.

(h) The facility shall display its licensure certificate prominently at each outpatient location and each approved residential site.

§148.404. Licensure Renewal.

(a) A license issued by the Commission expires two years from the date of issuance.

(b) The licensee shall file a request for renewal and pay the renewal fee at least 60 days before the license expires. Failure to file the required renewal and pay the renewal fee as specified may delay approval.

(c) The facility shall not provide services after the license expiration date unless it has submitted the application update and fee by the date of expiration.

§148.405. Changes in Status.

(a) A facility shall submit the appropriate application and fees and receive written approval before:

(1) adding a new detoxification service;

(2) adding a new residential site;

(3) moving to a new residential site; or

(4) increasing the number of beds in a residential program.

(b) If the facility fails to provide the information the Commission requires to process the change in status application within six months from the date of application, the application may be denied. The facility shall not reapply for six months from the date of denial.

(c) A facility shall also notify the Commission's licensure department in writing before: adding a new residential service, day treatment service, outpatient service; adding a new outpatient site or moving an outpatient site to a new location; providing services to a new age group or gender.

(d) A facility shall notify the Commission's facility licensure department prior to, or immediately after, a change in the organization's name, closure of a residential or outpatient location, decrease in the number of residential beds or discontinuance of a service.

§148.406. Inactive Status and Closure.

(a) Inactive Status. The Commission will automatically retire the license of a facility site in which services are suspended or not provided for more than 60 days, unless the facility sends a written request to place the license on inactive status. To be eligible for inactive status, the facility must be in good standing with no pending legal actions or investigations.

(1) If granted, inactive status is limited to 60 days. The licensee is responsible for all licensure fees and for proper maintenance of client records while on inactive status.

(2) To reactivate the license, the facility shall submit a written request to reactivate the license no later than the date the inactivation period expires.

(3) If the license is not reactivated, it will be automatically retired at the end of the 60 day deactivation period.

(b) Closure. The facility shall notify the Commission's facility licensure department in writing prior to or immediately upon closure of a chemical dependency treatment program.

(1) A license becomes invalid when a program closes. The licensure certificate shall be returned to the Commission's licensure department within 30 days.

(2) When a facility closes, the provider shall ensure that all clients are appropriately discharged or transferred before the Program closes and make appropriate arrangements for properly maintaining client records in compliance with Federal and State law and Commission rules.

§148.407. Licensure Inspection.

The Commission may conduct a scheduled or unannounced inspection or request materials for review at any time. The facility shall allow Commission staff to access the facility's grounds, buildings, and records. The facility shall allow Commission staff to interview members of the governing body, staff, and clients. The facility shall make all property, records, and Documents available upon request for examination, copy, or reproduction, on or off premises.

§148.408. Licensure Fees.

(a) A facility shall pay the full licensure fee for any licensure period during which it provides chemical dependency treatment. Failure to notify the Commission's licensure department of closure does not excuse a licensee from paying fees.

(b) Fees shall be paid in full by cashier's check, or money order.

(c) The schedule for licensure fees is:

(1) application fee--$100;

(2) base fee--$1,000;

(3) fee per residential site--$100;

(4) fee per bed--$30;

(5) maximum fee per facility (excluding application fees)--$4,000.

(d) A $25 fee is charged for a printed list of licensed facilities, a set of mailing labels for licensed facilities, or a replacement certificate.

(e) Licensure fees are not refundable.

§148.409. Action Against a License.

(a) The Commission may take action as describe herein against an applicant for licensure or a facility if the applicant, licensee, owner, member of the governing body, administrator, or clinical Staff member, or any other personnel associated with the applicant or licensee:

(1) has a documented history of client abuse, exploitation, or neglect;

(2) violates any provision of TEX. HEALTH & SAFETY CODE ANN. ch. 464 (Vernon 2001), or any other applicable statute, or a Commission rule; or

(3) owes the Commission money.

(b) Action taken may include:

(1) suspending or revoking a license;

(2) refusing to issue or renew a license;

(3) placing a facility on probation when the facility's license has been suspended;

(4) imposing an administrative penalty; and

(5) any other action allowed under the law or these rules.

(c) The Commission will determine the length of probation or suspension. The Commission may hold a hearing at any time and revoke probation or suspension.

(d) Surrender or expiration of a license does not interrupt an investigation or action taken against a license. The facility is not eligible to regain the license until all outstanding investigations, disciplinary proceedings, or hearings are resolved and the licensee is found to have acted in compliance with these rules.

(e) If a facility has its license revoked, its governing body, administrators, and management are not eligible to apply for, or be associated with an application for facility licensure until they have petitioned the Commission and demonstrated the following:

(1) they were not directly involved in, aware of, or responsible for the acts or omissions that were the basis of the revocation; or

(2) sufficient time has passed to allow the events that led to the revocation to no longer serve as the basis of denial of application for licensure.

(f) After an investigation has been initiated by the Commission, or a facility's license has been revoked or surrendered, a facility is not eligible to receive a faith-based exemption under Subchapter O of this title (relating to Faith-Based Chemical Dependency Programs) until two years have elapsed.

(g) Each provider shall purchase a bond sufficient in value to provide for the storage and protection of client records and data required to be maintained in the event of discharge of its clients and/or closing of its facility or program.

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 August 18, 2003.

TRD-200305285
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER E. FACILITY REQUIREMENTS

40 TAC §§148.501 - 148.510

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health & Safety Code §461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rules are also proposed under Texas Health & Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rules is the Texas Health and Safety Code, Chapters 461 and 464.

§148.501. Facility Organization.

(a) Governing Body. If incorporated, the facility shall have a governing body and shall have legal authority to operate in the State of Texas. If the organization is governed by a board of directors, the board shall meet with sufficient frequency to monitor the quality of care provided and maintain minutes for each meeting. The governing body shall ensure that members are provided training regarding their responsibilities and liabilities.

(b) Organizational Structure. The facility shall maintain current documentation of the organization's staffing structure, including lines of supervision and the number of staff members for each position.

(c) Facility Contact Information. The facility shall provide the Commission's facility licensure department with a current mailing address, electronic mail address (if any), contact name, and contact phone number in writing or through electronic mail and shall update that information in writing or through electronic mail when there are changes. The facility is deemed to have received any correspondence or notice mailed to the address provided.

§148.502. Operational Plan, Policies and Procedures.

(a) The facility shall operate according to an operational plan. The operational plan shall reflect:

(1) program purpose or mission statement;

(2) services and how they are provided;

(3) description of the population to be served; and

(4) goals and objectives of the program.

(b) The facility shall adopt and implement written policies and procedures as deemed necessary by the facility and as required herein. The policies and procedures shall contain sufficient detail to ensure compliance with all applicable Commission rules.

(c) The policy and procedure manual shall be current, consistent with program practices, individualized to the program, and easily accessible to all Staff at all times.

(d) Facilities housing children shall comply with requirements set forth in 40 TEX. ADMIN. CODE §§715.601-632 (2003)(relating to Minimum Standards for Group Day-Care Homes) or obtain a daycare license.

§148.503. Reporting Measures.

Facilities shall submit the following information annually in a format provided by the Commission, unless a current contract with TCADA is in effect:

(1) total number of clients served by diagnosis;

(2) gender of clients served;

(3) ethnicity of clients served;

(3) ages of clients served;

(4) primary and secondary drug at admission;

(5) discharge reason per treatment episode, including length of stay at time of discharge; and

(6) average percent of occupancy for each residential program.

§148.504. Quality Management.

The facility shall develop procedures and implement a quality management process. The procedures shall address at a minimum:

(1) goals and objectives that relate to the program purpose or mission statement;

(2) methods to review the progress toward the goals and a documented process to implement corrections or changes;

(3) a mechanism to review and analyze incident reports, monitor compliance with rules and other requirements, identify areas where quality is not optimal and procedures to analyze identified issues, implement corrections, and evaluate and monitor their ongoing effectiveness;

(4) methods of utilization review to ensure appropriate client placement, adequacy of services provided and length of stay; and

(5) documentation of the activities of the quality management process.

§148.505. General Environment.

(a) The facility shall comply with applicable requirements of the Americans with Disabilities Act (ADA). The facility shall maintain documentation that it has conducted a self-inspection to evaluate compliance and implemented a corrective action plan, as necessary, with reasonable time frames to address identified deficiencies.

(b) The facility shall have a certificate of occupancy from the local authority that reflects the current use by the occupant or documentation that the locality does not issue occupancy certificates.

(c) The site, including grounds, buildings, electrical and mechanical systems, appliances, equipment, and furniture shall be structurally sound, in good repair, clean, and free from health and safety hazards.

(d) The facility shall provide a safe, clean, well-lighted and well-maintained environment.

(e) The facility shall have adequate space, furniture, and supplies.

(f) The facility shall have private space for confidential interactions, including all group counseling sessions.

(g) The facility shall prohibit smoking inside facility buildings and vehicles and during structured program activities. If smoking areas are permitted, they shall be clearly marked as designated smoking areas and shall not be less than 15 feet from the building(s). Staff shall not provide or facilitate client access to tobacco products.

(h) The facility shall prohibit firearms and other weapons, alcohol, illegal drugs, illegal activities, and violence on the program site.

(i) Animals shall be properly vaccinated and supervised.

§148.506. Required Postings.

(a) The facility shall post a legible copy of the following documents in a prominent public location that is readily available to clients, visitors, and staff:

(1) the Client Bill of Rights;

(2) the Commission's current poster on reporting complaints and violations; and

(3) the client grievance procedure.

(b) These documents shall be displayed in English and in a second language(s) appropriate to the population(s) served at every location where services are provided.

§148.507. General Documentation Requirements.

(a) The facility shall keep complete, current documentation.

(b) All documents shall be factual and accurate.

(c) All documents and entries shall be dated and authenticated by the person responsible for the content.

(1) Authentication of paper records shall be an original signature that includes at least the first initial, last name, and credentials. Initials may be used if the client record includes a document that identifies all individuals initialing entries, including the full printed name, signature, credentials, and initials.

(2) Authentication of electronic records shall be a Digital Authentication Key.

(d) Documentation shall be permanent and legible.

(e) When it is necessary to correct a client record, incident report, or other document, the error shall be marked through with a single line, dated, and initialed by the writer.

(f) Records shall contain only those abbreviations included on the facility's list of approved abbreviations.

§148.508. Client Records.

(a) The facility shall establish and maintain a single record for every client beginning at the time of admission. The content of client records shall be complete, current, and well organized.

(b) The facility shall protect all client records and other client-identifying information from destruction, loss, tampering, and unauthorized access, use or disclosure.

(1) All active client records shall be stored at the facility. Inactive records, if stored off-site, shall be fully protected. All original client records shall be maintained in the State of Texas.

(2) Information that identifies those seeking services shall be protected to the same degree as information that identifies clients.

(3) Electronic client information shall be protected to the same degree as paper records and shall have a reliable backup system.

(c) Only personnel whose job duties require access to client records shall have such access.

(d) Personnel shall keep records locked at all times unless authorized staff is continuously present in the immediate area.

(e) The facility shall ensure that all client records can be located and retrieved upon request at all times.

(f) The facility shall comply with Federal and State confidentiality laws and regulations, including 42 C.F.R pt. 2 (Federal regulations on the Confidentiality of Alcohol and Drug Abuse Patient Records), TEX. HEALTH & SAFETY CODE ANN. ch. 611 (Vernon 2001)(relating to Mental Health Records) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The facility shall also protect the confidentiality of HIV information as required in TEX. HEALTH & SAFETY CODE ANN. §81.103 (Vernon 2001)(relating to Confidentiality; Criminal Penalty).

(g) The facility shall not deny clients access to the content of their records except as provided by TEX. HEALTH & SAFETY CODE ANN. §611.0045 (Vernon 2001) and HIPAA.

(h) Client records shall be maintained for at least five years. Records of adolescent clients shall be maintained for at least five years after the client turns 18.

(i) If client records are microfilmed, scanned, or destroyed, the facility shall take steps to protect confidentiality. The facility shall maintain a record of all client records destroyed on or after September 1, 1999, including the client's name, record number, birth date, and dates of admission and discharge.

§148.509. Incident Reporting.

(a) The facility shall report to the Commission's investigations division, all allegations of client abuse, neglect, and exploitation. Acts constituting client abuse, neglect and exploitation are specifically described in §148.703 of this title (relating to Abuse, Neglect, and Exploitation).

(b) The facility shall complete an internal incident report for all client incidents, including:

(1) a violation of a client rights, including but not limited to, allegations of abuse, neglect and exploitation;

(2) accidents and injuries;

(3) medical emergencies;

(4) psychiatric emergencies;

(5) medication errors;

(6) illegal or violent behavior;

(7) loss of a client record;

(8) personal or mechanical restraint or seclusion;

(9) release of confidential information without client consent;

(10) fire;

(11) death of an active outpatient or residential client (on or off the program site);

(12) clients absent without permission from a residential program;

(13) suicide attempt by an active client (on or off the program site);

(14) medical and psychiatric emergencies that result in admission to an inpatient unit of a medical or psychiatric facility; and

(15) any other significant disruptions.

(c) The incident report shall be completed within 24 hours of the incident and shall provide a detailed description of the event, including the date, time, location, individuals involved, and action taken.

(d) The individual writing the report shall sign it and record the date and time it was completed.

(e) All incident reports shall be stored in a single, separate file.

(f) The facility shall have a designated individual responsible for reviewing incident reports and all incidents should be evaluated through the quality management process to determine opportunities to improve or address program and staff performance.

§148.510. Client Transportation.

(a) The facility shall have a written policy on the use of facility vehicles and/or staff to transport clients.

(b) If the facility allows the use of facility vehicles and/or staff to transport clients, it shall adopt transportation procedures which include the following.

(1) Any vehicle used to transport a client must have appropriate insurance coverage for business use with a current safety inspection sticker and license.

(2) All vehicles used to transport clients must be maintained in safe driving condition.

(3) Drivers must have a valid driver's license.

(4) Drivers and passengers must wear seatbelts at all times the vehicle is in operation as required by law.

(5) A vehicle shall not be used to transport more passengers than designated by the manufacturer.

(6) Drivers shall not use cell phones while driving.

(7) Use of tobacco products shall not be allowed in the vehicle.

(8) Every vehicle used for client transportation shall have a fully stocked first aid kit and an A:B:C fire extinguisher that are easily accessible.

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 August 18, 2003.

TRD-200305293
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER F. PERSONNEL PRACTICES AND DEVELOPMENT

40 TAC §§148.601 - 148.603

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health & Safety Code §461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rules are also proposed under Texas Health & Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rules is the Texas Health and Safety Code, Chapters 461 and 464.

§148.601. Hiring Practices.

(a) A facility whose personnel includes counselor interns shall be registered with the Commission as a clinical training institution and comply with all applicable requirements.

(b) The facility shall verify by telephone or letter and document the current status of all required credentials with the credentialing authority.

(c) The facility shall be aware of its obligations under TEX. CIV. PRAC. & REM. CODE ANN. §81.003 (Vernon 1997).

(d) The facility shall not hire or utilize an individual until it obtains and assesses a criminal background check from the Department of Public Safety. The facility shall use the criteria listed in TEX. OCC. CODE ANN. §53.022, §53.023 (Vernon 2002) to evaluate criminal history reports and make related employment decisions.

(e) The facility shall not hire an individual who has not passed a pre-employment drug test that meets criteria established by the Commission. This requirement does not restrict facilities from implementing random drug testing of its staff as permitted by law.

(f) The facility shall develop a job description which outlines job duties and minimum qualifications for all personnel.

(g) The facility shall maintain a personnel file for each employee, and all contractors, students and volunteers with any direct client contact which contains documentation demonstrating compliance with this section.

§148.602. Students and Volunteers.

(a) The facility shall ensure that students and volunteers comply with all applicable rules.

(b) Students and volunteers shall be qualified to perform assigned duties.

(c) Students and volunteers shall receive orientation and training appropriate to their qualifications and responsibilities.

(d) Students and volunteers shall be appropriately supervised.

§148.603. Training.

(a) Unless otherwise specified, video, manual, or computer-based training is acceptable if the supervisor discusses and documents the material with the Staff person in a face-to-face session to highlight key issues and answer questions.

(b) The facility shall maintain documentation of all required training.

(1) Documentation of external training shall include:

(A) date;

(B) number of hours;

(C) topic;

(D) instructor's name; and

(E) signature of the instructor (or equivalent verification).

(2) The facility shall maintain documentation of all internal training. For each topic, the file shall include:

(A) an outline of the contents

(B) the name, credentials, relevant qualifications of the person providing the training, and

(C) the method of delivery.

(3) For each group training session, the facility shall maintain on file a dated attendee sign-in sheet.

(c) Prior to performing their duties and responsibilities, the facility shall provide orientation to staff, volunteers, and students. This orientation shall include information addressing:

(1) TCADA rules;

(2) facility policies and procedures;

(3) client rights;

(4) client grievance procedures;

(5) confidentiality of client-identifying information (42 C.F.R. pt. 2; HIPAA);

(6) standards of conduct; and

(7) emergency and evacuation procedures.

(d) The following initial training(s) must be received within the first 30 Days of employment. Subsequent training must be completed as specified.

(1) Abuse, Neglect, and Exploitation. All personnel with any direct client contact shall receive face-to-face training as described in Appendix A which is attached hereto and incorporated herein as if set forth at length.

(2) HIV, Hepatitis B and C, Tuberculosis and Sexually Transmitted Diseases. All personnel with any direct client contact shall receive this training. The training shall be based on the Texas Commission on Alcohol and Drug Abuse Workplace and Education Guidelines for HIV and Other Communicable Diseases.

(A) The initial training shall be three hours in length.

(B) Staff shall receive annual updated information about these diseases.

(3) Cardio Pulmonary Resuscitation (CPR).

(A) all direct care staff in a residential program shall maintain current CPR and First Aid certification.

(B) Licensed health professionals and personnel in licensed medical facilities are exempt if emergency resuscitation equipment and trained response teams are available 24 hours a day.

(4) Nonviolent Crisis Intervention. All direct care staff in residential programs and outpatient programs shall receive this training. The face-to-face training shall teach staff how to use verbal and other non-physical methods for prevention, early intervention, and crisis management. The instructor shall have documented successful completion of a course for crisis intervention instructors or have equivalent documented training and experience.

(A) The initial training shall be four hours in length.

(B) Staff shall complete two hours annual training thereafter.

(5) Restraint and/or Seclusion. All direct care staff in residential programs that use restraint or seclusion shall have face-to-face training and demonstrate competency in the safe methods of the specific procedures. This includes programs that accept adolescent residential and emergency detentions.

(A) The initial training must be four hours in length.

(B) Staff shall complete four hours annual training thereafter.

(C) The training shall include hands-on practice under the supervision of a qualified instructor.

(6) Intake, Screening and Admission Authorization. All staff who conduct intake, screening and authorize admission for applicants to receive program services shall complete training in the program's screening and admission procedures. The training shall include two hours of DSM diagnostic criteria for substance-related disorders, and other mental health diagnoses.

(A) The initial training shall be eight hours in length.

(B) Staff shall complete eight hours annual training thereafter.

(C) The training shall be completed before Staff screen or authorize applicants for admission.

(7) Self-administration of Medication. All personnel responsible for supervising clients in self-administration of medication, who are not credentialed to administer medication, shall complete this training before performing this task.

(A) Staff shall complete two hours initial one time training.

(B) The training shall be provided by a physician, pharmacist, physician assistant, or registered nurse before administering medication and shall include:

(i) prescription labels;

(ii) medical abbreviations;

(iii) routes of administration;

(iv) use of drug reference materials;

(v) storage, maintenance, handling, and destruction of medication;

(vi) documentation requirements; and

(vii) procedures for medication errors, adverse reactions, and side effects.

(8) Adolescent Training. All direct care staff in adolescent programs shall have or receive specialized education or training. Training shall be 20 hours in length and include chemical dependency problems specific to adolescent treatment, appropriate treatment strategies, including family engagement strategies, and emotional, developmental, and mental health issues for adolescents.

(9) Detoxification Training. All direct care staff in detoxification programs shall receive this training. The training shall be provided by a physician, physician assistant, advanced practice nurse, or registered nurse with at least one year of documented experience in detoxification.

(A) The initial training shall be four hours in length.

(B) The facility may accept documented training from another organization if completed during the year prior to employment and it meets Commission requirements.

(C) Staff shall receive annual updated information on detoxification.

(D) The training shall include:

(i) signs of withdrawal;

(ii) observation and monitoring procedures;

(iii) pregnancy-related complications (if the program admits women);

(iv) complications requiring transfer; and

(v) appropriate interventions; and frequently-used medications, including purpose, precautions, and side effects.

(10) Women and Children's Services Training. Service delivery staff and program administrators shall demonstrate expertise in addressing the needs of women and children. All service delivery staff shall receive periodic training regarding therapeutic issues relevant to women and Children.

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 August 18, 2003.

TRD-200305292
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER G. CLIENT RIGHTS

40 TAC §§148.701 - 148.708

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health & Safety Code §461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rules are also proposed under Texas Health & Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rules is the Texas Health and Safety Code, Chapters 461 and 464.

§148.701. Client Bill of Rights.

(a) The facility shall respect and protect clients' rights. The Client Bill of Rights for all facilities shall include:

(1) You have the right to accept or refuse treatment after receiving this explanation.

(2) If you agree to treatment or medication, you have the right to change your mind at any time (unless specifically restricted by law).

(3) You have the right to a humane environment that provides reasonable protection from harm and appropriate privacy for your personal needs.

(4) You have the right to be free from abuse, neglect, and exploitation.

(5) You have the right to be treated with dignity and respect.

(6) You have the right to appropriate treatment in the least restrictive setting available that meets your needs.

(7) You have the right to be told about the program's rules and regulations before you are admitted.

(8) You have the right to be told before admission:

(A) the condition to be treated;

(B) the proposed treatment;

(C) the risks, benefits, and side effects of all proposed treatment and medication;

(D) the probable health and mental health consequences of refusing treatment;

(E) other treatments that are available and which ones, if any, might be appropriate for you; and

(F) the expected length of stay.

(9) You have the right to a treatment plan designed to meet your needs, and you have the right to take part in developing that plan.

(10) You have the right to meet with staff to review and update the plan on a regular basis.

(11) You have the right to refuse to take part in research without affecting your regular care.

(12) You have the right not to receive unnecessary or excessive medication.

(13) You have the right to have information about you kept private and to be told about the times when the information can be released without your permission.

(14) You have the right to be told in advance of all estimated charges and any limitations on the length of services of which the facility is aware.

(15) You have the right to receive an explanation of your treatment or your rights if you have questions while you are in treatment.

(16) You have the right to make a complaint and receive a fair response from the facility within a reasonable amount of time.

(17) You have the right to complain directly to the Texas Commission on Alcohol and Drug Abuse at any reasonable time.

(18) You have the right to get a copy of these rights before you are admitted, including the address and phone number of the Texas Commission on Alcohol and Drug Abuse.

(19) You have the right to have your rights explained to you in simple terms, in a way you can understand, within 24 hours of being admitted.

(b) For residential sites, the Client Bill of Rights shall also include:

(1) You have the right not to be restrained or placed in a locked room by yourself unless you are a danger to yourself or others.

(2) You have the right to communicate with people outside the facility. This includes the right to have visitors, to make telephone calls, and to send and receive sealed mail. This right may be restricted on an individual basis by your physician or the person in charge of the Program if it is necessary for your Treatment or for security, but even then you may contact an attorney or the Texas Commission on Alcohol and Drug Abuse at any reasonable time.

(3) If you consented to treatment, you have the right to leave the facility within four hours of requesting release unless a physician determines that you pose a threat of harm to yourself and others.

(c) If a client's right to free communication is restricted under the provisions of paragraph (b)(2) of this section, the physician or program director shall document the clinical reasons for the restriction and the duration of the restriction in the client record. The physician or program director shall also inform the client, and, if appropriate, the client's consenter of the clinical reasons for the restriction and the duration of the restriction.

§148.702. Client Grievances.

(a) The facility shall have a written client grievance procedure.

(b) Staff shall give each client and consenter a copy of the grievance procedure within 24 hours of admission and explain it in clear, simple terms that the client understands.

(c) The grievance procedure shall tell clients that they can:

(1) file a grievance about any violation of client rights or Commission rules;

(2) submit a grievance in writing and get help writing it if they are unable to read or write; and

(3) request writing materials, postage, and access to a telephone for the purpose of filing a grievance.

(d) The procedure shall also inform clients that they can submit a complaint directly to the Commission at any time and include the current mailing address and toll-free telephone number of the Commission's investigations division.

(e) The facility shall have a written procedure for staff to follow when responding to client grievances. The facility shall:

(1) evaluate the grievance thoroughly and objectively, obtaining additional information as needed;

(2) provide a written response to the client within seven days of receiving the grievance;

(3) take action to resolve all grievances promptly and fairly; and

(4) document all grievances, including the final disposition, and keep the documentation in a central file.

(f) The facility shall not:

(1) retaliate against clients who try to exercise their rights or file a grievance; or

(2) restrict, discourage, or interfere with client communication with an attorney or with the Commission for the purposes of filing a grievance.

§148.703. Abuse, Neglect, and Exploitation.

(a) Any person who receives an allegation or has reason to suspect that a client or participant has been, is, or will be abused, neglected, or exploited by any person shall immediately inform the Commission's investigations division and the provider's chief executive officer or designee. If the allegation involves the chief executive officer, it shall be reported directly to the provider's governing body.

(1) The person shall also report allegations of child abuse or neglect to the Texas Department of Protective and Regulatory Services as required by TEX. FAM. CODE ANN. §261.101 (Vernon 1996).

(2) The person shall also report allegations of abuse or neglect of an elderly or disabled individual to the Texas Department of Protective and Regulatory Services as required by TEX. HUM. RES. CODE ANN. §48.051 (Vernon Supp. 2003).

(b) If the allegation involves sexual exploitation, the chief executive officer shall comply with reporting requirements listed in TEX. CIV. PRAC. & REM. CODE ANN. §81.006 (Vernon 1997).

(c) The chief executive officer shall take immediate action to prevent or stop the abuse, neglect, or exploitation and provide appropriate care.

(d) The chief executive officer or designee shall ensure that a verbal report has been or is made to the Commission's investigations division as required in subsection (a) of this section.

(e) The person who reported the incident shall submit a written incident report to the chief executive officer within 24 hours.

(f) The chief executive officer shall send a written report to the Commission's investigations division within two business days after receiving notification of the incident. This report shall include:

(1) the name of the client or participant and the person the allegations are against;

(2) the information required in the incident report or a copy of the incident report;

(3) other individuals, organizations, and law enforcement notified.

(g) The chief executive officer or designee shall also notify the consenter. If the client is the consenter, family members may be notified only if the client gives written consent.

(h) The provider shall investigate the complaint and take appropriate action unless otherwise directed by the Commission's investigations division. The investigation and the results shall be documented.

(i) The governing body or its designee shall take action needed to prevent any confirmed incident from recurring.

(j) The provider shall:

(1) document all investigations and resulting actions and keep the documentation in a single, segregated file;

(2) have a written policy that clearly prohibits the abuse, neglect, and exploitation of clients and/or participants;

(3) enforce appropriate sanctions for confirmed violations; including, but not limited to, termination of personnel with confirmed violations of client or participant physical or sexual abuse or instances of neglect that result in client or participant harm.

§148.704. Program Rules.

(a) The facility shall establish therapeutically sound written program rules addressing client behavior designed to protect their health, safety, and welfare.

(b) The consequences for violating program rules shall be defined in writing and shall include clear identification of violations that may result in discharge. The consequences shall be reasonable, take into account the client's diagnosis and progress in treatment, and shall not include:

(1) physical discipline or measures involving the denial of food, water, sleep, or bathroom privileges; or

(2) discipline that is authorized, supervised, or carried out by clients.

(c) At the time of admission, every client shall be informed verbally, and in writing, of the program rules and consequences for violating the rules.

(d) The facility shall enforce the rules fairly and objectively and shall not implement consequences for the convenience of Staff.

§148.705. Client Labor and Interactions.

(a) The facility shall not hire clients to fill Staff positions. Former clients are not eligible for employment at the facility until at least two years after documented discharge from active treatment from the facility.

(b) The facility shall not require clients to participate in any fund raising or publicity activities for the facility.

(c) The facility and its personnel shall not enter into a business or personal relationship with a client, give a personal gift to a client, or accept a personal gift of value from a client until at least two years after services to the client cease.

§148.706. Restraint and Seclusion.

(a) The governing body shall adopt a policy to either authorize or prohibit the use of personal restraint, mechanical restraint, and seclusion. All adolescent residential programs, and programs accepting emergency detentions shall authorize use of personal restraint. Any facility authorizing use of restraint or seclusion shall have a written procedure that ensures compliance with this section. Outpatient programs shall prohibit the use of restraint or seclusion, except as it relates to court commitment clients.

(b) In programs authorizing use of restraint or seclusion, direct care staff shall be trained as described in §148.603 of this title (relating to Training).

(c) Staff shall not use restraint or seclusion unless a client's behavior endangers the client or others and less restrictive methods have been tried and failed.

(d) Staff shall not use more force than is necessary to prevent imminent harm and shall ensure the safety, well-being, and dignity of clients who are restrained or secluded, including attention for personal needs.

(e) Staff shall obtain authorization from the supervising Qualified Credentialed Counselor (QCC) before starting restraint or seclusion or as soon as possible after implementation.

(1) The facility shall not use standing authorizations for restraint or seclusion.

(2) Authorization for mechanical restraint or seclusion shall be based on a face-to-face evaluation.

(3) Each authorization shall include a specific time limit, not to exceed 12 hours.

(f) When the client has been safely restrained or secluded, staff shall tell the client what behavior and timeframes are required for release and shall release the client as soon as the criteria are met.

(g) Clinical staff shall review and document alternative strategies for dealing with behaviors necessitating the use of restraint or seclusion for an individual client two or more times in any 30-day period.

(h) The chief executive officer of the facility or designee shall review all incident reports involving restraint or seclusion and take action to address unwarranted use of these measures.

(i) A client held in restraint shall be under continuous direct observation. The facility shall ensure adequate circulation during restraint and shall only use devices designed for therapeutic restraint.

(j) Seclusion rooms shall be constructed to prevent clients from harming themselves and shall allow staff to observe clients easily in all parts of the room. When a client is in seclusion, staff shall conduct a visual check every 15 minutes.

(k) Staff shall record the following information in the client record within 24 hours:

(1) the circumstances leading to the use of restraint or seclusion;

(2) the specific behavior necessitating the restraint or seclusion and the behavior required for release;

(3) less restrictive interventions that were tried before restraint or seclusion began;

(4) the signed authorization of the supervising QCC;

(5) the names of the Staff members who implemented the restraint or seclusion;

(6) the date and time the procedure began and ended;

(7) the behavior and timeframes required for release;

(8) the client's response;

(9) observations made, including the 15 minute checks; and

(10) attention given for personal needs.

§148.707. Responding to Emergencies.

(a) The facility shall ensure that staff have the training and resources necessary to protect the health and safety of clients and other individuals during medical and psychiatric emergencies.

(b) The facility shall have written procedures for responding to medical and psychiatric emergencies.

(c) Emergency numbers shall be posted by all telephones.

(d) The facility shall have fully stocked first aid supplies that are visible, labeled and easy to access.

§148.708. Searches.

(a) All facilities shall adopt a written policy on client searches. Client searches include personal searches and searches of a client's property or sleeping quarters. If client searches are allowed, the facility shall adopt a written search procedure that ensures the protection of client rights.

(b) Client searches may only be conducted to protect the health, safety, and welfare of clients.

(c) Searches shall be conducted in a professional manner that maintains respect and dignity for the client. The facility shall not conduct a directly observed strip search of any client.

(d) A witness shall be present during all client searches.

(e) Staff and witnesses involved in a personal search must be the same gender as the client.

(f) All Client searches shall be documented in the client record, including the reason for the search, the result of the search, and the signatures of the individual conducting the search and the witness.

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 August 18, 2003.

TRD-200305291
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER H. SCREENING AND ASSESSMENT

40 TAC §§148.801 - 148.805

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health & Safety Code §461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rules are also proposed under Texas Health & Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rules is the Texas Health and Safety Code, Chapters 461 and 464.

§148.801. Screening.

(a) To be eligible for admission to a treatment program, an individual shall meet the DSM criteria for substance abuse or dependence (or substance withdrawal or intoxication in the case of a detoxification program). The facility shall use a validated screening instrument appropriate for the target population, individual's age, developmental level, culture and gender which includes the Texas Department of Insurance (TDI) criteria to determine eligibility for admission or referral.

(b) The screening process shall collect other information as necessary to determine the type of services that are required to meet the individual's needs. This may necessitate the administration of all or part of validated assessment instruments.

(c) TDI criteria shall guide referral and treatment recommendations as well as placement decisions.

(d) Sufficient documentation shall be maintained in the client record to support the diagnosis and justify the referral/placement decision. Documentation shall include the date of the screening and the signature and credentials of the Qualified Credentialed Counselor (QCC) supervising the screening process.

(e) For admission to a detoxification program, the screening will be conducted by a physician, physician assistant, advanced practice nurse, or registered nurse.

(f) For admission to all other treatment programs, the screening will be conducted by a counselor or counselor intern.

§148.802. Admission Authorization and Consent to Treatment.

(a) A QCC shall authorize each admission in writing and specify the level of care to be provided. If the screening counselor or intern is not qualified to authorize admission, the QCC shall review the results of the screening and meet with the applicant face-to-face before authorizing admission. The authorization shall be documented in the client record and shall contain sufficient documentation to support the diagnosis and the placement decision.

(b) The facility shall obtain written authorization from the consenter before providing any treatment or medication. The consent form shall be dated and signed by the client, the consenter, and the staff person providing the information, and shall document that the client and consenter have received and understood the following information:

(1) the specific condition to be treated;

(2) the recommended course of treatment;

(3) the expected benefits of treatment;

(4) the probable health and mental health consequences of not consenting;

(5) the side effects and risks associated with the treatment;

(6) any generally accepted alternatives and whether an alternative might be appropriate;

(7) the qualifications of the staff that will provide the treatment;

(8) the name of the primary counselor;

(9) the client grievance procedure;

(10) the Client Bill of Rights as specified in §148.701 of this title;

(11) the program rules, including rules about visits, telephone calls, mail, and gifts, as applicable;

(12) violations that can lead to disciplinary action or discharge;

(13) any consequences or searches used to enforce program rules;

(14) the estimated average daily charge, including an explanation of any services that may be billed separately;

(15) the facility's services and treatment process; and

(16) opportunities for family to be involved in treatment.

(c) This information shall be explained to the client and consenter in simple, non-technical terms. If an emergency or the client's physical or mental condition prevents the explanation from being given or understood by the client within 24 hours, staff shall document the circumstances in the client record and present the explanation as soon as possible. Documentation of the explanation shall be dated and signed by the client, the consenter, and the staff person providing the explanation.

(d) The client record shall include a copy of the Client Bill of Rights dated and signed by the client and consenter.

(e) If possible, all information shall be provided in the consenter's primary language.

(f) If an individual is not admitted, the program shall refer and assist the applicant to obtain appropriate services.

(g) When an applicant is denied admission, the facility shall maintain documentation signed by the examining QCC which includes the reason for the denial and all referrals made.

§148.803. Assessment.

(a) A QCC shall conduct and document a comprehensive psychosocial assessment with the client admitted to the facility. The assessment shall document and elicit enough information about the client's past and present status to provide a thorough understanding of the following areas:

(1) presenting problems resulting in admission;

(2) alcohol and other drug use;

(3) psychiatric and chemical dependency treatment;

(4) medical history and current health status, to include Tuberculosis (TB), HIV and other sexually transmitted disease (STD) information;

(5) relationships with family;

(6) social and leisure activities;

(7) education and vocational training;

(8) employment history;

(9) legal problems;

(10) mental/ emotional functioning; and

(11) strengths and weaknesses.

(b) The assessment shall result in a comprehensive listing of the client's problems, needs, and strengths.

(c) The assessment shall result in a comprehensive diagnostic impression. The diagnostic impression shall include all DSM Axes I, IV, and V at a minimum, and Axes II and III, as allowed by the QCC's license and scope of practice.

(d) If the assessment identifies a potential mental health problem, the facility shall obtain a mental health assessment and seek appropriate mental health services when resources for mental health assessments and/or services are available internally or through referral at no additional cost to the program. These services shall be provided by a facility authorized to provide such services or a qualified professional as described in §148.901 of this title (relating to Treatment Program Services).

(e) The assessment shall be signed by a QCC and filed in the client record within three individual service days of admission.

(f) The program may accept an evaluation from an outside source if:

(1) it meets the criteria set forth herein;

(2) it was completed during the 30 days preceding admission or is received directly from a facility that is transferring the client; and

(3) a counselor reviews the information with the client and documents an update.

(g) For residential clients, a licensed health professional shall conduct a health assessment of the client's physical health status within 96 hours of admission. The facility may accept a health assessment from an outside source completed no more than 30 days before admission or received directly from a transferring facility. If the client has any physical complaints or indications of medical problems, the client shall be referred to a physician, physician assistant, or advanced practice nurse for a history and physical examination. The examination, if needed, shall be completed within a reasonable time frame and the results filed in the client record.

§148.804. Treatment Planning, Implementation and Review.

(a) The counselor and client shall work together to develop and implement an individualized, written treatment plan that identifies services and supports needed to address problems and needs identified in the assessment. When appropriate, family shall also be involved.

(1) When the client needs services not offered by the facility, appropriate Referrals shall be made and documented in the client record. When feasible, other QCCs or mental health professionals serving the client from a referral agency should participate in the treatment planning process.

(2) The client record shall contain justification when identified needs are temporarily deferred or not addressed during treatment.

(b) The treatment plan shall include goals, objectives, and strategies.

(1) Goals shall be based on the client's problems/needs, strengths, and preferences.

(2) Objectives shall be individualized, realistic, measurable, time specific, appropriate to the level of treatment, and clearly stated in behavioral terms.

(3) Strategies shall describe the type and frequency of the specific services and interventions needed to help the client achieve the identified goals and shall be appropriate to the level of intensity of the program in which the client is receiving treatment.

(c) The treatment plan shall include initial plans for discharge. The discharge plans shall be updated as the client progresses through treatment.

(d) The treatment plan shall include the projected length of stay.

(e) The treatment plan shall identify the client's primary counselor, and shall be dated and signed by the client, and the counselor. When the treatment plan is conducted by an intern or graduate, a QCC shall review and sign the treatment plan.

(f) The treatment plan shall be completed and filed in the client record within three individual service days of admission.

(g) The treatment plan shall be evaluated on a regular basis and revised as needed to reflect the ongoing reassessment of the client's problems, needs, and response to treatment.

(h) The primary counselor shall meet with the client to review and update the treatment plan at appropriate intervals defined in writing by the program. Treatment plan reviews shall be conducted weekly in residential programs and monthly in outpatient programs.

(i) The treatment plan review shall include:

(1) an evaluation of the client's progress toward each goal and objective;

(2) revision of the goals, objectives; and

(3) justifications of continued length of stay.

(j) Treatment plan reviews shall be dated and signed by the client, the counselor and the supervising QCC, if applicable.

(k) When a client's intensity of service is changed, the client record shall contain:

(1) clear documentation of the decision signed by a QCC, including the rationale and the effective date;

(2) a revised treatment plan; and

(3) documentation of coordination activities with receiving treatment provider.

(l) Program staff shall document all treatment services (counseling, chemical dependency education, and life skills training) in the client record within 72 hours, including the date, nature, and duration of the contact, and the signature and credentials of the person providing the service.

(1) Education, life skills training, and group counseling notes shall also include the topic/issue addressed.

(2) Individual counseling notes shall include the goals addressed, clinical observation and new issues or needs identified during the session.

§148.805. Discharge.

(a) The counselor and client/consenter shall develop and implement an individualized discharge plan. The plan shall include the criteria for discharging or transferring the client to another level of care. The Texas Department of Insurance criteria shall be used as a general guideline for determining when clients are appropriate for transfer or discharge, but individualized criteria shall be specifically developed for each client.

(b) Discharge plans shall be updated as the client progresses through treatment and shall address the continued appropriateness of the current treatment level.

(c) The discharge plan shall address continuity of services to the client.

(1) When a client is referred or transferred to another chemical dependency or mental health service provider for continuing care, the facility shall contact the receiving program before the client is discharged to make arrangements for the transfer.

(2) Coordination activities shall be documented in the client record, including timeframe for client being able to access needed Services and any constraints associated with the referral.

(3) With proper client consent, the facility shall provide the receiving program with copies of relevant parts of the client's record.

(d) The program shall involve the client's family or an alternate support system in the discharge planning process when appropriate.

(e) Discharge planning shall be completed before the client's scheduled discharge.

(f) A written discharge plan shall be developed to address ongoing client needs, including:

(1) individual goals or activities to sustain recovery;

(2) referrals; and

(3) recovery maintenance services, if applicable.

(g) The completed discharge plan shall be dated and signed by the counselor, the client, and the consenter (if applicable).

(h) The program shall give the client and consenter a copy of the plan, and file the original signed plan in the client record.

(i) The program shall complete a discharge summary for each client within 30 Days of discharge. The discharge summary shall be signed by a QCC and shall include:

(1) dates of admission and discharge;

(2) needs and problems identified at the time of admission, during treatment, and at discharge;

(3) services provided;

(4) assessment of the client's progress towards goals;

(5) reason for discharge; and

(6) referrals and recommendations, including arrangements for recovery maintenance.

(j) The facility shall contact each client no later than 90 Days after discharge from the facility and document the individual's current status or the reason the contact was unsuccessful.

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 August 18, 2003.

TRD-200305290
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER I. TREATMENT PROGRAM SERVICES

40 TAC §§148.901 - 148.911

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health & Safety Code §461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rules are also proposed under Texas Health & Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rules is the Texas Health and Safety Code, Chapters 461 and 464.

§148.901. Requirements Applicable to All Treatment Services.

(a) Each client's treatment shall be based on a treatment plan developed from the client's comprehensive assessment.

(b) Group counseling sessions are limited to a maximum of 16 clients. Group education and life skills training sessions are limited to a maximum of 35 clients. This limit does not apply to multi-family educational groups, seminars, outside speakers, or other events designed for a large audience.

(c) Chemical dependency education and life skills training shall follow a written curriculum. All educational sessions shall include client participation and discussion of the material presented.

(d) The program shall provide education about Tuberculosis (TB), HIV, Hepatitis B and C, and sexually transmitted diseases (STDs) based on the Texas Commission on Alcohol and Drug Abuse Workplace and Education Guidelines for HIV and Other Communicable Diseases.

(e) The program shall provide education about the health risks of tobacco products and nicotine addiction.

(f) The program shall provide access to screening for TB and testing for HIV antibody, Hepatitis C, and STDs.

(1) HIV antibody testing shall be carried out by an entity approved by the Texas Department of Health.

(2) If a client tests positive, the program shall refer the client to an appropriate health care provider.

(g) The program shall facilitate access to physical health, mental health, and ancillary services if those services are not available through the program and are necessary to meet treatment goals and shall document these efforts.

(h) Individuals shall not be denied admission or discharged from treatment because they are taking prescribed medication.

(i) The facility shall maintain an adequate number of qualified staff to comply with licensure rules, provide appropriate and individualized treatment, and protect the health, safety, and welfare of clients.

(j) All personnel shall receive the training and supervision necessary to ensure compliance with Commission rules, provision of appropriate and individualized treatment, and protection of client health, safety and welfare.

(k) Direct care staff shall be awake and on site during all hours of program operation.

(l) Residential direct care staff included in staff-to-client ratios shall not have job duties that prevent ongoing and consistent client supervision.

(m) Residential programs shall have at least one counselor on duty at least eight hours a day, six days a week.

(n) Clients in residential programs shall have an opportunity for eight continuous hours of sleep each night. Staff shall conduct and document at least three checks while clients are sleeping.

(o) Individuals responsible for planning, directing, or supervising treatment programs shall be QCCs. The clinical program director must have at least two years of post-licensure experience providing chemical dependency treatment.

(p) Chemical dependency counseling must be provided by a qualified credentialed counselor (QCC), graduate, or counselor intern. Chemical dependency education and life skills training shall be provided by counselors or individuals who have the specialized education and expertise.

(q) All counselor interns shall work under the direct supervision of a QCC as required in Chapter 150 of this title (relating to Counselor Licensure).

(r) Qualified mental health professionals acting as QCCs shall have a minimum of 2,000 hours of documented work experience under the supervision of a licensed chemical dependency counselor.

§148.902. Requirements Applicable to Detoxification Services.

(a) A facility providing detoxification Services shall ensure every individual admitted to a detoxification program meets the DSM criteria for substance intoxication or withdrawal.

(b) All detoxification programs shall ensure continuous access to emergency medical care.

(c) The program shall have a medical director who is a licensed physician. The medical director shall be responsible for admission, diagnosis, medication management, and client care.

(d) The medical director or his/her designee (physician assistant, or advanced practice nurse) shall approve all medical policies, procedures, guidelines, tools, and the medical content of all forms, which shall include:

(1) screening instruments and procedures;

(2) protocol or standing orders for each major drug category of abusable drugs (opiates, alcohol and other sedative-hypnotic/anxiolytics, inhalants, stimulants, hallucinogens) that are consistent with guidelines published by nationally recognized organizations (e.g., Substance Abuse and Mental Health Services Administration, American Society of Addiction Medicine, American Academy of Addiction Psychology).

(3) procedures to deal with medical emergencies;

(4) medication and monitoring procedures for pregnant women that address effects of detoxification and medications used on the fetus; and

(5) special consent forms for pregnant women identifying risks inherent to mother and fetus.

(e) The medical director or his/her designee (physician assistant, advanced practice nurse) shall authorize all admissions, conduct a face-to-face examination, to include both a history and physical examination of each applicant for services to establish the Axis I diagnosis, assess level of intoxication or withdrawal potential, and determine the need for treatment and the type of treatment to be provided to reach a placement decision.

(1) The examination shall identify potential physical and mental health problems and/or diagnoses that warrant further assessment.

(2) The authorization and examination shall be documented in the client record and shall contain sufficient documentation to support the diagnoses and the placement decision. If the physician determines an admission was not appropriate, the client shall be transferred to an appropriate service provider.

(3) The face-to-face examination (history and physical examination) and signed orders of admission shall occur within 24 hours of admission.

(4) The program may accept an examination completed during the 24 hours preceding admission if it is approved by the program's medical director or designee and includes the elements of (e)(1)-(2)of this section. The program may not require a client to obtain a history and physical as a condition of admission.

(5) Detoxification programs shall have a licensed vocational nurse or registered nurse On duty for at least eight hours every day and a physician or designee on call 24 hours a day.

(6) Detoxification programs shall ensure that detoxification services are accessible at least 16 hours per day, seven days per week.

(f) Residential and ambulatory (outpatient) detoxification programs shall provide monitoring to manage the client's physical withdrawal symptoms. Monitoring shall be conducted at a frequency consistent with the degree of severity of the client's withdrawal symptoms, the drug(s) from which the client is withdrawing, and/or the level of intoxication of the client. This information will be documented in the client's record and reflected in the client's orders.

(1) Monitoring shall include:

(A) changes in mental status;

(B) vital signs; and

(C) response of the client's symptoms to the prescribed detoxification medications

(2) Use of instruments such as the Clinical Institute Withdrawal Assessment-Alcohol, revised (CIWA-Ar) for alcohol and sedative hypnotic withdrawal and the "clinician's assessment" in the Behavioral Health Integrated Provider System (BHIPS) is recommended.

(3) More intensive monitoring is required for clients with a history of severe withdrawal symptoms (e.g. a history of hallucinosis, delirium tremors, seizures, uncontrolled vomiting/dehydration, psychosis, inability to tolerate withdrawal symptoms, self harming attempts), or the presence of current severe withdrawal symptoms and/or co-occurring medical and psychiatric disorders.

(4) At a minimum, monitoring should be done every four hours in residential detoxification programs for the first 72 hours and as ordered by the medical director or designee thereafter, dependent on the client's signs and symptoms.

(5) Medication should be available to manage withdrawal/intoxication from all classes of abusable drugs.

(6) Medication "regimens", "protocols" or standing orders can be used, but detoxification should be tailored to each client's need based on vital signs and symptom severity (objective and subjective) and noted in the client's record.

(7) Ambulatory detoxification should have clear documentation by the physician or designee that the client's symptoms are or are expected to be of a severity that necessitates a minimum of once a day monitoring.

(g) In addition to the management of withdrawal and intoxicated states, detoxification programs shall provide services, including counseling, which are designed to:

(1) assess the client's readiness for change;

(2) offer general and individualized information on substance abuse and dependency;

(3) enhance client motivation;

(4) engage the client in treatment; and

(5) include a detoxification plan that contains the goals of successful and safe detoxification as well as transfer to another intensity of treatment. At least one daily individual session by the clinical staff, QCC or counselor intern with the client will be conducted.

(h) Ambulatory detoxification shall not be a stand alone service and services shall be provided in conjunction with outpatient treatment services. When treatment services are not available in conjunction with ambulatory detoxification services, the ambulatory detoxification program shall arrange for them.

(i) Bunk beds shall not be used in residential detoxification programs.

(j) In residential programs, direct care staff shall be On duty where the clients are located 24 hours a Day.

(1) During day and evening hours, at least two staff shall be On duty for the first 12 clients, with one more staff on duty for each additional one to 16 clients.

(2) At night, at least one staff member with detoxification training shall be On duty for the first 12 clients with one more staff on duty for each additional one to 16 clients.

(k) Clients who are not in withdrawal but meet the DSM criteria for substance dependence may be admitted to detoxification services for 72 hours for crisis stabilization.

(l) Crisis stabilization is appropriate for clients who have diagnosed conditions that result in current emotional or cognitive impairment in clients such that they would not be able to participate in a structured and rigorous schedule of formal chemical dependency treatment.

(1) The specific client signs and symptoms that meet the DSM or other medical criteria for the disorder must be documented in the client record.

(2) Documentation must also include what symptoms are precluding the client from participating in treatment and the manner in which they are to be resolved.

§148.903. Requirements Applicable to Intensive Residential and Day Treatment Services.

(a) Residential Treatment provides 24-hour per day, 7 days per week multidisciplinary professional clinical support to facilitate recovery from addiction. Clients are housed in a residential site. Comprehensive chemical dependency treatment services offer a structured therapeutic environment.

(b) The facility shall ensure access to the full continuum of treatment services and will ensure sufficient treatment intensity to achieve treatment plan goals. Intensity and content of treatment shall be appropriate to the client's needs and consistent with generally accepted placement guidelines and standards of care.

(c) Each individual admitted to intensive residential services shall be appropriate for this treatment setting, with written justification to support the admission.

(d) Intensive residential shall provide an average of at least 30 hours of treatment services per week for each client, comprised of at least ten hours of chemical dependency counseling, including two hours of individual counseling, nine hours of group Counseling, and 19 hours of additional counseling, chemical dependency education and life skills training (at least 5 of these hours shall be during weekends).

(e) In adult intensive residential programs, the direct care staff-to-client ratio shall be at least 1:16 when Clients are awake and 1:32 during sleeping hours.

(f) In intensive residential programs counselor caseloads shall not exceed ten clients for each counselor.

(g) Adult supportive residential shall provide at least seven hours of treatment services per week for each client, comprised of at least one hour of individual counseling and 6 hours of group counseling per week.

(h) In adult supportive residential programs, the direct care staff-to-client ratio shall be at least 1:20 when clients are awake and 1:50 during sleeping hours.

(i) In supportive residential programs counselor caseloads shall not exceed 20 clients per counselor.

§148.904. Requirements for Outpatient Treatment Programs.

(a) Outpatient programs are designed for clients who do not require the more structured environment of residential treatment to maintain sobriety.

(b) Outpatient programs shall ensure access to full continuum of care and ensure sufficiency of treatment intensity to achieve treatment plan goals. Intensity and content of treatment shall be appropriate to the client's needs and consistent with generally accepted placement guidelines and standards of care.

(c) Each individual admitted to an outpatient program shall be appropriate for this treatment setting, with written justification to support the admission.

(d) Treatment includes individualized treatment planning based on a comprehensive assessment, educational and process groups, and individual counseling.

(e) Each client's progress is assessed regularly by clinical staff to help determine the length and intensity of the program for that client.

§148.905. Additional Requirements for Adolescent Programs.

(a) Facilities providing adolescent residential services shall:

(1) maintain separation between adults and adolescents;

(2) have separate sleeping areas, bedrooms, and bathrooms for adults and adolescents, and for males and females;

(3) provide access to education approved by the Texas Education Agency within three school days of admission when treatment is expected to last more than 14 Days;

(4) provide planned, structured activities during evenings and weekends in addition to the required treatment services. Recreational and leisure activities shall be included in the structured time. The minimum number of additional hours is 15;

(5) ensure the direct care staff-to-client ratio is at least 1:8 during waking hours (including program-sponsored activities away from the facility) and 1:16 during sleeping hours;

(6) ensure clients are under direct supervision at all times. During sleeping hours, staff shall conduct and document hourly bed checks;

(7) facilitate regular communication between an adolescent client and the client's family and shall not arbitrarily restrict any communications without clear individualized clinical justification documented in the client record; and

(8) have written procedures addressing notification of parents or guardians in the event an adolescent leaves a residential program without authorization.

(b) Facilities providing outpatient services shall:

(1) maintain separation between adults and adolescents; and

(2) provide access to education approved by the Texas Education Agency within three school days of admission when treatment is expected to last more than 14 days, if required by law.

(c) All facilities shall:

(1) ensure the program's treatment services, lectures, and written materials are age-appropriate and easily understood by clients; and

(2) involve the client's family or an alternate support system in the treatment process or document why this is not possible.

(d) Adolescent programs may serve children 13 to 17 years of age. However, young adults aged 18 to 21 may be admitted to an adolescent program when the screening process indicates the individual's needs, experiences, and behavior are similar to those of adolescent clients.

(e) Adult programs serve individuals 18 years of age or older. However, adolescents aged 17 may be admitted to an adult program when they are referred by the adult criminal justice system or when the screening process indicates the individual's needs, experiences, and behavior are similar to those of adult clients.

(f) Every exception to the general age requirements shall be clinically justified and documented and approved in writing by a QCC.

§148.906. Access to Services for COPSD Clients.

(a) In determining an individual's initial and ongoing eligibility for any service, an entity may not exclude an individual based on the following factors:

(1) the individual's past or present mental illness;

(2) medications prescribed to the individual in the past or present;

(3) the presumption of the individual's inability to benefit from treatment; or

(4) the individual's level of success in prior treatment episodes.

(b) Providers must ensure that a client's refusal of a particular service does not preclude the client from accessing other needed mental health or substance abuse services.

(c) Providers must establish and implement procedures to ensure the continuity between screening, assessment, treatment and referral services provided to clients.

§148.907. Additional Requirements for Co-Occurring Psychiatric and Substance Use Disorders Programs.

(a) The services provided to a client with co-occurring psychiatric and substance use disorders (COPSD) must:

(1) address both psychiatric and substance use disorders;

(2) be provided within established practice guidelines for this population; and

(3) facilitate individuals in accessing available services they need and choose, including self-help groups.

(b) The services provided to a client with COPSD must be provided by staff who are competent in the areas identified in §148.908 of this title (relating to Specialty Competencies of Staff Providing Services to Individuals with COPSD).

§148.908. Specialty Competencies of Staff Providing Services to Clients with COPSD.

(a) Providers must ensure that services to clients are age-appropriate and are provided by staff within their scope of practice who have the following minimum knowledge, technical, and interpersonal competencies prior to providing services.

(1) Knowledge competencies:

(A) knowledge of the fact that psychiatric and substance use disorders are potentially recurrent relapsing disorders, and that although abstinence is the goal, relapses can be opportunities for learning and growth;

(B) knowledge of the impact of substance use disorders on developmental, social, and physical growth and development of children and adolescents;

(C) knowledge of interpersonal and family dynamics and their impact on individuals;

(D) knowledge of the current Diagnostic and Statistical Manual of Mental Disorders (DSM) diagnostic criteria for psychiatric disorders and substance use disorders and the relationship between psychiatric disorders and substance use disorders;

(E) knowledge regarding the increased risks of self-harm, suicide, and violence in individuals;

(F) knowledge of the elements of an integrated treatment plan and community support plan for individuals;

(G) basic knowledge of pharmacology as it relates to individuals with a mental disorder;

(H) basic understanding of the neurophysiology of addiction;

(I) knowledge of the phases of recovery for individuals;

(J) knowledge of the relationship between COPSD and DSM Axis III disorders; and

(K) knowledge of self-help in recovery.

(2) Technical competencies:

(A) ability to perform age-appropriate assessments of clients; and

(B) ability to formulate an individualized Treatment plan and community support plan for clients.

(3) Interpersonal competencies:

(A) ability to tailor interventions to the process of recovery for clients;

(B) ability to tailor interventions with readiness to change; and

(C) ability to engage and support Clients who choose to participate in 12-step recovery programs.

(b) Within 90 days of the effective date of this rule, providers must ensure that staff who provide services to clients with COPSD have demonstrated the competencies described in subsection (a) of this section. These competencies may be evidenced by compliance with current licensure requirements of the governing or supervisory boards for the respective disciplines involved in serving clients with COPSD or by documentation regarding the attainment of the competencies described in subsection (a) of this section.

§148.909. Screening, Assessment, and Treatment Planning of Services to Clients with COPSD.

(a) The treatment plan must identify services to be provided and must include measurable outcomes that address COPSD.

(b) The treatment plan must identify the family members' need for education and support services related to the client's mental illness and substance abuse and a method to facilitate the family members' receipt of the needed education and support services.

(c) The client and, if requested, family member, must be given a copy of the treatment plan as permitted by law.

§148.910. Treatment Services for Women and Children.

(a) Clients shall receive gender-specific services in female-only specialized programs.

(b) When appropriate, pre-admission service coordination shall be provided to reduce barriers to treatment, enhance motivation, stabilize life situations, and facilitate engagement in treatment.

(c) Services shall address relationship issues, including past or current experience with sexual, physical, and emotional abuse.

(d) Clients shall receive access to appropriate primary medical care, including prenatal care and reproductive health education and services.

(e) Pregnant clients, women with children in custody, and women with dependent children shall receive parenting education and support cervices.

(f) Women and their dependent children shall be treated as a unit, and both the woman and her children will be admitted into treatment when appropriate.

(g) Children shall receive services to address their needs and support healthy development, including primary pediatric care, early childhood intervention services, substance abuse prevention services, and/or other therapeutic interventions.

(h) Provisions for daycare are as follows:

(1) On-site day care shall comply with 40 TEX. ADMIN. CODE §§715.601-632 (2003)(relating to Minimum Standards for Group Day-Care Homes).

(2) Off-site contracted daycare providers shall be licensed by the Texas Department of Protective and Regulatory Services.

(3) If a center has an attendance of more than 30 children at lunch or dinner time, staff shall be provided for meal preparation, serving and cleanup. The staff providing meal services shall not be included in staff to child ratios during this time.

(i) The program shall assist the parent/guardian as necessary to ensure educational opportunities for school age children in accordance with the requirements of the Texas Education Agency.

(j) School age children shall have access and transport to school.

(k) The program shall document any services provided to children, including daycare and community support. The record shall document the child's developmental, physical, emotional, social, and educational needs, and family background and current status.

§148.911. Treatment Services Provided by Electronic Means.

(a) A licensed treatment program may provide outpatient chemical dependency treatment program services by electronic means provided the criteria outlined in this section are addressed.

(1) Services shall be provided to adult clients only; and

(2) Services shall be provided by a QCC.

(b) All treatment sessions shall have two forms of access control as follows:

(1) all on-line contact between a QCC and clients must begin with a verification of the client through a name, password or pin number; and

(2) security as detailed in HIPAA.

(c) All data, including audio, video, text and presentation materials shall be transferred using 128 bit-Encryption.

(d) Programs shall maintain compliance with HIPAA and 42 C.F.R. pt. 2.

(e) Programs shall not use email communications containing Client identifying information.

(f) Programs shall use audio and video in real time.

(g) Programs shall ensure timely access to individuals qualified in the technology as backup for systems problems.

(h) Programs shall maintain a toll-free telephone number for technical support.

(i) Programs shall develop a contingency plan for clients when technical problems occur during the provision of services.

(j) Programs shall provide a description of all services offered.

(k) Programs shall provide develop criteria, in addition to DSM, to assess clients for appropriateness of utilizing electronic services.

(l) Programs shall provide appropriate referrals for clients who do not meet the criteria for services.

(m) Programs shall develop a grievance procedure and provide a link to the Commission for filing a complaint when using the Internet or the Commission's toll-free number when counseling by telephone.

(n) Prior to clients engaging in Internet Services, programs shall describe and provide in writing the potential risks to clients. The risks shall address at a minimum these areas:

(1) clinical aspects;

(2) security; and

(3) confidentiality.

(o) Programs shall create safeguards to ensure appropriate age and identification of the client.

(p) Programs shall maintain information on statutes and regulations of the governing area in which the client resides or is receiving services by electronic means.

(q) Programs shall provide emergency contact information to the client.

(r) Programs shall maintain resource information for the local area of the client.

(s) Programs shall provide reasonable ADA accommodations for clients upon request.

(t) Programs must reside and perform cervices in Texas.

(u) The Commission maintains the authority to regulate the program regardless of the location of the client.

(v) The Program shall maintain information on statutes and regulations of the governing area in which the client resides or is receiving the Internet services.

(w) Facility shall provide emergency contact information to the client.

(x) Facility shall maintain resource information for the local area of the Client.

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 August 18, 2003.

TRD-200305297

Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER J. MEDICATION

40 TAC §§148.1001 - 148.1004

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health & Safety Code §461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rules are also proposed under Texas Health & Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rules is the Texas Health and Safety Code, Chapters 461 and 464.

§148.1001. General Provisions for Medication.

(a) All facilities that provide medication shall implement written procedures for medication storage, administration, documentation, inventory, and disposal.

(b) Prescription medication shall be used only for therapeutic and medical purposes and shall be administered as prescribed by an appropriately Licensed professional.

(c) Single doses of prescription medication shall be prepared and packaged by a licensed pharmacist caXor physician.

(d) The facility shall ensure that Staff provide medication are properly credentialed and trained.

(e) The program shall have the phone number of a pharmacy and a comprehensive drug reference manual easily accessible to staff.

§148.1002. Medication Storage.

(a) Prescription and over-the-counter medications, syringes, and needles shall be kept in locked storage and accessible only to staff who are authorized to provide medication.

(b) Clients may keep prescription or over-the-counter medication in their personal possession on site with written authorization from the program director. Staff shall ensure that- authorized clients keep medication on their persons or safely stored and inaccessible to other clients.

(c) The program shall store all medications, syringes, and needles in their original containers under appropriate conditions. Medications requiring refrigeration shall not be stored with food and other items.

(d) The facility shall ensure that stock prescription medications are stored in a licensed pharmacy or physician's office and dispensed by a pharmacist or physician as required by TEX. OCC. CODE ANN. ch. 551 (Vernon 2002).

(e) The facility shall ensure that prescription medication is in a container labeled by the pharmacy.

§148.1003. Medication Inventory and Disposal.

(a) The program shall use an effective system to track and account for all prescription medication.

(b) Staff shall inventory and inspect all stored DEA Schedule II, III, and IV prescription medication at least daily using a centralized medication inventory form.

(c) The staff member conducting the inventory shall sign and date the inventory sheet. When a discrepancy exists between the administration record and the inventory count form, a note explaining the reason for the discrepancy or action taken to reconcile/correct the discrepancy shall be signed by the staff member conducting the inventory and kept with the medication inventory forms.

(d) Staff shall separate unused and outdated medication immediately and dispose of it within 30 days.

(e) Methods used for disposal shall prevent medication from being retrieved, salvaged, or used. Two staff members shall witness and document disposal, including amount of medication disposed and method used.

§148.1004. Administration of Medication.

(a) Staff shall provide and discontinue medication exactly as prescribed.

(b) Prescription medication shall be administered only by nurses and other staff who are legally authorized to administer medication.

(c) Clients may self-administer medication under the supervision of staff who are trained as described in §148.603 of this title (relating to Staff Training).

(d) Each dose of prescription and over-the-counter medication taken by the client shall be documented in the client's medication record.

(e) The medication record shall include:

(1) the client's name;

(2) drug allergies (or the absence of known allergies);

(3) the name and dose of each medication;

(4) the frequency and route of each medication;

(5) the date and time of each dose; and

(6) the signature of the staff person who administered or supervised each dose.

(f) The facility shall document the circumstances and reason for any missed doses.

(g) When a client appears to have an adverse reaction to medication, a staff member shall:

(1) notify the prescribing professional or another physician, dentist, podiatrist, physician assistant or advanced practice nurse (preferably the prescribing professional);

(2) complete an incident report; and

(3) document the facts in the client record, including the date and time of notification and any other action taken.

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 August 18, 2003.

TRD-200305296
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER K. FOOD AND NUTRITION

40 TAC §§148.1101 - 148.1104

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health & Safety Code §461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rules are also proposed under Texas Health & Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rules is the Texas Health and Safety Code, Chapters 461 and 464.

§148.1101. Meals in Outpatient Programs.

(a) Programs shall provide a meal break after five consecutive hours of scheduled activities.

(b) If the facility prepares meals in a centralized kitchen on site, it shall pass an annual kitchen health inspection as required by law.

§148.1102. Meals in Residential Programs.

(a) The residential program shall provide wholesome, well-balanced meals, according to posted weekly approved menus.

(b) The program shall provide modified diets to residents who medically require them as determined by a Licensed Health Professional. Special diets shall be prepared in consultation with a licensed dietitian.

(c) All food shall be selected, stored, prepared, and served in a safe and healthy manner.

(d) The Program shall provide at least three meals daily. The Program shall provide packaged meals or make other arrangements for Clients who are scheduled to be away from the Facility during meal time.

(e) A licensed dietitian shall approve menus and written guidelines for substitutions in advance; or

(1) approve a meal planning manual with sample menus and guidelines for substitutions;

(2) approve menus prepared by new Staff before they plan meals independently;

(3) review a sample of menus served at least annually; and

(4) provide Staff training as needed.

§148.1103. Meals Prepared by Clients.

(a) Staff shall provide training and supervision needed to ensure compliance with the rules in §148.1102 of this title (relating to Meals in Residential Programs).

(b) The program shall define duties in writing and have written instructions posted or easily accessible to clients.

(c) If menu planning and independent meal preparation are part of the clients' treatment program, a licensed dietitian shall:

(1) approve the client training curriculum; and

(2) provide training or approve a training program for staff that instruct and supervise clients in meal preparation.

§148.1104. Meals Provided by a Food Service.

(a) When meals are provided by a food service, a written contract shall require the food service to:

(1) comply with the rules in §148.1102 of this title (relating to Meals in Residential Programs); and

(2) pass an annual kitchen health inspection as required by law.

(b) The facility shall ensure the meals are transported to the facility in temperature controlled containers to ensure the food remains at the temperature at which it was prepared.

(c) The facility shall ensure that at least one staff, at a minimum, maintains a current food handler's permit.

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 August 18, 2003.

TRD-200305295
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER L. RESIDENTIAL PHYSICAL PLANT REQUIREMENTS

40 TAC §§148.1201 - 148.1207

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health & Safety Code §461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rules are also proposed under Texas Health & Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rules is the Texas Health and Safety Code, Chapters 461 and 464.

§148.1201. General Physical Plant Provisions.

(a) Physical plant requirements apply only to residential programs.

(b) The water supply shall be of safe, sanitary quality, suitable for use, and adequate in quantity and pressure. The water shall be obtained from a water supply system approved by the Texas Natural Resource Conservation Commission (TNRCC).

(c) Sewage shall be discharged into a State-approved sewage system or septic system; otherwise, the sewage must be collected, treated, and disposed of in a manner which is approved by TNRCC.

(d) Mobile homes, recreational vehicles, and campers shall not be used for client sleeping areas.

§148.1202. Required Inspections.

The residential site shall pass all required inspections and keep a current file of reports and other documentation needed to demonstrate compliance with applicable laws and regulations. The inspections must be signed, dated, and free of any outstanding corrective actions. The following inspections are required:

(1) annual inspection by the local certified fire inspector or the State fire marshal;

(2) annual inspection of the alarm system by the fire marshal or an inspector authorized to install and inspect such systems;

(3) annual kitchen inspection by the local health authority or the Texas Department of Health;

(4) gas pipe pressure test once every three years by the local gas company or a licensed plumber;

(5) annual inspection and maintenance of fire extinguishers by personnel licensed or certified to perform those duties; and

(6) annual inspection of liquefied petroleum gas systems by an inspector certified by the Texas Railroad Commission.

§148.1203. Emergency Evacuation.

Every residential Program shall:

(1) have emergency evacuation procedures that include provisions for individuals with disabilities;

(2) hold fire drills on each shift at least quarterly and correct identified problems promptly;

(3) post exit diagrams conspicuously throughout the program site (except in small one-story buildings where all exits are obvious); and

(4) be able to clear the building safely and in a timely manner at all times.

§148.1204. Exits.

(a) Every building shall have at least two well-separated exits on each story.

(b) Every route of exit shall be free of hazards and obstructions, well lit, and marked clearly with illuminated exit signs at all times.

(c) Rooms for 50 or more people shall have exit doors that swing out.

(d) No door may require a key for emergency exit. Locked facilities shall have emergency exit door releases as described in the Life Safety Code and approved by the fire marshal.

§148.1205. Space, Furniture and Supplies.

(a) The facility shall have areas for leisure and dining with adequate space for the number of residents.

(b) Sleeping areas shall have at least:

(1) 80 usable square feet per individual in single-occupancy rooms; and

(2) 60 usable square feet per individual in multiple-occupancy rooms (or 50 square feet per individual if bunk beds are used).

(c) The facility shall provide adequate personal storage space for each client, including space for hanging clothes.

(d) The program shall make at least one phone available to clients.

(e) Each client shall have a separate bed of solid construction with a mattress. Clean bed linen, towels, and soap shall be available at all times and in quantity sufficient to meet the needs of the residents.

(f) All clients shall have access to laundry services or properly maintained laundry facilities equivalent to one washer and dryer per 25 clients.

§148.1206. Fire Systems.

(a) A fire detection, alarm, and communication system required for life safety shall be installed, tested, and maintained in accordance with the facility's occupancy and capacity classifications.

(b) Electrical fire alarm systems shall be installed by agents registered with the State fire marshal's office. The facility shall maintain a copy of the fire alarm installation certificate.

(c) Quarterly fire alarm system tests shall be conducted and documented by facility staff.

(d) Alarms shall be loud enough to be heard above normal noise levels throughout the building.

(e) Fire extinguishers shall be mounted throughout the facility as required by code and approved by the fire marshal.

(1) Each laundry and walk-in mechanical room shall have at least one portable A:B:C extinguisher, and each kitchen shall have at least one B:C fire extinguisher.

(2) Each extinguisher shall have the required maintenance service tag attached.

(f) Staff shall conduct quarterly inspections of fire extinguishers for proper location, obvious physical damage, and a full charge on the gauge.

§148.1207. Other Physical Plant Requirements.

(a) Occupied parts of the building shall be kept between 65 degrees and 85 degrees Fahrenheit, including kitchens and laundry areas. Cooling and heating shall be provided, as necessary, for resident comfort.

(b) Portable electric heaters and open-flame heating devices are prohibited. All fuel-burning devices shall be vented.

(c) The facility shall be well ventilated through the use of windows, mechanical ventilation, or a combination. Windows used regularly for ventilation shall be screened.

(d) Bedrooms and bathrooms with windows shall have appropriate window coverings for privacy.

(e) The facility shall have adequate internal and external lighting to provide a safe environment and meet user needs.

(f) There shall be at least one sink, one tub or shower, and one toilet for every eight residents. All of the fixtures must be in good working order and have the appropriate drain and drain trap to prevent sewage gas escape back into the facility.

(g) The facility shall provide an adequate supply of hot water for the number of residents and the program schedule.

(h) Showers and tubs shall have no-slip surfaces and curtains or other safe enclosures for privacy.

(i) Clean drinking water shall be readily available to all residents.

(j) Food and waste shall be stored, handled, and removed in a way that will not spread disease, cause odors, or provide a breeding place for pests.

(k) The facility shall be kept free of insects, rodents, and vermin.

(l) Poisonous, toxic, and flammable materials shall be labeled, stored, and used safely

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 August 18, 2003.

TRD-200305294
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER M. COURT COMMITMENT SERVICES

40 TAC §148.1301

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health & Safety Code §461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rules are also proposed under Texas Health & Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rule is the Texas Health and Safety Code, Chapters 461 and 464.

§148.1301. Court Commitment Services.

(a) Facilities accepting court commitments shall be licensed to provide the appropriate level of service:

(1) emergency detention: residential detoxification or intensive residential Services;

(2) adult inpatient involuntary commitments: intensive residential or residential services for adults;

(3) adult outpatient involuntary commitments: day treatment or outpatient services;

(4) juvenile inpatient commitments: intensive residential services for adolescents;

(5) juvenile outpatient commitments: day treatment or outpatient services for adolescents.

(b) The facility's court commitment program shall comply with the TEX. HEALTH & SAFETY CODE ANN. ch. 462 (Vernon 2001).

(c) The facility shall report unauthorized departures to the referring courts. Verbal report shall be made immediately, with written confirmation within 24 hours.

(d) The program shall provide the judiciary with sufficient written information about its program design, treatment methods, admission processes, lengths of stay and continuum of care to assist the judiciary in committing appropriate clients to the facility.

(e) The program shall accept all chemical dependency clients brought to the facility under an emergency detention warrant, order of protective custody, or civil court order for treatment. A formal screening and assessment is not required before admission.

(f) A program that accepts emergency detentions shall adopt a written policy authorizing use of restraint and/or seclusion and implement procedures that conform with §148.706 of this title (relating to Restraint and Seclusion).

(g) The client record shall contain documentation of the conditions and/or behaviors that caused the client's entry into the civil court commitment process.

(h) The client record shall also contain copies of the legal Documents required for civil court commitment as specified by TEX. HEALTH & SAFETY CODE ANN. ch. 462 (Vernon 2001).

(i) The facility shall provide training for at least two designated Staff to ensure they understand and comply with court commitment statutes, regulations, and procedures.

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 August 18, 2003.

TRD-200305316
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER N. CORRECTIONAL FACILITIES

40 TAC §148.1401

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health & Safety Code §461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rules are also proposed under Texas Health & Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rules is the Texas Health and Safety Code, Chapters 461 and 464.

§148.1401. Correctional Facilities.

(a) Programs located in correctional facilities are required to meet Commission rules in areas under the control of the correctional facility unless the facility has requirements, standards or mandates which have been adopted by the board of the Texas Department of Criminal Justice. Correctional mandates shall take precedence when correctional requirements conflict with Commission requirements.

(b) A correctional facility is an institution operated under the jurisdiction of Federal, State or local government used to confine individuals who have been convicted of a crime and sentenced to a period of incarceration. Correctional facilities include prisons, jails, and youth detention centers but exclude community-based organizations serving individuals mandated to treatment by the judicial or correctional system.

(c) The Commission may grant variances to community-based treatment facilities that contract with correctional authorities when correctional requirements conflict with Commission requirements.

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 August 18, 2003.

TRD-200305315
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER O. FAITH BASED CHEMICAL DEPENDENCY PROGRAMS

40 TAC §§148.1501 - 148.1506

The new rules are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission programs and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The new rules are also proposed under Texas Health & Safety Code §461.0128 which provides that the Commission shall develop model program standards for substance abuse services for use by each state agency that provides or pays for substance abuse services. The new rules are also proposed under Texas Health & Safety Code, §464.009, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed new rules is the Texas Health and Safety Code, Chapters 461 and 464.

§148.1501. Definitions.

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

(1) Medical Care - Diagnosis or treatment of a physical or mental disorder.

(2) Medical Detoxification Services - Chemical dependency treatment designed to systematically reduce the amount of alcohol and other toxic chemicals in a client's body, manage withdrawal symptoms, and encourage the client to seek ongoing treatment for chemical dependency.

(3) Medical Withdrawal Service - See Medical Detoxification Services.

(4) Program - For the purposes of this subchapter, Program means a system of care delivered to chemically dependent individuals.

(5) Religious Organization--A church, synagogue, mosque, or other religious institution:

(A) the purpose of which is the propagation of religious beliefs; and

(B) that is exempt from Federal income tax under Section 501(a) of the Internal Revenue Code of 1986, 26 U.S.C. §501(a), by being listed as an exempt organization under Section 501(c) of that code, 26 U.S.C. §501(c).

§148.1502. Exemption for Faith-Based Programs.

(a) A Chemical dependency treatment program is exempt from licensure under Chapter 148 of this title (relating to Standard of Care) if it:

(1) is conducted by a religious Organization;

(2) is exclusively religious, spiritual, or ecclesiastical in nature;

(3) does not treat minors; and

(4) is registered under this chapter.

(b) An exempt program registered under this section may not provide medical care, medical detoxification, or medical withdrawal services.

§148.1503. Registration for Exempt Faith-Based Programs.

(a) To register its exemption, the religious organization shall complete and submit these documents to the Commission:

(1) a registration application;

(2) a copy of the determination letter from the Internal Revenue Service documenting the organization's tax exempt status under the Internal Revenue Code (26 U.S.C. §501(c)(3); and

(3) a copy of the organization's articles of incorporation documenting that the primary purpose of the organization is the propagation of religious beliefs or a letter from the State of Texas Comptroller's Office documenting the organization's religious tax exemption status.

(b) The Commission shall issue a letter documenting the organization's registered exemption if the application packet satisfies the requirements in this section.

(c) An exempt organization registered under this section shall notify the Commission in writing within ten working days of any change affecting the program's exemption.

(d) Incomplete applications shall be returned to the applicant.

§148.1504. Admission to Faith-Based Programs.

(a) An exempt program registered under this section may not admit a individual unless the individual signs the admission statement at the time of admission.

(b) The program shall keep the original signed admission statement and give a copy of it to the individual admitted.

§148.1505. Advertisement.

(a) An exempt program registered under this section must include a notice in any advertisements or literature that promotes or describes the program or its chemical dependency treatment services.

(b) This statement shall reflect the following: The treatment and recovery services at (name of program) are exclusively religious in nature and are not subject to licensure or regulation by the Texas Commission on Alcohol and Drug Abuse. This program offers only non-medical treatment and recovery methods, such as prayer, moral guidance, spiritual counseling, and scriptural study.

§148.1506. Revocation of Exemption.

(a) The Commission may revoke the exemption after notice and hearing if:

(1) the organization conducting the program fails to inform the Commission of any material changes in the program's registration information in a timely manner;

(2) any program advertisement or literature fails to include the statements required under this section; or

(3) the organization violates TEX. HEALTH & SAFETY CODE ANN. ch. 464 (Vernon 2001), Subchapter C or any Commission rule adopted under the subchapter.

(b) The Commission shall notify the organization in writing of its intent to revoke the exemption and offer the organization the opportunity for an informal hearing.

(c) The organization shall have 15 calendar days from the postmark date of the notice to submit a written request for an informal hearing.

(d) If the organization does not request an informal hearing, the revocation shall go into effect 30 calendar days from the postmark date of the notice of intent.

(e) If the organization requests an informal hearing, the Commission shall schedule the informal hearing within 15 calendar days of the postmark date of the request.

(f) At the hearing, the organization shall have opportunity to show compliance.

(g) If the organization does not show compliance, the Commission's governing board shall consider the information received at the hearing and determine whether or not to revoke the organization's exemption.

(h) The Commission shall send the organization written notification of its decision within 30 calendar days of the date of the hearing.

(i) The revocation shall take effect 30 calendar days from the postmark date of the written notice of decision.

(j) An organization whose exemption has been revoked may apply to reinstate the exemption one year after the effective date of the revocation.

Figure: 40 TAC §148.1506(j)

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 August 18, 2003.

TRD-200305314
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

CHAPTER 150. COUNSELOR LICENSURE

40 TAC §§150.1, 150.11 - 150.14, 150.21 - 150.28, 150.31 - 150.34, 150.41 - 150.43, 150.51 - 150.56, 150.62

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Commission on Alcohol and Drug Abuse (TCADA) proposes the repeal of Chapter 150, concerning Counselor Licensure.

Section 150.1 contains definitions.

Sections 150.11 - 150.14 pertain to counselor licensure requirements, exemptions, scope of practice, and fees.

Sections 150.21 - 150.28 pertain to requirements for licensure, educational and practicum standards, standards for supervised work experience, licensure application and registration process, examination, and licensure through reciprocity.

Sections 150.31 - 150.34 pertain to criminal history standards, license expiration and renewal, continuing education standards, and inactive status.

Sections 150.41 - 150.43 contain information on documentation requirements, ethical standards, and actions against a license.

Sections 150.51 - 150.56 provide information on Pre-Service Education Institutions, Clinical Training Institutions, and supervision of interns.

Section 150.62 provides information on Continuing Education Provider Standards.

The repeal of Chapter 150 is proposed because TCADA is adopting new rules. The new rules will be reorganized to provide a more functional and logical framework that is more closely aligned with the other agencies operating under the Health and Human Services Commission.

Thomas F. Best, General Counsel, has determined that there will be no fiscal implications for state or local government for the first five-year period the repeal is in effect.

Mr. Best has also determined that for each year of the first five years the repeal is in effect the anticipated public benefit will be more efficient use of resources, reduced duplicative information and greater clarity regarding expectations TCADA has for individuals and organizations providing substance abuse services in Texas so that more concentration on quality of care issues and service outcomes results. There will be no effect on small businesses and there is no anticipated economic cost to current providers.

Comments on the proposal may be submitted to Albert Ruiz, Texas Commission on Alcohol and Drug Abuse, P.O. Box 80529, Austin, Texas 78708-0529. Comments may also be submitted electronically to *rules.revisions@tcada.state.tx.us* or faxed to (512) 821-4419. All comments must be received no later than 30 days from the date the proposal is published in the *Texas Register*.

The repeal is proposed under the Texas Health and Safety Code, Chapter 461, which provides TCADA with the authority to adopt rules governing its functions and Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities. The repeal is also proposed under the Texas Occupations Code, Chapter 504, which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules for the licensure of chemical dependency counselors.

The codes affected by the proposed repeals are Chapters 461 and 464 of the Texas Health and Safety Codes and Chapter 504 of the Texas Occupations Code.

§150.1. Definitions.
§150.11. License Required.
§150.12. Scope of Practice.
§150.13. Commission Review.
§150.14. Fees.
§150.21. Requirements for Licensure by Examination.
§150.22. Educational Standards.
§150.23. Practicum Standards.
§150.24. Standards for Supervised Work Experience.
§150.25. Licensure Application and Registration Process.
§150.26. Examination.
§150.27. Issuing Licenses.
§150.28. Licensure through Reciprocity.
§150.31. Criminal History Standards.
§150.32. License Expiration and Renewal.
§150.33. Continuing Education Standards.
§150.34. Inactive Status.
§150.41. Documentation.
§150.42. Ethical Standards.
§150.43. Actions Against a License.
§150.51. Pre-Service Education Institution (PSEI) Transition.
§150.52. Practicum Provider Transition.
§150.53. Clinical Training Institution (CTI) Registration.
§150.54. Clinical Training Institution (CTI) Standards.
§150.55. Direct Supervision of Interns.
§150.56. Intern Violations.
§150.62. Continuing Education Provider Standards.

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 August 15, 2003.

TRD-200305249
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

40 TAC §§150.101 - 150.126

The Texas Commission on Alcohol and Drug Abuse (TCADA) proposes new Chapter 150, §§150.101 - 150.126, pertaining to

Counselor Licensure. TCADA has submitted its proposal to repeal the existing Chapter 150 to the Texas Register for publication in this issue.

The new Chapter 150 proposes to adopt by rule the provisions of the scope of practice guidelines defined by the Center for Substance Abuse Treatment in Technical Assistance Publication 21: Addictions Counseling Competencies: The Knowledge, Skills, and Attitudes of Professional Practice. The new rules also incorporate provisions from Senate Bill 333 (78th Texas Legislature) which increase the minimum education level for the licensed chemical dependency counselor (LCDC) to an associate degree. The new rules also address practice standards for LCDCs who conduct private practice services via electronic means including the Internet; a requirement that LCDCs list their credentials when signing a professional document; and a requirement that clinical training institution (CTI) providers employ a full-time qualified credentialed counselor as a CTI coordinator.

Thomas F. Best, General Counsel, has determined that there will be no significant fiscal impact on state or local government for the first five-year period the new rules are in effect.

The new rules reflect the statutory requirement that an applicant obtain an associates degree if they apply for initial licensure after September 1, 2004. The cost to obtain a degree will vary geographically and according to the applicant's educational background. TCADA estimates that the cost to obtain an associates degree will be less than $2000.

Except as describe above, the Commission does not anticipate that the adoption of the new rules will have a significant effect on small businesses or a significant economic cost to current licensees.

Mr. Best has also determined that for each year of the first five years the new rules are in effect the anticipated public benefit will be increased quality of care to service recipients and greater consistency of service quality.

Comments on the proposal may be submitted to Albert Ruiz, Texas Commission on Alcohol and Drug Abuse, P.O. Box 80529, Austin, Texas 78708-0529. Comments may also be submitted electronically to *rules.revisions@tcada.state.tx.us* or faxed to (512) 831-4418. All comments must be received by October 15, 2003.

To ensure consideration, comments must clearly specify the particular section of the rule to which they apply. General comments should be labeled as such. Comments should include proposed alternative language as appropriate.

The new rules are proposed under the Occupations Code, §504.051, which provides the Commission with the authority to adopt rules governing the licensure of chemical dependency counselors.

The code affected by the proposed new rules is Chapter 504 of the Texas Occupations Code.

§150.101. License Required.

(a) An individual identified to the public as a chemical dependency counselor must be licensed or exempt under this chapter. Except as provided by this section, individuals who are not licensed chemical dependency counselors (LCDCs) shall not:

(1) offer or provide chemical dependency counseling services other than education;

(2) represent themselves as chemical dependency counselors; or

(3) use any name, title, or designation that implies licensure as a chemical dependency counselor.

(b) The following people are exempt from this chapter when they are acting within the scope of their authorized duties:

(1) counselors employed by Federal institutions;

(2) school counselors certified by the Texas Education Agency;

(3) licensed physicians, licensed psychologists, licensed professional counselors (LPC), licensed marriage and family therapists (LMFT), and licensed master social workers (LMSW);

(4) religious leaders of congregations providing pastoral counseling within the scope of their congregational duties and people who are working for or providing counseling with a program exempted under Chapter 148 of this title (relating to Faith-Based Chemical Dependency Treatment Centers);

(5) students who are participating in a practicum as part of a supervised course of clinical training at a regionally accredited institution of higher education or a proprietary school; and

(6) counselor interns who are registered with the Commission and working under the auspices of a registered clinical training institution.

(c) Residents of other states are exempt if they:

(1) are legally authorized to provide chemical dependency counseling in those states; and

(2) do not offer or provide chemical dependency counseling in Texas for more than 30 days in any 12-month period.

(d) A person who qualifies for an exemption but chooses to get a license from the Commission is subject to the same rules and disciplinary actions as other licensees.

§150.102. Scope of Practice.

(a) A licensed chemical dependency counselor (LCDC) is licensed to provide chemical dependency counseling services involving the application of the principles, methods, and procedures of the chemical dependency profession as defined by the profession's ethical standards and the Knowledge, Skills, and Abilities (KSAs) as defined in Chapter 141 of this title (relating to General Provisions). The license does not qualify an individual to provide services outside this scope of practice.

(b) The scope of practice for a chemical dependency counselor includes services that address substance abuse/dependence and/or its impact on the service recipient subject to the following:

(1) the counselor is prohibited from using techniques that exceed his or her professional competence;

(2) the service recipient may only be the user, family member or any other person involved in a significant relationship with an active user;

(3) LCDCs may diagnose substance disorders, but anything other than a provisional mental health diagnosis must be determined by a qualified professional;

(4) LCDCs are not qualified to treat individuals with a mental health disorder or provide family counseling to individuals whose presenting problems do not include chemical dependency; and

(5) a counselor in the course of treating the substance abuse/dependence issues of a client may independently address family issues, co-occurring mental health issues and physical and sexual abuse issues of a client if the counselor demonstrates:

(A) 45 hours of post licensure educational hours in each area, and

(B) 2,000 hours of clinically supervised post licensure work experience by a qualified professional.

§150.103. Commission Review.

A person licensed, registered, or approved under this chapter shall allow Commission staff to access the facilities and records and to interview or survey clients, members of the governing body, staff, and students. The person shall make all property, records, and documents related to the license, registration, or approval available for examination or reproduction during normal business hours.

§150.104. Fees.

(a) The schedule for fees is:

(1) initial application fee--$25;

(2) initial licensure fee--$75;

(3) renewal fees:

(A) renewal application fee--$25;

(B) license renewal fee--$75;

(C) late renewal penalty fee (up to 90 days after the license expiration date)--$37.50;

(D) late renewal penalty fee (between 91 days and one year after the license expiration date)--$75;

(4) background investigation fee--$40;

(5) inactive status fee--$50;

(6) certificate replacement or duplication fee--$25.

(b) The Commission charges a $25 fee for a printed list of licensed counselors or a set of mailing labels.

(c) The Commission may contract with an outside organization to administer the licensure examination, and the fee charged by the contract organization is subject to change. The current fee shall be printed in the registration form. Examination fees shall be paid directly to the contract organization administering the examination.

(d) Licensure fees paid to the Commission are not refundable.

(e) Fees shall be paid in full with a cashier's check, commercial check, or money order. If online application is available, the fee may be paid with a credit card and is subject to a surcharge by the online vendor.

§150.105. Licensure Application Standards and Registration.

(a) Every person seeking licensure shall register with the Commission by submitting the following items in a form acceptable to the Commission:

(1) the application fee and the background investigation fee;

(2) the Commission's current application form which has been completed, signed, dated, and notarized;

(3) a recent full-face wallet-sized photograph of the applicant;

(4) two sets of fingerprints completed according to Commission instructions with cards issued by the Commission;

(5) documentation that the applicant has successfully completed intern registration requirements in §150.106 of this title (relating to Requirements for Counselor Intern Registration).

(b) An applicant shall:

(1) read the Commission rules (Chapter 150 (2003) of this title);

(2) follow all laws and rules, including the ethical standards;

(3) allow the Commission to seek any additional information or references necessary; and

(4) notify the Commission in writing within 30 days of a change in address.

(c) Application materials become the property of the Commission.

(d) An application packet will not be accepted unless it is complete.

(1) Incomplete documents will be returned to the sender. The Commission will hold the remaining documents, but will not accept the application until all outstanding documents have been completed and approved.

(2) The application and background fee is not refundable and will not be returned. When resubmitting documents that were returned to the sender as incomplete, a second application fee is not required.

(e) A document may be considered incomplete if it does not conform to the following standards.

(1) All documents must be complete, signed, and dated. Signatures shall include credentials. If the documentation relates to past activity, the date of the activity shall also be recorded.

(2) Documentation shall be permanent and legible.

(3) When it is necessary to correct a document, the error shall be marked through with a single line, dated, and initialed by the writer. Correction fluid shall not be used.

(f) An applicant must receive written notice of registration from the Commission before accumulating any supervised work experience or taking the examination or providing chemical dependency services.

(g) Within 45 Days of receipt of the application, the Commission shall notify the applicant that the application is complete or specify the additional information required.

(h) By signing the application, the applicant accepts responsibility for remaining knowledgeable of licensure rules, including revisions.

(1) Current rules are published in the Texas Administrative Code and posted on the Secretary of State's web site and the Commission's web site.

(2) Proposed rule changes are published in the *Texas Register* and posted on the Secretary of State's web site and the Commission's web site.

§150.106. Requirements for Counselor Intern Registration.

To be eligible for a counselor intern registration under this chapter, a person must:

(1) be at least 18 years of age;

(2) have a high school diploma or its equivalent;

(3) successfully complete 270 classroom hours of chemical dependency curricula as described in §150.107 of this title (relating to Standards for 270 Educational Hours) or meet the educational waiver contained in §150.109 of this title (relating to Education and Experience Exemptions/Waivers);

(4) complete 300 hours of approved supervised field work practicum as described in §150.108 of this title (relating to Practicum Standards) or meet the educational waiver contained in §150.109 of this title (relating to Education and Experience Exemptions/Waivers);

(5) pass the criminal history standards described in §150.115 of this title (relating to Criminal History Standards);

(6) sign a written agreement to abide by the ethical standards contained in §150.121 of this title (relating to Ethical Standards); and

(7) be worthy of the public trust and confidence as determined by the Commission.

§150.107. Standards for 270 Educational Hours.

(a) At least 135 (nine semester hours) of the education hours must be specific to substance use disorders and their treatment. The remaining 135 hours may be specific or related to chemical dependency counseling. Related education hours may include courses in psychology, upper division sociology, counseling, mental health, behavioral science, psychiatric nursing, ethics, and rehabilitation counseling.

(b) The education shall be provided by a proprietary school, or an accredited institution of higher education.

(c) Continuing education and extended learning courses offered by institutions of higher education are not acceptable unless the curriculum follows the Workforce Education Curriculum Manual and meets the standards equivalent to a credit course.

(d) Educational hours obtained at a proprietary school must follow the curriculum for Transdisciplinary Foundations for Addictions Professional outlined in the KSAs:

(1) Understanding Addiction;

(2) Treatment Knowledge;

(3) Application to Practice; and

(4) Professional Readiness.

(e) The Commission shall not accept hours unless documented with a passing grade on an official transcript from the school. The applicant shall submit additional information requested by the Commission if needed to verify the content of a course.

§150.108. Practicum Standards.

(a) The practicum shall be completed under the administration of a proprietary school or an accredited institution of higher education.

(b) The applicant must complete the practicum under the administration of a single school.

(c) The Commission shall not accept a practicum without an official transcript from the school and a letter from the school's educational coordinator or chair verifying that the practicum was completed in the field of substance abuse.

(d) Practicum hours may be paid or voluntary.

(e) The practicum shall be delivered according to a written training curriculum that provides the student with an orientation to treatment services and exposure to treatment activities in each of the KSA dimensions. The practicum must include the intern observing treatment delivery and the intern providing services under direct observation. The practicum shall include at least 20 hours of experience in each of the KSA dimensions.

(f) All training shall be provided by qualified credentialed counselors (QCCs).

§150.109. Education and Experience Exemptions/Waivers.

(a) Applicants holding a degree in chemical dependency counseling, sociology, psychology, or any other degree approved by the Commission are exempt from the 270 hours of education and the 300 hour practicum. The applicant must submit an official college transcript with the official seal of the college and the signature of the registrar. Degree programs approved by the Commission include baccalaureate, masters, or doctoral degrees with a course of study in human behavior/development and service delivery.

(b) The Commission may waive the 4,000 hours of supervised work experience for individuals who hold a masters or doctoral degree in social work or a masters or doctoral degree in a counseling-related field with 48 semester hours of graduate-level courses. Counseling related degrees shall be reviewed on a case-by-case basis. The applicant shall submit an official college transcript with the official seal of the college and the signature of the registrar, and any other related documentation requested by the Commission.

§150.110. Requirements for Licensure.

To be eligible for a license under this chapter, a person must:

(1) complete the application related to §150.105 of this title (relating to Licensure Application Standards and Registration);

(2) meet the requirements to be a counselor intern in §150.106 of this title (relating to Requirements for Counselor Intern Requirements);

(3) hold an associate degree or more advanced degree with a course of study in human behavior/development and service delivery, with the exception of:

(A) those applicants who meet the requirements for intern registration and submit an application to the Commission by September 1, 2004, and

(B) those counselors who are renewing a continuous license.

(4) complete 4,000 hours of approved supervised experience working with chemically dependent persons as described in §150.111 of this title (relating to Standards for Supervised Work Experience);

(5) pass the written chemical dependency counselor examination approved by the Commission;

(6) submit an acceptable written case presentation to the test administrator;

(7) pass an oral chemical dependency counselor examination approved by the Commission; and

(8) submit two letters of recommendation from LCDCs.

§150.111. Standards for Supervised Work Experience.

(a) An applicant must be registered with the Commission as described in §150.105 and 150.106 of this title (relating to Licensure Application Standards and Registration and Requirements for Counselor Intern Registration) before accumulating supervised work experience.

(b) All supervised work experience obtained in Texas must be completed at a registered clinical training institution (CTI).

(c) Work experience must be documented on the Commission's supervised work experience documentation form and signed by the agency's CTI coordinator.

(1) All hours included in the documented supervised work experience must be performed within the KSA dimensions.

(2) The supervised work experience form must be accompanied by the intern's job description reflecting duties in the KSA dimensions.

(d) Out-of-state work experience will be accepted only if the following conditions are met.

(1) The Applicant is either certified or licensed or in the process of seeking licensure or certification in the other state.

(2) The standards for clinical supervision of work experience must meet or exceed Texas standards and be outlined in the governing agency's rules or standards. A copy of the governing rules or standards must be submitted with the other required documentation of supervised work experience.

(3) The supervised work experience must be documented on the Commission's supervised work experience form or a comparable form used by the governing agency of the other state.

(e) Supervised work experience may be paid or voluntary.

(f) An intern must complete all supervised work experience, pass the written and oral examination and complete an approved associate degree within five years from the date of registration.

(g) A person who has completed the 4,000 hours of supervised work experience and is currently eligible to take or retake the examination is a graduate intern and may continue to provide chemical dependency services under the auspices of a registered clinical training institution during the five-year registration period.

(h) It is the applicant's responsibility to verify that the training institution is registered with the Commission. The Commission shall not accept hours from an unregistered provider. A list of registered CTIs is available on the Commission's web site.

§150.112. Examination.

(a) To be eligible for examination, an applicant shall:

(1) be registered with the Commission as an intern;

(2) submit an acceptable case study to the test administrator; and

(3) pay the examination fee to the test administrator.

(b) All required documentation and fees must be submitted to the test administrator by the specified deadlines. It is the applicant's responsibility to obtain testing information.

(c) An applicant may only take the examination four times, and all testing must be completed within five years from the date of registration. An applicant must take the written and oral portions of the examination together unless the applicant has already passed one part of the examination.

(d) If an applicant does not pass both parts of the examination within five years of the date of registration, does not complete the approved associate degree and/or does not complete the required 4,000 hours of supervised work experience, the Commission shall deny the application.

(1) A person whose license application has been denied is no longer an intern or a graduate and cannot provide chemical dependency counseling services under the auspices of a clinical training institution.

(2) A person whose application has been denied under this section may reapply for licensure only after completing 24 semester hours of course work pre-approved by the Commission at an institution of higher education. The new application shall not be considered complete without an official college transcript documenting the required coursework.

(3) If the Commission accepts the new application, the person must complete the remaining requirements for licensure and may take only the failed portion(s) of the examination an additional three times. Transition standards will not apply. The additional tests must be completed within three years of the new date of registration. During this period, the applicant may provide chemical dependency counseling services as an intern under the auspices of a registered clinical training institution.

§150.113. Issuing Licenses.

(a) When the applicant has met all requirements for licensure and paid the licensure fee, the Commission will issue a license within 45 days.

(b) LCDCs shall keep current versions of the certificate of licensure and the Commission's public complaint notice prominently displayed in their place of business.

(c) A licensee shall not duplicate the licensure certificate to obtain a second copy of the license. A licensee can obtain an official duplicate certificate from the Commission by submitting a written request and the fee specified in §150.104 of this title (relating to Fees).

(d) The Commission will replace a lost or damaged certificate if the licensee provides:

(1) the remnants of the original license (if damaged);

(2) the original license and copy of legal documents (for a name change);

(3) the original license (for printing error); or

(4) a notarized statement if the license has been lost, stolen, or destroyed.

(e) A license replaced because of a printing error or mail damage will be replaced without cost, but all other license replacements require a fee, as specified in §150.104 of this title (relating to Fees). The fee shall be paid in advance with a money order, commercial check, or cashier's check.

(f) LCDCs shall notify the Commission in writing within 30 days of a change in address.

(g) The licensee shall return the license if it is suspended or revoked.

(h) The licensee shall remain knowledgeable of the current rules in this chapter, including rule changes.

§150.114. Licensure through Reciprocity.

(a) A person seeking application through reciprocity shall submit:

(1) a copy of the reciprocal license or certification;

(2) the Commission's current reciprocity application which has been completed, signed, dated, and notarized;

(3) two sets of fingerprints on cards issued by the Commission;

(4) a recent full-face wallet-sized photograph of the applicant;

(5) two letters of recommendation; and

(6) the application fee and the background investigation fee.

(b) The applicant shall meet the criminal history standards described in §150.115 of this title (relating to Criminal History Standards).

(c) The Commission may issue a license based on reciprocity if the individual is currently licensed or certified by another state as a chemical dependency counselor.

(d) The Commission shall not issue a license based on reciprocity unless it finds that the licensing or certification standards of the state of origin are at least substantially equivalent to the requirements for licensure of this chapter.

(e) An applicant who does not qualify for reciprocity may apply for licensure through examination and is subject to the same standards as other applicants.

§150.115. Criminal History Standards.

(a) The Commission reviews the criminal history of every applicant for licensure. Reviews are conducted when:

(1) an applicant registers with the Commission as an intern;

(2) a LCDC applies for license renewal; and

(3) the Commission receives information that a counselor or intern has been charged, indicted, placed on deferred adjudication, community supervision, or probation, or convicted of an offense described in subsection (d) of this section.

(b) An applicant shall disclose and provide complete information about all misdemeanor and felony charges, indictments, deferred adjudications, episodes of community supervision or probation, and convictions. Failure to make full and accurate disclosure will be grounds for immediate application denial, disciplinary action, or license revocation.

(c) The Commission obtains criminal history information from the Texas Department of Public Safety, including information from the Federal Bureau of Investigations (FBI).

(d) The Commission determines whether an offense is directly related to the duties and responsibilities of a LCDC. The Commission has identified the following related offenses and categorized them according to the seriousness of the offense. If an offense is not listed in one of these categories and the Commission determines that it is directly related to chemical dependency counseling, the Commission shall determine the appropriate category.

(1) Category X includes:

(A) capital offenses;

(B) sexual offenses involving a child victim;

(C) felony sexual offenses involving an adult victim who is a client (single count);

(D) multiple counts of felony sexual offenses involving any adult victim; and

(E) homicide 1st degree.

(2) Category I includes:

(A) kidnapping;

(B) arson;

(C) homicide lesser degrees;

(D) felony sexual offenses involving an adult victim who is not a client (single count); and

(E) attempting to commit crimes in Category I or X.

(3) Category II includes felony offenses that result in actual or potential harm to others and/or animals not listed separately in this section.

(4) Category III includes:

(A) class A misdemeanor alcohol and drug offenses;

(B) class A misdemeanor offenses resulting in actual or potential harm to others or animals;

(C) felony alcohol and drug offenses; and

(D) other felony offenses that do not result in actual or potential harm to others and/or animals.

(5) Category IV includes:

(A) class B misdemeanor alcohol and drug offenses; and

(B) class B misdemeanor offenses resulting in actual or potential harm to others or animals.

(e) The Commission shall deny the initial or renewal license application of a person who has been convicted or placed on community supervision in any jurisdiction for a:

(1) category X offense during the person's lifetime;

(2) category I offense during the 15 years preceding the date of application;

(3) category II offense during the ten years preceding the date of application;

(4) category III offense during the seven years preceding the date of application; or

(5) category IV offense during the five years preceding the date of application.

(f) The Commission shall deny the intern registration application of a person who has been convicted or placed on community supervision in any jurisdiction for a:

(1) category X offense during the person's lifetime;

(2) category I offense during the ten years preceding the date of application;

(3) category II offense during the five years preceding the date of application;

(4) category III offense during the two years preceding the date of application; or

(5) category IV offense during the year preceding the date of application.

(g) The Commission shall defer action on the application of a person who has been charged, indicted, or placed on deferred adjudication, community supervision, or probation for an offense described in subsection (d) of this section. The person may reapply when:

(1) the charges are dropped or the person is found not guilty; or

(2) the timeframes established in subsection (d) of this section have been met.

(h) The Commission shall suspend a counselor's license or an intern's registration if the Commission receives notice from the Texas Department of Public Safety or another law enforcement agency that the individual has been charged, indicted, placed on deferred adjudication, community supervision, or probation, or convicted of an offense described in subsection (d) of this section.

(1) The Commission shall send notice stating the grounds for summary suspension by certified mail to the license holder at the address listed in the Commission's records. The suspension is effective five days after the date of mailing.

(2) The Commission shall restore the person's license upon receipt of official documentation that the charges have been dismissed or the person has been found not guilty.

(i) A person whose license has been denied or suspended under this section may only appeal the action if:

(1) the person was convicted or placed on community supervision; and

(2) the appeal is based on the grounds that the timeframes defined in subsection (d) of this section have been met.

§150.116. License Expiration and Renewal.

(a) A license issued under this chapter is valid for two years, or until the expiration date printed on the license. The licensee is responsible for renewing the license in a timely manner. The Commission shall send the licensee a renewal notice, but failure to receive notice from the Commission does not waive or extend renewal deadlines.

(b) To renew a license, the counselor shall:

(1) send a complete renewal application to the Commission;

(2) pay the renewal application fee, the license fee, and the background investigation fee;

(3) submit two sets of fingerprints completed according to Commission instructions with cards issued by the Commission (if the counselor has not previously submitted fingerprint cards for initial licensure through examination or licensure renewal);

(4) meet the criminal history standards described in §150.115 of this title (relating to Criminal History Standards); and

(5) complete all required continuing education as described in section §150.117 of this title (relating to Continuing Education Standards).

(c) A LCDC who is also licensed as an LMSW, LMFT, LPC, physician, or psychologist in the State of Texas shall complete at least 24 hours of continuing education during each two-year licensure period. The 24 hours of education must include the specific courses required in subsection (f) of this section and, if applicable, in subsection (g) of this section. The individual must submit a copy of the active non-LCDC licensure certificate to be eligible for this provision.

(d) A LCDC who does not meet the criteria in subsection (c) of this section must complete at least 60 hours of continuing education.

(e) All continuing education hours must be specific to substance use disorders and their treatment or related to chemical dependency counseling as defined by the KSA dimensions. Related education hours may include courses in psychology, sociology, counseling, mental health, behavioral science, psychiatric nursing, ethics, and rehabilitation counseling.

(f) Continuing education hours must include at least three hours of ethics training and at least six hours of training (total) in HIV, Hepatitis C, and sexually transmitted diseases.

(g) If an individual's job duties include clinical supervision, required hours of continuing education must include three hours of clinical supervision training.

(h) Renewal fees are due on or before the expiration date. A licensee who submits a late renewal application shall pay a penalty fee in addition to the renewal application and licensure fees, as provided in §150.104 of this title (relating to Fees).

(i) A license cannot be renewed more than one year after the date of expiration. To obtain a new license, the person shall comply with the requirements and procedures for obtaining an initial license. Everyone who applies for a new license under this subsection must pass the written and oral examinations, with one exception. If the person was licensed in Texas, moved to another state, and is currently licensed and has been in practice in the other state for the two years preceding application, the person may renew an expired license without reexamination. The person must pay a fee that is equal to two times the required renewal fee.

(j) A person whose license has expired cannot offer or provide chemical dependency counseling services as defined by the KSAs, represent himself or herself as an LCDC, or act in the capacity of a QCC.

(k) A licensee who teaches a qualifying continuing education course shall receive the same number of hours as students attending the course. Only one set of hours can be accrued for a single curriculum and no more than 30 hours of CE credit will be granted for courses taught by the applicant.

§150.117. Continuing Education Standards.

(a) The Commission will accept continuing education (CE) hours that meet the criteria in this section. Hours that do not meet these criteria may be evaluated on a case-by-case basis.

(b) The Commission will accept continuing education credits from:

(1) recognized State boards, including, but not limited to the Texas State Boards of Social Work and Professional Counselor Examiners;

(2) the National Association of Alcohol and Drug Abuse Counselors; and

(3) the Texas Certification Board for Addiction Professionals.

(c) For counselors who live out of state, the Commission will also accept continuing education hours approved by other state and Federal agencies.

(d) Continuing education certificates must contain:

(1) applicant's name and license number;

(2) date CE hours were completed;

(3) number of CE hours assigned to each course;

(4) CE course title;

(5) educational provider number, if applicable;

(6) sponsoring agency name; and

(7) signature of instructor or coordinator.

(e) The Commission will also accept education hours from an accredited college or university.

(1) College transcripts must contain the official seal of the college and the signature of the registrar.

(2) One hour of college credit is equivalent to 15 CE hours.

(f) Independent study or distance learning courses must be guided and monitored by the instructor and include an evaluation of performance and/or participation verification. In addition, the course must be structured so that students have access to faculty or instructors for questions and assistance in the completion of such course work.

(g) If a counselor earns more than the required number of hours during a two-year licensure period, up to one third of the required hours may be carried forward into the following licensure period.

§150.118. Inactive Status.

(a) A Licensee may request to have his or her license placed on inactive status by submitting a written request and paying the inactive fee before the license expires. Inactive status shall not be granted unless the license is current and in good standing, with no pending investigations or disciplinary actions.

(b) A person on inactive status cannot perform activities outlined in the KSA dimensions, represent himself or herself as an LCDC, or act in the capacity of a QCC. A person is subject to investigation and action during the period of inactive status.

(c) Inactive status shall not exceed two years.

(d) To return to active status, the person shall submit a written request to reactivate the license, a completed renewal application form, the renewal application fee and the license renewal fee, and documentation of 30 hours of continuing education within the inactive status period.

(e) An inactive license will automatically expire at the end of the two-year period.

§150.119. Documentation.

(a) The rules in this section apply only to counseling records of a counselor's private practice.

(b) The counselor shall establish and maintain a record for every client at the time of initial service delivery. The client record shall include:

(1) client identifying information;

(2) assessment results, including a statement of the client's problems and/or diagnosis;

(3) plan of care;

(4) documentation of all services provided, including date, duration, and method of delivery; and

(5) a description of the client's status at the time services are discontinued.

(c) The counselor shall maintain a record of all charges billed and all payments received.

(d) All entries shall be permanent, legible, accurate, and completed in a timely manner.

(e) All documents and entries shall be dated and authenticated. Authentication of electronic records shall be a cryptography-based digital signature.

(f) When it is necessary to correct a record, the error shall be marked through with a single line, dated, and initialed by the counselor.

(g) The counselor shall protect all client records and other client-identifying information from destruction, loss, tampering, and unauthorized access, use or disclosure. Electronic client information shall be protected to the same degree as paper records and shall have a reliable backup system.

(h) The counselor shall not deny clients access to the content of their records except as provided by TEX. HEALTH & SAFETY CODE ANN. §611.0045 (Vernon 2001).

(i) Client records shall be kept for at least five years. Records of adolescent clients shall be kept for at least five years after the client turns 18.

§150.120. Counseling Through Electronic Means.

(a) The rules in this section apply only to a counselor in private practice using the Internet or counseling by telephone.

(b) The counselor must reside in and perform the services from Texas.

(c) The Commission maintains its authority to regulate the counselor regardless of the location of the client.

(d) The counselor is subject to the statutes of other states and countries where the client may reside or receives services by electronic means. Such statutes may limit the counselor's practice.

(e) The Counselor's provision of services by electronic medium must comply with 42 C.F.R. pt. 2 and the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

(f) The counselor must be able to verify the identification of the client and ensure the client's appropriate age.

(g) If a counselor uses the Internet as the electronic means by which counseling is provided or transfers data through the internet, the counselor must comply with the following:

(1) data may only be transferred using at least a 128-Encryption;

(2) email communication is restricted relating to client information and documentation; and

(3) the counselor must provide technical backup for system problems by providing a phone number to the client to call for technical support and a contingency plan for the client when a technical problem occurs.

(h) The counselor must provide services using audio and video in real time.

(i) The counselor must provide a description of all services offered to the client in writing and describe who is appropriate for the services. The description must include:

(1) a grievance procedure and provide a link to the Commission for filing a complaint when using the Internet and the toll-free number for the Commission when counseling by telephone;

(2) the counselor's credentials, education level, and training;

(3) a link to the licensure verification page when using the Internet and the toll-free number for the Commission when counseling by telephone;

(4) the difference between electronic counseling and traditional counseling; and

(5) the potential risk regarding clinical issues, security and confidentiality.

(j) Services may only be offered by licensed counselors. Counselor interns may not provide counseling by electronic medium.

(k) The counselor must provide an emergency contact person and phone number and emergency procedures to the client in writing.

§150.121. Ethical Standards.

(a) All applicants and LCDCs shall comply with these ethical standards.

(b) The LCDC shall not discriminate against any client or other person on the basis of gender, race, religion, age, national origin, disability, sexual orientation, or economic condition.

(c) The LCDC shall maintain objectivity, integrity, and the highest standards in providing services to the client.

(d) The LCDC shall:

(1) promptly report to the Commission any suspected, alleged, or substantiated incidents of abuse, neglect, or exploitation committed by self or other LCDCs or registered counselor interns;

(2) promptly report to the Commission violations of TEX. OCC. CODE ANN. ch. 504 (Vernon 2002), or rules adopted under the statute, including violations of this section by self or others, unless making such a report would violate Federal confidentiality regulations found in 42 C.F.R. pt. 2;

(3) recognize the limitations of his or her ability and shall not offer Services outside the counselor's scope of practice or use techniques that exceed his or her professional competence; and

(4) try to prevent the practice of chemical dependency counseling by unqualified or unauthorized persons.

(e) The LCDC shall not engage in the practice of chemical dependency counseling if impaired by, intoxicated by, or under the influence of chemicals, including alcohol.

(f) The LCDC shall uphold the law and refrain from unprofessional conduct. In so doing, the LCDC shall:

(1) comply with all applicable laws and regulations;

(2) not make any claim, directly or by implication, that the counselor possesses professional qualifications or affiliations that the counselor does not possess;

(3) include their current credentials when signing all professional documents;

(4) not mislead or deceive the public or any person; and

(5) refrain from any act which might tend to discredit the profession.

(g) The LCDC shall:

(1) report information fairly, professionally, and accurately to clients, other professionals, the Commission, and the general public;

(2) maintain appropriate documentation of services provided; and

(3) provide responsible and objective training and supervision to interns and subordinates under the counselor's supervision. This includes properly documenting supervision and work experience and providing supervisory documentation needed for licensure.

(h) In any publication, the LCDC shall give written credit to all persons or works which have contributed to or directly influenced the publication.

(i) The LCDC shall respect a client's dignity, and shall not engage in any action that may injure the welfare of any client or person to whom the counselor is providing services. The LCDC shall:

(1) make every effort to provide access to treatment, including advising clients about resources and Services, taking into account the financial constraints of the client;

(2) remain loyal and professionally responsible to the client at all times, disclose the counselor's ethical code of standards, and inform the client of the counselor's loyalties and responsibilities;

(3) not engage in any activity which could be considered a professional conflict, and shall immediately remove himself or herself from such a conflict if one occurs;

(4) terminate any professional relationship or counseling services which are not beneficial, or is in any way detrimental to the client;

(5) always act in the best interest of the client;

(6) not abuse, neglect, or exploit a client;

(7) not have sexual contact with or enter into a personal or business relationship with a client (including any client receiving services from the counselor's employer) for at least two years after the client's services end;

(8) not request a client to divulge confidential information that is not necessary and appropriate for the services being provided; and

(9) not offer or provide chemical dependency counseling or related services in settings or locations which are inappropriate, harmful to the client or others, or which would tend to discredit the profession of chemical dependency counseling.

(j) The LCDC shall protect the privacy of all clients and shall not disclose confidential information without express written consent, except as permitted by law. The LCDC shall remain knowledgeable of and obey all State and Federal laws and regulations relating to confidentiality of chemical dependency treatment records, and shall:

(1) inform the client, and obtain the client's consent, before tape-recording the client, allowing another person to observe or monitor the client;

(2) ensure the security of client records;

(3) not discuss or divulge information obtained in clinical or consulting relationships except in appropriate settings and for professional purposes which clearly relate to the case;

(4) avoid invasion of the privacy of the client;

(5) provide the client his/her rights regarding confidentiality, in writing, as part of informing the client in any areas likely to affect the client's confidentiality; and

(6) ensure the data requested from other parties is limited to information that is necessary and appropriate to the Services being provided and is accessible only to appropriate parties.

(k) The LCDC shall inform the client about all relevant and important aspects of the professional relationship between the client and the counselor, and shall:

(1) in the case of clients who are not their own consenters, inform the client's parent(s) or legal guardian(s) of circumstances which might influence the professional relationship;

(2) not enter into a professional relationship with members of the counselor's family, close friends or associates, or others whose welfare might be jeopardized in any way by such relationship;

(3) not establish a personal relationship with any client (including any individual receiving services from the counselor's employer) for at least two years after the client's services end;

(4) neither engage in any type or form of sexual behavior with a client (including any individual receiving services from the counselor's employer) for at least two years after the client's services end nor accept as a client anyone with whom they have engaged in sexual behavior; and

(5) not exploit relationships with clients for personal gain.

(l) The LCDC shall treat other professionals with respect, courtesy, and fairness, and shall:

(1) refrain from providing or offering professional services to a client who is receiving chemical dependency treatment from another professional, except with the knowledge of the other professional and the consent of the client, until treatment with the other professional ends;

(2) cooperate with the Commission, professional peer review groups or programs, and professional ethics committees or associations, and promptly supply all requested or relevant information unless prohibited by law; and

(3) ensure that his/her actions in no way exploit relationships with supervisees, employees, students, research participants or volunteers.

(m) Prior to treatment, the LCDC shall inform the client of the counselor's fee schedule and establish financial arrangements with a client. The counselor shall not:

(1) charge exorbitant or unreasonable fees for any treatment service;

(2) pay or receive any Commission, consideration, or benefit of any kind related to the referral of a client for treatment;

(3) use the client relationship for the purpose of personal gain, or profit, except for the normal, usual charge for treatment provided; or

(4) accept a private professional fee or any gift or gratuity from a client if the client's treatment is paid for by another funding source, or if the client is receiving treatment from a facility where the counselor provides services (unless all parties agree to the arrangement in writing).

§150.122. Actions Against a License.

(a) Actions against a license include:

(1) refusal to issue or renew a license;

(2) suspension or revocation of a license;

(3) placing a counselor on probation if the counselor's license has been suspended; and

(4) reprimand of a license holder.

(b) The Commission shall take action against a license for:

(1) violating or assisting another to violate the statute or these rules;

(2) circumventing or attempting to circumvent the statute or these rules;

(3) participating, directly or indirectly, in a plan to evade the statute or these rules;

(4) engaging in false, misleading, or deceptive conduct as defined by TEX. BUS. & COM. CODE ANN. §17.46 (Vernon 2002);

(5) engaging in conduct that discredits or tends to discredit the profession of chemical dependency counseling;

(6) revealing or causing to be revealed, directly or indirectly, a confidential communication made to the LCDC by a client or recipient of services, except as required by law;

(7) having a license to practice chemical dependency counseling in another jurisdiction refused, suspended, or revoked for a reason that the Commission finds would constitute a violation of this chapter;

(8) refusing to perform an act or service for which the person is licensed to perform under this chapter on the basis of the client's or recipient's sex, race, religion, age, national origin, or handicaps; or

(9) committing an act for which liability exists under TEX. CIV. PRAC. & REM. CODE ANN. ch. 81 (Vernon 1997 & Supp. 2003).

(c) The Commission will determine the length of the probation or suspension. The Commission may hold a hearing at any time and revoke the probation or suspension.

(d) The Commission may impose an administrative penalty against a licensee who violates TEX. OCC. CODE ANN. ch. 504 (Vernon 2002) or a rule or order adopted under the statute.

(e) Surrender or expiration of a license does not interrupt an investigation or disciplinary action. The individual is not eligible to regain the license until all outstanding investigations, disciplinary actions, or hearings are resolved.

(f) An individual whose license has been revoked is not eligible to apply for licensure until two years have passed since the date of revocation. During the period of revocation, the individual cannot become a counselor intern. The individual is not eligible to reapply for licensure unless he/she petitions the Commission and demonstrates that sufficient time has elapsed to allow the events leading to revocation to no longer serve as a basis for denial of application. The Commission may require certain conditions be met, before it grants an individual's petition for re-licensure.

(g) The Commission shall deny, suspend, and/or refuse to renew the license of a person based on criminal history as provided in §150.115 of this title (relating to Criminal History Standards).

(h) The Commission shall implement a final order to suspend the license of a counselor for failure to pay child support as provided by the TEX. FAM. CODE ANN. ch. 232 (Vernon 1996 & Supp. 2002).

§150.123. Clinical Training Institution (CTI) Registration.

(a) To become a registered clinical training institution (CTI), an organization shall:

(1) provide activities in an array of the KSA dimensions, including assessment and counseling;

(2) serve a predominantly substance-abusing population;

(3) employ a QCC as the CTI coordinator;

(4) be in good standing with applicable licensing and regulatory agencies;

(5) agree to comply with applicable rules in this chapter; and

(6) submit a complete application.

(b) The program shall receive the registration letter and training program number before training begins. Approval allows the organization to provide clinical training at any of its programs or sites with relevant services.

(c) The approval is valid for two years. The CTI shall reapply every two years by submitting a completed application form. The Commission may mail a courtesy notice, but it is the program's responsibility to reapply at least 45 Days before the expiration date.

(d) The CTI shall notify the Commission in writing within 30 Days of the following changes:

(1) a change in the CTI coordinator;

(2) a change in the organization's name or mailing address; and

(3) closure of the training program.

(e) The Commission may withdraw approval if the CTI fails to comply with all applicable Commission rules.

§150.124. Clinical Training Institution (CTI) Standards.

(a) The training program shall appoint a single training coordinator who is a qualified credentialed counselor (QCC). The training coordinator shall oversee all training activities and ensure compliance with Commission requirements and rules.

(b) The Clinical Training Institution (CTI) shall establish admission criteria. No Applicant shall be admitted without:

(1) documentation that the applicant is registered with the Commission; and

(2) a signed ethics agreement which is consistent with the LCDC ethical standards in §150.121 of this title (relating to Ethical Standards).

(c) The CTI shall establish the following level system to classify interns according to hours of supervised work experience:

(1) Level I: 0 - 1,000 hours of work experience;

(2) Level II: 1,001 - 2000 hours of work experience;

(3) Level III: 2,001 - 4,000 hours of work experience; and

(4) Graduate Status: over 4,000 hours of work experience.

(d) The CTI shall have an organizational structure that includes all intern levels. The CTI shall designate each intern's level in writing and provide the intern with a copy of the documentation.

(e) All interns must be under the direct supervision of a QCC as described in §150.125 of this title (related to Direct Supervision of Interns).

(f) The CTI shall provide each Level I, II, and III intern with reading assignments and training activities for the supervised work experience that includes material in each KSA dimension.

(g) The CTI shall use the Commission's KSA evaluation tool to structure the intern's 4,000 hours of supervised work experience.

(1) The clinical supervisor and the intern shall set weekly objectives based on areas targeted for improvement.

(2) The supervisor shall provide reading, computer, and/or video assignments that address areas needing improvement. The CTI shall allow the intern two hours per month to complete these assignments.

(3) The clinical supervisor shall monitor the intern's progress and provide verbal and written feedback during weekly supervision meetings.

(4) The intern shall complete a written KSA self-evaluation during the first 50 hours of work experience.

(5) The clinical supervisor and the intern shall complete and discuss a written KSA evaluation at the completion of each level of experience (after 1,000 hours, 2,000 hours, and 4,000 hours).

(h) The CTI shall not allow a Level I, II, or III intern to accrue more than 40 hours of work experience per week.

(i) A person who has completed the 4,000 hours of supervised work experience and is currently eligible to take or retake the examination is a graduate intern and may continue to provide chemical dependency counseling services at a registered clinical training institution during the five-year registration period.

(j) The CTI coordinator shall send the following documents directly to the Commission and provide the intern with copies within ten working days from the date the intern completes the required 4,000 hours or leaves the agency:

(1) the supervised work experience form signed by the CTI Coordinator; and

(2) a copy of the intern's job description showing job responsibilities within the KSAs.

(k) All activities counted towards the intern's supervised work experience shall be within the scope of chemical dependency counseling services as defined by the KSAs.

(l) The CTI shall not approve hours for which the intern fails to substantially complete related activities and supervision assignments. Any failure to complete assignments shall be documented on the weekly supervision form.

(m) The CTI shall give each student the Commission's student CTI assessment form with instructions to complete the assessment and mail it directly to the Commission's counselor licensure department.

(n) The CTI shall use all current forms mandated by the Commission.

(o) The CTI shall ensure that each clinical supervisor obtains three hours of continuing education in clinical supervision every two years.

(p) The CTI shall inform students of testing requirements and procedures, as well as testing schedules and information provided by the Commission.

(q) The CTI shall ensure that interns designate their status by using "intern" or "CI" when signing client record entries.

(r) The CTI shall maintain the following documentation for four years in the student files, to include:

(1) letter of registration;

(2) ethics agreement signed by the student;

(3) copies of KSA evaluations;

(4) documentation of all supervision activities;

(5) documentation of intern levels and accumulated hours; and

(6) copy of the supervised work experience form.

(s) The CTI shall give the student a copy of all information contained in the intern file when the intern completes the required supervised work experience and/or leaves the agency.

§150.125. Direct Supervision of Interns.

(a) Direct supervision is oversight and direction of a counselor intern provided by a QCC that complies with the provisions in this section.

(b) The QCC shall assume responsibility for the actions of the intern within the scope of the intern's clinical training.

(c) If the intern has less than 2,000 hours of supervised work experience, the supervisor must be on site when the intern is providing services. If the intern has at least 2,000 hours of documented supervised work experience, the supervisor may be on site or immediately accessible by telephone.

(d) During an intern's first 1,000 hours of supervised work experience (Level I), the CTI coordinator or QCC designee shall:

(1) be on duty at the program site where the intern is working;

(2) observe and document the intern performing assigned activities at least once every two weeks (or 80 hours);

(3) provide and document one hour of face-to-face individual or group supervision each week; and

(4) sign off on all clinical assessments, treatment plans, and discharge summaries completed by the intern.

(e) During an intern's second 1,000 hours of supervised work experience (Level II), the CTI coordinator or QCC designee shall:

(1) be on duty at the program site where the intern is working;

(2) observe and document the intern performing assigned activities at least once every month (160 hours);

(3) provide and document one hour of face-to-face individual or group supervision each week; and

(4) sign off on all clinical assessments, treatment plans, and discharge summaries completed by the intern.

(f) During an intern's last 2,000 hours of required supervised work experience (Level III), the CTI coordinator or QCC designee shall:

(1) be available by phone while the intern is working;

(2) observe and document the intern performing assigned activities as determined necessary by the CTI coordinator;

(3) provide and document one hour of face-to-face individual or group supervision each week; and

(4) sign off on all clinical assessments, treatment plans, and discharge summaries completed by the intern.

(g) After an intern achieves graduate status, the CTI coordinator or QCC designee shall:

(1) be available by phone while the graduate intern is working;

(2) provide and document one hour of face-to-face individual or group supervision each week; and

(3) sign off on all clinical assessments, treatment plans, and discharge summaries completed by the graduate intern.

(h) A supervisor's schedule must allow an average of two hours of supervision-related activity per week per intern.

§150.126. Intern Violations.

(a) The CTI shall investigate all allegations that an intern has violated the ethical standards described in §150.121 of this title (relating to Ethical Standards).

(b) If the allegation is substantiated, the CTI shall take appropriate action. Action may include denying some or all of the intern's supervised work experience hours.

(c) The CTI shall submit a written report to the Commission with 48 hours of substantiating that an intern has:

(1) abused, neglected, or exploited a service recipient;

(2) committed an ethical violation that results in actual or potential harm to a service recipient;

(3) engaged in illegal activity;

(4) falsified or destroyed documentation; or

(5) established a close personal or business relationship with a client outside the counseling relationship.

(d) The CTI shall deny all supervised work experience hours for an intern with a substantiated ethical violation described in subsection (c) of 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 August 18, 2003.

TRD-200305313
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

CHAPTER 153. OFFENDER EDUCATION PROGRAMS

The Texas Commission on Alcohol and Drug Abuse (TCADA) proposes the repeal of Chapter 153, concerning Offender Education Programs because of extensive changes made to the existing rules.

Sections 153.1 - 153.8 of Subchapter A--General Provisions and Procedures contain definitions and information pertaining to scope of rules, fees, application and approval process, expiration and renewal of certification, exceptions, sanctions and procedure for disciplinary hearings.

Sections 153.32 - 153.36, 153.41 - 153.44, and 153.51 - 153.55 of Subchapter B--Program Standards contain information on requirements for classroom facilities and equipment, program administration, and recordkeeping and reporting. Information on general program operation requirements for Drug Offender Education Programs, Alcohol Education Program for Minors, DWI Education Programs, and DWI Intervention Programs are also provided.

The repeal of Chapter 153 is proposed because TCADA is adopting new rules. The new rules will be reorganized to provide

a more functional and logical framework that is more closely aligned with the other agencies operating under the Health and Human Services Commission.

Thomas F. Best, General Counsel, has determined that there will be no fiscal implications for state or local government for the first five-year period the repeal is in effect.

Mr. Best has also determined that for each year of the first five years the repeal is in effect the anticipated public benefit will be more efficient use of resources, reduced duplicative information and greater clarity regarding expectations TCADA has for individuals and organizations providing substance abuse services in Texas so that more concentration on quality of care issues and service outcomes results. There will be no effect on small businesses and there is no anticipated economic cost to current providers.

Comments on the proposal may be submitted to Albert Ruiz, Texas Commission on Alcohol and Drug Abuse, P.O. Box 80529, Austin, Texas 78708-0529. Comments may also be submitted electronically to *rules.revisions@tcada.state.tx.us* or faxed to (512) 821-4419. All comments must be received no later than 30 days from the date the proposal is published in the *Texas Register*.

SUBCHAPTER A. GENERAL PROVISIONS AND PROCEDURES

40 TAC §§153.1 - 153.8

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Transportation Code, §521.374, the Texas Alcoholic Beverage Code, §106.115, the Texas Code of Criminal Procedure article 42.12 §13(h) and (j), and the Texas Health and Safety Code, Chapters 461 and 464, which provide TCADA with the authority to promulgate written rules setting forth minimum standards for the approval or certification of offender education programs.

The code affected by the proposed repeals is the Texas Transportation Code, §521.374, the Texas Alcoholic Beverage Code, §106.115, the Texas Code of Criminal Procedure article 42.12 §13(h) and (j), and the Texas Health and Safety Code, Chapters 461 and 464.

§153.1. Definitions.

§153.2. Scope of Rules.

§153.3. Fees.

§153.4. Application and Approval/Certification.

§153.5. Expiration and Renewal.

§153.6. Exceptions.

§153.7. Sanctions.

§153.8. Procedure for Disciplinary Hearings.

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 August 15, 2003.

TRD-200305248

Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

SUBCHAPTER B. PROGRAM STANDARDS

40 TAC §§153.32 - 153.36, 153.41 - 153.44, 153.51 - 153.55

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Transportation Code, §521.374, the Texas Alcoholic Beverage Code, §106.115, the Texas Code of Criminal Procedure article 42.12 §13(h) and (j), and the Texas Health and Safety Code, Chapters 461 and 464, which provide TCADA with the authority to promulgate written rules setting forth minimum standards for the approval or certification of offender education programs.

The code affected by the proposed repeals is the Texas Transportation Code, §521.374, the Texas Alcoholic Beverage Code, §106.115, the Texas Code of Criminal Procedure article 42.12 §13(h) and (j), and the Texas Health and Safety Code, Chapters 461 and 464.

§153.32. Program Content and Materials.

§153.33. Uniform Certificates of Course Completion.

§153.34. Confidentiality.

§153.35. Discrimination Prohibited.

§153.36. Participant Complaints.

§153.41. Classroom Facilities and Equipment.

§153.42. Program Administration.

§153.43. Recordkeeping and Reporting.

§153.44. Program Instructors.

§153.51. General Program Operation Requirements.

§153.52. Additional Requirements for Drug Offender Education Programs.

§153.53. Additional Requirements for Alcohol Education Program for Minors.

§153.54. Additional Requirements for DWI Education Programs.

§153.55. Additional Requirements for DWI Intervention Programs.

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 August 15, 2003.

TRD-200305247
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 349-6607

♦ ♦ ♦

PART 4. TEXAS COMMISSION FOR THE BLIND

CHAPTER 169. BLIND CHILDREN'S VOCATIONAL DISCOVERY AND DEVELOPMENT PROGRAM

The Texas Commission for the Blind proposes the amendment of §169.4, pertaining to Definitions, and §169.52, pertaining to Order of Selection Expenditure Categories. The Commission also proposes the repeal of §169.33, pertaining to Respite Care Services. These rules are part of Chapter 169, Blind Children's Vocational Discovery and Development Program.

Section 169.4 is being amended to remove the definition of respite care services. Section 169.33, pertaining to respite care services, is being proposed for repeal. The Commission's reduced budget for children's services in the upcoming biennium requires the agency to make adjustments to its current level of services. To ensure that children who are blind continue to receive as many direct services as possible, the agency is eliminating respite care services to parents of severely disabled blind children. In addition, the agency is amending §169.52 to create eight priority categories rather than five within the Commission's order of selection criteria. The amended order of selection provides clearer notice to families where their children fall within the agency's priorities.

The Commission will be implementing the order of selection to ensure that blind and severely visually impaired children receive the highest priority when funds are inadequate to purchase services for all eligible children with visual impairments. The agency will be operating at category C, priority 4 within §169.52 effective September 1 on an emergency basis and will continue operating at this level upon adoption of these rules for the foreseeable future. At this level, expenditure of case service funds will be limited to planned, necessary program services of children who meet the definition of being blind, children who are blind in one eye and who have a severe visual loss in the other eye, children who have a corrected visual acuity of 20/70 or worse in the better eye, and children who are certified as visually impaired by a local education agency.

Alvin Miller, Chief Financial Officer, has determined that for each year of the first five years the proposed amendments and repeal will be in effect there will be an estimated reduction in state funds expended for restoration services for children who are not severely visually impaired, respite care for families, and vision screening in the amount of $431,000 per year. The estimate is based on the amount the agency expended on these particular services in fiscal year 2003. There will be no fiscal effect on local governments.

Mr. Miller has also determined that for each of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the proposed amendments will be agency policies that ensure that children with the most severe visual impairments receive priority when insufficient funds are appropriated to the agency to provide the full range of services to all eligible children with visual impairments.

Mr. Miller has determined that there will be no anticipated economic cost to the public, small businesses, or to the persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Policy and Rules Coordinator, Texas Commission for the Blind, 4800 North Lamar, Austin, Texas 78756, or by e-mail to pio@tcb.state.tx.us, or by fax (512) 377-0682. Comments must be received by the Commission no later than 30 days from the date this proposal is published in the *Texas Register*.

SUBCHAPTER A. GENERAL INFORMATION

40 TAC §169.4

The amended rule is adopted under the authority of the Human Resources Code, Chapter 91, §91.011 and §91.028 (relating to Services for Visually Handicapped Children), which authorize the Commission to adopt rules for the administration of its programs.

The proposal affects no other statutes.

§169.4. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise. The use of the singular or plural case is not meant to be limiting unless the context clearly indicates otherwise.

(1)-(12) (No change.)

~~[(13) Respite care services--Services provided to the parent of a child as a period of temporary relief from their responsibilities as primary caregiver.]~~

(13) [~~(14)~~] Restoration services--Services to eliminate or reduce limitations imposed by a visual impairment on the functioning of a child and cosmetic services necessary to improve the physical appearance of the child's eyes when the eyes are abnormal to the extent that they negatively impact the child's social and emotional well-being.

(14) [~~(15)~~] Severe visual loss--A loss of vision such that the best corrected visual acuity is between 20/70 and 20/200 in the better eye; or a visual loss such that the visual field is 30 degrees or less but greater than 20 degrees with best correction.

(15) [~~(16)~~] Severely visually impaired child--A child with a visual impairment that has resulted in a permanent condition of blindness or severe visual loss; or a child who has been certified as blind or severely visually impaired by a local education agency; or a child who has been determined to be functioning as a person who is blind or who has a severe visual loss.

(16) [~~(17)~~] Technology services--Services to provide a child access to an item, piece of equipment, or product system that maintains or improves the child's communication, independent living, social, or prevocational skills.

(17) [~~(18)~~] Visual impairment--An injury, disease, or other disorder that reduces, or if not treated will probably result in reducing, visual functioning; or a visual condition requiring cosmetic treatment, psychological assistance, counseling, or other assistance that the commission can render.

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 August 12, 2003.

TRD-200305077

Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 377-0611

♦ ♦ ♦

SUBCHAPTER C. SERVICES

40 TAC §169.33

(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 Blind or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the authority of the Human Resources Code, Chapter 91, §91.011 and §91.028 (relating to Services for Visually Handicapped Children), which authorize the Commission to adopt rules for the administration of its programs.

The proposal affects no other statutes.

§169.33. Respite Care Services.

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 August 12, 2003.

TRD-200305078
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 377-0611

♦ ♦ ♦

SUBCHAPTER E. ORDER OF SELECTION FOR PAYMENT OF SERVICES

40 TAC §169.52

The amended rule is adopted under the authority of the Human Resources Code, Chapter 91, §91.011 and §91.028 (relating to Services for Visually Handicapped Children), which authorize the Commission to adopt rules for the administration of its programs.

The proposal affects no other statutes.

§169.52. Order of Selection Expenditure Categories.

Order of Selection expenditure categories, from most restrictive to least restrictive, are:

(1) Category A--No expenditure of case service funds.

(2) Category B--Expenditure of case service funds only for diagnostics.

(3) Category C--Expenditure of case service funds authorized for any planned, necessary BCVDD Program services according to the following priorities:

(A) Priority 1--Children who meet the definition of being blind.

(B) Priority 2--Children who are blind in one eye and who have a severe visual loss in the other eye.

(C) Priority 3--Children who have a corrected visual acuity of 20/70 or worse in the better eye.

(D) Priority 4--Children who are certified as visually impaired by a local education agency.

(E) Priority 5--Children who have a nonsevere visual loss and a degenerative eye condition that will result in further visual loss;

(F) Priority 6--Children who need a prosthesis.

(G) Priority 7--Children with nonsevere visual losses that affect visual acuity who are in need of services other than correction of a refractive error.

(H) Priority 8--Children with treatable visual impairments that may or may not affect visual acuity and children with an uncorrected visual acuity of 20/70 or worse in both eyes who need no services other than correction of a refractive error.

~~[(C) Priority 3--Children who fall in one or more of the following categories:]~~

~~*[(i)* Children who have a corrected visual acuity of 20/70 or worse in the better eye;]~~

~~*[(ii)* Children who have a nonsevere visual loss and a degenerative eye condition that will result in further visual loss;]~~

~~*[(iii)* Children who need a prosthesis; and]~~

~~*[(iv)* Children who are certified as visually impaired by a local education agency.]~~

~~[(D) Priority 4--Children with nonsevere visual losses that affect visual acuity who are in need of services other than correction of a refractive error.]~~

~~[(E) Priority 5--Children with treatable visual impairments that may or may not affect visual acuity and children with an uncorrected visual acuity of 20/70 or worse in both eyes who need no services other than correction of a refractive error.]~~

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 August 12, 2003.

TRD-200305079
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 377-0611

♦ ♦ ♦

PART 6. TEXAS COMMISSION FOR THE DEAF AND HARD OF HEARING

CHAPTER 181. GENERAL RULES OF PRACTICE AND PROCEDURE

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §181.29

The Texas Commission for the Deaf and Hard of Hearing proposes an amendment to §181.29. The amendment is proposed to make clarifications to eligibility criteria, add CART and note taking services as additional examples of limitations and establish a 6-year records retention policy.

David W. Myers, Executive Director, has determined that for each year of the first five years the amendment to this section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Mr. Myers has also determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of this amendment will be the continuation of the Certificate of Deafness for tuition waiver program. There will be no effect on small businesses. There is no anticipated economic hardship to persons required to comply with the amendment as proposed.

Comments on this proposed amendment may be submitted to Doug Dittfurth, Program Specialist - Regional Services, Texas Commission for the Deaf and Hard of Hearing, P.O. Box 12904, Austin, Texas 78711-2904.

The amendment is proposed 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 adopt rules for administration and programs.

No other statute, code or article is affected by this proposed amendment.

§181.29. Certificate of Deafness for Tuition Waiver.

(a) Description of Services. The Commission is responsible for providing Certification of Deafness for tuition waiver [~~certification of deafness~~] for eligible applicants, to be used for applying for waiver of tuition at State funded institutes of higher education.

(b) Eligibility of Services. To be eligible for Certification of Deafness for tuition waiver [~~certification~~], an individual must:

(1) be a Texas resident;

(2) submit a copy of an audiogram showing the applicant's name and the name, address and contact information of the audiologist or licensed hearing aid dealer. The audiogram must show at least a 55db loss in the better ear using the average of unaided pure tone hearing levels at 500, 1000, 2000, and 4000 Hz;

~~[(2) submit a copy of an audiogram showing the individual's name, the name of the licensed audiologist or licensed hearing aid dealer and the pure tone average (PTA) which must be at least a 55 dB loss in the better ear without correction, or have a licensed physician sign the application certifying the individual is functionally deaf and the primary mode of communication in the classroom is visual, and]~~

(3) in the event the applicant's loss does not meet the minimum criteria from paragraph (2) of this subsection, a licensed physician may sign the application certifying the applicant as functionally deaf with the primary mode of communication in the classroom as being visual; and

~~[(3) submit a completed application with original signatures; a facsimile is not acceptable.]~~

(4) submit a completed application with original signatures to the Commission; facsimiles are not accepted.

(c) Program Policies.

(1) applicants [~~Applicants~~] should allow 14 business days for processing of applications. The certification is valid for each semester the individual enrolls at the same institution in a designated course of study. The Commission is not responsible for any fees or associated costs such as interpreters, CART, note taking or books that may be incurred as a result of any certification of deafness; and[.]

(2) approved Certificate of Deafness for tuition waiver applications/certificates will be retained for a period of 6 years after approval.

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 August 18, 2003.

TRD-200305259
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 407-3250

♦ ♦ ♦

SUBCHAPTER F. FEES

40 TAC §181.830

The Texas Commission for the Deaf and Hard of Hearing proposes an amendment to §181.830. The amendment is proposed to remove language regarding establishing maximum allowable fees for payment of interpreter services. Legislative changes to the Commission's statues eliminated this authority.

David W. Myers, Executive Director, has determined that for each year of the first five years the amendment to this section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Mr. Myers has also determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of this amendment will be a better understanding of how fees for interpreter services are determined. There will be no effect on small businesses. There is no anticipated economic hardship to persons required to comply with the amendment as proposed.

Comments on this proposed amendment may be submitted to Billy Collins, Texas Commission for the Deaf and Hard of Hearing, P.O. Box 12904, Austin, Texas 78711-2904.

The amendment is proposed 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 adopt rules for administration and programs.

No other statute, code or article is affected by this proposed amendment.

§181.830. Interpreter Services for the Deaf and Hard of Hearing.

~~[(a) Under the authority of the Texas Code of Criminal Procedure, Article 38.31, and the Texas Administrative Code, Chapter 81, §81.006(a) the Commission establishes maximum allowable fees for the payment of interpreter services for persons who are deaf and hard of hearing which must be provided by law in proceedings of state agencies, courts, and political subdivisions. Under the authority of the Texas Administrative Code, Chapter 81 §81.006(c) other state agencies shall adopt the schedule of fees established by the Commission. The fees~~

~~are established as the best value through competitive bid on a biennial basis and may be reviewed and or revised as deemed necessary by the Commission. The schedule of fees and any changes will be posted on the agency website.]~~

[~~(b)~~] The Commission defines the following:

(1) After Hours Interpreting services is any scheduled interpreting situation which begins between the hours of 6:00 p.m. and 6:00 a.m, Monday through Friday.

(2) Weekend Interpreting services is any scheduled interpreting situation which occurs anytime on Saturday or Sunday.

(3) Emergency interpreting service situations within proceedings of state agencies, courts, and political subdivisions are defined as essential situations which are potentially life threatening or pose a threat to the clients' well-being during any time of the day or night. In this definition of an emergency interpreting service situation, all interpreting service situations which can reasonably be delayed to allow adequate planning, or which can be planned for in advance and do not pose a special hardship for the service provider are not considered to be emergency interpreting service situations. Lateness in planning on the part of the consumer or client are not emergency situations as defined in this subsection. The designation "emergency interpreting service situation" is to be used prudently in view of its potential for abuse.

(4) Holiday Interpreting service situations are defined as applying to any federally observed holiday.

(5) Portal to portal is the time an interpreter leaves scheduled headquarters and returns to headquarters at the completion of the assignment. Headquarters is the site of the contracted service provider or the home base of the contracted interpreter whichever is closer to the assignment. Service providers will not be reimbursed mileage costs whenever portal to portal costs are charged unless otherwise specified.

(6) Guaranteed minimum assignment is the least amount of time a service provider will be reimbursed and presently is established as two hours.

(7) Late cancellation means providing less than twenty-four hours notice of the cancellation of an assignment. Cancellation must be made Monday through Friday during regular business hours unless otherwise specified.

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 August 18, 2003.

TRD-200305260
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Earliest possible date of adoption: September 28, 2003
For further information, please call: (512) 407-3250

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 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. MEDICAID REIMBURSEMENT RATES

SUBCHAPTER F. SPECIFIC REIMBURSEMENT METHODOLOGY

1 TAC §355.773, §355.775

The Texas Health and Human Services Commission has withdrawn from consideration the proposed amendments to §355.773 and §355.775, which appeared in the June 27, 2003 issue of the *Texas Register* (28 TexReg 4725).

Filed with the Office of the Secretary of State on August 11, 2003.

4991
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: August 11, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 17. LONESTAR SELECT CONTRACTING PROGRAM

1 TAC §355.8321

The Texas Health and Human Services Commission has withdrawn from consideration the proposed amendment to §355.8321, which appeared in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4737).

Filed with the Office of the Secretary of State on August 11, 2003.

4998
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: August 11, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

TITLE 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 3. STATE BANK REGULATION

SUBCHAPTER D. PLEDGE AND MAINTENANCE OF ASSETS BY FOREIGN BANK LICENSED TO MAINTAIN TEXAS STATE BRANCH OR AGENCY

7 TAC §§3.51 - 3.61

The Finance Commission of Texas has withdrawn from consideration the proposed new §§3.51 - 3.61 which appeared in the July 4, 2003, issue of the *Texas Register* (28 TexReg 5021).

Filed with the Office of the Secretary of State on August 15, 2003.

5221
Everette D. Jobe
Certifying Official
Finance Commission of Texas
Effective date: August 15, 2003
For further information, please call: (512) 475-1300

♦ ♦ ♦

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 95. YOUTH DISCIPLINE

SUBCHAPTER A. DISCIPLINARY PRACTICES

37 TAC §95.3

The Texas Youth Commission has withdrawn from consideration the proposed amendments to §95.3 which appeared in the July 18, 2003, issue of the *Texas Register* (28 TexReg 5646).

Filed with the Office of the Secretary of State on August 13, 2003.

5189
Steve Robinson
Executive Director
Texas Youth Commission
Effective date: August 13, 2003
For further information, please call: (512) 424-6014

♦ ♦ ♦

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 48. COMMUNITY CARE FOR AGED AND DISABLED

SUBCHAPTER H. ELIGIBILITY

40 TAC §48.2925

The Texas Department of Human Services has withdrawn from consideration the proposed new §48.2925 which appeared in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4878).

Filed with the Office of the Secretary of State on August 12, 2003.

TRD-200305083
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: August 12, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

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 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 2. MEDICAID VISION CARE PROGRAM

1 TAC §§354.1015, 354.1021, 354.1023

The Texas Health and Human Services Commission (HHSC or Commission) adopts the amendments to §354.1015, Benefits and Limitations, and §354.1021, Additional Claims Information Requirements, without changes to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4698) and will not be republished. The Commission adopts amendments to §354.1023, Optometrist Services, with changes to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4698). The text of the rule will be republished.

The adopted amendments bring the rules into compliance with the General Appropriations Act, 78th Leg., R.S. (2003). The amendments to §354.1015 restrict the provision of prosthetic and non-prosthetic eyewear through Vision Care Services to Medicaid recipients eligible for the Early and Periodic Screening, Diagnosis, and Treatment program under 25 TAC Chapter 33. The restriction of prosthetic and non-prosthetic eyewear through Vision Care Services is necessary due to the lack of available appropriated funds for continuation of the service to Medicaid recipients who are 21 years of age or older or to recipients who are not eligible for EPSDT services. The amendments to §354.1021 and §354.1023 are administrative and include clarifying language and updates to the references within the rules. The rules are effective 20 days after submission to the Secretary of State.

The HHSC received the following comments regarding §§354.1015, 354.1021, and 354.1023 during the 30-day comment period. Each comment is followed by the Commission's response and any resulting change.

Comment: Concerning the rules in general, comments were received from Texas Health Care Association, Center for Public Policy Priorities, Texas Technology Access Project and Disability Policy Consortium, and one private individual, regarding the potential effects of eliminating the provision of prosthetic and non-prosthetic eyewear for the Medicaid population 21 years and older.

Response: HHSC acknowledges the comments received and recognizes the potential impact of eliminating prosthetic and non-prosthetic eyewear for the adult population 21 years of age and older. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Eyewear services are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to eyewear services are necessary. No change was made to the rule in response to these comments.

Comment: Concerning the rules in general, one commenter recommended working with the community to secure funding for vision services and to establish monitoring and reporting to legislative committees to illustrate the impact on patient care.

Response: HHSC acknowledges the comment received. These recommendations are outside of the Commission's charge; therefore, no change was made to the rules in response to these recommendations.

Comment: Concerning the rules in general, comments were received from Texas Health Care Association, Center for Public Policy Priorities, Texas Technology Access Project and Disability Policy Consortium, Advocacy, Inc., and several individual providers and recipients expressing concern about the loss of the eyewear services and requesting that HHSC restore the eyewear benefit for persons over 21 years of age and older.

Response: HHSC acknowledges the requests to restore the eyewear benefit for persons age 21 and older. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Eyewear services are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to eyewear services are necessary. No change was made to the rule in response to these comments.

Comment: Concerning the preamble for §354.1015, the Texas Optometric Association, Inc., recommended a change from the phrase "Optometrist Services" to "Vision Services" that appeared in first paragraph.

Response: HHSC disagrees with the comment. The phrase "Optometrist Services" refers to the actual title of the rule. No change was made to the rule in response to the comment.

Comment: Concerning §354.1021, the Texas Optometric Association, Inc., recommended changing the phrase "optometric services" to "vision services".

Response: HHSC disagrees with the comment. "Optometric Services" is the term used in the Code of Federal Regulations to describe Medicaid vision services provided by a physician or optometrist. No change was made to the rule in response to the comment.

Comment: Concerning §354.1023, the Texas Optometric Association, Inc., recommended changing the title of the rule from "Optometrist Services" to "Vision Care Provider".

Response: HHSC agrees with the comment in part. The title "Optometrist Services" should be revised to incorporate both physicians and optometrists. The term "Vision Care Provider" is too broad and may include providers that are not licensed to deliver vision care. A change to the rule title from "Optometrist Services" to "Optometric Services Provider" was made.

Comment: Concerning §354.1023 (b)(1), the Texas Optometric Association, Inc., recommended changing the phrase "within the optometrist's scope of practice" to "within the vision provider's scope of practice".

Response: HHSC agrees with the comment in part. The term "vision provider" is too broad and may include providers that are not licensed to deliver vision care services. Changes to the rule were made to include: a sentence to define optometric services as vision care delivered by a physician or an optometrist; "physician" was included within the rule as a provider of vision care services; and, "within the optometrist's scope of practice" to "within the scope of optometrist's or physician's scope of practice".

Comment: The Commission received a comment from the Medical Care Advisory Committee (MCAC) concerning the sentence in the Proposed Preamble: "Local governments will not incur additional costs." The MCAC contended that this comment was not accurate because local governments would be asked to incur some of the costs for eyewear services eliminated by this rule. The MCAC recommended a revision stating that local governments may be asked to pay for eyewear services previously paid through Medicaid.

Response: The Commission acknowledges the comment from MCAC and recognizes the potential for requests to local governments to reimburse for or furnish eyewear services previously covered through the Texas Medicaid program. The potential impact to local governments is difficult for HHSC to quantify because HHSC cannot anticipate the responses from local governments to any requests to furnish or reimburse for eyewear services.

The amendments are adopted under the Texas Government Code, §531.033, which provides the Commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide the Health and Human Services Commission (HHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Government Code, §2001.006, which allows state agencies to adopt rules in preparation for the implementation of legislation.

§354.1023. Optometric Services Provider.

(a) Optometric services are defined as vision care services provided by a physician or optometrist. In addition to those services described in §354.1015 and §363.502 of this title (both relating to Benefits and Limitations) and subject to the specifications, conditions, limitations, and requirements established by the Texas Health and Human Services Commission (Commission) or its designee, diagnostic services provided by an optometrist or physician are covered by the Texas Medical Assistance Program.

(b) To be covered, the evaluation services shall be:

(1) within the optometrist's or physician's scope of practice, as defined by state law;

(2) reasonable and medically necessary as determined by the Commission or its designee; and

(3) provided to an eligible recipient by an optometrist or physician enrolled in the Texas Medical Assistance Program at the time the service(s) are provided.

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 August 11, 2003.

TRD-200304999
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

DIVISION 4. MEDICAID CHIROPRACTIC SERVICES

1 TAC §354.1051, §354.1052

The Health and Human Services Commission (HHSC or Commission) adopts the amendments to §354.1051, Additional Claim Information Requirements, and §354.1052, Authorized Chiropractic Services, without changes to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4700), and will not be republished.

The amendment to §354.1051 is administrative and updates a reference in the rule to another regulatory provision. The amendment to §354.1052 restricts the provision of chiropractic services provided by a doctor of chiropractic to Medicaid recipients eligible for the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program under 25 TAC Chapter 33. The limitation of chiropractic services is necessary because of a lack of available appropriated funds to continue the service for Medicaid recipients who are 21 years of age and older and for persons under the age of 21 years who are not eligible for the EPSDT program. The amendment to §354.1052 is necessary to comply with the General Appropriations Act, 78th Leg., R.S. (2003). The rules are effective 20 days after filing notice with the Secretary of State.

The HHSC did not receive any comments regarding the proposed amendments to §354.1051 and §354.1052 during the 30-day comment period.

The amendments are adopted under the Texas Government Code, §531.033, which provides the Commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide the Commission with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Government Code, §2001.006, which allows state agencies to adopt rules in preparation for the implementation of legislation.

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 August 11, 2003.

TRD-200305000
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

DIVISION 8. PODIATRY SERVICES

1 TAC §354.1101, §354.1102

The Health and Human Services Commission (HHSC) adopts amendments to §354.1101, Additional Claim Information Requirements, and §354.1102, Authorized Podiatry Services, without changes to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4701) and will not be republished.

The amendments to §354.1101 are administrative and update a reference to a related regulatory provision (§354.1001). The amendment to §354.1102 restricts the provision of podiatry services provided by a Podiatrist to recipients eligible for the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program under 25 TAC Chapter 33. The restriction of podiatry services is necessary because of a lack of available appropriated funds to continue the service for Medicaid recipients who are 21 years of age and older, and for persons under the age of 21 years who are not eligible for the EPSDT program. The adopted amendments bring the rules into compliance with the General Appropriations Act, 78th Leg., R.S. (2003). The amended rules are effective 20 days after submission to the Secretary of State.

The Commission received the following comments concerning §354.1101 and §354.1102 during the 30-day comment period. Each comment is followed by the Commission's response and any resulting change.

Comment: Concerning the rules in general, comments were received from the Texas Health Care Association, Center for Public Policy Priorities, Texas Technology Access Project and Disability Policy Consortium, Texas Podiatric Medical Association, Texas Diabetes Council, University of Texas Health Science Center at San Antonio, State Representative Delwin Jones, and 45 podiatrists, concerning the potential affects of eliminating podiatry services for the population 21 years and older. For example, one commenter expressed concern over the economic burden to Texas if services provided by a podiatrist are eliminated, as this would result in an increase in specialty care and hospital services. Other comments included concern over: access to care when podiatry care was not available through a podiatrist; quality of care delivered when the podiatrist, who specializes in foot care, was not involved; and cost savings that would be achieved through preventive foot care provided by a podiatrist for diabetic patients.

Response: The Commission acknowledges the comments received and the potential impact of eliminating services performed by a podiatrist for the adult population over 21 years of age. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Podiatry services provided by a podiatrist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to podiatry services are necessary. No change was made to the rule in response to these comments.

Comment: Concerning the rules in general, one commenter recommended working with the community to secure funding for podiatry services and to establish monitoring and reporting to legislative committees to illustrate the impact on patient care.

Response: HHSC acknowledges the comment received. These recommendations are outside of the Commission's charge, therefore, no change was made to the rules in response to these recommendations.

Comment: Concerning the rules in general, comments were received from the Texas Health Care Association, Center for Public Policy Priorities, Texas Technology Access Project and Disability Policy Consortium, Texas Podiatric Medical Association, Texas Diabetes Council, University of Texas Health Science Center at San Antonio, State Representative Delwin Jones, and 38 podiatrists asking that HHSC restore the podiatry services provided by a podiatrist for persons 21 years of age and older.

Response: HHSC acknowledges the requests to restore the services provided by a podiatrist benefit for persons age 21 and older. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Podiatry services provided by a podiatrist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to podiatry services are necessary. No change was made to the rule in response to these comments.

Comment: The Commission received a comment from the Medical Care Advisory Committee (MCAC) concerning the sentence in the Proposed Preamble: "Local governments will not incur additional costs." The MCAC contended that this comment was not accurate because local governments would be asked to incur some of the costs for podiatry services eliminated by this rule. The MCAC recommended a revision stating that local governments may be asked to pay for podiatry services previously paid through Medicaid.

Response: The Commission acknowledges the comment from MCAC and recognizes the potential for requests to local governments to reimburse for or furnish podiatry services previously

covered through the Texas Medicaid program. The potential impact to local governments is difficult for HHSC to quantify because HHSC cannot anticipate the responses from local governments to any requests to furnish or reimburse for podiatry services.

Comment: HHSC received a comment concerning the date of implementation, September 1, 2003, and whether this date could be pushed back.

Response: The Commission acknowledges the comment. The effective date for the rule implementation of September 1, 2003, is a set date and cannot be moved. The purpose of the September 1, 2003, date is that HHSC may be able to drawn down additional federal funding if the rules are in place by that date. No changes were made to the rule in response to the comment.

Comment: HHSC received a comment requesting an amendment to the proposed rule that would allow recipients to receive foot care services through an M.D., D.O., or a podiatrist.

Response: The Commission acknowledges the comment concerning a revision to the rule that would allow recipients to receive foot care services through a physician or podiatrist. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Podiatry services provided by a podiatrist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to podiatry services are necessary. No change was made to the rule in response to the comment.

The amendments are adopted under the Texas Government Code, §531.033, which provides the Commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide the Health and Human Services Commission (HHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Government Code, §2001.006, which allows state agencies to adopt rules in preparation for the implementation of legislation.

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 August 11, 2003.

TRD-200305001
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

DIVISION 15. HEARING AID SERVICES

1 TAC §§354.1231, 354.1233, 354.1235

The Health and Human Services Commission (HHSC or Commission) adopts amendments to §354.1231, Benefits and Limitations, with changes to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4702). The rule with the revised language will be republished in the *Texas Register*. The Commission adopts §354.1233, Requirements for Hearing Aid Services, and §354.1235, Requirements for Provider Participation, without changes to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4702) and will not be republished.

The adopted amendments bring the rules into compliance with the General Appropriations Act, 78th Leg., R.S. (2003). The amendments to §§354.1231, 354.1233, and 354.1235, limit hearing aid services, for persons age 21 years and over, to hearing evaluations only. The exclusion, of hearing aid dispensing and fitting for Medicaid recipients 21 years and older, is necessary because of a lack of appropriated funds to continue the service without this limitation. Hearing aid services continue to be available to Medicaid recipients under the age of 21 through the Texas Department of Health, pursuant to 25 TAC Chapter 37. The amendments also update references to other regulatory provisions and to the Commission. The rules are effective 20 days after submission to the Secretary of State.

The Commission received the following comments concerning §§354.1231, 354.1233, and 354.1235 during the 30-day comment period. Each comment is followed by the Commission's response and any resulting change.

Comment: Concerning the rules in general, comments were received from Texas Health Care Association, Center for Public Policy Priorities, Texas Technology Access Project and Disability Policy Consortium, and one private individual, regarding the potential effects of eliminating hearing aids for the population 21 years and older. Several individuals expressed concern over the loss of the hearing aid services. For example, one commenter noted that, with age, people begin to suffer hearing loss, and "without this small piece of equipment, they can no longer interact effectively, and they may require more expensive services and support to remain in their own homes." Another commenter expressed the difficulty in treating people who cannot hear, especially when interaction is required, such as in therapies.

Response: HHSC acknowledges the comments received and recognizes the potential impact of limiting hearing aid services for the adult population over 21 years of age and older, nursing home residents, and long-term care residents. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Hearing aid services are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to hearing aid services are necessary. No change was made to the rule in response to these comments.

Comment: Concerning the rules in general, one commenter recommended working with the community to secure funding for hearing aid services and to establish monitoring and reporting to legislative committees to illustrate the impact to patient care.

Response: HHSC acknowledges the comment received. These recommendations are outside of the Commission's charge. No change was made to the rules in response to these recommendations.

Comment: Concerning the rules in general, comments were received from Texas Health Care Association, Center for Public Policy Priorities, Texas Technology Access Project and Disability

Policy Consortium, Advocacy, Inc., and nine private individuals requesting that HHSC restore the hearing aid benefit for persons 21 years of age and older.

Response: HHSC acknowledges the requests to restore the hearing aid benefit for persons age 21 and older. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Hearing aid services are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to hearing aid services are necessary. No change was made to the rule in response to these comments.

Comment: The Commission received a recommendation from the Medical Care Advisory Committee to clarify the language in §354.1231 (b) (1) concerning "available only to non-EPSDT eligible Medicaid recipients".

Response: The Commission agrees with the comment. The language in §354.1231(b)(1) has been revised for clarification purposes.

The amendments are adopted under the Texas Government Code, §531.033, which provides the Commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide the Commission with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Government Code, §2001.006, which allows state agencies to adopt rules in preparation for the implementation of legislation.

§354.1231. Benefits and Limitations.

(a) Benefits. Reimbursement for hearing aid services available through the Texas Medical Assistance (Medicaid) Program shall be provided in accordance with federal regulations found at 42 CFR Subchapter C, Medical Assistance Programs; state-legislated appropriations; and the provisions and procedures found elsewhere in this chapter as cited at §354.1233 of this title (relating to Requirements for Hearing Aid Services). The following hearing aid services shall be reimbursed, through the Texas Medicaid Program:

(1) physician examination to determine the medical necessity for a hearing aid;

(2) hearing aid evaluations, including home visit hearing evaluations;

(b) Limitations and exclusions. Hearing aid providers and examining physicians must comply with the following conditions and limitations established by the department or its designee.

(1) Hearing aid services are available to persons who are 21 years of age and older and eligible for Medicaid services.

(2) An individual using a hearing aid before becoming eligible for Medicaid benefits may have a hearing evaluation conducted by an approved hearing aid services provider after becoming eligible for Medicaid.

(3) Providers may not submit a hearing evaluation claim to the Commission or its designee unless the Medicaid recipient meets the eligibility criteria in §354.1233 of this title (relating to Requirements for Hearing Aid Services).

(4) The Commission or its designee shall not pay for the replacement of batteries or cords.

(5) Recipients may receive home visit hearing evaluations on the written recommendation of a physician.

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 August 11, 2003.

TRD-200305002
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

DIVISION 19. PSYCHOLOGISTS' SERVICES

1 TAC §354.1281, §354.1282

The Health and Human Services Commission (HHSC or Commission) adopts the amendments to §354.1281, Benefits and Limitations, and §354.1282, Conditions of Participation, without changes to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4705) and will not be republished.

The amendment to §354.1281 restricts psychologists' services provided by licensed psychologists to Medicaid recipients who are under the age of 21 years and eligible for the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program under 25 TAC Chapter 33. The amendment to §354.1282 adds language to allow an exception to the requirement that Medicaid providers must be enrolled in Medicare for providers who meet the criteria specified in §354.1173(b). This change is for clarification purposes and links the two sections of the Texas Administrative Code. The proposed amendments also replace references to the Texas Department of Health with references to HHSC, as appropriate. The amendment to §354.1281 is necessary because of a lack of available appropriated funds to continue psychologists' services for Medicaid recipients who are 21 years of age and older, and for persons under the age of 21 years who are not eligible for the EPSDT program. The proposed amendment to §354.1281 was necessary to remain within the level of funding allocated in the General Appropriations Act, 78th Leg., R.S. (2003). The amended rules are effective 20 days after submission to the Secretary of State.

The Commission received written comments concerning §354.1281 and §354.1282 during the 30-day comment period from June 27 to July 28, 2003. A summary of the comments and HHSC's responses follow.

Comment: Concerning the rule §354.1281 in general, comments were received from the Texas Health Care Association, the Center for Public Policy Priorities, the Texas Technology Access Project and the Disability Policy Consortium, the Texas Psychological Association, the Medical Care Advisory Committee, the Texas Council of Community Mental Health and Mental Retardation, the National Alliance of Mental Health, Austin-Travis County Mental Health and Mental Retardation and, 301 private individuals and providers opposed to the rule that expressed concern about the potential effects of eliminating psychologists' services provided by a licensed psychologist to the population 21 years of age and older. For example, several

comments expressed concern that eliminating the services provided by licensed psychologists would result in increased expenditures for emergency care, inpatient hospitalizations, and medications.

Other comments addressing §354.1281 included concerns about the following: (1) access to care if reimbursement of psychologists' services, for those age 21 years and older, is limited to psychiatrists; (2) the availability of psychiatrists to pick up counseling and psychological testing services provided by a psychologist when currently there is a waiting period of 3-8 weeks to schedule appointments; (3) the hardship to recipients who would need to travel to other areas for services because a psychiatrist is not available in the area in which the recipients live; (4) the quality of care provided to recipients when psychiatrists are accustomed to seeing patients for the purpose of prescribing medications and not for long-term therapy services; (5) the physical and mental impact to recipients who utilize counseling services in conjunction with medications; (6) the impact on family members who care for or live with persons receiving services from a licensed psychologist currently; (7) the impact on health conditions for recipients who are terminally ill, chronically ill, or those experiencing long-term illness and the improved health benefits to these individuals with the use of services from a licensed psychologist in conjunction with physical health treatment; (8) perpetuating a system reliant on Medicaid and Social Security benefits; and (9) the increased short- and long-term costs for state of Texas.

Response: The Commission acknowledges the comments received, recognizes the potential impact of limiting psychologists' services to persons under the age of 21 years and eligible for EPSDT services, and appreciates the value of services provided to Medicaid recipients by licensed psychologists. However, in order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by licensed psychologists are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within the levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: One commenter recommended working with the community to secure funding for counseling services and to establish monitoring and reporting to legislative committees to illustrate the impact on patient care.

Response: HHSC acknowledges the comment received. These recommendations are outside of the Commission's charge; therefore, no change was made to the rules in response to these recommendations.

Comments: Comments were received from the Medical Care Advisory Committee and several private individuals and providers requesting the deletion of §354.1281(e), which restricts psychologists' services to Medicaid recipients under the age of 21 years and eligible for EPSDT services.

Response: HHSC acknowledges the comment to delete §354.1281(e). However, in order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by a licensed psychologist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within the levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received several comments concerning the necessity of restricting counseling services to persons under the age of 21 years and eligible for the EPSDT program, stating that this rule change is not required to bring the rules into compliance with H.B. 2292, 78th Leg., R.S. (2003).

Response: HHSC acknowledges and agrees with the comments. However, in order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services that are provided by a licensed psychologist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received several comments expressing concern with the access to psychologists' services for individuals who are 21 years of age and older and federal requirements for accessibility for covered services. The Texas Council of Community Mental Health and Mental Retardation Centers, Inc., stated that 26 of the 42 Community Mental Health and Mental Retardation Centers reported that "approximately 3608 adults will no longer be getting this service" due to the rule change. One commenter stated that in the counties of Travis and Williamson, "there are over 4,000 licensed Medicaid nursing facility beds with only two psychiatrists" providing services to residents of nursing facilities in these counties. Another commenter explained the difficulty in getting psychiatric services in a rural community and that rural communities tend to rely on other mental health providers for counseling services. One commenter noted that "At least 60% of nursing home residents display symptoms of behavior disorders and depression; up to 80% display symptoms of dementia, and half of these demonstrate psychiatric symptoms." The commenter goes on to say that, "The Surgeon General's Report in 1999 confirmed that over 60% of nursing home residents have a diagnosable mental illness, often viewed as organic brain syndrome and left untreated."

Response: The Commission acknowledges the comments and recognizes the potential effects on access to psychologists' services for individuals who are 21 years of age and older. The state is required to ensure accessibility of services when those services are mandated and defined in the state's Medicaid State Plan. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by a licensed psychologist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the

proposed limitations to psychologists' services are necessary to remain within the levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received 53 comments that, "receiving appropriate mental health services is known to decrease the amount of money spent on physical health issues for people. Take care of a person's mental health, and their physical health will improve too."

Response: The Commission acknowledges the comments and recognizes the potential effects of restricting psychologists' services provided by licensed psychologist to Medicaid recipients under the age of 21 years and eligible for the EPSDT program. However, in order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by licensed psychologists are optional services under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: Concerning the amendment to §354.1281, HHSC received 12 comments about the current decrease in emergency room capacity and the increase in cost associated with these rule changes to a system that is already stretched. The comments generally expressed the belief that eliminating psychologists as providers of counseling services to Medicaid recipients 21 years of age and older will lead to increased utilization of emergency room services. They further state that, "psychotherapy and counseling services can be the stabilizing factor for someone with mental illness. The withdrawal of these supports will likely result in the increased severity of symptoms and a decrease in stress tolerance and the ability to utilize effective coping strategies."

Response: The Commission acknowledges the comments and recognizes the potential effects of restricting psychologists' services to Medicaid recipients under the age of 21 years and eligible for the EPSDT program. However, in order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by a licensed psychologist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within the levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: Concerning the amendment to §354.1281, HHSC received 12 comments expressing concern over the decreased availability of community mental health facilities to absorb the "cost of providing all of the needed supports for Medicaid covered adults and could not if they did not meet priority population guidelines" if the amendment is adopted.

Response: The Commission acknowledges the comments received and recognizes the potential effects of restricting psychologists' services to persons under the age of 21 years and eligible for EPSDT services. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by a licensed psychologist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received 25 comments concerning the impact to long-term care facilities of restricting psychologists' services to persons under the age of 21 years and eligible for EPSDT. The commenters contend that these rule changes limit the long-term care facility's ability to comply with OBRA 1987 and OBRA 1997. Additional comments include concerns about the: (1) impact to the facilities related to increased cost of delivering services due to "uncooperative residents, staff stress, and instances of abuse and neglects due to the lack of training and regular assistance and counsel from psychologists and therapists"; (2) increase in "falls and other accidents requiring medical attention due to the higher use of physical and chemical restraints that will be employed where therapy would have been affective" in modifying behaviors; (3) elimination of psychologists' services to the adult population which "would mean that my facility can no longer manage these residents behaviors, they have to be discharged to a State facility that already is suffering budget cuts and closures or to the Police Department because of violent behaviors"; and (4) the lack of adequate provider reimbursement will result in residents that do not "have access to professional care and facilities will not be compliant with federal OBRA regulation."

Response: The Commission acknowledges the comments received and recognizes the potential effects of restricting psychologists' services to persons under the age of 21 years and eligible for EPSDT services. Long-term facilities will be required to continue to comply with federal regulations governing quality of care for residents of long-term care facilities. The rule changes speak only to what services the Texas Medicaid program will reimburse. How to provide quality care in long-term care facilities will be the decision of the persons involved in the individual treatment planning for long-term care residents. In addition, in order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by a licensed psychologist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received comments from the Medical Care Advisory Committee and other private individuals and providers concerning the implementation of §354.1281 as proposed and the impact to the local governments, small or micro businesses, private practices, and local health and human service agencies.

The commenters expressed a belief, contrary to HHSC's assessment in the preamble to the proposed rule, that local government and local health and human services agencies would incur additional costs and that small or micro businesses would incur additional costs.

Response: The Commission acknowledges the comments and recognizes the potential impact for requests to local governments and local health and human service agencies to reimburse for or furnish psychologists' services previously covered through the Texas Medicaid program. The Commission also recognizes the potential impact on small or micro businesses and private practices of implementing the rule as proposed. However, the determinations of fiscal impact is based on the conclusion that neither local governments and health and human services agencies nor small or micro-business are required to alter their practices in order to comply with the amendments. The distinction is between compliance with the law and the economic effect of implementation of the law by others. Moreover, the potential impact to local governments and local health and human service agencies is difficult for HHSC to quantify because HHSC cannot anticipate the responses from the entities to any requests to furnish or reimburse for psychologists' services. It would also be difficult to quantify the potential impact on small or micro businesses and private practices because HHSC cannot anticipate responses from these entities. The state does not require anything from providers or businesses to comply with these rules, i.e., computer software, new forms, new computer systems. No change was made to the rules in response to these comments.

Comment: HHSC received comments concerning the impact on businesses in general. For example, one comment described the: personnel impacts (layoffs), decreased salaries to providers, and reduction in numbers of providers because they cannot afford to stay in business.

Response: The Commission acknowledges the comments and recognizes the potential impact of implementing the amendment to §354.1281. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by licensed psychologists are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received comments from several providers concerning the delivery of counseling services by primary care physicians. One commenter contends that this is not "very effective in treating mental disorders." Reference is made to a federally-funded study reported in the Houston Chronicle that states that "PCPs often under diagnose or under medicate individuals with Clinical Depression. This is inappropriate treatment which results in ineffective service delivery that costs the health care system significant amounts of "wasted" health care dollars."

Response: The Commission acknowledges the comments and recognizes the potential effect of restricting psychologists' services to persons under the age of 21 years and eligible for the EPSDT program. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by a licensed psychologist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: The HHSC received comments from several individual providers concerning the limitation of the most effective course of treatment for mental illness. For example, one comment received was that the combination of medications and psychotherapy tends to reduce the number of psychotic episodes and medication changes. Another comment was that "behavioral health services have much the same preventive effect that immunization has for physical illness. It prevents the more costly acute care crisis that devastates individuals, families, and health care systems."

Response: The Commission acknowledges the comments and recognizes the potential effect of restricting psychologists' services to persons under the age of 21 years and eligible for the EPSDT program. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by a licensed psychologist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: The Commission received comments concerning the impact on the foster care system of restricting psychologists' services to Medicaid recipients under the age of 21 years and eligible for the EPSDT program. For example, one commenter observed that counseling is often mandatory for parents before the child can be placed back in the place of residence, resulting in children left in the foster care system for longer periods of time. Other comments included: (1) a therapy session with a parent would be covered only if the child remains in the room while therapy takes place. Children should not be present during a therapy session that deals with a parent's history of sexual or physical abuse; (2) therapists who work with foster children are in short supply currently, limiting the providers will make the shortage even more critical and put the children at risk; (3) "HB2292, and the MCAC interpretation of it, limits access to adults for all providers of mental health services and to children for all providers except psychiatrists, serves to abandon children of neglects and abuse statewide."

Response: HHSC acknowledges the comments received and recognizes the impact on the foster care system of restricting psychologists' services, including counseling, performed by licensed psychologists to Medicaid recipients under the age of 21 years and eligible for the EPSDT program. Psychologists' services provided by a licensed psychologist will continue to be available for children under the age of 21 years who are eligible for the EPSDT program without any changes. The rule changes impact services only to the adult population. In order for a state

to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by a licensed psychologist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received comments concerning the lack of "proper psychiatric services" and the impact on the recipients. For example, the rule changes would result in increases in discharges from the facility, violent behaviors, incident reporting to the state, "police reports and/or interventions, depression, delusions, mental disorders, and probably increased death." Another commenter noted that, "50% of older adults who committed suicide had visited their physician in the preceding month."

Response: The Commission acknowledges the comments and recognizes the potential impact of restricting psychologists' services to persons under the age of 21 years and eligible for the EPSDT program. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: The reduction of mental health services "will have unintended consequences for the quality of care and will actually increase the costs of the Medicaid and Vendor Drug programs." The commenter also stated that the "elimination of psychotherapy in the nursing facilities will result in higher related medical, operation, and compliance costs to the State of Texas." The commenter contends that the increased costs will "more than offset the estimated savings of eliminating the fees presently paid to licensed psychologists, professional counselors, social workers, and marriage and family therapist." An invitation to the Commission is extended to participate in gathering additional research "which we feel is necessary because the issues was not fully developed or debated during the Legislative session." Other comments expressed concern with: (1) decreased quality of care; (2) federal guideline compliance issues for long-term care facilities; (3) effects on the care of residents because of staffing issues in the long-term care facilities; and (4) potential for increased incidences and neglect of residents because of resource demands. A final comment expressed opposition to the rule change based on the potential for adverse health consequences and increased costs to the Medicaid and Vendor Drug programs.

The following exhibits were included with the comments: (1) Texas Department of Aging. *The State of Our State on Aging*, Mental Health Section, December 2002; (2) American Journal of Geriatric Psychiatry 7:1, Winter, 1999; (3) *Mental Health: A Report of the Surgeon General*, 1999; (4) AHCA Provider magazine, *Focus on Caregiving*, June 2003; (5) AHCA Provider Magazine, *Identifying Mental Illness*, May 2003; (6) American Journal of Geriatric Psychiatry - Spring 2000; (7) Testimony, Shortage of Geriatric Healthcare Professionals, Special Committee on Aging, United States Senate, Statement for the Record submitted by the American Association for Geriatric Psychiatry, February 2002; (8) *Psychology: Promoting Health and Well-being through High Quality, Cost Effective Treatment*, American Psychological Association, 2001; (9) Long-term Care Forum, Volume 1, Issue 3; (10) New England Journal of Medicine, Vol. 342, No. 20, May 18, 2000; (11) Journal of the American Medical Association - JAMA, Vol. 281, No. 1, January 1999, (12) Clinical Geriatrics, Helen Lavretsky, M.D., Department of Psychiatry and Behavioral Science, UCLA School of Medicine; (13) The American Journal of Psychiatry, 155:871-877, July 1998; (14) JAMA Abstracts - May 28, 1997; (15) Diabetes Care, 25 (3), March 2002; (16) Journal of Psychology in Medical Settings, Vol. 8, No. 4, December 2001; (17) Monitor on Psychology, Volume 33, No. 3, March 2002; (18) Professional Psychology Research and Practice, Vol. 27, No. 2, April 1996; (19) APA Online, *The Cost of Failing to Provide Appropriate Mental Health Care*; (20) APA Practice Directory, *Mental Health Benefit is Cost Effective*, September 1993; (21) APA Online, *Medical Cost Offset*; (22) Health Psychology, November 1995, Vol. 14, No. 6.

Response: The Commission acknowledges the comments and recognizes the potential impact of restricting psychologists' services to persons under the age of 21 years and eligible for the EPSDT program. The changes to the rules are based on lack of appropriated funds. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by a licensed psychologist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received comments from the Texas Council of Community Mental Health and Mental Retardation Centers, Inc., concerning the impact on the Community Mental Health and Mental Retardation Centers. Comments from the Centers were included, for example: (1) approximately 3608 adults will no longer be getting this service; (2) "counseling services in conjunction with medication treatment has proven to be more effective than medication treatment alone in treating individuals with affective disorders"; (3) anticipated financial loss to Centers estimated at $50,000 to $100,000 annually; (4) concern that Centers will experience increased caseloads due to individuals seeking services in the private sector will move to local facilities; (5) one center reports that 65 % of persons receiving services are Medicaid recipients; (6) effect of changes will impact both the mental health areas and the mental retardation areas of the facilities.

Response: The Commission acknowledges the comments and recognizes the potential impact of restricting psychologists' services to Medicaid recipients under the age of 21 years and eligible for the EPSDT program. The changes to the rules are based on lack of appropriated funds. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by a licensed psychologist are optional under federal law.

Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received one comment requesting a review of financial resources to locate funding for psychologists or allow LPCs or LMSWs to continue to provide psychologists' services "as an equitable contrast to psychologists and licensed marriage and family therapists" repealed in H.B. 2292.

Response: The Commission acknowledges the comments and recognizes the potential impact of restricting psychologists' services provided by a licensed psychologist to Medicaid recipients under the age of 21 years and eligible for the EPSDT program. The request of review of financial resources to locate additional funding is outside of HHSC's charge. In addition, in order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by a licensed psychologist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: The HHSC received a comment from the Medical Care Advisory Committee (MCAC) requesting the deletion of §354.1281(e) which limits the provision of psychologists' services by a licensed psychologist to Medicaid recipients under the age of 21 years and eligible for EPSDT services. Several providers supported this comment.

Response: The Commission acknowledges the comments from MCAC requesting the deletion of §354.1281(e) which limits psychologists' services provided by a licensed psychologist to Medicaid recipients under the age of 21 years and eligible for the EPSDT program. The change to the rule is based on the level of funding allocated to HHSC in the General Appropriations Act. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by a licensed psychologist are optional services under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received comments concerning the impact on physical health to which mental health conditions may contribute. The commenter stated that, "Research is showing how various mental health variables such as depression, anger, social support, as well as stress and anxiety can impact people who are recovering from a cardiac event, even significantly impacting the likelihood of whether they will have another heart attack in the near future."

Response: The Commission acknowledges the comments and recognizes the potential impact of restricting psychologists' services to Medicaid recipients under the age of 21 years and eligible for the EPSDT program. The changes to the rules are based on lack of appropriated funds. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by a licensed psychologist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received a comment from the Texas Psychological Association, in which a concern about the potential for reduced quality of care for recipients if the rules are implemented as proposed. "Psychiatrists are trained in medications, most are not trained in psychotherapy. Even those that have some training in psychotherapy do not have the time to spend counseling with their patients. They rely on other professionals such as psychologists to perform this needed service." In addition, the Texas Psychological Association expressed concern over recipient access to services in rural areas of Texas.

Response: The Commission acknowledges the comments and recognizes the potential impact of restricting psychologists' services to Medicaid recipients under the age of 21 years and eligible for the EPSDT program. The changes to the rules are based on lack of appropriated funds. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by a licensed psychologist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received comments from the Medical Care Advisory Committee and the Texas Psychological Association, in which concerns were expressed that the limitation of psychologists' services will result in the exclusion of psychological and neuropsychological testing, which is a necessary diagnostic tool. One comment observed that "psychologists are the only mental health professionals who can provide psychological and neuropsychological evaluations, which are critical to correct diagnosis and treatment in many cases of severe mental illness," as well as, Alzheimer's disorder and Reye's syndrome. Another comment was that, "psychological testing is often the only way to distinguish between neurological deficits and psychological disorders."

Response: The Commission acknowledges the comments, recognizes the potential impact of limiting psychologists' services to persons under the age of 21 years and eligible for EPSDT services, and appreciates the value of services provided to Medicaid recipients by licensed psychologists. The changes to the rules are based solely on the lack of appropriated funds. In order for

a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by a licensed psychologist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comments: HHSC received a comment from the Texas Psychological Association in which the "Final Report of President Bush's New Freedom Commission on Mental Health" was referenced. "The finding of this commission is that mental illness must be given the same priority as physical illness." The New Freedom Commission's report suggested a need for a "transformed system of health care." Two principles were pulled from the report related to a "transformed system": (1) a system that is "consumer and family centered...geared to give consumers real and meaningful choices about treatment options and providers...; (2) and emphasis on "increasing consumers" ability to successfully cope with life's challenges, on facilitating recovery, and on building resilience, not just on managing symptoms." The Association contends that one form for managing symptoms, that is also cost effective, is through the use of medications. "For many of the psychiatric disorders, psychotherapy has been found to be as good as medication and in some disorders better than medication. Psychotherapy is not only a means of managing symptoms but is the way to teach people how to cope with their illness and deal with life's challenges."

Response: The Commission acknowledges the comments and recognizes the potential impact of restricting psychologists' services to Medicaid recipients under the age of 21 years and eligible for the EPSDT program. The changes to the rules are based sole on a lack of appropriated funds. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by a licensed psychologist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: One comment noted that "mental and behavioral health services affect not only quality of life and ability to function to the best of one's ability, but have repeatedly been shown to reduce health care utilization and costs. These cost offset studies are significant, and should be seriously considered when analyzing the expected savings in service cuts." The commenter supplied the following references with the written comments: (1) Vericare Monograph 1, Spring 2002; (2) Vericare Monograph 2, January , 2003; Vericare Monograph 3, February 2003.

Response: The Commission acknowledges the comments and recognizes the potential impact of restricting psychologists' services to Medicaid recipients under the age of 21 years and eligible for the EPSDT program. The changes to the rules are based on lack of appropriated funds. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by a licensed psychologist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received one comment concerning the increase in inpatient psychiatric services for Medicaid recipients in nursing homes. The commenter notes that "This bill will likely increase the usage of inpatient psychiatric hospitals (which are more costly to the State - in 1996 alone the cost of inpatient treatment of Alzheimer's disease, substance abuse and other mental health disorders cost approximately $99 billion - see surgeon general report, chapter 6) by nursing home residents who have not alternative and NO ACCESS to outpatient mental health services (which, by the way is a violation of federal law and may disqualify Texas for federal matching grants).

Response: The Commission acknowledges the comments and recognizes the potential impact of restricting psychologists' services to Medicaid recipients under the age of 21 years and eligible for the EPSDT program. The changes to the rules are based on lack of appropriated funds. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by a licensed psychologist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received a comment concerning the "substandard reimbursement rates" of the Medicare and Medicaid programs which affects delivery of psychiatry and psychological services to residents of nursing homes. "PARITY between payments to medical practitioners and psychologists is still an unreality, despite the many justifications to correct this injustice." In addition, the commenter noted that the amendment was contrary to President Bush's mandate that "We must work for a welcoming and compassionate society where no American is dismissed and no American is forgotten. We must give all Americans who suffer from mental illness the treatment and the respect they deserve."

Response: The Commission acknowledges the comments and recognizes the potential impact of restricting psychologists' services to Medicaid recipients under the age of 21 years and eligible for the EPSDT program. The changes to the rules are based on lack of appropriated funds. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients.

Certain other health care services are optional and need not be provided to adults age 21 and over. Psychologists' services provided by a licensed psychologist are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to psychologists' services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

The amendments are adopted under the Texas Government Code, §531.033, which provides the Commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide the Health and Human Services Commission (HHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Government Code, §2001.006, which allows state agencies to adopt rules in preparation for the implementation of legislation.

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 August 11, 2003.

TRD-200305003
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

DIVISION 29. LICENSED PROFESSIONAL COUNSELORS AND ADVANCED CLINICAL PRACTITIONERS

1 TAC §354.1381, §354.1382

The Health and Human Services Commission (HHSC or Commission) adopts the amendments to §354.1381, Benefits and Limitations, and §354.1382, Conditions for Participation, without changes to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4706), and will not be republished.

The amendment to §354.1381 restricts the provision of counseling services provided by licensed marriage and family therapists (LMFT), licensed professional counselors (LPC), and licensed master social worker-advanced clinical practitioners (LMSW-ACP) to Medicaid recipients who are under the age of 21 years and eligible for the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program under 25 TAC Chapter 33. The amendment to §354.1382 adds language to allow an exception for providers who meet the criteria specified in §354.1173(b) to the requirement that Medicaid providers must be enrolled in Medicare. This change is for clarification purposes and links the two sections of the Texas Administrative Code. The proposed amendments also replace references to the Texas Department of Health with references to HHSC. The amendment to §354.1381 is necessary because of a lack of available appropriated funds to continue counseling services for Medicaid recipients who are 21 years of age and older, and for persons under the age of 21 years who are not eligible for the EPSDT program. The proposed amendment to §354.1381 was necessary to remain within the level of funding allocated to the Commission in the General Appropriations Act, 78th Leg., R.S. (2003). The amended rules are effective 20 days after submission to the Secretary of State.

The Commission received written comments concerning §354.1381 and §354.1382 during the 30-day comment period from June 27 to July 28, 2003. A summary of the comments and HHSC's responses follow.

Comment: Concerning the rule §354.1381 in general, comments were received from the Texas Health Care Association, the Center for Public Policy Priorities, the Texas Technology Access Project and the Disability Policy Consortium, the Texas Counseling Association, the Texas Association for Marriage and Family Therapy, Inc., the Medical Care Advisory Committee, the Texas Council on Family Violence, Hardin-Simmons University, the Texas Council of Community Mental Health and Mental Retardation, the National Alliance of Mental Health, Austin-Travis County Mental Health and Mental Retardation and, 283 private individuals and providers opposed to the rule and expressed concern about the potential effects of eliminating counseling services provided by an LMFT, LPC, or LMSW-ACP to the population 21 years of age and older. For example, several comments expressed concern that eliminating the services provided by LMFTs, LPCs, and LMSW-ACPs would result in increased expenditures for emergency care, inpatient hospitalizations, and medications.

Other comments addressing §354.1381 included concerns about the following: (1) access to care if reimbursement of counseling services, for persons age 21 years and older, is limited to psychiatrists; (2) the availability of psychiatrists to pick up counseling services when currently, there is a waiting period of 3-8 weeks to schedule appointments currently; (3) the hardship to recipients who would need to travel to other areas for services because a psychiatrist is not available in the area in which the recipients live; (4) the quality of care provided to recipients when psychiatrists are accustomed to seeing patients for the purpose of prescribing medications and not for long-term counseling; (5) the physical and mental impact to recipients who utilize counseling services in conjunction with medications; (6) the impact to family members who care for or live with persons receiving counseling services currently; (7) the impact to health conditions for recipients who are terminally ill, chronically ill, or those experiencing long-term illness and the improved health benefits to these individuals with the use of counseling in conjunction with physical health treatment; (8) perpetuating a system reliant on Medicaid and Social Security benefits; (9) the increased short and long-term costs for state of Texas.

Response: The Commission acknowledges the comments received, recognizes the potential impact of limiting counseling services, provided by LMFTs, LPCs, and LMSW-ACPs, to persons under the age of 21 years and eligible for EPSDT services, and appreciates the value of services provided by LMFTs, LPCs, and LMSW-ACPs. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, and LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC

concluded that the proposed limitations to counseling services are necessary in order to remain within appropriated limits. No change was made to the rule in response to these comments.

Comment: One commenter recommended working with the community to secure funding for counseling services and to establish monitoring and reporting to legislative committees to illustrate the impact on patient care.

Response: HHSC acknowledges the comment received. These recommendations are outside of the Commission's charge; therefore, no change was made to the rules in response to these recommendations.

Comments: Comments were received from the Texas Association for Marriage and Family Therapy, Inc., and several private individuals and providers, requesting the deletion of §354.1381 (d), which restricts counseling services provided by LMFTs, LPCs, or LMSW-ACPs to Medicaid recipients who are under the age of 21 years and eligible for EPSDT services.

Response: HHSC acknowledges the comment to delete §354.1381(d). In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, or LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to counseling services are necessary to remain within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received several comments concerning the necessity of restricting counseling services provided by LMFTs, LPCs, or LMSW-ACPs to persons under the age of 21 years and eligible for the EPSDT program, stating this rule change is not required to bring the rules into compliance with H.B. 2292, 78th Leg., R.S. (2003).

Response: HHSC acknowledges and agrees with the comments. However, in order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, or LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to counseling services are necessary to stay within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received several comments expressing concern with the access to counseling services for individuals who are 21 years of age and older and federal requirements for accessibility for covered services. The Texas Association for Marriage and Family Therapists noted that, currently, 36 counties in Texas do not have a mental health provider. However, 173 Texas counties do not have a psychiatrist in their area which represents an access issue for Medicaid recipients 21 years of age and older in need of counseling services. The Texas Council of Community Mental Health and Mental Retardation Centers, Inc., stated that 26 of the 42 Community Mental Health and Mental Retardation Centers reported that "approximately 3608 adults will no longer be getting this service" due to the rule change. One commenter stated that in the counties of Travis and Williamson, "there are over 4,000 licensed Medicaid nursing facility beds with only two psychiatrists" providing services to residents of nursing facilities in these counties. Another commenter explained the difficulty in getting psychiatric services in a rural community and that rural communities tend to rely on other mental health providers for counseling services.

Response: The Commission acknowledges the comments and recognizes the potential effects on access to counseling services for individuals who are 21 years of age and older. The state is required to ensure accessibility of services when those services are mandated and defined in the state's Medicaid State Plan. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, or LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to counseling services are necessary to stay within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received 53 comments stating that, "receiving appropriate mental health services is known to decrease the amount of money spent on physical health issues for people. Take care of a person's mental health, and their physical health will improve too."

Response: The Commission acknowledges the comments and recognizes the potential effects of restricting counseling services provided by LMFTs, LPCs, or LMSW-ACPs to Medicaid recipients under the age of 21 years and eligible for the EPSDT program. However, in order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, or LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to counseling services are necessary to stay within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received 35 comments requesting that the Commission not adopt §354.1381(e).

Response: The Commission disagrees with the comments received. The proposed rules §354.1381 do not include a paragraph (e). No change was made to the rule in response to these comments.

Comment: Concerning the amendment to §354.1381, HHSC received 12 comments about the current decrease in emergency room capacity, and the increase in cost associated with these rule changes to a system that is already stretched. The comments generally expressed the belief that eliminating LMFTs, LPCs, and LMSW-ACPs as providers of counseling services to Medicaid recipients 21 years of age and older will lead to increased utilization of emergency room services. They further state that, "psychotherapy and counseling services can be the

stabilizing factor for someone with mental illness. The withdrawal of these supports will likely result in the increased severity of symptoms and a decrease in stress tolerance and the ability to utilize effective coping strategies."

Response: The Commission acknowledges the comments and recognizes the potential effects of restricting counseling services provided by LMFTs, LPCs, or LMSW-ACPs to Medicaid recipients under the age of 21 years and eligible for the EPSDT program. However, in order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, or LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to counseling to stay within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: Concerning the amendment to §354.1381, HHSC received 12 comments expressing concern over the decreased availability of community mental health facilities to absorb the "cost of providing all of the needed supports for Medicaid covered adults and could not if they did not meet priority population guidelines" if the amendment is adopted.

Response: The Commission acknowledges the comments received and recognizes the potential effects of restricting counseling services provided by LMFTs, LPCs, or LMSW-ACPs to persons under the age of 21 years and eligible for EPSDT services. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, or LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to counseling services are necessary to stay within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received 24 comments concerning the impact to long-term care facilities of restricting counseling services provided by LMFTs, LPCs, or LMSW-ACPs to persons under the age of 21 years and eligible for EPSDT. The commenters contend that these rule changes limit the long-term care facility's ability to comply with OBRA 1987 and OBRA 1997. Additional comments include concerns about the: (1) impact to the facilities related to increased cost of delivering services due to "uncooperative residents, staff stress, and instances of abuse and neglects due to the lack of training and regular assistance and counsel from psychologists and therapists"; (2) increase in "falls and other accidents requiring medical attention due to the higher use of physical and chemical restraints that will be employed where therapy would have been affective" in modifying behaviors; (3) elimination of counseling services provided by LMFTs, LPCs, or LMSW-ACPs to the adult population which "would mean that my facility can no longer manage these residents behaviors, they have to be discharged to a State facility that already is suffering budget cuts and closures or to the Police Department because of violent behaviors."

Response: The Commission acknowledges the comments received and recognizes the potential effects of restricting counseling services provided by LMFTs, LPCs, or LMSW-ACPs to persons under the age of 21 years and eligible for EPSDT services. Long-term facilities will be required to continue to comply with federal regulations governing quality of care for residents of long-term care facilities. The rule changes speak only to what services the Texas Medicaid program will continue to reimburse. How to provide quality care in long-term care facilities will be the decision of the persons involved in the individual treatment planning for long-term care residents. In addition, in order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, or LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to counseling services are necessary to stay within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received comments from the Medical Care Advisory Committee and other private individuals concerning the implementation of §354.1381 as proposed and the impact to the local governments, small or micro businesses, private practices, and local health and human service agencies. The commenters expressed a belief that local government and local health and human services agencies would incur additional costs and that small or micro businesses would incur additional costs.

Response: The Commission acknowledges the comments and recognizes the potential impact of requests to local governments and local health and human service agencies to reimburse for or furnish counseling services previously covered through the Texas Medicaid program. The Commission also recognizes the potential impact on small or micro businesses and private practices of implementing the rule as proposed. However, the determination of fiscal impact is based on the conclusion that neither local governments and health and human services agencies nor small or micro businesses are required to alter their practices in order to comply with the amendments. The distinction is between compliance with the law and the economic effect of implementation of the law by others. The potential impact to local governments and local health and human service agencies is difficult for HHSC to quantify because HHSC cannot anticipate the responses from the entities to any requests to furnish or reimburse for counseling services. It would also be difficult to quantify the potential impact on small or micro businesses and private practices because HHSC cannot anticipate responses from these entities. The state does not require anything from providers or businesses to comply with these rules, i.e. computer software, new forms, new computer systems. No change was made to the rules in response to these comments.

Comment: HHSC received comments concerning the impact to businesses in general. For example, one comment described the impact to personnel (layoffs), decreased salaries to providers, reduction in providers because they cannot afford to stay in business.

Response: The Commission acknowledges the comments and recognizes the potential impact of implementing the amendment to §354.1381. In order for a state to participate in the Medicaid program, the federal government requires that certain health

care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, or LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to counseling services are necessary to stay within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: Concerning the rules in general, HHSC received comments from the Texas Council on Family Violence and several private providers concerning the impact to family violence programs and the recipients of family violence services. For example, one comment explained that the majority of counseling services for the family violence programs are provided by community agencies and paid for by Medicaid. Another comment was that these rules "eliminate an integral component of the comprehensive spectrum of services needed by victims of family violence." Another comment expressed concern that "abusers and victims will fall back onto other avenues of function through law enforcement, through Protective and Regulatory Services, and through additional repeat visits to domestic violence organizations."

Response: The Commission acknowledges the comments and recognizes the potential impact in implementing the rules. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, or LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to counseling services are necessary to stay within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received comments from several providers concerning the delivery of counseling services by primary care physicians. One commenter contends that this is not "very effective in treating mental disorders." There is reference made to a Federally funded study reported in the Houston Chronicle that states that "PCPs often under diagnose or under medicate individuals with Clinical Depression. This is inappropriate treatment which results in ineffective service delivery that costs the health care system significant amounts of "wasted" health care dollars."

Response: The Commission acknowledges the comments and recognizes the potential effect of restricting counseling services to persons under the age of 21 years and eligible for the EPSDT program. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, or LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to counseling services are necessary to stay within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: The HHSC received comments from several individual providers concerning the limitation of the most effective course of treatment for mental illness. For example, one comment received was that the combination of medications and psychotherapy tends to reduce the number of psychotic episodes and medication changes. Another comment was that "behavioral health services have much the same preventive effect that immunization has for physical illness. It prevents the more costly acute care crisis that devastates individuals, families, and health care systems."

Response: The Commission acknowledges the comments and recognizes the potential effect of restricting counseling services to persons under the age of 21 years and eligible for the EPSDT program. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, or LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to counseling services are necessary to stay within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: The Commission received comments concerning the impact on the foster care system of restricting counseling services provided by LMFTs, LPCs, or LMSW-ACPs, for Medicaid recipients under the age of 21 years and eligible for the EPSDT program. For example, one commenter observed that counseling is often mandatory for parents before the child can be placed back to the place of residence, resulting in children left in the foster care system for longer periods of time. Other comments included: (1) a therapy session with a parent would be covered only if the child remains in the room while therapy takes place. Children should not be present during a therapy session that deals with a parent's history of sexual or physical abuse; (2) therapists who work with foster children are in short supply currently, limiting the providers will make the shortage even more critical and put the children at risk; (3) "HB2292, and the MCAC interpretation of it, limits access to adults for all providers of mental health services and to children for all providers except psychiatrists, serves to abandon children of neglects and abuse statewide."

Response: HHSC acknowledges the comments received and recognizes the impact on the foster care system of restricting counseling services provided by LMFTs, LPCs, or LMSW-ACPs, to the persons under the age of 21 years and eligible for the EPSDT program. Counseling services will continue to be available for children under the age of 21 years who are eligible for the EPSDT program without any changes. The rule changes impact services only to the adult population. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, or LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to counseling services are necessary to stay within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received one comment that the elimination of counseling services provided by LMFTs, LPCs, or LMSW-ACPs "discriminates against persons with mental illness, while suggesting that only medical illness presents as life threatening."

Response: The Commission disagrees with the comment. The changes to rules are based on lack of appropriated funds only and do not compare one illness to another. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, or LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to counseling services are necessary to stay within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received one comment concerning restricting counseling services provided by LMFTs, LPCs, or LMSW-ACPs, to psychiatrists and contends this is "restraint of trade for those licensed to treat with psychotherapy."

Response: The Commission disagrees with the comment. The changes to the rules are necessary due only to a lack of appropriated funds. Federal law mandates that physician services are covered services. Counseling services provided by persons other than a physician are optional services. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, or LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to counseling services are necessary to stay within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received one comment concerning the lack of "proper psychiatric services" and the impact on the recipients. For example, the rule changes would result in increases in discharges from the facility, violent behaviors, incident reporting to the state, "police reports and/or interventions, depression, delusions, mental disorders, and probably increased death."

Response: The Commission acknowledges the comments and recognizes the potential impact of restricting counseling services provided by LMFTs, LPCs, or LMSW-ACPs to persons under the age of 21 years and eligible for the EPSDT program. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, or LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to counseling services are necessary to stay within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: The reduction of mental health services "will have unintended consequences for the quality of care and will actually increase the costs of the Medicaid and Vendor Drug programs." The commenter also stated that the "elimination of psychotherapy in the nursing facilities will result in higher related medical, operation, and compliance costs to the State of Texas." The commenter contends that the increased costs will "more than offset the estimated savings of eliminating the fees presently paid to licensed psychologists, professional counselors, social workers, and marriage and family therapist." An invitation to the Commission is extended to participate in gathering additional research "which we feel is necessary because the issues was not fully developed or debated during the Legislative session." Other comments expressed concern with: (1) decreased quality of care; (2) federal guideline compliance issues for long-term care facilities; (3) effects on the care of residents because of staffing issues in the long-term care facilities; and (4) potential for increased incidences and neglect of residents because of resource demands. A final comment expresses opposition to the rule change based on the potential for adverse health consequences and increased costs to the Medicaid and Vendor Drug programs.

The following exhibits were included with the comments: (1) Texas Department of Aging. The State of Our State on Aging, Mental Health Section, December 2002; (2) American Journal of Geriatric Psychiatry 7:1, Winter, 1999; (3) Mental Health: A Report of the Surgeon General, 1999; (4) AHCA Provider magazine, Focus on Caregiving, June 2003; (5) AHCA Provider Magazine, Identifying Mental Illness, May 2003; (6) American Journal of Geriatric Psychiatry - Spring 2000; (7) Testimony, Shortage of Geriatric Healthcare Professionals, Special Committee on Aging, United States Senate, Statement for the Record submitted by the American Association for Geriatric Psychiatry, February 2002; (8) Psychology: Promoting Health and Well-being through High Quality, Cost Effective Treatment, American Psychological Association, 2001; (9) Long-term Care Forum, Volume 1, Issue 3; (10) New England Journal of Medicine, Vol. 342, No. 20, May 18, 2000; (11) Journal of the American Medical Association - JAMA, Vol. 281, No. 1, January 1999, (12) Clinical Geriatrics, Helen Lavretsky, M.D., Department of Psychiatry and Behavioral Science, UCLA School of Medicine; (13) The American Journal of Psychiatry, 155:871-877, July 1998; (14) JAMA Abstracts - May 28, 1997; (15) Diabetes Care, 25 (3), March 2002; (16) Journal of Psychology in Medical Settings, Vol. 8, No. 4, December 2001; (17) Monitor on Psychology, Volume 33, No. 3, March 2002; (18) Professional Psychology Research and Practice, Vol. 27, No. 2, April 1996; (19) APA Online, The Cost of Failing to Provide Appropriate Mental Health Care; (20) APA Practice Directory, Mental Health Benefit is Cost Effective, September 1993; (21) APA Online, Medical Cost Offset; (22) Health Psychology, November 1995, Vol. 14, No. 6.

Response: The Commission acknowledges the comments and recognizes the potential impact of restricting counseling services provided by LMFTs, LPCs, or LMSW-ACPs to persons under the age of 21 years and eligible for the EPSDT program. The changes to the rules are based on lack of appropriated funds. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, or LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded

that the proposed limitations to counseling services are necessary to stay within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received comments from the Texas Council of Community Mental Health and Mental Retardation Centers, Inc., concerning the impact to the Community Mental Health and Mental Retardation Centers. Comments from the Centers were included, for example: (1) approximately 3608 adults will no longer be getting this service; (2) "counseling services in conjunction with medication treatment has proven to be more effective than medication treatment alone in treating individuals with affective disorders"; (3) anticipated financial loss to Centers estimated at $50,000 to $100,000 annually; (4) concern that Centers will experience increased caseloads due to individuals seeking services in the private sector will move to local facilities; (5) one center reports 65 % of persons receiving services are Medicaid recipients; (6) effect of changes will impact both the mental health areas and the mental retardation areas of the facilities.

Response: The Commission acknowledges the comments and recognizes the potential impact of restricting counseling services provided by LMFTs, LPCs, or LMSW-ACPs to persons under the age of 21 years and eligible for the EPSDT program. The changes to the rules are based on lack of appropriated funds. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, or LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to counseling services are necessary to stay within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: HHSC received one comment requesting a review of financial resources to locate funding for psychologists or allow LPCs or LMSWs to continue to provide counseling services "as an equitable contrast to psychologists and licensed marriage and family therapists" repealed in H.B. 2292.

Response: The Commission acknowledges the comments and recognizes the potential impact of restricting counseling services provided by LMFTs, LPCs, or LMSW-ACPs to persons under the age of 21 years and eligible for the EPSDT program. The request of review of financial resources to locate additional funding is outside of HHSC's charge. In addition, in order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, or LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to counseling services are necessary to stay within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

Comment: The HHSC received a comment from the Medical Care Advisory Committee (MCAC) requesting the deletion of §354.1381(d) which limits the provision of counseling services provided by LMFTs, LPCs, or LMSW-ACPs to persons under the age of 21 years and eligible for EPSDT services. This comment from MCAC was supported by several providers also.

Response: The Commission acknowledges the comments from MCAC requesting the deletion of §354.1381(d) which limits counseling services provided by LMFTs, LPCs, or LMSW-ACPs to persons under the age of 21 years and eligible for the EPSDT program. The change to the rule is based on the level of funding allocated to HHSC in the General Appropriations Act. In order for a state to participate in the Medicaid program, the federal government requires that certain health care services be available to Medicaid recipients. Certain other health care services are optional and need not be provided to adults age 21 and over. Counseling services provided by LMFTs, LPCs, or LMSW-ACPs are optional under federal law. Based on the Legislature's decision to continue participation in the Medicaid program and on the level of appropriated funds, HHSC concluded that the proposed limitations to counseling services are necessary to stay within levels of funding allocated to HHSC in the General Appropriations Act. No change was made to the rule in response to these comments.

The amendments are adopted under the Texas Government Code, §531.033, which provides the Commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide the Health and Human Services Commission (HHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Government Code, §2001.006, which allows state agencies to adopt rules in preparation for the implementation of legislation.

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 August 11, 2003.

TRD-200305004
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

CHAPTER 355. MEDICAID REIMBURSEMENT RATES

SUBCHAPTER A. COST DETERMINATION PROCESS

1 TAC §355.112

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §355.112 without changes to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4707) and will not be republished.

This amendment is adopted to ensure that the Attendant Compensation Rate Enhancement system does not exceed appropriated funding levels and does not cause reductions to the add-on payment amounts paid to existing participating providers. The amendment restricts new community care contracted providers

from participating in the Attendant Compensation Rate Enhancement and from receiving the enhanced rate add-on amounts when funds are not available. If funding becomes available to grant additional enhanced rates, new contracted providers will have the opportunity to participate in enhanced rates during the subsequent open enrollment period.

HHSC received no comments regarding adoption of the amendment.

The amendment is adopted under the Texas Government Code, §531.033, which authorizes the commissioner of HHSC to adopt rules necessary to carry out the commission's duties; and §531.021(a), which established HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The amendment is adopted under the Texas Government Code, §531.033 which provides the Commissioner of HHSC with broad rulemaking authority, and §531.021(b) which provides HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

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 August 11, 2003.

TRD-200304988
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

SUBCHAPTER B. ESTABLISHMENT AND ADJUSTMENT OF REIMBURSEMENT RATES BY THE HEALTH AND HUMAN SERVICES COMMISSION

1 TAC §355.201

The Health and Human Services Commission ("Commission") adopts new §355.201 in 1 TAC Chapter 355, Medicaid Reimbursement Rates, Subchapter B, Establishment and Adjustment of Reimbursement Rates by the Health and Human Services Commission, with changes, to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4708). The text of the rule will be republished.

The Commission conducted three public hearings and received public testimony concerning the proposed rule: the first at the June 26, 2003, meeting of the Commission's Hospital Payment Advisory Committee, the second at the July 10, 2003, meeting of the Commission's Medical Care Advisory Committee, and the third at a public hearing held on July 16, 2003, for the purpose of obtaining additional public comment on the proposed rule. The Commission received oral testimony and written comments from seventeen individuals, including representatives of the Texas Hospital Association, Texas Medical Association, Texas Health Care Association, Texas Association of Public and Non-Profit Hospitals, Rio Grande Valley Pharmacy Association, Texas Pharmacy Association, Catholic Health Association of Texas, and Texas Dental Association.

One commenter urged against the adoption of the proposed rule and requested a more concise statement of the principal reasons for and against adoption of the rule in accordance with §2001.030 of the Administrative Procedure Act. A summary of the comments submitted for and against the adoption of the rule, and the Commission's responses to the comments, are provided below.

The principal reasons for the adoption of the rule is the enactment of §531.021(d) and (e) of the Government Code. This provision, which is effective September 1, 2003, authorizes the Commission to provide for payment of rates fees, and charges, in accordance with methodologies codified in the Commission's rules, state or federal law, economic conditions that in the Commission's determination substantially and materially affect provider participation, and levels of appropriated funds. The rule does not change or prescribe the methodologies by which payment rates, fees, and charges are established, nor does it implement specific rate adjustments. It merely provides a framework for the Commission to respond to changes in ways that may not adequately be addressed in a rate setting methodology.

In addition, the adoption of the rule is supported by the Legislature's previous enactment of §32.0281(b)(5) of the Human Resources Code in 1989. This statute provides that, in adopting rules to determine payment rates, the Commission must include "a method of adjusting rates if new legislation, regulations, or economic factors affect costs". Section 531.021(d) and (e) elaborate on the Commission's authority under §32.0281(b)(5). Another basis for the adoption of the rule is its similarity to two current rules of the Commission. Section 355.109 (applicable to the Medicaid nursing facility and long term care programs) and §355.706 (applicable to Medicaid Intermediate Care Facilities for the Mentally Retarded program) "that have been in effect since 1996 and 1999, respectively, and partially implement the authority granted by §32.0281(b)(5). Both current rules provide for the adjustment of reimbursement rates in response to economic factors, changes in the law, and when changes in law affect the availability of funding. Neither rule requires advance notice or publication of proposed rate adjustments; however, other rules applicable to these programs require 10 working days" notice and publication in the *Texas Register* of such changes. The new §355.201 elaborates on this process and provides additional opportunities for public participation that are not reflected in the two current rules.

In addition, several comments appear to presume the rule as proposed affects a reduction in reimbursement rates. The rule does not change any reimbursement or payment rate but merely provides the Commission the flexibility to adjust rates--either upward or downward--in accordance with the guidelines referenced in §531.021(d) and to address the specific circumstances described in the section. Further, the rule implements a specific change in the law enacted by the 78th Legislature and thus attempts to equip the Commission to fulfill legislative intent, specifically as reflected in the appropriation of funds.

Several commenters objected to the amount of time allowed in the rule for prior notice of a proposed rate change taken pursuant to the proposed rule. One commenter recommended a notice of 45 days before the effective date of the proposed rate change; other commenters recommended a 30-day advance notification.

The Commission agrees with the comments but does not agree that 45 days or 30 days advance notice is an appropriate length of time to permit the Commission to respond to fiscal directives or economic conditions that may compel or permit consideration of a rate adjustment. The Commission believes that a minimum 10 state working days prior notice, when considered in conjunction with the public hearing requirement of §32.0282, Human Resources Code and the publication schedule of the *Texas Register*, provides ample time for interested parties to consider and provide input into the process. The Commission has revised subsections (e) and (f) of the new rule accordingly.

Two commenters stated that the proposed rule is vague, either because it does not prescribe a specific methodology to govern how the Commission will go about adjusting a payment rate or because it does not offer a provider the opportunity to predict or anticipate reimbursement levels.

The Commission disagrees with these comments. As the preamble to the proposed rule explained, the Commission believes the Legislature specifically intended to provide the Commission with the flexibility to set payment rates, fees, and charges in response to changes in the law, acute economic conditions, compelling circumstances that affect provider participation or costs, or to comply with legislative decisions concerning the appropriation of funds. Neither the proposed rule nor the statute that it is based on indicate that a provider will be deprived of the opportunity to anticipate the effect of a rate adjustment that supported the enactment of §531.021(d) and (e). Indeed, the rule provides for public notice and a public hearing concerning the proposed adjustment. Thus, it is unclear how a provider would not have the opportunity to consider the impact of a proposed adjustment and provide meaningful comments to the Commission concerning the change before it became effective.

The same commenter stated that the proposed rule does not comport with the plain meaning and legislative intent of §531.021(e) or with §32.0281 and §32.0282 of the Human Resources Code. The commenter stated that the requirements contained in the latter provisions must be complied with in the administration of the proposed rule. For example, the commenter stated, one of the provisions invokes the provisions of the Administrative Procedure Act and the other requires public hearings to allow interested persons to supply comments to the proposed payment rates. The commenter noted the plain language of §531.021(e) that "[n]otwithstanding any other provision of Chapter 32, Human Resources Code," the Commission was authorized to adjust reimbursement rates under the circumstances described in subsection (d). The commenter stated, however, that the Commission is nonetheless constrained by §32.0281 and §32.0282 in implementing §531.021(e).

This interpretation disregards the plain language of §531.021(e). It also overlooks the public notice and hearing requirements of the proposed rule. The Commission believes these provisions substantially comply with the public policy reflected in §32.0281 and §32.0282 even though those provisions do not, by the plain language of §531.021(e), restrict the discretion conferred on the Commission. Accordingly, the Commission disagrees with the comment.

The same commenter, addressing the Commission on behalf of pharmacy providers, observed that the rule must comply with federal law regarding the establishment of payment rates and the contract with the Commission's Medicaid Vendor Drug Program. The comment implies that the mere adoption of the rule or an action taken under it to reduce a reimbursement rate would violate federal law.

The commenter also stated that the effect of the rule is to require pharmacies to execute an open-ended, unilateral contract amendment with no meaningful input as to its impact. The commenter concluded that the rule directly impairs pharmacies' contract rights.

The Commission is unaware of any specific provision of federal law that prohibits the Commission's implementation of §531.021(d) and (e) through the proposed rule. Consequently, the Commission disagrees with the comment. Furthermore, the provider agreement executed by pharmacies that participate in the Vendor Drug Program is expressly made subject to applicable state and federal law and regulations. Thus, it is incorrect to state that the rule per se violates the terms of the contract or otherwise impairs the contract rights of pharmacies, since the contract itself incorporates the provisions of state and federal law and the rule, comprising and implementing state law, makes no change in reimbursement rates.

One commenter stated that the proposed rule is the very antithesis of the public participation provisions of the Texas Administrative Procedure Act, which require public participation in the rulemaking process.

The Commission agrees that the Administrative Procedure Act requires substantial opportunity for the public to participate in the administrative rule making process and believes that this policy has been substantially complied with in the adoption of this rule. However, the Commission disagrees that the same criteria apply under the Administrative Procedure Act with respect to the adoption of reimbursement rates, particularly since neither Chapter 32 of the Human Resources Code nor §531.021 of the Government Code expressly so provide. Neither is the Commission aware of a specific provision of another statute that requires Medicaid payment rates to be adopted in accordance with the rulemaking provisions of the Administrative Procedure Act.

Nonetheless, the Commission appreciates the concern expressed by the commenter concerning the development of rate adjustments under the rule. The Commission believes the rule provides reasonable opportunity for public participation in the adjustment of rates under the rule and thus attempts to strike a fair balance between the public interest in participation and the public necessity to address economic circumstances, provider participation concerns, and limits on the availability of appropriated funds.

One commenter stated that the proposed rule violates Government Code §2001.023, which requires at least 30 days' notice of a state agency's intention to adopt an administrative rule and filing of notice of such intent with the secretary of state for publication in the *Texas Register*.

Again, the Commission disagrees that the provisions of the Administrative Procedure Act that relate only to the adoption of administrative rules by a state agency are applicable to the adoption of payment rates by an administrative agency. Accordingly, the Commission disagrees with the comment.

The same commenter noted that the proposed rule is contrary to the intent of §2.03 of House Bill 2292 in that the proposed rule does not provide that the Legislature and the impacted providers are informed fully and involved in the development of the proposed changes. The commenter recommended that the notice

of a proposed rate adjustment be published in the *Texas Register* and be combined with provider notification.

The Commission is unaware of any specific intent concerning §2.03 relating to notification of providers and the Legislature and thus generally disagrees with this comment. Section 32.0281, Human Resources Code, requires the Commission to notify the Legislative Budget Board and Governor's office concerning the process by which it sets rates. The new rule, furthermore, establishes processes for obtaining provider input before adoption of rate adjustment under the rule.

Nevertheless, the Commission agrees that publication in the *Texas Register* would ensure additional time and opportunity for interested parties to become aware of proposed adjustments to rates and to provide input. The Commission has modified subsection (e) of the rule to require publication in the *Texas Register* and on the agency's web site. The Commission also believes the recommendation concerning provider notification is worthwhile, but requires additional research concerning potential fiscal impact and should be coordinated with provider groups before implementation. Accordingly, the Commission has modified subsection (e) to permit the Commission to issue written or electronic notification to providers if economically feasible.

The same commenter recommended deletion of subsection (c)(3) and (4) of the new rule. The commenter argued that these provisions allow HHSC to have the unfettered ability and an overly broad scope of authority to change reimbursement rates with minimal notice to providers based on consideration of economic factors that HHSC determines have or may have a significant and measurable effect on provider participation or their ability to deliver services.

The Commission notes in response that subsection (c)(3) and (4) implement specific provisions of new §531.021(d). The Commission is required to implement these provisions and believes the rule applies reasonable criteria to do so.

Several commenters advised the Commission of the impact of rate reductions on providers' ability to deliver services and supply access to healthcare. Some requested the Commission take action regarding specific rate reductions, some currently proposed for implementation in the next state fiscal biennium. One commenter asked the Commission to analyze how the adjustment of rates will affect the different regions of the state. The commenter noted that independent pharmacists average a net profit of two percent, so, even a small reduction in overall reimbursements could have disastrous results in Medicaid patient access to pharmacy services. The commenter stated that affidavits and analyses conducted by an independent consultant group were available to attest to the truthfulness of this statement. The commenter suggested that the Commission adopt a minimum two-year time period for the adjustments to be in effect should be established.

One commenter claimed that the state receives a net economic gain from expenditures on nursing facilities, requested that the proposed decrease in nursing facility rates be delayed and recommended that a team of experts be assembled to develop a rate methodology that provides rate increases tied to certain spending requirements.

Three commenters stated that reductions in Medicaid payments rates would negatively impact the services available for medically fragile Medicaid-eligible children living in their own homes. All three commenters requested that everything possible be done to increase Medicaid rates, not reduce them.

Two commenters stated that reductions in Medicaid payments to hospitals would significantly impact the financial situation of the hospitals, potentially causing the hospitals to reduce services or cut programs in order to remain financially viable. One commenter stated that drug cost reimbursement in Texas is the lowest in the nation and, as such, reductions in rates could result in access issues, especially in rural and under-served areas where low-volume pharmacies have higher acquisition costs.

The Commission appreciates these comments and recommendations but believes that they are more germane to the issue of implementing a rate reduction, rather than to the rule. The Commission will, however, take the recommendations under advisement in addressing currently proposed rate reductions.

Another commenter, commenting on behalf of the Texas Association of Public and Nonprofit Hospitals (TAPNH), unequivocally opposed the adoption of the new rule. The commenter stated that any change to Medicaid reimbursements to hospitals significantly impacts the financial situation of TAPNH members who provide approximately 40% of the Medicaid inpatient hospital care in Texas and more than 50% of the care for indigent patients.

The commenter also noted that the proposed rule provides the Commission the authority to change Medicaid hospital rates without going through the current rulemaking process that involves full and open public discussion and implement reimbursement changes by giving providers a 10-day notice of the change. The Commission is mandated by House Bill 18 of the 70th Legislature to bring all hospital-related reimbursement changes to Hospital Payment Advisory Committee. Additionally, HHSC is required by federal law to have a Medical Care Advisory Committee to oversee its Medicaid program.

Another commenter noted the similar role of the Physician Payment Advisory Committee in the Commission's establishment of payment rates for physician services.

The Commission appreciates the comments but disagrees with the recommendation. The new rule is specifically intended to implement new state law. Furthermore, §531.021(e) specifically authorizes the Commission to act "[n]otwithstanding any other provision of Chapter 32, Human Resources Code," including §32.022, the statute that established the Hospital Payment Advisory Committee. Nevertheless, the Commission anticipates that proposed changes to hospital and physician reimbursement rates taken pursuant to the new rule will be presented to the Hospital Payment Advisory Committee and Physician Payment Advisory Committee before adoption, but §531.021(e) also appears to anticipate circumstances under which this may not be possible.

Eleven commenters stated that the proposed rule does not allow adequate notice of and opportunity for comment on future proposed changes to payment rates prior to their adoption. One commenter stated that this is a right available to providers under 42 U.S.C. §1396a(a)(13), while another stated that the minimum 10-day notice is a violation of the spirit, if not the letter, of Senate Bill 487 of the 71st Texas Legislature. Three commenters noted that providers are required to give 30 days' notice before withdrawal from the Medicaid program and, as such, be afforded at least the same amount of notice of adjustments to rates by the Commission. One commenter recommended that the 10-day notice be revised to at least 45 days.

The Commission disagrees with the suggestion of one commenter that the rule violates 42 U.S.C. §1396a(a)(13). This provision, added by the Balanced Budget Act of 1997, requires a state to ensure that institutional provider rates are accomplished pursuant to a public process that informs the public of proposed and final rates, the methodologies that underlie those rates, the justification for such rates, and provides the public a reasonable opportunity to comment on the proposed and final rates. The new rule requires the Commission to publish the adjustment to a rate and invite public comment on the rate. The statute does not require a public hearing, nor does it specify the timeframes for obtaining public input. The Commission believes that the new rule, as modified to include publication in the *Texas Register* and a public hearing, fully complies with the requirements of the Balanced Budget Act.

The Commission disagrees that the new rule, and the statutory provision on which it is based, are inconsistent with Senate Bill 487 of the 71st Legislature. That bill enacted, among other provisions, §32.0281 and §32.0282 of the Human Resources Code. As indicated above, §32.0281 provides the Commission with authority comparable to §531.021(d) and (e). Thus, the new rule is not inconsistent with Senate Bill 487.

Two commenters recommended that subsection (c)(3) and (4) be deleted since these provisions allow HHSC to have an unfettered ability and an overly broad scope of authority to change reimbursement rates based on consideration of economic factors that HHSC determine have or may have significant and measurable effect on provider participation or their ability to deliver services.

The Commission disagrees with the comment. The Commission recognizes the principal concern of the commenters regarding the Commission's exercise of this authority to reduce rates, but the Commission also notes that subsection (c)(3) and (4) authorize the Commission to increase rates to address economic conditions that affect provider participation or unanticipated increases in appropriated funds.

One commenter requested that the contents of the notice detailed in subsection (f) be revised to include the time, place and date of a public hearing.

The Commission agrees with the comment and has modified subsection (f) accordingly.

Three commenters stated that the proposed rule supercedes the current open, inclusive ratesetting process. The commenters stated their opposition to the abandonment of the traditional ratesetting approach.

The Commission notes that the rule does not propose to repeal any current rate setting methodology, but is primarily intended to apply in limited circumstances when a rate setting methodology fails to adequately address an economic condition or change in the law, including court orders that require specific action by the Commission and appropriations decisions of the Legislature or the Congress that limit or increase the amount of funds available to fund provider rates. The rule also includes procedures to ensure public participation in cases where an adjustment may be necessary. The rule does not limit, and the Commission does not envision abandonment of, current practices that provide for stakeholder input into the rate setting process. Consequently, the Commission disagrees with the comment.

The new rule is adopted under the Texas Government Code, §531.033, the Texas Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provides the Commissioner of HHSC with broad rulemaking authority, and provides HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

§355.201. Establishment and Adjustment of Reimbursement Rates by the Health and Human Services Commission.

(a) Definitions. Unless the context clearly indicates otherwise, the following words and terms when used in this section are defined as follows:

(1) "Commission" means the Health and Human Services Commission.

(2) "Medical assistance" means a medical or health care related service, item, or supply that is delivered to a Medicaid recipient and is approved and authorized for payment or reimbursement by the Commission or a health and human services agency pursuant to state and federal law.

(3) "Program" means a specific component of the Medicaid program for which the Commission establishes either a methodology to reimburse a provider or a specific fee, payment rate, or charge that is paid to a provider for medical assistance in accordance with state and federal law.

(4) "Provider" means a health care practitioner, institution, or other entity that is enrolled in the medical assistance program and is authorized to submit claims for payment or reimbursement of medical assistance.

(b) Purpose. This section implements the provisions of §531.021(d) and (e), Government Code and applies to all programs that provide medical assistance and to all reimbursement methodologies prescribed under this chapter.

(c) Establishment of fees, rates, and charges. The Commission establishes fees, rates, and charges to be paid for medical assistance in accordance with:

(1) the formulas, procedures, or methodologies prescribed in this chapter;

(2) the requirements of state and federal law, including:

(A) legislative or Congressional enactments that change state or federal laws in a manner that affects such fees, rates, and charges;

(B) changes in federal regulations, and policies that affect such fees, rates, and charges; and

(C) judicial orders, opinions, or interpretations regarding state or federal law that affect such fees, rates, and charges;

(3) the consideration of economic factors that, in the Commission's determination:

(A) have or may have a significant and measurable effect on provider participation; or

(B) have or may have a significant and measurable effect on providers' ability to deliver services in accordance with state and federal law; and

(4) levels of appropriated state and federal funds or state or federal laws or enactments that limit, restrict, or condition the availability of appropriated funds for medical assistance.

(d) Adjustment of fees, rates, and charges. Notwithstanding any other provision of this chapter, the Commission may adjust fees, rates, and charges paid for medical assistance if:

(1) state or federal law is enacted, amended, or judicially interpreted to:

(A) require the Commission to increase or reduce a fee, rate, or charge paid to a provider for medical assistance;

(B) change the amount, scope, or type of allowable or unallowable costs for providers of medical assistance that are required to report costs to the Commission or a health and human services agency for purposes of establishing a reimbursement rate for medical assistance;

(C) require all providers within a program or category of providers to incur additional costs to provide medical assistance, other than unallowable costs, that are not currently recognized in the reimbursement methodology established by the Commission for the program; or

(D) restrict, limit, or condition the availability of appropriated funds to the Commission for payment or reimbursement of medical assistance;

(2) economic conditions that prevail among all providers within a specific program or category of providers and:

(A) result in a demonstrable increase in the cost of providing services beyond amounts recognized in the Commission's established reimbursement methodology; or

(B) require providers within a program or category of providers to incur costs, other than unallowable costs, that are not currently recognized in the reimbursement methodology established by the Commission for the program.

(e) Notice of adjustment of fees, rates, and charges. If the Commission adjusts fees, rates, or charges under this section, the Commission or its designee will publish notice of the proposed adjustment at the earliest feasible date but not later than 10 state working days before the effective date of the adjustment. If the adjustment is required by the enactment or amendment of state or federal law, such notice may be published before the effective date of such enactment or amendment, but the adjustment to fees, rates, or charges will not take effect before the effective date of the enactment or amendment. The notice must be published either by publication on the Commission's Internet web site, and in the *Texas Register*. In addition, the Commission may issue written or electronic communication to providers, if economically feasible.

(f) Contents of notice. The notice required under subsection (e) of this section will include the following:

(1) a description of the specific increase or reduction of fees, rates, and charges;

(2) the date on which such adjustment will take effect and the period during which the adjustment will be in effect;

(3) a description of the legal and factual bases for the adjustment;

(4) a description of the specific requirements of the rate setting methodology established under this chapter that cannot effectively be implemented as a result of the adjustment;

(5) instructions for interested parties to submit written comments to the Commission regarding the proposed adjustment; and

(6) The date, time, and location of a public hearing in accordance with §32.0282, 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 August 11, 2003.

TRD-200304989
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

SUBCHAPTER C. REIMBURSEMENT METHODOLOGY FOR NURSING FACILITIES

1 TAC §355.307, §355.308

The Texas Health and Human Services Commission (HHSC) adopts amendments to §355.307 and §355.308 with changes to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4711). The text of the rules will be republished.

The amendments are necessary to bring the nursing facility reimbursement methodology and the enhanced direct care staff rate into compliance with House Bill 1 and House Bill 2292 of the 78th legislative session, as well as to clarify and/or simplify various aspects of the program and to correct erroneous references. House Bill 1 details appropriations for the nursing facility program for state fiscal years 2004 and 2005; Health and Human Services Commission (HHSC) Appropriations Rider 46 requires that reductions to any long term care budget strategy shall be calculated without rebasing of current reimbursement factors and shall be shared equally across all Medicaid providers funded by the strategy; House Bill 2292 requires that HHSC not impose a minimum spending requirement on facilities not participating in the direct care staff rate enhancement and that HHSC not set a base rate for a facility participating in the direct care staff rate enhancement that is more than the base rate for a nursing facility not participating in the program.

Modifications necessary to comply with House Bill 1 and Rider 46 include: (1) setting the direct care staff, dietary, general/administration, fixed capital asset and other resident care rate components as well as the ventilator and pediatric tracheostomy add-ons and the pediatric care facility rate for state fiscal years 2004 and 2005 at the 2003 level adjusted as necessary to remain within appropriations; and (2) indicating that any adjustments necessary to remain within appropriations will apply equally in percentage terms across each component of the nursing facility rate and each add-on.

Major modifications necessary to comply with House Bill 2292 include: (1) eliminating the minimum spending requirement for nonparticipants in the direct care staff rate enhancement; and (2) eliminating the base rate for nonparticipants by creating a single base rate for both participants and nonparticipants.

Other modifications necessary to comply with House Bill 1 and Rider 46 and/or House Bill 2292 include: (1) indicating that facilities will be notified if funds are not available to maintain roll-over levels, participation levels or to fund pre-existing enhancements during an enrollment period; (2) changing how new facilities are handled to accommodate the fact that there will be one base rate for participants and nonparticipants instead of two base rates; (3) clarifying that if the granting of newly requested enhancements to ongoing providers is limited during enrollment that the granting of

enhancements to new facilities is limited to that same level; (4) modifying reporting requirements to exempt providers not participating in the enhancement; (5) deleting the 10 percent direct care recoupment for nonsubmittal of reports; and (6) modifying the spending requirement for participants to insure that their final rate cannot be lower than the base rate. In addition, it is necessary to delete the provision allowing for mitigation of spending recoupments below the nonparticipant rate for facilities demonstrating high quality care. This provision is made unnecessary by the elimination of all recoupments below the base rate.

Clarifications are necessary to ensure that the title of §355.308 represents the contents of the section; that readers understand that open enrollment is for enhanced direct care staff rates; and that report preparers understand the training requirements for completion of Annual Staffing and Compensation Reports. Additional clarifications are necessary to ensure that calculations of minimum staffing requirements are based on residents in Medicaid-contracted beds only; calculations of availability of funds to purchase additional staffing time are based on direct care revenues and expenses; and that calculations of staffing requirements for facilities adjusting their enhancement levels in the middle of the rate year are based on weighted averages for the reporting period. Finally, a clarification is necessary to ensure that the provision that allows related facilities to have their compliance with the spending requirement determined in the aggregate for all related facilities applies to limited partnerships rather than limited liability partnerships.

Simplifications are necessary to eliminate provisions that have never been utilized such as the opportunity for unachieved enhancements to qualify as pre-existing enhancements in terms of enrollment priority if the provider can prove a good faith effort to meet the requirements and to eliminate provisions that are not cost effective such as interest charges for facilities missing their staffing requirements by four or more LVN equivalent minutes. Simplifications will also set practical deadlines for HHSC to notify providers of their recoupment status and eliminate provisions allowing new owners to request to become participants or increase their enhancement level within available funds since all enhancement funds are awarded during open enrollment, leaving no funds available to activate this provision. Simplifications will also make recoupments due to nonsubmittal of an accountability report permanent if the report is not received by HHSC within a year of its due date.

Corrections to erroneous references are necessary to increase readers' understanding of the sections.

Finally, the amendments are necessary to ensure that reinvested funds are kept within the current nursing facility program rather than being distributed to entities that are no longer contracted to provide care to Medicaid clients.

A public hearing was held on July 16, 2003. At the hearing, comments were received from representatives of the Texas Association of Homes and Services for the Aging, Texas Health Care Association, the Alzheimer's Association Coalition of Texas, various nursing facility chains, individual nursing facilities, nursing facility residents and nurses working in nursing facilities. Written comments were also received from the Texas Health Care Association, the Alzheimer's Association Coalition of Texas, various nursing facility chains, individual nursing facilities, residents of nursing facilities, relatives of residents of nursing facilities, employees of nursing facilities and various individuals. Some commenters submitted additional comments that did not relate to the proposed rules. A summary of the comments relating to the proposed rules and the commission's responses follow.

General comment concerning §355.307 and §355.308: One commenter recommended that these sections be modified to state that any additional federal funding be used to restore rate reductions.

Response: Proposed wording in §355.307(f) and §355.308(k)(5) states that any adjustments to nursing facility rates necessary to remain within appropriations will apply equally in percentage terms across each component of the nursing facility rate and each add-on. This wording complies with House Bill 1, HHSC Rider 46 which requires that reductions to any long term care budget strategy be calculated without rebasing of current reimbursement factors and be shared equally across all Medicaid providers funded by the strategy. If rate reductions are eased due to additional federal funding, under the proposed rules the additional funding will be distributed so that any remaining adjustments necessary to remain within appropriations still apply equally in percentage terms across each component of the nursing facility rate and each add-on. HHSC is adopting this subsection and paragraph without change.

Comment concerning §355.307(b)(3)(E)(ii)(I): One commenter recommended deleting the proposed change as it is unnecessary if the base rate for all providers is the participant base rate.

Response: This sub clause has been modified to delete language that refers to case mix adjustments to enhancements.

Comment concerning §355.307(f) and §355.308(k)(5): One commenter recommended that this subsection and paragraph be modified to direct that state fiscal year 2004 and 2005 rates be set using a 7% adjustment factor before rates are reduced to remain within appropriations.

Response: House Bill 1, HHSC Rider 46 requires that reductions to any long term care budget strategy be calculated without rebasing of current reimbursement factors and be shared equally across all Medicaid providers funded by the strategy. The commencer's recommendation would require rebasing of current reimbursement factors and would lead to rate reductions that are not shared equally across all Medicaid providers funded by the strategy. Under the commencer's recommendation, providers not participating in the enhancement program and providers participating at a low level would experience rate increases or small rate decreases while providers participating in the enhancement program at a high level would experience larger rate decreases. HHSC is adopting this subsection and paragraph without change.

Comment concerning §355.307(f) and §355.308(k)(5): One commenter recommended adding language that specifies that rate reductions and restorations will be applied equally across all rate components.

Response: Proposed wording in §355.307(f) and §355.308(k)(5) already states that any adjustments to nursing facility rates necessary to remain within appropriations will apply equally in percentage terms across each component of the nursing facility rate and each add-on. If rate reductions are eased due to additional federal funding, under the proposed rules the additional funding will be distributed so that any remaining adjustments necessary to remain within appropriations still apply equally in percentage terms across each component of the nursing facility rate and each add-on. HHSC adopts this subsection and paragraph without change.

General comments concerning §355.308: Eighty-seven commenters either spoke or wrote in support of the nursing facility direct care staff enhancement program and continued funding of the enhancement program at the highest possible level now and in the future.

Response: The revisions to §355.308 preserve the enhancement program at the highest level of funding possible under current appropriations. HHSC adopts this section without changes related to these comments.

General comment concerning §355.308. One commenter recommended that if rates are reduced to remain within appropriations staffing requirements should be reduced by a similar percentage.

Response: Section 355.308(j)(1)(A) states that HHSC will determine minimum required LVN equivalent minutes per resident day of service for various types of residents using time study data, cost report information, and other appropriate data sources. Other appropriate data sources include appropriation levels. This subparagraph already provides HHSC with the ability to consider appropriation levels when determining minimum required LVN-equivalent minutes. HHSC adopts this subparagraph without change.

General comment concerning §355.308. One commenter complained that the proposed rules were too complex and cumbersome.

Response: Modifications made to §355.308(k) to set a single base rate for nonparticipants at the current participant base rate will eliminate considerable complexity.

Comment concerning §355.308(a)(7): One commenter recommended that this paragraph be modified to allow any staff person providing direct care services to be credited against a facility's staffing and spending requirements

Response: Administrators and assistant administrators are hired to provide administrative and supervisory support to the nursing facility. The enhancement program is intended to increase the staffing and pay of direct care staff of the facility that are hired for that purpose. To reclassify the administrator or assistant administrator as direct care staff for the purposes of the enhancement program is in opposition to the intent of the enhanced payment rates. For facilities to receive enhanced payment rates, they must hire additional direct care staff and/or increase the wages paid to direct care staff. HHSC adopts this paragraph without change.

Comment concerning §355.308(e): One commenter recommended that this subsection be modified to allow new facilities to opt into the enhancement program at the most recent ceiling that has been applied to staffing enhancement levels.

Response: The subsection as proposed already states that if the granting of newly requested enhancements was limited during the most recent enrollment, enrollment for new facilities will be subject to that same limitation. HHSC is adopting this subsection without change.

Comments concerning §355.308(f): One commenter recommended that this subsection be modified to require continued submission of Staffing and Compensation Reports from nonparticipants in the enhancement program.

Response: Staffing and Compensation Reports are used to determine each participant's compliance with their staffing and spending requirements. Nonparticipants in the enhancement program are not subject to staffing and spending requirements and so are not required to complete Staffing and Compensation Reports. Information on staffing and compensation on all providers is collected through the nursing facility cost reports. Cost report data will be available for use in any analyses comparing participants to nonparticipants. Requiring that nonparticipants complete a Staffing and Compensation Report as well as a cost report would not provide additional information for use in analyses and would require nonparticipants to complete a report which would not be put to any use. HHSC is adopting this subsection without change.

Comments concerning §355.308(h): One commenter stated that this subsection is a new requirement. The commenter requested that staff justify the mandated training sequence.

Response: Existing rules state that staffing and compensation reports must be completed by preparers who have attended the required nursing facility cost report training as per §355.102(d). Section 355.102(d) states that preparers must attend cost report training every other year for the odd-year cost report in order to be certified to complete both that odd-year cost report and the following even-year cost report. The existing rules do not make sense for odd year staffing and compensation reports as the odd year staffing and compensation reports are due before the odd year cost report training is provided. The proposed rules codify current practice which is that for odd year staffing and compensation reports, preparers are required to have attended the most recent cost report training provided prior to the due date of the report. HHSC is adopting this subsection without change.

Comments concerning §355.308(j)(1)(A)(i): One commenter requested that the Medicare index be limited to 1.5 times the TILE 207 index and that a workgroup be established to revisit the issue of staffing assumptions for Medicare clients.

Response: Analyses of data from facilities participating in the Texas Medicare Case Mix Demonstration indicate that, on average, the case mix index of Medicare recipients is 1.5 times the case mix index of Medicaid recipients. HHSC is adopting this clause without change.

Comments concerning §355.308(k): Three commenters recommended that this subsection be modified to set the base rate for all facilities at the participant base rate rather than the nonparticipant base rate.

Response: Language has been modified in this subsection to set a single base rate for all facilities at the participant base rate, adjusted as necessary to remain within appropriations, rather than at the nonparticipant base rate. Language in §355.307(b)(3)(E)(ii) has also been modified in response to this comment.

Comments concerning §355.308(k): One commenter recommended that the statement "so that participating and nonparticipating facilities will receive equal percentage adjustments to the overall reimbursement rates" be added to the end of this subsection. A second commenter recommended that the statement "so participating facilities will receive equal percentage adjustments to their overall reimbursement rates" be added to the end of this subsection.

Response: House Bill 2292 requires that HHSC "not set a base rate for a nursing home participating in the program that is more than the base rate for a nursing home not participating in the program" while House Bill 1, HHSC Rider 46 requires that reductions to any long term care budget strategy be calculated without

rebasing of current reimbursement factors and be shared equally across all Medicaid providers funded by the strategy. This subsection complies with House Bill 2292 by eliminating the nonparticipant base rate which will lead to a rate increase for nonparticipants. The subsection also requires that adjustments to nursing facility rates necessary to remain within appropriations apply equally in percentage terms across each component of the nursing facility rate and each add-on. The end result will be equal percentage adjustments to overall reimbursement for nonparticipants and participants after adjusting to the single base rate. HHSC is adopting this subsection without change.

Comments concerning §355.308(j): One commenter recommended that this subsection be modified to require separate conversion factors to convert Medication Aide and Certified Nurse Aide time into LVN equivalent minutes.

Response: The change proposed by the commenter would be a substantive change and would have a negative impact on some providers. These providers would not have had an opportunity to comment on the recommended change as it was not included in the proposed amendments. HHSC is adopting this subsection without change.

Comments concerning §355.308(l): One commenter recommended that proposed references to case mix adjustments be deleted since these adjustments are not required if the base rate for all providers is set at the current participant base level.

Response: The proposed changes relating to case mix adjustments in this subsection have been deleted.

Comments concerning §355.308(m)(2)(B)(vi): One commenter recommended that proposed references to case mix adjustments be deleted since these adjustments are not required if the base rate for all providers is set at the current participant base level.

Response: The proposed changes relating to case mix adjustments in this clause have been deleted. Proposed changes relating to case mix adjustments in §355.308(j)(2), (3)(A) and (B) and §355.308(cc)(2)(A) have also been deleted in response to this comment.

Comments concerning §355.308(o): One commenter recommended that the 85% spending requirement be lowered to 80% in concert with the rate reductions in the other components of the rate.

Response: The proposed changes already eliminate the spending requirement for nonparticipants and participants on the base rate, thereby limiting the spending requirement to only enhancement funds requested by participants. These changes give providers increased flexibility in the spending of direct care funds. Participation in the enhancement program is voluntary and the intent of the program is to provide incentives to increase direct care staff and direct care wages and benefits. The reduction of the spending requirement on enhancement funds would dilute these incentives. HHSC is adopting this subsection without change.

Comments concerning §355.308(p)(2): One commenter recommended that this paragraph be retained and modified so that calculations used actual direct care revenues received and not the nonparticipant rate.

Response: This paragraph was adopted to provide relief to providers subject to recoupment of funds below the nonparticipant base rate due to failure to meet spending requirements. These rules eliminate the nonparticipant base rate and require that no provider be recouped below the base rate due to failure to meet spending requirements. These rule changes provide 100% relief of spending recoupments below the base rate making this subsection superfluous. The commenter is requesting that the relief offered by this subsection be expanded to apply to recoupments of enhanced funds. The purpose of the enhancement program as stated in House Bill 2292 is to "offer incentives for increasing direct care staff and direct care wages and benefits". Implementation of the commencer's request would lessen these incentives. HHSC is adopting the deletion of this paragraph.

Comment concerning §355.308(cc): One commenter recommended that this subsection be modified to distribute reinvestment funds in proportion to the amount above the ceiling. So, if the amount recouped was equal to 10% of uncompensated spending, each facility would receive 10% of their uncompensated amount.

Response: Reinvestment funds are distributed in the same manner as initial enhancement levels are awarded during enrollment, starting with the lowest level and adding levels until available funds are exhausted. This method of distribution provides a stronger incentive for facilities with low and average staffing levels to increase their staffing. HHSC is adopting this subsection without change.

Comments concerning §355.308(cc)(1)(E): One commenter recommended that this subsection be modified so that providers who have changed ownership types but whose controlling entity remains the same are still eligible for reinvestment of funds.

Response: HHSC has modified this subsection to allow for reinvestment in cases where a change of ownership has occurred and the Texas Department of Human Services has approved a Successor Liability Agreement between the contract in effect during the reinvestment reporting period and the contract in effect when reinvestment is determined.

Comments concerning §355.308(ee): One commenter recommended that this subsection be modified to define exactly how providers will be notified of their status in the enhancement program.

Response: The form of notification will vary depending upon the number of providers impacted by any change in enhancement status. In cases where a small number of providers are impacted, it might be most practical to notify the providers by mail while in cases where all providers are impacted, it might be most practical to notify providers by a posting on HHSC's web site. The proposed rule gives HHSC flexibility to use the most practical method of notification for each incident. HHSC is adopting this subsection without change.

In addition, §355.307(b)(3)(E)(ii)(I) and §355.308(p) have been renumbered to follow the Texas Register Style Manual and references to renumbered paragraphs within subsection (p) have been revised to reflect this renumbering. As well, references to §355.308(l) in §355.308(m) have been revised to reflect renumbering in §355.308(l). Finally, two words were changed from singular to plural in §355.308(o)(3)

The amendments are adopted under the Government Code, §531.033, which authorizes the commissioner of the Health and Human Services Commission to adopt rules necessary to carry out the commission's duties, and §531.021(b), which establishes the commission as the agency responsible for

adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under Chapter 32, Human Resources Code.

§355.307. Reimbursement Setting Methodology.

(a) Case mix classes. The Texas Health and Human Services Commission (HHSC) reimbursement rates for nursing facilities (NFs) vary according to the assessed characteristics of recipient. Rates are determined for 11 case mix classes of service, plus a 12th, temporary classification assigned by default when assessment data are incomplete or in error.

(b) Reimbursement determination. HHSC applies the general principles of cost determination as specified in §355.101 of this title (relating to Introduction).

(1) Rate Components. Under the case mix methodology, reimbursements are comprised of five cost-related components: the direct care staff component; the other recipient care component; the dietary component; the general/administration component; and the fixed capital asset component. The direct care staff component is calculated as specified in §355.308 of this title (relating to Direct Care Staff Rate Component).

(A) The dietary rate component is constant across all case mix classes.

(i) For rates effective May 1, 2000, using the inflation factors used in determination of the nursing facility rates in effect January 1, 2000, project the costs in the 1998 Texas Nursing Facility Cost Report data base to the rate period beginning January 1, 2000, and ending August 31, 2000. Using these projected costs, determine the median per diem dietary cost (weighted by Medicaid days of service in the data base) in the array of allowable per diem costs for all contracted nursing facilities included in the January 1, 2000, data base, multiplied by 1.07.

(ii) For rates effective September 1, 2000, multiply the dietary per diem rate from clause (i) of this subparagraph by 1.016.

(iii) For rates effective September 1, 2001, and thereafter, the dietary component is calculated at the median cost (weighted by Medicaid days of service in the rate base) in the array of projected allowable per diem costs for all contracted nursing facilities included in the rate base, multiplied by 1.07.

(B) The general/administration rate component is constant across all case mix classes.

(i) For rates effective May 1, 2000, the general/administration rate component is equal to the difference between the general, administration, and dietary rate component in effect January 1, 2000, and the dietary rate component as calculated in subparagraph (A)(i) of this paragraph.

(ii) For rates effective September 1, 2000, multiply the general/administration per diem rate from clause (i) of this subparagraph by 1.016.

(iii) For rates effective September 1, 2001, and thereafter, the general/administration component is calculated at the median cost (weighted by Medicaid days of service in the rate base) in the array of projected allowable per diem costs for all contracted nursing facilities included in the rate base, multiplied by 1.07.

(C) The fixed capital asset component is constant across all case mix classes.

(i) For rates effective May 1, 2000, the fixed capital asset component is equal to the fixed capital asset component in effect January 1, 2000.

(ii) For rates effective September 1, 2000, the fixed capital asset component is equal to the fixed capital asset component from clause (i) of this subparagraph multiplied by 1.016.

(iii) For rates effective September 1, 2001 and thereafter, the fixed capital asset component is calculated as follows:

(I) Determine the 80th percentile in the array of allowable appraised property values per licensed bed, including land and improvements. Appraised values for this purpose are determined as follows:

(-a-) For proprietary facilities, tax exempt facilities provided an appraisal from their local property taxing authority, and tax exempt facilities not provided an appraisal from their local property taxing authority because of an "exempt" status whose independent appraisal is in the first year of its five-year interval as described in §355.402(f)(2)(B)(ii) of this title (relating to Cost Report Requirements: 1997 and Subsequent Cost Reports), allowable appraised values are determined as described in §355.402(f) of this title (relating to Cost Report Requirements: 1997 and Subsequent Cost Reports).

(-b-) For tax exempt facilities not provided an appraisal from their local property taxing authority because of an "exempt" status whose independent appraisal is not in the first year of its five-year interval as described in §355.402(f)(2)(B)(ii) of this title (relating to Cost Report Requirements: 1997 and Subsequent Cost Reports), allowable appraised values are determined by indexing the facility's allowable appraised value as determined in §355.402(f) of this title (relating to Cost Report Requirements: 1997 and Subsequent Cost Reports) to the median increase in appraised values among contracted facilities in the state as a whole from the reporting period coinciding with the first year of the facility's five-year interval to the reporting period upon which reimbursements are to be based.

(-c-) Those facilities that do not report an allowable appraised value as described in §355.402(f) of this title (relating to Cost Report Requirements: 1997 and Subsequent Cost Reports) are not included in the array for purposes of calculating the use fee.

(II) Project the 80th percentile of appraised property values per bed by one-half the forecasted increase in the personal consumption expenditures (PCE) chain-type price index from the cost reporting year to the rate year.

(III) Calculate an annual use fee per bed as the projected 80th percentile of appraised property values per bed times an annual use rate of 14%.

(IV) Calculate a per diem use fee per bed by dividing the annual use fee per bed by annual days of service per bed at the higher of 85% occupancy, or the statewide average occupancy rate during the cost reporting period.

(V) The use fee is limited to the lesser of the fee as calculated in subclauses (I) - (IV) of this clause, or the fee as calculated by inflating the fee from the previous rate period by the forecasted rate of change in the PCE chain-type price index.

(2) Case mix classification system. All Medicaid recipients are classified according to the Texas Index for Level of Effort (TILE) classification system described in §371.212 of this title (relating to Case Mix Classification System). The TILE classification system includes four clinical categories, which are further subdivided on the basis of an activity of daily living (ADL) scale, resulting in a total of 11 TILE case mix groups. A 12th group is used by default when a recipient's case-mix group membership is indeterminate because of assessment errors or omissions. Each of the 12 case-mix groups, including the default group, is assigned a case-mix index of effort. This index indicates the relative amount of staff time required on average to deliver care to recipients in that group. The case-mix index for each of

the 11 TILE groups is determined through statistical and clinical analyses of recipient resource utilization data previously collected in Texas NFs. The lowest index for the 11 TILE groups is used as the case-mix index for the default group.

(3) Per diem rate methodology. Staff determine per diem rate recommendations for each of the 11 TILE groups and for the default group according to the following procedures:

(A) Determine the statewide average case mix index for all Medicaid recipients, except those in the default group. Weight the indexes from paragraph (2) of this subsection, which are based on a sample of nursing facilities, by the estimated statewide recipient days of service by case mix group during the cost reporting period covered by the rate base and determine the weighted average. The statewide average index is based on the most recent and complete data available indicating recipient days of service by case mix group that correspond to the period covered by the cost reports included in the rate base.

(B) Determine the standardized statewide case mix index for each of the 11 TILE groups by dividing each of the indexes described under paragraph (2) of this subsection by the statewide average case mix index described under subparagraph (A) of this paragraph.

(C) The other recipient care rate component varies according to case mix class of service.

(i) For rates effective May 1, 2000, using the inflation factors used in determination of the nursing facility rates in effect January 1, 2000, project the costs in the 1998 Texas Nursing Facility Cost Report data base to the rate period beginning January 1, 2000, and ending August 31, 2000. Using these projected costs, determine the sum of other recipient care costs in all nursing facilities included in the 1998 data base. Then divide the total by the sum of recipient days of service in all facilities in the 1998 data base. Multiply the resulting weighted, average per diem cost of other recipient care by 1.07. The result is the average other recipient care rate component. To calculate the other recipient care per diem rate component for each of the 11 TILE case mix groups and for the default group, multiply each of the standardized statewide case mix indexes used in determination of the nursing facility rates in effect January 1, 2000, by the average other recipient care rate component.

(ii) For rates effective September 1, 2000, multiply the average other recipient care per diem rate from clause (i) of this subparagraph by 1.016. To calculate the other recipient care per diem rate component for each of the 11 TILE case mix groups and for the default group, multiply each of the standardized statewide case mix indexes used in determination of the nursing facility rates in effect January 1, 2000, by the average other recipient care rate component.

(iii) For rates effective September 1, 2001, and thereafter, the average other recipient care rate component is calculated as follows. Adjust the raw sum of other recipient care costs in all nursing facilities included in the rate base in order to account for disallowed costs and inflation, as specified in §355.306 of this title (relating to Cost Finding Methodology). Then divide the adjusted total by the sum of recipient days of service in all facilities in the current rate base. Multiply the resulting weighted, average per diem cost of other recipient care by 1.07. The result is the average other recipient care rate component. To calculate the other recipient care per diem rate component for each of the 11 TILE case mix groups and for the default group, multiply each of the standardized statewide case mix indexes from subparagraph (B) of this paragraph by the average other recipient care rate component.

(D) Total case mix per diem rates vary according to case mix class of service and according to participant status in Direct Care Staff Rate enhancements described in §355.308 of this title (relating to Direct Care Staff Rate Component).

(i) For each participating facility, for each of the 11 TILE case mix groups and for the default group, the recommended total per diem rate is the sum of the following five rate components:

(I) the dietary rate component from paragraph (1)(A) of this subsection;

(II) the general/administration rate component from paragraph (1)(B) of this subsection;

(III) the fixed capital asset use fee component from paragraph (1)(C) of this subsection;

(IV) the case mix group's other recipient care per diem rate component by case mix group from subparagraph (C) of this paragraph; and

(V) the case mix group's total direct care staff rate component for that participating facility as determined in §355.308(l) of this title (relating to Direct Care Staff Rate Component).

(ii) For nonparticipating facilities, for each of the 11 TILE case mix groups and for the default group, the recommended total per diem rate is the sum of the following five rate components:

(I) the dietary rate component from paragraph (1)(A) of this subsection;

(II) the general/administration rate component from paragraph (1)(B) of this subsection;

(III) the fixed capital asset use fee component from paragraph (1)(C) of this subsection;

(IV) the case mix group's other recipient care per diem rate component by case mix group from subparagraph (C) of this paragraph; and

(V) the case mix group's total direct care staff base rate component as determined in §355.308(k) of this title (relating to Direct Care Staff Rate Component).

(E) Qualifying ventilator-dependent residents may receive a supplement to the per diem rate specified in subparagraph (D) of this paragraph.

(i) To qualify for supplemental reimbursement, a resident must require artificial ventilation for at least six consecutive hours daily and the use must be prescribed by a licensed physician.

(ii) A ventilator-dependent resource differential case mix index is calculated, based on time-study research data. This resource differential index reflects the difference between direct nursing services for ventilator-dependent residents and services for residents in the most severe heavy-care TILE group. The per diem rate supplement is calculated by multiplying the resource differential case mix index times the per diem average other recipient care rate component, as described in subparagraph (C) of this paragraph and by the average direct care staff base rate component as described in §355.308(k) of this title (relating to Direct Care Staff Rate) and summing the products.

(iii) The supplemental reimbursement for residents requiring continuous artificial ventilation is 100% of the per diem ventilator rate supplement.

(iv) The supplemental reimbursement for residents not requiring continuous artificial ventilation daily but requiring artificial ventilation for at least six consecutive hours daily is 40% of the per diem ventilator rate supplement.

(F) Qualifying children with tracheostomies requiring daily care may receive a supplement to the per diem rate specified in subparagraph (D) of this paragraph.

(i) To qualify for supplemental reimbursement, a resident must be less than 22 years of age; require daily cleansing, dressing, and suctioning of a tracheostomy; and be unable to do self care. The daily care of the tracheostomy must be prescribed by a licensed physician.

(ii) The supplemental reimbursement for children receiving daily tracheostomy care is 60% of the per diem ventilator rate supplement as specified in subparagraph (E) of this paragraph.

(G) Children with qualifying conditions as specified in subparagraphs (E) and (F) of this paragraph may receive only one of the supplemental reimbursements. Therefore, children with tracheostomies who are also ventilator-dependent are not eligible to receive both supplemental reimbursements.

(4) Case mix classification effective periods. The effective periods of case mix classifications are defined as follows.

(A) A recipient's case mix classification and associated per diem rate payment remain in effect until the recipient's next required assessment, unless one of the following events takes place:

(i) a provider submits an off-cycle assessment as specified in 40 TAC §19.2412(a)(5) (relating to Texas Index for Level of Effort (TILE) Assessments);

(ii) a DHS nurse reviewer revises the recipient's assessment and TILE classification under the provisions of 40 TAC §19.2412(b) (Texas Index for Level of Effort (TILE) Assessments); or

(iii) the recipient is discharged from the Medicaid nursing facility vendor payment system for more than 30 days prior to receiving a permanent medical necessity determination.

(B) The case mix classification and associated per diem payment rate of a recipient in the default group are changed retroactively when the provider furnishes DHS with corrected data that permit classification in one of the 11 TILE case mix groups.

(c) Special reimbursement class. HHSC may define special reimbursement classes, including experimental reimbursement classes of service to be used in research and demonstration projects on new reimbursement methods and reimbursement classes of service, to address the cost differences of a select group of recipients. Special classes may be implemented on a statewide basis, may be limited to a specific region of the state, or may be limited to a selected group of providers.

(1) Pediatric Care Facility Class. The purpose of this special class is to recognize, through the adoption of a facility-specific payment rate, the cost differences that exist in a nursing facility or distinct unit of a nursing facility that serves predominantly children.

(2) Definitions.

(A) Pediatric care facility--A pediatric care facility is an entire facility that has maintained an average daily census of 80% or more children for the six-month period prior to its entry into the pediatric care facility class based on the entire licensed facility. A pediatric care facility can also be a distinct unit of a facility that has maintained an average daily census of 85% or more children for the six-month period prior to its entry into the pediatric care facility class based on the distinct unit of the facility. To remain a pediatric care facility, the pediatric care facility must maintain an average daily census of 80% or more children if the pediatric care facility is an entire facility and 85% or more children if the pediatric care facility is a distinct unit of the facility. The contracted provider must request in writing by certified mail or by special mail delivery where the delivery can be verified to become a member of the pediatric care facility special reimbursement class. The request must be sent to the Texas Health and Human Services Commission.

(B) Distinct unit--A portion of a nursing facility that is physically separate from (beds are not commingled with) other units of the facility. The distinct unit can be an entire wing, a separate building, an entire floor, or an entire hallway. The distinct unit consists of all beds within the designated area. A distinct unit must consist of 28 or more Medicaid-contracted beds.

(C) Children--For the purposes of this pediatric care facility class, children are defined as being at or below 22 years of age.

(3) Payment rate determination. Payment rates will be determined in the following manner:

(A) Cost reports and payment rate determination for pediatric care facilities are governed by the requirements specified in Subchapter A of this chapter (relating to Cost Determination Process). A nursing facility that contains a pediatric care facility distinct unit must complete two cost reports: one report for the pediatric care facility distinct unit and one report for the remainder of the facility.

(B) Payment rates for this class of service will be determined on a facility-specific basis for the pediatric care facility. The total allowable costs from the most recent cost report deemed acceptable are adjusted for inflation from the cost report period to the rate period. The adjusted cost is divided by the greater of total patient days of service reported on the cost report or the days of service at 85% of contracted capacity of the pediatric care facility. The resulting cost per day is multiplied by a factor of 1.03 to determine the final facility-specific rate. If no acceptable cost report is available, the provider will be required to submit a cost report covering the time period specified by HHSC.

(C) The facility-specific payment rate from paragraph (3)(B) of this subsection will be paid for all Medicaid residents of a qualifying pediatric care facility regardless of the TILE level of the resident.

(D) Residents of the pediatric care facility will not be eligible to receive the ventilator-dependent or the children-with-tracheostomies supplemental reimbursements.

(E) Pediatric care facilities are not eligible to participate in §355.308 of this title (relating to Enhanced Direct Care Staff Rate).

(d) Nurse aide training and competency evaluation costs.

(1) DHS reimburses nursing facilities for the actual costs of training and testing nurse aides as required under the Omnibus Budget Reconciliation Act of 1987 (OBRA '87). Payments are based on cost reimbursement vouchers that are to be submitted quarterly. Allowable costs are limited to those costs incurred for training provided after October 1, 1990, for:

(A) actual training course expenses up to a set amount determined by DHS per nurse aide;

(B) competency evaluation; or

(C) supplies and materials used in the nurse aide training not already covered by the training course fee.

(2) Nurse aide salaries while in training are factored into the vendor rate and are not to be included on the reimbursement voucher.

(3) Training program costs that exceed the DHS cost ceiling must have prior approval from DHS before costs can be reimbursed. A written request to Provider Billing Services must include:

(A) name and vendor number of facility.

(B) description of training program for which the facility is seeking reimbursement approval, to include:

(i) name, telephone number and address of the nurse aide training and competency evaluation program (NATCEP);

(ii) whether the NATCEP program is facility or non-facility-based; and

(iii) name of the NATCEP program director.

(C) an explanation of why the cost for the NATCEP exceeds the reimbursement ceiling. The explanation must include:

(i) a completed nurse aide unit cost calculation form for a facility-based NATCEP; or

(ii) a breakdown of the nurse aide unit cost by the instructor fees and training materials for a non-facility-based NATCEP.

(D) an explanation of why the nursing facility cannot utilize a training program at or below the reimbursement ceiling and what steps the facility has taken to explore more cost efficient training courses. The explanation must include:

(i) the availability of NATCEPs, such as the location or the frequency of training offered, in the geographic region of the facility;

(ii) the name and address of each NATCEP that the facility has explored as a provider of nurse aide training; and

(iii) the cost per nurse aide for each NATCEP identified in clause (i) of this subparagraph, as specified in subparagraph (C)(i) or (ii) of this paragraph.

(4) All prior approval requests as outlined in paragraph (3) of this subsection must be submitted to DHS, Provider Billing Services that:

(A) may request additional information in order to evaluate a reimbursement request; and

(B) will make the final decision on a reimbursement request.

(5) All nurse aide training courses must be approved by DHS before costs associated with them can be reimbursed.

(6) Nursing facilities are responsible for tracking and documenting nurse aide training costs for each nurse aide trained. All documentation is subject to DHS audits. If substantiating documentation for amounts billed to DHS cannot be verified, DHS will immediately recoup funds paid to the facility.

(7) Individuals who have successfully completed a nurse aide training and competency evaluation program (NATCEP) may be directly reimbursed for costs incurred in completing a NATCEP. The individual must meet all of the conditions specified in subparagraphs (A) - (E) of this paragraph.

(A) The individual must not have been employed at the time of completing the NATCEP.

(B) The individual must have been employed by, or received an offer of employment from, a nursing facility not later than 12 months after successfully completing the NATCEP.

(C) The individual must have been employed by the facility for no less than six months.

(D) The nursing facility must not have claimed reimbursement for training expenses for the individual.

(E) The individual must be listed on the current Nurse Aide Registry.

(8) Individuals must submit cost reimbursement vouchers to DHS with proof that the individual has been employed by a facility for no less than six months.

(9) Individuals who leave nursing facility employment before accruing the required six months of employment, as specified in paragraph (7)(C) of this subsection, may receive 50% reimbursement as long as the individual was employed for no less than three months.

(10) Reimbursement to individuals may not exceed the reimbursement ceiling as detailed in paragraph (1)(A) of this subsection.

(e) Oxygen costs. Oxygen costs incurred on or after January 1, 1995, will not be reimbursed on cost reimbursement vouchers. Those oxygen costs must be reported as expenses on the cost report.

(f) For rates effective September 1, 2003 and September 1, 2004, the rates for the dietary rate component from subsection (b)(1)(A) of this section, the general/administration rate component from subsection (b)(1)(B) of this section, fixed capital asset component from subsection (b)(1)(C) of this section, the other recipient care rate component from subsection (b)(3)(C) of this section, the supplement to per diem rates for qualified ventilator-dependent residents from subsection (b)(3)(E) of this section, the supplement to per diem rates for qualified children with tracheostomies from subsection (b)(3)(F) of this section and the pediatric care facility rate from subsection (c) of this section will be equal to the rates in effect August 31, 2003 adjusted as necessary to remain within appropriations. Adjustments necessary to remain within appropriations will apply equally in percentage terms across each component of the nursing facility rate and each add-on.

§355.308. Direct Care Staff Rate Component.

(a) Direct care staff cost center. This cost center will include compensation for employee and contract labor Registered Nurses (RNs), including Directors of Nursing (DONs) and Assistant Directors of Nursing (ADONs); Licensed Vocational Nurses (LVNs), including DONs and ADONs; medication aides; and nurse aides performing nursing-related duties for Medicaid contracted beds.

(1) Compensation to be included for these employee staff types is the allowable compensation defined in §355.103(b)(1) of this title (relating to Specifications for Allowable and Unallowable Costs) that is reported as either salaries and/or wages (including payroll taxes and workers' compensation) or employee benefits. Benefits required by §355.103(b)(1)(A)(iii) of this title (relating to Specifications for Allowable and Unallowable Costs) to be reported as costs applicable to specific cost report line items are not to be included in this cost center.

(2) Direct care staff who also have administrative duties not related to nursing must properly direct charge their compensation to each type of function performed based upon daily time sheets maintained throughout the entire reporting period.

(3) Nurse aides must meet the qualifications enumerated under 40 TAC §19.1903 (relating to Required Training of Nurse Aides) to be included in this cost center. Nurse aides include certified nurse aides and nurse aides in training as per 40 TAC §94.3(k) (relating to Nurse Aide Training and Competency Evaluation Program (NATCEP) Requirements).

(4) Contract labor refers to personnel for whom the contracted provider is not responsible for the payment of payroll taxes (such as FICA, Medicare, and federal and state unemployment insurance) and who perform tasks routinely performed by employees. Allowable contract labor costs are defined in §355.103(b)(2)(C) of this title (relating to Specifications for Allowable and Unallowable Costs).

(5) For facilities receiving supplemental reimbursement for children with tracheostomies requiring daily care as described in §355.307(b)(3)(F) of this title (relating to Reimbursement Setting Methodology), staff required by 40 TAC §19.901(14)(C)(iii) (relating to Quality of Care) performing nursing-related duties for Medicaid contracted beds are included in the direct care staff cost center.

(6) For facilities receiving supplemental reimbursement for qualifying ventilator-dependent residents as described in §355.307(b)(3)(E) of this title (relating to Reimbursement Setting Methodology), Registered Respiratory Therapists and Certified Respiratory Therapy Technicians are included in the direct care staff cost center.

(7) Nursing facility administrators and assistant administrators are not included in the direct care staff cost center.

(8) Staff members performing more than one function in a facility without a differential in pay between functions are categorized at the highest level of licensure or certification they possess. If this highest level of licensure or certification is not that of an RN, LVN, medication aide, or certified nurse aide, the staff member is not to be included in the direct care staff cost center but rather in the cost center where staff members with that licensure or certification status are typically reported.

(b) Rate year. The standard rate year begins on the first day of September and ends on the last day of August of the following year.

(c) Open enrollment. Open enrollment for the enhanced direct care staff rates will begin on the first day of July and end on the last day of that same July preceding the rate year for which payments are being determined unless the Texas Health and Human Services Commission (HHSC) notified providers prior to the first day of July that open enrollment has been postponed or cancelled. Should conditions warrant, HHSC may conduct additional enrollment periods during a rate year.

(d) Enrollment contract amendment. An initial enrollment contract amendment is required from each facility choosing to participate in the enhanced direct care staff rate. Participating and nonparticipating facilities may request to modify their enrollment status (i.e., a nonparticipant can request to become a participant, a participant can request to become a nonparticipant, a participant can request to change its enhancement level) during any open enrollment period. Requests to modify a facility's enrollment status during an open enrollment period must be received by HHSC Rate Analysis by the last day of the open enrollment period as per subsection (c) of this section. If the last day of the open enrollment period falls on a weekend, a national holiday, or a state holiday, then the first business day following the last day of the open enrollment period is the final day the receipt of the enrollment contract amendment will be accepted. An enrollment contract amendment that is not received by the stated deadline will not be accepted. Facilities from which HHSC Rate Analysis has not received an acceptable request to modify their enrollment by the last day of the open enrollment period will continue at the level of participation in effect during the open enrollment period within available funds. If HHSC determines that funds are not available to continue participation at the level of participation in effect during the open enrollment period, facilities will be notified as per subsection (ee) of this section. To be acceptable, an enrollment contract amendment must be completed according to instructions, signed by an authorized signator as per the Texas Department of Human Services (DHS) Form 2031 applicable to the provider's contract or ownership type, and be legible.

(e) New facilities. For purposes of this section, for each rate year a new facility is defined as a facility delivering its first day of service to a DHS recipient after the first day of the open enrollment period, as defined in subsection (c) of this section, for that rate year. Facilities that underwent an ownership change are not considered new facilities. For purposes of this subsection, an acceptable enrollment contract amendment is defined as a legible enrollment contract amendment that has been completed according to instructions, signed by an authorized signator as per the DHS Form 2031 applicable to the provider's contract or ownership type, and received by HHSC within 30 days of the mailing of notification to the facility by HHSC that such an enrollment contract amendment must be submitted. New facilities will receive the direct care staff base rate as determined in subsection (k) of this section with no enhancements. For new facilities specifying their desire to participate on an acceptable enrollment contract amendment, the direct care staff rate is adjusted as specified in subsection (l) of this section, effective on the first day of the month following receipt by HHSC of the acceptable enrollment contract amendment. If the granting of newly requested enhancements was limited as per subsection (j)(3) of this section during the most recent enrollment, enrollment for new facilities will be subject to that same limitation.

(f) Staffing and Compensation Report submittal requirements. Staffing and Compensation Reports must be submitted as follows:

(1) Annual Staffing and Compensation Report. All participating facilities will provide HHSC, in a method specified by HHSC, an Annual Staffing and Compensation Report reflecting the activities of the facility while delivering contracted services from the first day of the rate year through the last day of the rate year. This report will be used as the basis for determining compliance with the staffing requirements and recoupment amounts as described in subsection (n) of this section, and as the basis for determining the spending requirements and recoupment amounts as described in subsection (o) of this section. Participating facilities failing to submit an acceptable Annual Staffing and Compensation Report within 60 days of the end of the rate year will be placed on vendor hold until such time as an acceptable report is received and processed by HHSC.

(A) When a participating facility changes ownership, the prior owner must submit a Staffing and Compensation Report covering the period from the beginning of the rate year to the date recognized by DHS as the ownership-change effective date. This report will be used as the basis for determining any recoupment amounts as described in subsections (n) and (o) of this section. The new owner will be required to submit a Staffing and Compensation Report covering the period from the day after the date recognized by DHS as the ownership-change effective date to the end of the rate year.

(B) Participating facilities whose contracts are terminated either voluntarily or involuntarily must submit a Staffing and Compensation Report covering the period from the beginning of the rate year to the date recognized by DHS as the contract termination date. This report will be used as the basis for determining any recoupment amounts as described in subsections (n) and (o) of this section.

(C) Participating facilities who voluntarily withdraw from participation as per subsection (r) of this section must submit a Staffing and Compensation Report within 60 days of the date of withdrawal as determined by HHSC, covering the period from the beginning of the rate year to the date of withdrawal as determined by HHSC. This report will be used as the basis for determining any

recoupment amounts as described in subsections (n) and (o) of this section.

(D) Participating facilities whose cost report year coincides with the state of Texas fiscal year as per §355.105(b)(5) of this title (relating to General Reporting and Documentation Requirements, Methods and Procedures) are exempt from the requirement to submit a separate Annual Staffing and Compensation Report. For these facilities, their cost report will be considered their Annual Staffing and Compensation Report.

(2) Other reports. HHSC may require other Staffing and Compensation Reports from all facilities as needed.

(3) Vendor hold. HHSC or its designee will place on hold the vendor payments for any participating facility that does not submit a Staffing and Compensation Report completed in accordance with all applicable rules and instructions by the due dates described in this subsection. This vendor hold will remain in effect until an acceptable Staffing and Compensation Report is received by HHSC. Participating facilities that do not submit a Staffing and Compensation Report completed in accordance with all applicable rules and instructions within 60 days of the due dates described in this subsection will become nonparticipants retroactive to the first day of the reporting period in question and will be subject to an immediate recoupment of funds related to participation paid to the facility for services provided during the reporting period in question. These facilities will remain nonparticipants and recouped funds will not be restored until they submit an acceptable report and repay to HHSC or its designee funds identified for recoupment from subsections (n) and/or (o) of this section. If an acceptable report is not received within 365 days of the due date, the recoupment will become permanent. In addition, participating facilities with an ownership change or contract termination that do not submit a Staffing and Compensation report completed in accordance with all applicable rules within 60 days of the change in ownership or contract termination will become nonparticipants retroactive to the first day of the reporting period in question and will be subject to an immediate recoupment of funds related to participation paid to the facility for services provided during the reporting period in question. These facilities will remain nonparticipants and recouped funds will not be restored until they submit an acceptable report and repay to HHSC or its designee funds identified for recoupment from subsections (n) and/or (o) of this section. If an acceptable report is not received within 365 days of the change of ownership or contract termination date, the recoupment will become permanent.

(4) Provider-initiated amended accountability reports. Reports must be received prior to the date the provider is notified of compliance with spending and/or staffing requirements for the report in question as per subsections (n) and/or (o) of this section.

(g) Report contents. Annual Staffing and Compensation Reports will include any information required by HHSC to implement this enhanced direct care staff rate.

(h) Completion of Reports. All Staffing and Compensation Reports must be completed in accordance with the provisions of §§355.102 - 355.105 of this title (relating to General Principles of Allowable and Unallowable Costs, Specifications for Allowable and Unallowable Costs, Revenues, and General Reporting and Documentation Requirements, Methods, and Procedures) and may be reviewed or audited in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports). Beginning with the state fiscal year 2002 report, all Staffing and Compensation Reports must be completed by preparers who have attended the required nursing facility cost report training as per §355.102(d) of this title (relating to General Principles of Allowable and Unallowable Costs). For Staffing and Compensation Reports for even numbered state fiscal years, preparers must have attended the cost report training for that same even numbered year. For Staffing and Compensation Reports for odd numbered state fiscal years, preparers must have attended the most recent cost report training sessions provided prior to the due date of the Staffing and Compensation Report.

(i) Enrollment. Facilities choosing to participate in the enhanced direct care staff rate must submit to HHSC a signed contract amendment as described in subsection (d) of this section, before the end of the open enrollment period. Participation will remain in effect, subject to availability of funds, until the facility notifies HHSC in accordance with subsection (r) of this section that it no longer wishes to participate or the facility is removed from participation as described in subsection (n) of this section. If HHSC determines that funds are not available to continue participation, facilities will be notified as per subsection (ee) of this section. Facilities voluntarily withdrawing from participation will have their participation end effective on the date of the withdrawal as determined by HHSC.

(j) Determination of staffing requirements for participants. Facilities choosing to participate in the enhanced direct care staff rate agree to maintain certain direct care staffing levels. In order to permit facilities the flexibility to substitute RN, LVN and aide (Medication Aide and nurse aide) staff resources and, at the same time, comply with an overall nursing staff requirement, total nursing staff requirements are expressed in terms of LVN equivalent minutes. Conversion factors to convert RN and aide minutes into LVN equivalent minutes are based upon most recently available, reliable relative compensation levels for the different staff types.

(1) Minimum staffing levels. HHSC determines, for each participating facility, minimum LVN equivalent staffing levels as follows.

(A) Determine minimum required LVN equivalent minutes per resident day of service for various types of residents using time study data, cost report information, and other appropriate data sources.

(i) Determine LVN equivalent minutes associated with Medicare residents based on the data sources from this subparagraph adjusted for estimated acuity differences between Medicare and Medicaid residents.

(ii) Determine minimum required LVN equivalent minutes per resident day of service associated with each Texas Index for Level of Effort (TILE) case mix group and additional minimum required minutes for residents reimbursed under the TILE system who also qualify for supplemental reimbursement for ventilator care or pediatric tracheostomy care as described in §355.307 of this title (relating to Reimbursement Setting Methodology) based on the data sources from this subparagraph adjusted for acuity differences between Medicare and Medicaid residents and other factors.

(B) Based on most recently available, reliable utilization data, determine for each facility the total days of service by TILE group, days of service provided to TILE residents qualifying for Medicaid supplemental reimbursement for ventilator or tracheostomy care, total days of service for Medicare Part A residents in Medicaid-contracted beds, and total days of service for all other residents in Medicaid-contracted beds.

(C) Multiply the minimum required LVN equivalent minutes for each TILE group and supplemental TILE reimbursement group from subparagraph (A) of this paragraph by the facility's Medicaid days of service in each TILE group and supplemental TILE reimbursement group from subparagraph (B) of this paragraph and sum the products.

(D) Multiply the minimum required LVN equivalent minutes for Medicare residents by the facility's Medicare Part A days of service in Medicaid-contracted beds.

(E) Effective for reporting periods beginning on or after September 1, 2001, divide the sum from subparagraph (C) of this paragraph by the facility's total Medicaid days of service, with a day of service for a Medicaid TILE recipient who also qualifies for a supplemental TILE reimbursement counted as one day of service, compare this result to the minimum required LVN-equivalent minutes for a TILE 207 and multiply the lower of the two figures by the facility's other resident days of service in Medicaid-contracted beds.

(F) Sum the results of subparagraphs (C), (D) and (E) of this paragraph, divide the sum by the facility's total days of service in Medicaid-contracted beds, with a day of service for a Medicaid TILE recipient who also qualifies for a supplemental TILE reimbursement counted as one day of service. The results of these calculations are the minimum LVN equivalent minutes per resident day a participating facility must provide.

(2) Enhanced staffing levels. Participating facilities desiring to staff above the minimum requirements from paragraph (1) of this subsection may request LVN-equivalent staffing enhancements from an array of LVN-equivalent enhanced staffing options and associated add-on payments during open enrollment.

(3) Granting of staffing enhancements. HHSC divides all requested enhancements into two groups: pre-existing enhancements that facilities request to carry over from the prior year and newly-requested enhancements. Newly-requested enhancements may be enhancements requested by facilities that were nonparticipants in the prior year or by facilities that were participants in the prior year desiring to be granted additional enhancements. For the granting of enhancements to be effective on or after September 1, 2001, for an enhancement to qualify as a pre-existing enhancement a facility must have actually met the enhancement's staffing requirements during the most recent reporting period from which reliable data is available at the time qualification is determined. Using the process described herein, HHSC first determines the distribution of carry-over enhancements. If HHSC determines that funds are not available to carry over some or all pre-existing enhancements, facilities will be notified as per subsection (ee) of this section. If funds are available after the distribution of carry-over enhancements, HHSC then determines the distribution of newly requested enhancements. HHSC may not distribute newly requested enhancements to facilities owing funds identified for recoupment from subsections (n) and/or (o) of this section.

(A) HHSC determines projected units of service for facilities requesting each enhancement option, and multiplies this number by the rate add-on associated with that enhancement option as determined in subsection (l) of this section.

(B) HHSC compares the sum of the products from subparagraph (A) of this paragraph to available funds.

(i) If the product is less than or equal to available funds, all requested enhancements are granted.

(ii) If the product is greater than available funds, enhancements are granted beginning with the lowest level of enhancement and granting each successive level of enhancement until requested enhancements are granted within available funds. Based upon an examination of existing staffing levels and staffing needs, HHSC may grant certain enhancement options priority for distribution.

(4) Notification of granting of enhancements. Participating facilities are notified, in a manner determined by HHSC, as to the disposition of their request for staffing enhancements.

(k) Determination of direct care staff base rate.

(1) Determine the sum of recipient care costs from the direct care staff cost center in subsection (a) of this section in all nursing facilities included in the Texas Nursing Facility Cost Report database used to determine the nursing facility rates in effect on January 1, 2000 (hereinafter referred to as the initial database).

(2) Adjust the sum from paragraph (1) of this subsection as specified in §355.108 of this title (relating to Determination of Inflation Indices) to inflate the costs to the prospective rate year.

(3) Divide the result from paragraph (2) of this subsection by the sum of recipient days of service in all facilities in the initial database and multiply the result by 1.07. The result is the average direct care staff base rate component for all facilities.

(4) To calculate the direct care staff per diem base rate component for all facilities for each of the 11 TILE case mix groups and for the default group, multiply each of the standardized statewide case mix indices associated with the initial database by the average direct care staff base rate component from paragraph (3) of this subsection.

(5) The direct care staff per diem base rates will remain constant except for adjustments for inflation from paragraph (2) of this subsection. HHSC may also recommend adjustments to the rates in accordance with §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs). For rates effective September 1, 2003 and September 1, 2004, the direct care staff per diem base rate will be equal to the direct care staff rate for participating facilities associated with maintaining LVN equivalent minutes at the minimum levels required for participation in effect August 31, 2003 adjusted as necessary to remain within appropriations. Adjustments necessary to remain within appropriations will apply equally in percentage terms across each component of the nursing facility rate and each add-on.

(l) Determine each participating facility's total direct care staff rate. Each participating facility's total direct care staff rate will be equal to the direct care staff base rate from subsection (k) of this section plus any add-on payments associated with enhanced staffing levels selected by and awarded to the facility during open enrollment. HHSC will determine a per diem add-on payment for each enhanced staffing level taking into consideration the most recently available, reliable data relating to LVN equivalent compensation levels.

(m) Staffing requirements for participating facilities. Each participating facility will be required to maintain adjusted LVN-equivalent minutes equal to those determined in subsection (j) of this section. Each participating facility's adjusted LVN-equivalent minutes maintained during the reporting period will be determined as follows.

(1) Determine unadjusted LVN-equivalent minutes maintained. Upon receipt of the staffing and spending information described in subsection (f) of this section, HHSC will determine the unadjusted LVN-equivalent minutes maintained by each facility during the reporting period.

(2) Determine adjusted LVN-equivalent minutes maintained. Compare the unadjusted LVN-equivalent minutes maintained by the facility during the reporting period from paragraph (1) of this subsection to the LVN-equivalent minutes required of the facility as determined in subsection (j) of this section. The adjusted LVN-equivalent minutes are determined as follows:

(A) If the number of unadjusted LVN-equivalent minutes maintained by the facility during the reporting period is greater than or equal to the number of LVN-equivalent minutes required for the facility or less than the minimum LVN-equivalent minutes required

for participation as determined in subsection (j)(1) of this section; the facility's adjusted LVN-equivalent minutes maintained is equal to its unadjusted LVN-equivalent minutes; or

(B) If the number of unadjusted LVN-equivalent minutes maintained by the facility during the reporting period is less than the number of LVN-equivalent minutes required of the facility, but greater than or equal to the minimum LVN-equivalent minutes required for participation as determined in subsection (j)(1) of this section, the following steps are performed.

(i) Determine what the facility's accrued Medicaid fee-for-service direct care revenue for the reporting period would have been if their staffing requirement had been set at a level consistent with the highest LVN-equivalent minutes that the facility actually maintained, as defined in subsection (j) of this section.

(ii) Determine the facility's adjusted accrued direct care revenue by multiplying the accrued direct care revenue from clause (i) of this subparagraph by 0.85.

(iii) Determine the facility's accrued allowable Medicaid fee-for-service direct care staff expenses for the rate year.

(iv) Determine the facility's direct care spending surplus for the reporting period by subtracting the facility's adjusted accrued direct care revenue from clause (ii) of this subparagraph from the facility's accrued allowable direct care expenses from clause (iii) of this subparagraph.

(v) If the facility's direct care spending surplus from clause (iv) of this subparagraph is less than or equal to zero, the facility's adjusted LVN-equivalent minutes maintained is equal to the unadjusted LVN-equivalent minutes maintained as calculated in paragraph (1) of this subsection.

(vi) If the facility's direct care spending surplus from clause (iv) of this subparagraph is greater than zero, the adjusted LVN-equivalent minutes maintained by the facility during the reporting period is set equal to the facility's direct care spending surplus from clause (iv) of this subparagraph divided by the per diem enhancement add-on as determined in subsection (l) of this section plus the unadjusted LVN-equivalent minutes maintained by the facility during the reporting period from paragraph (1) of this subsection. according to the following formula: (Direct Care Spending Surplus/Per Diem Enhancement Add-on for One LVN-equivalent Minute) + Unadjusted LVN-equivalent Minutes.

(n) Staffing accountability. Participating facilities will be responsible for maintaining the staffing levels determined in subsection (j) of this section. HHSC will determine the adjusted LVN-equivalent minutes maintained by each facility during the reporting period by the method described in subsection (m) of this section.

(1) HHSC or its designee will recoup all direct care staff revenues associated with unmet staffing goals from participating facilities that fail to meet their staffing requirements during the reporting period.

(2) In addition, effective the first day of the rate year immediately following the determination that a facility failed to maintain the required weighted average LVN-equivalent minutes for the reporting period by four or more adjusted LVN-equivalent minutes or that a facility that was required to provide at least four LVN-equivalent minutes above its minimum staffing requirement, as determined in subsection (j)(1) of this section failed to meet its minimum staffing requirement for the reporting period, the facility will have its enrollment in the enhancement program limited to a level consistent with the highest adjusted LVN-equivalent minutes, as defined in subsection (m) of this section, that the facility actually attained plus two additional LVN-equivalent minutes. If the adjusted level attained is more than two LVN-equivalent minutes below the minimum direct care staff requirement for participation, the facility will be precluded from enrollment in the enhancement program and will be a nonparticipant. These enrollment limitations will remain in effect for the longer of either one full rate year or until the first day of the rate year that begins after funds identified for recoupment from subsections (n) and/or (o) of this section are repaid to HHSC or its designee.

(o) Spending requirements for participants. Participating facilities are subject to a direct care staff spending requirement with recoupment calculated as follows:

(1) At the end of the rate year, a spending floor will be calculated by multiplying accrued Medicaid fee-for-service direct care staff revenues (net of revenues recouped by HHSC or its designee due to the failure of the facility to meet a staffing requirement as per subsection (n) of this section) by 0.85.

(2) Accrued allowable Medicaid direct care staff fee-for-service expenses for the rate year will be compared to the spending floor from paragraph (1) of this subsection. HHSC or its designee will recoup the difference between the spending floor and accrued allowable Medicaid direct care staff fee-for-service expenses from facilities whose Medicaid direct care staff spending is less than their spending floor.

(3) At no time will a participating facility's direct care rates after spending recoupment be less than the direct care base rates.

(p) Dietary and Fixed Capital Mitigation. Recoupment of funds described in subsection (o) of this section may be mitigated by high dietary and/or fixed capital expenses as follows.

(1) Calculate dietary cost deficit. At the end of the facility's rate year, accrued Medicaid dietary per diem revenues will be compared to accrued, allowable Medicaid dietary per diem costs. If costs are greater than revenues, the dietary per diem cost deficit will be equal to the difference between accrued, allowable Medicaid dietary per diem costs and accrued Medicaid dietary per diem revenues. If costs are less than revenues, the dietary cost deficit will be equal to zero.

(2) Calculate dietary revenue surplus. At the end of the facility's rate, accrued Medicaid dietary per diem revenues will be compared to accrued, allowable Medicaid dietary per diem costs. If revenues are greater than costs, the dietary per diem revenue surplus will be equal to the difference between accrued Medicaid dietary per diem revenues and accrued, allowable Medicaid dietary per diem costs. If revenues are less than costs, the dietary revenue surplus will be equal to zero.

(3) Calculate fixed capital cost deficit. At the end of the facility's rate year, accrued Medicaid fixed capital per diem revenues will be compared to accrued, allowable Medicaid fixed capital per diem costs as defined in §355.306(a)(2)(A) of this title (relating to Cost Finding Methodology). If costs are greater than revenues, the fixed capital cost per diem deficit will be equal to the difference between accrued, allowable Medicaid fixed capital per diem costs and accrued Medicaid fixed capital per diem revenues. If costs are less than revenues, the fixed capital cost deficit will be equal to zero. For purposes of this paragraph, fixed capital per diem costs of facilities with occupancy rates below 85% are adjusted to the cost per diem the facility would have accrued had it maintained an 85% occupancy rate throughout the rate year.

(4) Calculate fixed capital revenue surplus. At the end of the facility's rate year, accrued Medicaid fixed capital per diem revenues will be compared to accrued, allowable Medicaid fixed capital

per diem costs as defined in §355.306(a)(2)(A) of this title (relating to Cost Finding Methodology). If revenues are greater than costs, the fixed capital revenue per diem surplus will be equal to the difference between accrued Medicaid fixed capital per diem revenues and accrued, allowable Medicaid fixed capital per diem costs. If revenues are less than costs, the fixed capital revenue surplus will be equal to zero. For purposes of this paragraph, fixed capital per diem costs of facilities with occupancy rates below 85% are adjusted to the cost per diem the facility would have accrued had it maintained an 85% occupancy rate throughout the rate year.

(5) Facilities with a dietary per diem cost deficit will have their dietary per diem cost deficit reduced by their fixed capital per diem revenue surplus, if any. Any remaining dietary per diem cost deficit will be capped at $2.00 per diem.

(6) Facilities with a fixed capital cost per diem deficit will have their fixed capital cost per diem deficit reduced by their dietary revenue per diem surplus, if any. Any remaining fixed capital per diem cost deficit will be capped at $2.00 per diem.

(7) Each facility's recoupment, as calculated in subsection (o) of this section, will be reduced by the sum of that facility's dietary per diem cost deficit as calculated in paragraph (5) of this subsection and its fixed capital per diem cost deficit as calculated in paragraph (6) of this subsection.

(q) Adjusting staffing requirements. Facilities that determine that they will not be able to meet their staffing requirements from subsection (m) of this section may request a reduction in their staffing requirements and associated rate add-on. These requests will be effective on the first day of the month following approval of the request.

(r) Voluntary withdrawal. Facilities wishing to withdraw from participation must notify HHSC in writing by certified mail. Facilities voluntarily withdrawing must remain nonparticipants for the remainder of the rate year.

(s) Notification of recoupment based on Annual Staffing and Compensation Report. Facilities will be notified, in a manner specified by HHSC, within 90 days of the determination of their recoupment amount by HHSC of the amount to be repaid to HHSC or its designee. If a subsequent review by HHSC or audit results in adjustments to the Annual Staffing and Compensation Report as described in subsection (f)(1) of this section that changes the amount to be repaid to HHSC or its designee, the facility will be notified in writing of the adjustments and the adjusted amount to be repaid. HHSC or its designee will recoup any amount owed from a facility's vendor payment(s) following the date of the notification letter.

(t) Vendor hold. Facilities required to submit a Staffing and Compensation Report due to a change of ownership or contract termination as described in subsection (f)(1)(A) - (B) of this section will have funds held as per 40 TAC §19.2308(2) (relating to Change of Ownership) until an acceptable Staffing and Compensation Report is received by HHSC and funds identified for recoupment from subsections (n) and/or (o) of this section are repaid to HHSC or its designee. HHSC or its designee will recoup any amount owed from the facility's vendor payments that are being held. In cases where funds identified for recoupment cannot be repaid from the held vendor payments, the responsible entity from subsection (x) of this section will be jointly and severally liable for any additional payment due to HHSC or its designee. Failure to repay the amount due or submit an acceptable payment plan within 60 days of notification will result in placement of a vendor hold on all DHS contracts controlled by the responsible entity and will bar the responsible entity from enacting any new contracts with DHS until repayment is made in full.

(u) Failure to document staff time and spending. Undocumented direct care staff and contract labor time and compensation costs will be disallowed and will not be used in the determination of direct care staff time and costs per unit of service.

(v) All other rate components. All other rate components will be calculated as specified in §355.307 of this title (relating to Reimbursement Setting Methodology) and will be uniform for all providers.

(w) Appeals. Subject matter of informal reviews and formal appeals is limited as per §355.110(a)(3)(B) of this title (relating to Informal Reviews and Formal Appeals).

(x) Responsible entities. The contracted provider, owner, or legal entity that received the revenue to be recouped upon is responsible for the repayment of any recoupment amount.

(y) Change of ownership. Participation in the enhanced direct care staff rate confers to the new owner as defined in 40 TAC §19.2308 (relating to Change of Ownership) when there is a change of ownership. The new owner is responsible for the reporting requirements in subsection (f) of this section for any reporting period days occurring after the change. If the change of ownership occurs during an open enrollment period as defined in subsection (c) of this section, then the owner recognized by DHS on the last day of the enrollment period may request to modify the enrollment status of the facility in accordance with subsection (d) of this section.

(z) Contract cancellations. If a facility's Medicaid contract is cancelled before the first day of an open enrollment period as defined in subsection (c) of this section and the facility is not granted a new contract until after the last day of the open enrollment period, participation in the enhanced direct care staff rate as it existed prior to the date when the facility's contract was cancelled will be reinstated when the facility is granted a new contract, if it remains under the same ownership.

(aa) In cases where a parent company, sole member, or governmental body controls more than one nursing facility (NF) contract, the parent company, sole member, or governmental body may request at the time each Annual Staffing and Compensation Report is submitted, in a manner prescribed by HHSC, to have its contracts' compliance with the spending requirements detailed in subsection (o) of this section for the applicable reporting period evaluated in the aggregate for all NF contracts it controlled at the end of the rate year or at the effective date of the change of ownership or termination of its last NF contract. In limited partnerships in which the same single general partner controls all the limited partnerships, that single general partner may make this request. Other such requests will be reviewed on a case-by-case basis. A new request to have compliance with spending requirements evaluated in the aggregate must be submitted for each reporting period. NF contracts that change ownership or terminate effective after the end of the applicable reporting period, but prior to the determination of compliance with spending requirements as per subsection (o) of this section, are excluded from all aggregate spending calculations. These contracts' compliance with spending requirements will be determined on an individual basis and the costs and revenues will not be included in the aggregate spending calculation.

(bb) Medicaid Swing Bed Program for Rural Hospitals. When a rural hospital participating in the Medicaid swing bed program furnishes NF nursing care to a Medicaid recipient under 40 TAC §19.2326 (relating to Medicaid Swing Bed Program for Rural Hospitals), DHS makes payment to the hospital using the same procedures, the same case-mix methodology and the same TILE rates that HHSC authorizes for reimbursing NFs participating in the enhanced direct care staff rate at the minimum level required for participation. These hospitals are not subject to the staffing and spending requirements detailed in this section.

(cc) Reinvestment. HHSC will reinvest recouped funds in the enhanced direct care staff rate program, to the extent that there are qualifying facilities.

(1) Identify qualifying facilities. Facilities meeting the following criteria during the most recent completed reporting period are qualifying facilities for reinvestment purposes.

(A) The facility was a participant in the enhanced direct care staff rate.

(B) The facility's unadjusted LVN-equivalent minutes as determined in subsection (m)(1) of this section were greater than the number of LVN-minutes required of the facility as determined in subsection (j) of this section.

(C) The facility met its spending requirement as determined in subsection (o) of this section.

(D) An acceptable Annual Staffing and Compensation Report for the reporting period was received by HHSC Rate Analysis at least 30 days prior to the date distribution of available reinvestment funds was determined.

(E) The DHS contract that was in effect for the facility during the reinvestment reporting period is still in effect as an active contract when reinvestment is determined or, in cases where a change of ownership has occurred, DHS has approved a Successor Liability Agreement between the contract in effect during the reinvestment reporting period and the contract in effect when reinvestment is determined.

(2) Distribution of available reinvestment funds. Available funds are distributed as described below.

(A) HHSC determines units of service provided during the most recent completed reporting period by each qualifying facility achieving, with unadjusted LVN-equivalent minutes as determined in subsection (m)(1) of this section, each enhancement option above the enhancement option awarded to the facility during the reporting period and multiplies this number by the rate add-on associated with that enhancement in effect during the reporting period.

(B) HHSC compares the sum of the products from subparagraph (A) of this paragraph to funds available for reinvestment.

(i) If the product is less than or equal to available funds, all achieved enhancements for qualifying facilities are retroactively awarded for the reporting period.

(ii) If the product is greater than available funds, retroactive enhancements are granted beginning with the lowest level of enhancement and granting each successive level of enhancement until achieved enhancements are granted within available funds.

(3) All retroactive enhancements are subject to spending requirements detailed in subsection (o) of this section. Revenue from retroactive enhancements is not eligible for mitigation of spending recoupment as described in subsection (p) of this section.

(4) Retroactively awarded enhancements do not qualify as pre-existing enhancements for enrollment purposes.

(5) Notification of reinvested enhancements. Qualifying facilities are notified in a manner determined by HHSC, as to the award of reinvested enhancements.

(dd) Disclaimer. Nothing in these rules should be construed as preventing facilities from adding direct care staff in addition to those funded by the enhanced direct care staff rate.

(ee) Notification of lack of available funds. If HHSC determines that funds are not available to continue participation for facilities from which it has not received an acceptable request to modify their enrollment by the last day of an enrollment period as per subsection (d) of this section, to maintain participation until a facility notifies it that the facility no longer wishes to participate or is removed from participation as per subsection (i) of this section, or to fund carry-over enhancements as per subsection (j)(3) of this section, HHSC will notify providers in a manner determined by HHSC that such funds are not available.

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 August 11, 2003.

TRD-200304990
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

SUBCHAPTER J. PURCHASED HEALTH SERVICES
DIVISION 4. MEDICAID HOSPITAL SERVICES

1 TAC §355.8063

The Health and Human Services Commission (HHSC) adopts amendments to §355.8063, concerning the reimbursement methodology for inpatient hospital services, in its Medicaid Reimbursement Rates chapter. Some of amendments are adopted with changes and some amendments are adopted without changes to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4728). The text of the rule will be republished.

Amendment adopted with change.

The amendment adopted to §355.8063(u) adds criteria for determining hospitals eligible for a high-volume Standard Dollar Amount (SDA) increase and the adjustment factors to be included in the calculation of the SDAs for state fiscal year 2003, 2004, and 2005.

Amendments adopted without change.

The adopted amendments to the following subsections are made without changes. The adopted amendment to §355.8063(h) suspends the rebasing and recalculation of the standard dollar amounts for state fiscal years 2004 and 2005. The adopted amendment to of §355.8063(n)(2) suspends the application of the cost-of-living index to the SDA established for state fiscal years 2003, 2004, and 2005. The adopted amendment to §355.8063(o) limits Direct Graduate Medical Education (GME) reimbursement to children's hospitals based on the level of appropriations made specifically for this purpose. Subsection (q) prescribes the cost-based methodology for reimbursing certain hospitals over 100 licensed. Subsection (s) limits GME payments to Diagnosis Related Groups (DRG) reimbursed hospitals based on the level of appropriations made specifically for this purpose.

The amendments to §355.8063 add language to allow certain Medicaid hospitals with more than 100 licensed beds the option of receiving cost-based reimbursement authorized by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). The amendments also add language to implement Medicaid inpatient hospital rate reimbursement reductions and reductions in reimbursement for GME mandated by the 78th Legislature. The amendments are necessary to maintain cost-effective reimbursement for Medicaid hospital inpatient services within appropriated funds for the 2004 - 2005 biennium.

Article II, Rider 24, relating to the Health and Human Services Commission contained in the General Appropriations Act, 78th Legislature, Regular Session, 2003, directs HHSC to reimburse hospitals with fewer than 100 licensed beds and certain hospitals with more than 100 licensed beds, the greater of the amount received by the hospital under the Texas Medicaid inpatient prospective payment system or the TEFRA reimbursement methodology. The inpatient prospective payments made to hospitals with fewer than 100 licensed beds and certain other hospitals with more than 100 licensed beds, described in Rider 24, may be impacted by the reimbursement reductions described in Rider 46. Article II, Rider 46 relating to the Health and Human Services Commission contained in the General Appropriations Act, 78th Legislature, Regular Session, 2003, directs HHSC to reduce hospital reimbursement and calculate the reductions without rebasing of current reimbursement factors. Article II, Rider 48 relating to the Health and Human Services Commission contained in the General Appropriations Act, 78th Legislature, Regular Session, 2003, directs HHSC to limit the amount of reimbursement for GME to amounts appropriated or allocations of appropriations made specifically for GME reimbursement.

During the public comment period, which included a public hearing on July 16, 2003, HHSC received comments from the Texas Association of Public & Nonprofit Hospitals, the Texas Hospital Association, State government officials, and health care providers. HHSC reviewed each comment and grouped like or related comments. The comments and HHSC's responses are summarized below.

Comment: Several commenters expressed support for the proposed amendment to provide cost-based reimbursement to hospitals with over 100 licensed bed that are designated as rural referral centers or sole community hospitals.

Response: HHSC agrees that extending cost protection to these hospitals is important to meeting the health care needs of Medicare and Medicaid patients in rural communities.

Comment: Several commenters expressed opposition to the proposed amendment regarding the elimination of GME payments. The commenters indicated that the elimination of GME funds resulting from this amendment would directly affect teaching hospitals. Furthermore, the commenters indicated that teaching hospitals often serve a large percentage of Medicaid and uninsured patients and that the elimination of GME would cause these hospitals to cut services to Medicaid and uninsured patients.

Response: HHSC believes the amendment to §355.8063 is justified as it limits the amount of GME reimbursement to the extent that funds are appropriated specifically for this purpose as mandated by Article II, Rider 48, relating to the Health and Human Services Commission contained in the General Appropriations Act, 78th Legislature, Regular Session, 2003.

Comment: Several commenters expressed opposition to the proposed amendment regarding the reduction in hospital payments and the decision not to recalculate or rebase state fiscal year 2004 and 2005 hospital rates. The commenters noted that further reduction in Medicaid hospital payments are not warranted because of recent reductions in hospital outlier payments, reductions in disproportionate share hospital funds, selective contracting, and Medicaid managed care reductions. The commenters also noted that the five percent reduction in payments required by the 78th Legislature should be detailed clearly in the hospital rate-setting rule.

Response: HHSC believes the amendment to §355.8063 regarding the reductions in hospital reimbursement is necessary in order for the agency to operate the Medicaid program within appropriations and is consistent with the mandate in Article II, Rider 46, relating to the Health and Human Services Commission contained in the General Appropriations Act. Effective September 1, 2003, §531.021(d) and (e) of the Government Code grants HHSC the authority to implement procedures enabling the agency to adjust reimbursement rates in accordance with changes in appropriated funds.

Comment: Several commenters expressed opposition to the proposed amendment regarding the qualifications and adjustment percentages for the high-volume Medicaid add-on to the Standard Dollar Amount, noting that the adjustment percentages used for state fiscal year 2003 were not appropriate for the 2004 - 2005 biennium and recommending that the state delay implementation until additional data are available to adjust the qualifications. One commenter suggested that, if the state could not delay, at least the percentages applied during 2003 should be reduced by fifty percent for the state fiscal year 2004 - 2005 biennium.

HHSC agrees with the commenters that the percentages should be reduced and has adjusted the high volume Medicaid add-on percentages as indicated in §355.8063(u). The adjusted add-on percentages are fifty percent lower than those applied during state fiscal year 2003 and are consistent with the levels of funding to be directed to high volume Medicaid hospitals over the state fiscal year 2004 - 2005 biennium. HHSC does not agree that implementation of high volume payments based on the adjusted percentages can be delayed, but agency staff will review pertinent data as they become available to determine whether or not adjustments to the qualifications or adjustment percentages.

The amendments are adopted under the Texas Government Code, §531.033, which provides the commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code, §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

§355.8063. Reimbursement Methodology for Inpatient Hospital Services.

(a) Introduction. Except as otherwise specified in subsection (q) of this section, the Texas Medical Assistance Program (Medicaid) reimburses hospitals, except in-state children's hospitals, for covered inpatient hospital services using a prospective payment system. In-state children's hospitals are reimbursed for covered inpatient hospital services using the methodology described in subsection (o) of this section. For hospitals other than in-state children's hospitals, the department or its designee groups hospitals into payment divisions using the average

base year payment per case in each hospital after adjusting each hospital's base year payment per case by a case mix index, a cost-of-living index, and a budgetary reduction factor of 10%. The budgetary reduction factor for admissions occurring in state fiscal year 1990 (September 1, 1989, through August 31, 1990) is 7.0% and the budgetary reduction factor for admissions occurring in state fiscal year 1991 (September 1, 1990, through August 31, 1991) is 5.5%. For admissions occurring in state fiscal year 1992 (September 1, 1991, through August 31, 1992) and subsequent state fiscal years, a budgetary reduction factor is not applied. The payment divisions are separated into $100 increments. If a payment division has less than ten observations for Medicaid data, the department or its designee considers that payment division to be statistically invalid. Hospitals within that payment division are placed into the nearest valid payment division.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Diagnosis-related group (DRG)--The taxonomy of diagnoses as defined in the Medicare DRG system or as otherwise specified by the department or its designee.

(2) Case mix index--The hospital-specific average relative weight.

(3) Relative weight--The arithmetic mean of the dollars for a specific DRG divided by the arithmetic mean of the dollars for all cases.

(4) Standard dollar amount--The weighted mean base year payment for all hospitals in a payment division after adjusting each hospital's base year payment per case by a case mix index, a cost-of-living index, and a budgetary reduction factor of 10%. The budgetary reduction factor for admissions occurring in state fiscal year 1990 (September 1, 1989, through August 31, 1990) is 7.0% and the budgetary reduction factor for admissions occurring in state fiscal year 1991 (September 1, 1990, through August 31, 1991) is 5.5%. For admissions occurring in state fiscal year 1992 (September 1, 1991, through August 31, 1992) and subsequent state fiscal years, a budgetary reduction factor is not applied. The department or its designee establishes a minimum standard dollar amount of $1,600 and applies it to those hospitals whose standard dollar amount is less than the minimum. The department or its designee applies cost-of-living indexes to the standard dollar amounts established for the base year to calculate standard dollar amounts for prospective years. A cost-of-living index is not applied to the minimum standard dollar amount.

(5) Base year--A 12-consecutive-month period of claims data selected by the department or its designee as the basis for establishing the payment divisions, standard dollar amounts, and relative weights. The department or its designee selects a new base year at least every three years.

(6) Base year payment per case--The payment that would have been made to a hospital if the department or its designee reimbursed the hospital under similar methods and procedures used in Title XVIII of the Social Security Act, as amended, effective October 1, 1982, by Public Law 97-248. In calculating the base year payment per case, the department or its designee uses the interim rate established at tentative or final settlement, if applicable, of the most recent cost reporting period up to and including the cost reporting period associated with the base year.

(7) Interim rate--Total reimbursable Title XIX inpatient costs, as specified in paragraph (6) of this subsection, divided by total covered Title XIX inpatient charges per tentative or final cost reporting period. Beginning with 1985 hospital fiscal year cost reporting periods, the interim rate established at tentative settlement includes incentive/penalty payments to the extent that they continue to be permitted by federal law and regulation and continue to be included on Title XVIII cost reports.

(8) New hospital--A facility that has been in operation under present and previous ownership for less than three years and that initially enrolls as a Title XIX provider after the current base year. A new hospital must have been substantially constructed within the five previous years from the effective date of the prospective rate period.

(9) Children's hospital--A hospital within Texas that is recognized by Medicare as a children's hospital and is exempted by Medicare from the Medicare prospective payment system.

(10) Out-of-state children's hospital--A hospital outside of Texas that is recognized by Medicare as a children's hospital and is exempted by Medicare from the Medicare prospective payment system.

(c) Calculating relative weights and standard dollar amounts. The department or its designee uses recent Texas claims data to calculate both the relative weights and standard dollar amounts. A relative weight is calculated for each DRG and applied to all payment divisions. A separate standard dollar amount is calculated for each payment division. Except for border hospitals with a Texas Medicaid provider number beginning with an H and out-of-state children's hospitals, the department or its designee uses the overall arithmetic mean base year payment per case, including the cost of living update as specified in subsection (n) of this section, as the standard dollar amount to reimburse out-of-state hospitals. The overall arithmetic mean base year payment per case, including the cost of living update as specified in subsection (n) of this section, is also used as the standard dollar amount to reimburse military hospitals providing inpatient emergency services for admissions on or after October 1, 1993. The calculation of the standard dollar amount for out-of-state children's hospitals is described in subsection (r) of this section. Except for new hospitals, the overall arithmetic mean base year payment per case, including the cost of living update as specified in subsection (n) of this section, is also used as the standard dollar amount to reimburse hospitals that initially enroll as a Title XIX provider after the current base year. The standard dollar amount for new hospitals is the lesser of the overall arithmetic mean base year payment per case plus three percentile points, including the cost of living update as specified in subsection (n) of this section, or the hospital's average Medicaid cost per Medicaid discharge based on the tentative or final settlement, if applicable, of the hospital's first 12-month cost reporting period occurring after the hospital's enrollment as a Title XIX provider. In the event that the new hospital is a replacement facility for a hospital that is currently enrolled as a Title XIX provider, the hospital is reimbursed by using either the standard dollar amount of the existing provider or the standard dollar amount for new hospitals, whichever is greater. The use of the hospital's average Medicaid cost per Medicaid discharge, after adjusting for case-mix intensity, as its standard dollar amount is applied prospectively to the beginning of the next prospective year and is applicable only if the tentative or final settlement is completed and available at least 60 days before the beginning of the prospective year. The hospital's Medicaid costs are determined using similar methods and procedures used in Title XVIII of the Social Security Act, as amended, effective October 1, 1982, by Public Law 97-248. When two or more Title XIX participating providers merge, the department or its designee combines the Medicaid inpatient costs, as described in this subsection, of each of the individual providers to calculate a standard dollar amount, effective at the start of the next prospective period, to be used to reimburse the merged entity. Acquisitions and buyouts do not result in a recalculation of the standard dollar amount of the acquired provider unless

acquisitions or buyouts result in the purchased or acquired hospital becoming part of another Medicaid participating provider. When the department or its designee determines that the department or its designee has made an error that, if corrected, would result in the standard dollar amount of the provider for which the error was made changing to a new payment division, either higher or lower, the department or its designee moves the provider into the correct payment division, and the department or its designee reprocesses claims paid using the initial, incorrect standard dollar amount that was in effect for the current state fiscal year by using the existing standard dollar amount of the payment division in which the provider was moved. In the determination of the corrected payment division, the department or its designee uses the relative weights that are currently in effect for the state fiscal year. The correction of this error condition only applies to the current state fiscal year payments. No corrections are made to payment rates for services provided in previous state fiscal years. If a specific DRG has less than ten observations for Medicaid data, the department or its designee uses the corresponding Medicare relative weight, except for DRGs relating to organ transplants. Relative weights for organ transplant DRGs with less than ten observations may be developed using Medicaid-specific data. The relative weights include organ procurement costs for both solid and nonsolid organs. The department or its designee makes no distinction between urban and rural hospitals and there is no federal/national portion within the payment.

(d) Add-on payments. There are no separate add-on payments. The department or its designee:

(1) includes capital costs in the standard dollar amount for each payment division;

(2) includes the cost of indirect medical education in the standard dollar amount for each payment division;

(3) includes the cost of malpractice insurance in the standard dollar amount for each payment division; and

(4) includes return on equity in the standard dollar amount for each payment division.

(e) Calculating the payment amount. The department or its designee reimburses each hospital for covered inpatient hospital services by multiplying the standard dollar amount established for the hospital's payment division by the appropriate relative weight. The patient's DRG classification is primarily based on the patient's principal diagnosis. The resulting amount is the payment amount to the hospital.

(f) Patient transfers. If a patient is transferred, the department or its designee establishes payment amounts as specified in paragraphs (1) - (4) of this subsection. If appropriate, the department or its designee manually reviews transfers for medical necessity and appropriate payment.

(1) If the patient is transferred to a skilled nursing facility or intermediate care facility, the department or its designee pays the transferring hospital the total payment amount of the patient's DRG.

(2) If the patient is transferred to another hospital, the department or its designee pays the receiving hospital the total payment amount of the patient's DRG. The department or its designee pays the transferring hospital a DRG per diem. The DRG per diem is based on the following formula: (DRG relative weight x standard dollar amount)/DRG mean length of stay (LOS) x LOS. The LOS is the lesser of the DRG mean LOS, the claim LOS, or 30 days. The 30-day factor is not used in establishing a DRG per diem amount for a medically necessary stay of a recipient less than age one in a Title XIX participating hospital or a recipient less than age six in a disproportionate share hospital as defined by the department.

(3) If the department or its designee determines that the transferring hospital provided a greater amount of care than the receiving hospital, the department or its designee reverses the payment amounts. The transferring hospital is paid the total payment amount of the patient's DRG and the receiving hospital is paid the DRG per diem.

(4) The department or its designee makes multiple transfer payments by applying the per diem formula to the transferring hospitals and the total DRG payment amount to the discharging hospital.

(g) Split billing. The department or its designee does not allow interim billings by providers. The hospital may bill the department or its designee when the patient exceeds his 30-day inpatient hospital limit or is discharged. The department or its designee bases payment on the diagnosis codes known at billing. The payment is final.

(h) Rebasing the standard dollar amounts. The HHSC or its designee rebases the standard dollar amount for each payment division at least every three years. HHSC will not rebase or recalculate the standard dollar amounts for each payment division for admissions during the period September 1, 2003 through August 31, 2005. The relative weights are recalibrated whenever the standard dollar amounts are recalculated. The standard dollar amounts are not rebased on an interim basis unless the HHSC or its designee determines that special circumstances warrant rebasing.

(i) Recalibrating the relative weights. The department or its designee recalibrates the relative weights whenever the standard dollar amounts are rebased.

(j) Revising the diagnosis related groups. The department or its designee parallels the taxonomy of diagnoses as defined in the Medicare DRG prospective payment system unless a revision is required based on Texas claims data or other factors as determined by the department or its designee.

(k) Appeals.

(1) A hospital may appeal individual claims as specified in other department rules. As specified in subparagraphs (A) - (C) of this paragraph, a hospital may also appeal mechanical, mathematical, and data entry errors in base year claims data and incorrectly computed subsequent adjustments to the hospital's base year claims data because of the base year's tentative or final settlement.

(A) If a hospital believes that the department or its designee made a mechanical, mathematical, or data entry error in computing the hospital's base year claims data, the hospital may request a review of the disputed calculation by the department or, at the department's direction, its designee. A hospital may not request a review if the disputed calculation is the result of the hospital's submittal of incorrect data or the result of the department's or its designee's application of an interim rate to the base year claims data derived from a cost reporting period occurring before the base year. Upon the provider hospital's request, the department or its designee provides the applicable available data used in calculating the hospital's base year claims data to the provider hospital. The hospital must submit a specific written request for review and appropriate specific documentation supporting its contention that there has been a mechanical, mathematical, or data entry error to the department or its designee. Except as specified in subparagraph (C) of this paragraph, the request must be submitted within 60 days after the hospital receives initial notification of its payment division and standard dollar amount. The department or its designee conducts the review as quickly as possible and notifies the hospital of the results. If the hospital is dissatisfied with the results of the review, the hospital may request a formal hearing under the procedures, including the expedited processing provisions, contained in Chapter 1 of this title (relating to the Texas Board of Health), except that, in the event of

any conflict, the procedures contained in this section apply. Except as specified in subparagraph (C) of this paragraph, if the review or appeal is completed at least 60 days before the beginning of the next prospective year, any adjustment required after the completion of the review or appeal is applied to that next prospective year. If the review or appeal is not completed at least 60 days before the beginning of the next prospective year, any adjustment required after the completion of the review or appeal is applied only to the subsequent prospective year. The base year claims data used by the department or its designee pending the review or appeal is the base year claims data established by the department or its designee.

(B) If a hospital believes that the department or its designee incorrectly computed subsequent adjustments to the hospital's base year claims data because of the base year's tentative or final settlement, the hospital may request a review of the disputed calculation related to the tentative or final settlement by the department or, at the department's direction, its designee. The hospital's request may also include a request to review the tentative or final settlement. The hospital must submit a specific written request for review and appropriate specific documentation supporting its contention that the tentative or final settlement is incorrect to the department or its designee. Except as specified in subparagraph (C) of this paragraph, the request must be submitted within 60 days after the hospital receives notification of a tentative or final settlement of the base year data. The department or its designee conducts the review as quickly as possible and notifies the hospital of the results. If the hospital is dissatisfied with the results of the review, the hospital may request a formal hearing under the procedures, including the expedited processing provisions, contained in Chapter 1 of this title (relating to the Texas Board of Health), except that, in the event of any conflict, the procedures contained in this section apply. Except as specified in subparagraph (C) of this paragraph, if the review or appeal is completed at least 60 days before the beginning of the next prospective year, any adjustment required after the completion of the review or appeal is applied to that next prospective year. If the review or appeal is not completed at least 60 days before the beginning of the next prospective year, any adjustment required after the completion of the review or appeal is applied only to the subsequent prospective year. The interim rate applied to the base year claims data pending the review or appeal is the interim rate established by the department or its designee.

(C) If a hospital believes that the department or its designee incorrectly computed the hospital's 1985 base year claims data as specified in subparagraph (A) of this paragraph, the hospital may submit a specific written request for review and appropriate specific documentation supporting its contention within 60 days after the effective date of this section. If a hospital believes that the department or its designee incorrectly computed the tentative or final settlement of the cost reporting period associated with the 1985 base year as specified in subparagraph (B) of this paragraph, the hospital may submit a specific written request for review and appropriate specific documentation supporting its contention within 60 days after the effective date of this section. The hospital must follow the process described in subparagraph (A) or (B) of this paragraph, as appropriate. If the review or appeal is completed by December 31, 1987, any adjustment required after the completion of the review or appeal is applied to the March 1, 1988, adjustment described in subsection (n) of this section. If the review or appeal is not completed by December 31, 1987, any adjustment required after the completion of the review or appeal is applied to the next prospective year.

(2) A hospital may not appeal the prospective payment methodology used by the department or its designee, including:

(A) the payment division methodologies;

(B) the DRGs established;

(C) the methodology for classifying hospital discharges within the DRGs;

(D) the relative weights assigned to the DRGs; and

(E) the amount of payment as being inadequate to cover costs.

(l) Cost reports. Each hospital must submit a cost report at periodic intervals as prescribed by Medicare or as otherwise prescribed by the department or its designee. The department or its designee uses data from these reports in rebasing years, in making adjustments as described in subsections (n) and (q) of this section, and in completing cost settlements for children's hospitals.

(m) Cost settlements. If a hospital has already begun its fiscal year on September 1, 1986, cost settlement for that portion of the hospital's fiscal year which occurs before September 1, 1986, is based on reimbursement for covered inpatient hospital services under similar methods and procedures used in the Social Security Act, Title XVIII, as amended, effective October 1, 1982, by Public Law 97-248. Except as otherwise specified in subsection (q) of this section, there are no cost settlements for services provided to recipients admitted as inpatients to hospitals reimbursed under the prospective payment system on or after the implementation date of the prospective payment system.

(n) Adjustments to base year claims data.

(1) Beginning with 1985 hospital fiscal year cost reporting periods, the department or its designee adjusts each hospital's base year claims data and resulting payment division and standard dollar amount to reflect the interim rate established at tentative and final settlement, if applicable, of the cost reporting period associated with the base year. The adjustments are applied only to claims data for months within the base year that coincide with months within the hospital's cost reporting period. The claims data for months within the base year that do not coincide with months within the hospital's cost reporting period remain unchanged until the tentative or final settlement of the cost reporting period containing those months has been completed. The adjustments are applied to the next prospective year beginning September 1, 1988, except as specified in subparagraphs (A), (B), and (C) of this paragraph.

(A) If the tentative or final settlement is not completed and available at least 60 days before the beginning of the next prospective year, any adjustment required because of the settlement is applied to the subsequent prospective year.

(B) If a review or appeal of a tentative or final settlement is not completed at least 60 days before the beginning of the next prospective year, the interim rate applied to the claims data on which the hospital's payment division and standard dollar amount are established is the interim rate established at tentative or final settlement by the department or its designee. Any adjustment required after the completion of the review or appeal is applied only to the subsequent prospective year.

(C) The department or its designee makes a March 1, 1988, adjustment to each hospital's 1985 base year claims data and resulting payment division and standard dollar amount to reflect the interim rate established at tentative and final settlement, if applicable, of the cost reporting period associated with the 1985 base year. Any additional adjustments required as a result of reviews and appeals described in subsection (k) of this section and completed by December 31, 1987, are also reflected in the March 1, 1988, adjustment. Future adjustments as described in this subsection and subsection (k) of this section are made at the beginning of each prospective year.

(2) The HHSC or its designee updates the standard dollar amount each year for each payment division by applying a cost-of-living index to the standard dollar amount established for the base year. The cost-of-living index for state fiscal years 2003, 2004, and 2005 will not be applied to the standard dollar amount for admissions during the period September 1, 2003 through August 31, 2005. The index used to update the standard dollar amounts is the greater of:

(A) the Health Care Financing Administration's (HCFA) Market Basket Forecast (PPS Hospital Input Price Index) based on the report issued for the federal fiscal year quarter ending in March of each year, adjusted for the state fiscal year by summing one-third of the annual forecasted rate of the index for the current calendar year and two-thirds of the annual forecasted rate of the index for the next calendar year; or

(B) an amount determined by selecting the lesser of the following two measures:

(i) the change in total charges per case for the latest year available compared to total charges per case for the previous year; or

(ii) the change in the Texas medical consumer price index-urban (that is, the arithmetic mean of the Houston and Dallas/Fort Worth medical consumer price indices for urban consumers) for the latest year available compared to the Texas medical consumer price index-urban for the previous year.

(o) Reimbursement to in-state children's hospitals. The HHSC or its designee reimburses in-state children's hospitals under similar methods and procedures used in the Social Security Act, Title XVIII, as amended, effective October 1, 1982, by Public Law 97-248, Tax Equity and Fiscal Responsibility Act (TEFRA) except for the cost of direct graduate medical education (DGME). For cost reporting periods beginning on or after September 1, 2003, children's hospitals with allowable DGME costs as determined under TEFRA principles will receive a pro rata share of their annual TEFRA DGME cost based on appropriations or allocations from appropriations made specifically for this purpose. The amount and frequency of interim payments will also be subject to the availability of appropriations made specifically for this purpose. Interim payments are subject to settlement at both tentative and final audit of a hospital's cost report. The HHSC or its designee establishes target rates and stipulates payments per discharge, incentives, and percentage of payments. The department or its designee uses each hospital's 1987 final audited cost reporting period (fiscal year ending during calendar year 1987) as its target base period. The target base period for hospitals recognized by Medicare as children's hospitals after the implementation of this subsection is the hospital's first full 12-month cost reporting period occurring after its recognition by Medicare. The HHSC or its designee annually increases each hospital's target amount for the target base period by the cost-of-living index described in subsection (n) of this section. The HHSC or its designee selects a new target base period at least every three years. The HHSC or its designee bases interim payments to each hospital upon the interim rate derived from the hospital's most recent tentative or final Medicaid cost report settlement. If a Title XIX participating hospital is subsequently recognized by Medicare as a children's hospital after the implementation of this subsection, the hospital must submit written notification to the HHSC or its designee and include adequate documentation and claims data. Upon receipt of the written notification from the hospital, the HHSC or its designee reserves the right to take 90 days to convert the hospital's reimbursement to the reimbursement methodology described in this subsection.

(p) Day and cost outliers. Effective for inpatient hospital services provided on or after July 1, 1991, the HHSC or its designee pays day or cost outliers for medically necessary inpatient services provided to clients less than age one in all Title XIX participating hospitals and clients less than age six in disproportionate share hospitals, as defined by the HHSC, that are reimbursed under the prospective payment system. For purposes of outlier payment adjustments, disproportionate share hospitals are defined as those hospitals identified by the HHSC during the previous state fiscal year as disproportionate share hospitals. If an admission qualifies for both a day and a cost outlier, only the outlier resulting in the highest payment to the hospital is paid. (Note: This subsection does not address reimbursement for the provision of other necessary inpatient hospital services under the Early and Periodic Screening, Diagnosis, and Treatment Program, as required by the Omnibus Budget and Reconciliation Act of 1989.)

(1) To establish day outliers, the HHSC or its designee first removes from the current base year data those admissions whose actual lengths of stay are greater than or equal to plus or minus three standard deviations from the arithmetic mean length of stay for each DRG. The HHSC or its designee then recomputes the arithmetic mean length of stay and the standard deviations for each DRG. Inpatient days, which exceed two standard deviations beyond the arithmetic mean length of stay for the DRG are eligible for a day outlier. Payment is based on 70% of a per diem amount of a full DRG payment. The per diem amount is established by dividing the full DRG payment amount by the arithmetic mean length of stay for the DRG.

(2) To establish cost outliers, the HHSC or its designee first determines what the amount of reimbursement for the admission would have been if the HHSC or its designee reimbursed the hospital under similar methods and procedures used in the Social Security Act, Title XVIII, as amended, effective October 1, 1982, by Public Law 97-248, Tax Equity and Fiscal Responsibility Act (TEFRA). The HHSC or its designee then determines the outlier threshold by using the greater of the full DRG payment amount multiplied by 1.5 or an amount determined by selecting the lesser of the universe mean of the current base year data multiplied by 11.14, or the hospital's standard dollar amount multiplied by 11.14. The hospital's standard dollar amount is the amount that the HHSC or its designee uses to reimburse the hospital under the prospective payment system. The outlier threshold is subtracted from the amount of reimbursement for the admission established under the TEFRA principles. The HHSC or its designee multiplies any remainder by 70% to determine the actual amount of the cost outlier payment.

(3) If a recipient less than age one is admitted to and remains in a hospital past his or her first birthday, medically necessary inpatient days and hospital charges after the child reaches age one are included in calculating the amount of any day or cost outlier payment.

(q) Hospitals with 100 or fewer licensed beds and certain hospitals with more than 100 licensed beds. The policies in this subsection apply only to hospital fiscal years beginning on or after September 1, 1989 for hospitals with 100 or fewer licensed beds at the beginning of the hospital's fiscal year or hospital fiscal years beginning on or after September 1, 2003 for hospitals with more than 100 licensed beds at the beginning of the hospital's fiscal year, located in a county that is not in a metropolitan statistical area (MSA) as defined by the U.S. Office of Management and Budget (OMB) and designated by the Center for Medicare & Medicaid Services as a Sole Community Provider (SCH) or Rural Referral Center RCC. At tentative cost settlement of the hospital's fiscal year (with subsequent adjustment at final cost settlement, if applicable), the HHSC or its designee determines what the amount of reimbursement during the fiscal year would have been if the HHSC or

its designee reimbursed the hospital under similar methods and procedures used in Title XVIII of the Social Security Act, as amended, effective October 1, 1982, by Public Law 97-248, Tax Equity and Fiscal Responsibility Act (TEFRA). This determination is made without imposing a TEFRA cap. If the amount of reimbursement under the TEFRA principles is greater than the amount of reimbursement received by the hospital under the prospective payment system, the HHSC or its designee reimburses the difference to the hospital.

(r) Reimbursement to out-of-state children's hospitals. For admissions on or after September 1, 1991, the standard dollar amount for out-of-state children's hospitals is calculated as specified in this subsection. The department or its designee calculates the overall average cost per discharge for in-state children's hospitals based on tentative or final settlement of cost reporting periods ending in calendar year 1990. The overall average cost per discharge is adjusted for intensity of service by dividing it by the average relative weight for all admissions from in-state children's hospitals during state fiscal year 1990 (September 1, 1989 through August 31, 1990). The adjusted cost per discharge is updated each year by applying the cost-of-living index described in subsection (n) of this section. The resulting product is the standard dollar amount to be used for payment of claims as described in subsection (e) of this section. The department or its designee selects a new cost reporting period and admissions period from the in-state children's hospitals at least every three years for the purpose of calculating the standard dollar amount for out-of-state children's hospitals.

(s) Reimbursement of inpatient direct graduate medical education (GME) costs. The Medicaid allowable inpatient direct graduate medical education cost, as specified under similar methods and procedures used in the Social Security Act, Title XVIII, as amended, effective October 1, 1982, by Public Law 97-248, is calculated for each hospital having inpatient direct graduate medical education costs on its tentative or final audited cost report. Those inpatient direct medical education costs are removed from the calculation of the interim rate described in subsection (b)(7) of this section and not used in the calculation of the provider's standard dollar amount described in subsection (c) of this section. Those allowable inpatient direct graduate medical education costs for services delivered to Medicaid eligible patients with inpatient admission dates on or after September 1, 1997, will be subject to the cost determination and settlement provisions as described in this subsection. No Medicaid inpatient direct graduate medical education cost settlement provisions are applied to inpatient hospital admissions prior to September 1, 1997. For cost reporting periods beginning on or after September 1, 2003, providers with Medicaid allowable direct graduate medical education costs as described in this subsection will receive a pro rata share of their annual GME cost based on appropriations or allocations from appropriations made specifically for this purpose. The amount and frequency of interim payments will also be subject to the availability of appropriations made specifically for this purpose. Interim payments are subject to settlement at both tentative and final audit of a provider's cost report.

(t) Notwithstanding other provisions of this chapter, supplemental payments will be made each state fiscal year in accordance with this subsection to eligible hospitals that serve high volumes of Medicaid and uninsured patients.

(1) Supplemental payments are available under this subsection for inpatient hospital services provided by a publicly-owned hospital or hospital affiliated with a hospital district in Bexar, Dallas, Ector, El Paso, Harris, Lubbock, Nueces, Tarrant, and Travis counties on or after July 6, 2001.

(2) State funding for supplemental payments authorized under this paragraph will be limited to and obtained through intergovernmental transfers of local or hospital district funds. The supplemental payments described in this paragraph will be made in accordance with the applicable regulations regarding the Medicaid upper limit provisions codified at 42 C.F.R. §447.272.

(3) In each county listed in paragraph (1) of this subsection, the publicly-owned hospital or hospital affiliated with a hospital district that incurs the greatest amount of cost for providing services to Medicaid and uninsured patients, will be eligible to receive supplemental high volume payments. The supplemental payments authorized under this paragraph are subject to the following limits:

(A) In each state fiscal year the amount of any inpatient supplemental payments and outpatient supplemental payments may not exceed the hospital's "hospital specific limit," as determined under §355.8065(f)(2)(E) of this chapter (relating to Reimbursement to Disproportionate Share Hospitals (DSH)); and

(B) The amount of inpatient supplemental payments and fee-for-service Medicaid inpatient payments the hospital receives in a state fiscal year may not exceed Medicaid inpatient billed charges for inpatient services provided by the hospital to fee-for-service Medicaid recipients in accordance with 42 CFR §447.271.

(4) An eligible hospital will receive quarterly supplemental payments. The quarterly payments will be limited to one-fourth of the lesser of:

(A) The difference between the hospital's Medicaid inpatient billed charges and Medicaid payments the hospital receives for services provided to fee-for-service Medicaid recipients. Medicaid billed charges and payments will be based on a twelve consecutive-month period of fee-for-service claims data selected by HHSC; or

(B) The difference between the hospital's "hospital specific limit," as determined under §355.8065(f)(2)(E) of this chapter and the hospital's DSH payments as determined by the most recently finalized DSH reporting period.

(5) For purposes of calculating the "hospital specific limit" in paragraph (4)(B) of this subsection, the "cost of services to uninsured patients, " as defined by §355.8065(b)(5) of this chapter and "Medicaid shortfall," as defined by §355.8065(b)(16) of this chapter, will be adjusted as follows:

(A) The amount of Medicaid payments (including inpatient and outpatient supplemental payments) that exceed Medicaid cost will be subtracted from the "Medicaid shortfall."

(B) The amount of the "Medicaid shortfall," as adjusted in accordance with subparagraph (A) of this paragraph, will be subtracted from the "cost of services to uninsured patients" to ensure that, during any state fiscal year, a hospital does not receive more in total Medicaid payments (inpatient and outpatient rate payments, graduate medical education payments, supplemental payments and disproportionate share hospital payments) than its cost of serving Medicaid patients and patients with no health insurance.

(u) In accordance with this subsection and subject to the availability of funds, a high volume adjustment factor will be included in the calculation of the state fiscal year 2003 (September 1, 2002 through August 31, 2003) Standard Dollar Amount described in paragraph (4) of this subsection for eligible hospitals. For purposes of this subsection, payments made in state fiscal year 2004, prior to the effective date of this subsection, may be adjusted in accordance with the methodology set out in this subsection. Notwithstanding paragraphs (1) and (2) of this subsection, all non-state owned or operated, non public, DRG reimbursed hospitals located in urban counties with a population greater than 100,000, and Medicaid days in greater than 175% of the mean Medicaid days in state fiscal year 2002 (September 1, 2001 through

August 31, 2002) will be eligible for a high volume adjustment to their state fiscal year 2004 and 2005 SDA. Medicaid days will be based on hospital claims data selected by HHSC. County population will be based on the 2000 United States census. Eligible hospitals in counties with a population less than 1,000,000 will receive a high volume adjustment factor of 3.25%; eligible hospitals in counties with a population greater than 1,000,000 will receive a high volume adjustment factor of 5.125%.

(1) Eligible Hospitals. All non-state owned or operated, non public, DRG reimbursed hospitals located in urban counties with a population greater than 100,000, and Medicaid days greater than 175% of the mean Medicaid days in state fiscal year 2001 (September 1, 2000 through August 31, 2001) will be eligible for a high volume adjustment to their SDA. Medicaid days will be based on hospital claims data selected by HHSC. County population will be based on the 2000 United States census.

(2) All eligible hospitals in counties with a population less than 1,000,000 will receive a high volume adjustment factor of 6.50%; eligible hospitals in counties with a population greater than 1,000,000 will receive a high volume adjustment factor of 10.25%.

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 August 11, 2003.

TRD-200304992
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

1 TAC §355.8065

The Health and Human Services Commission (HHSC) adopts an amendment to §355.8065, concerning reimbursement to disproportionate share hospitals, with changes to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4730). The text of the rule will be republished.

The amendment is justified as an improvement to the program. The amendment deletes the use of the proxy for the calculation of uninsured costs and extends the time frame for the state to add conversion factors to certain public hospitals to August 31, 2005. The amendment also exempts city hospitals from receiving a conversion factor.

The HHSC is not adopting the proposed changes to §355.8065(b)(11) and (16). These proposed rule changes would have allowed the state to offset a hospital's Medicaid reimbursement in excess of its Medicaid costs against its cost of treating uninsured patients. They also would have allowed the state to include third party payments as part of its calculation of a hospital's un-reimbursed Medicaid cost. The HHSC plans further study of these proposed changes and their effects on hospitals.

During the public comment period, which included a public hearing held on July 16, 2003, comments were received from the Texas Hospital Association and the Texas Association of Public and Nonprofit Hospitals.

Comment: The commenters supported the proposed rule change eliminating the proxy for the calculation of uninsured costs. The commenters also supported extending the time frame for the state to add conversion factors to certain public hospitals and exempting city hospitals from receiving a conversion factor. The commenters pointed out that the existing conversion factors have a two-year effect in only one year.

Response: The agency staff will review pertinent data as they become available to determine the appropriate conversion factors for the state fiscal year 2004 - 2005 biennium.

The amendment is adopted under the Texas Government Code, §531.033, which provides the commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code, §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

§355.8065. Additional Reimbursement to Disproportionate Share Hospitals.

(a) Introduction. Hospitals participating in the Texas Medical Assistance (Medicaid) program that meet the conditions of participation and that serve a disproportionate share of low-income patients are eligible for additional reimbursement from the disproportionate share hospital fund. The single state agency or its designee shall establish each hospital's eligibility for and amount of reimbursement as specified in this section. For purposes of Medicaid disproportionate share eligibility determination, a multi-site hospital is considered as one provider unless it has separate Medicaid cost reports for each site. To verify data referred to in this section, hospitals must allow state personnel access to the hospital and its records.

(b) Definitions. For Purposes of this section, the following words and terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) Adjusted hospital specific limit--A hospital specific limit trended forward to account for inflation update factor since the base year.

(2) Bad debt charges--Uncollectible inpatient and outpatient charges that result from the extension of credit.

(3) Charity care--The unreimbursed cost to a hospital of providing, funding, or otherwise financially supporting health care services on an inpatient or outpatient basis to a person classified by the hospital as financially or medically indigent or providing, funding, or otherwise financially supporting health care services provided to financially indigent patients through other nonprofit or public outpatient clinics, hospitals, or health care organizations.

(4) Charity charges-Total amount of hospital charges for inpatient and outpatient services attributed to charity care in a hospital fiscal year. These charges do not include bad debt charges, contractual allowances or discounts (other than for indigent patients not eligible for medical assistance under the approved Medicaid state plan); that is, reductions or discounts in charges given to other third party payers such as, but not limited to, health care maintenance organizations, Medicare or Blue Cross. The amount of total charity charges must be consistent with the amount reported on the Texas Department of Health's annual hospital survey.

(5) Cost of services to uninsured patients--Inpatient and outpatient charges to patients who have no health insurance or other source of third party payment for services provided during the year,

multiplied by the hospital's ratio of costs to charges (inpatient and outpatient), less the amount of payments made by or on behalf of those patients. Uninsured patients are patients who have no health insurance or other source of third party payments for services provided during the year. Uninsured patients include those patients who do not possess health insurance that would apply to the service for which the individual sought treatment.

(6) Cost-to-charge ratio (inpatient only)--Hospital's overall inpatient cost-to-charge ratio, as determined from its Medicaid cost report it submitted for its fiscal year ending in the previous calendar year. The latest available Medicaid cost report will be used in the absence of the cost report for the hospital fiscal year ending in the previous calendar year.

(7) Cost-to-charge ratio (inpatient and outpatient)--Hospital's overall cost-to-charge ratio, as determined from its Medicaid cost report it submitted for its fiscal year ending in the previous calendar year. The latest available Medicaid cost report will be used in the absence of the cost report for the hospital fiscal year ending in the previous calendar year.

(8) Financially indigent--An uninsured or underinsured person who is accepted for care with no obligation or a discounted obligation to pay for the services rendered based on the hospital's eligibility system.

(9) Gross inpatient revenue--Amount of gross inpatient revenue (charges) reported by the hospital in the appropriate part of the Medicaid cost report it submitted for its fiscal year ending in the previous calendar year. Gross inpatient revenue excludes revenue related to the professional services of hospital-based physicians, swing bed facilities, skilled nursing facilities, intermediate care facilities, and other revenue that is unidentified. The latest available Medicaid cost report will be used in the absence of the cost report for the hospital fiscal year ending in the previous calendar year.

(10) Hospital eligibility criteria--The financial criteria used by a hospital to determine if a patient is eligible for charity care. The system includes income levels and means testing indexed to the federal poverty guidelines; provided, however that a hospital may not establish an eligibility system that sets the income level eligible for charity care lower than that required by counties under the Texas Health and Safety Code, §61.023, or higher, in the case of the financially indigent, than 200% of the federal poverty guidelines. A hospital may determine that a person is financially or medically indigent pursuant to the hospital's eligibility system after health care services are provided.

(11) Hospital specific limit--The sum of the following two measurements:

(A) the Medicaid shortfall; and

(B) cost of services to uninsured patients.

(12) Inflation update factor--The commission or its designee applies a cost of living index to a hospital's unreimbursed Medicaid costs and its cost of treating uninsured patients. The index used is the greater of:

(A) the Centers for Medicare and Medicaid Services (CMS) Market Basket Forecast (PPS Hospital Input Price Index) based on the report issued for the federal fiscal year quarter ending in March of each year, adjusted for the state fiscal year by summing one-third of the annual forecasted rate of the index for the current calendar year and two-thirds of the annual forecasted rate of the index for the next calendar year; or

(B) an amount determined by selecting the lesser of the following two measures:

(i) the change in total charges per case for the latest year available compared to total charges per case for the previous year; or

(ii) the change in the Texas medical consumer price index-urban (that is, the arithmetic mean of the Houston and Dallas/Fort Worth medical consumer price indices for urban consumers) for the latest year available compared to the Texas medical consumer price index-urban for the previous year.

(13) Low-income days--Number of days derived by multiplying a hospital's total inpatient census days by its low-income utilization rate.

(14) Low-income utilization rate--The result of the following computation: ((Title XIX inpatient hospital payments plus inpatient payments received from state and local governments) divided by (gross inpatient revenue multiplied by cost-to-charge ratio)) plus ((total inpatient charity charges minus inpatient payments received from state and local governments) divided by (gross inpatient revenue)).

(15) Medicaid inpatient utilization rate--Fraction expressed as a percentage, the numerator of which is the hospital's number of inpatient days attributable to patients who (for these days) were eligible for medical assistance under a state plan, and the denominator of which is the total number of the hospital's inpatient days in that period. The term "inpatient day" includes each day in which an individual (including a newborn) is an inpatient in the hospital, whether or not the individual is in a specialized ward and whether or not the individual remains in the hospital for lack of suitable placement elsewhere.

(16) Medicaid shortfall--The cost of services (inpatient and outpatient) furnished to Medicaid patients, less the amount paid under the nondisproportionate share hospital payment method under the state plan.

(17) Medically indigent--A person whose medical or hospital bills after payment by third-party payers exceed a specified percentage of the patient's annual gross income, determined in accordance with the hospital's eligibility system, and the person is financially unable to pay the remaining bill.

(18) Medicare inpatient utilization rate--Medicare inpatient days divided by total inpatient census days.

(19) Payments received--Payments received from uninsured patients from or on behalf of uninsured patients as defined in paragraph (5) of this subsection.

(20) Rural area--Area outside a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA). MSA and PMSA are defined by the Office of Management and Budget.

(21) Total inpatient census days--Total number of a hospital's inpatient census days during its fiscal year ending in the previous calendar year.

(22) Total inpatient charity charges--Total amount (excluding bad debt charges) of the hospital's charges for inpatient hospital services attributed to charity care (care provided to individuals who have no source of payment, third-party or personal resources) in a cost reporting period. The total inpatient charges attributable to charity care does not include contractual allowances and discounts (other than for indigent patients not eligible for medical assistance under an approved Medicaid State Plan); that is, reduction or discounts, in charges given to other third-party payers such as but not limited to HMOs, Medicare, or Blue Cross. The amount of total inpatient charity charges must be consistent with the amount reported on the commission or its designee's annual hospital survey.

(23) Total Medicaid inpatient days--Total number of Title XIX inpatient days based on the latest available state fiscal year data for patients eligible for Title XIX benefits. The term excludes days for patients who are covered for services which are fully or partially reimbursable by Medicare. The term includes Medicaid-eligible days of care billed to managed care organizations. Total Medicaid inpatient days includes days that were denied payment for reasons other than eligibility. Included are inpatient days of care provided to patients eligible for Medicaid at the time the service was provided, regardless of whether the claim was filed or paid. These denied claims include, but are not limited to, claims for patients whose spell of illness limits are exhausted, or claims that were filed late. The term excludes days attributable to Medicaid patients between the ages of 21 and 65 who live in an institution for mental diseases. The term includes days attributable to individuals eligible for Medicaid in other states. Total Medicaid inpatient days includes days with dates of admissions between September 1 and August 31 (state fiscal year) and claims finalized dates within the fiscal year and for nine months after the end of the fiscal year (May 31).

(24) Total Medicaid inpatient hospital payments--Total amount of Title XIX funds, excluding Medicaid disproportionate share funds, a hospital received for admissions during the latest available state fiscal year for inpatient services. The term includes dollars received by a hospital for inpatient services from managed care organizations. The term includes Medicaid inpatient payments received by a hospital for patients eligible for Medicaid in other states. Total Medicaid inpatient hospital payments includes payments associated with dates of admissions between September 1 and August 31 (state fiscal year) and dates of payments within the fiscal year and for nine months after the end of the fiscal year (May 31).

(25) Total operating costs --Total operating costs of a hospital during its fiscal year ending in the calendar year before the start of the current federal fiscal year, according to the hospital's Medicaid cost report (tentative, or final audited cost report, if available).

(26) Total state and local revenue--Total amount of state and local payments a hospital received for inpatient care, excluding all Title XIX payments, during its fiscal year ending in the previous calendar year. Sources of state and local payments include but are not limited to County Indigent Health Care, Children with Special Health Care Needs, Kidney Health Care, and tax funds. Payment sources containing federal dollars are not to be included in state and local payments. These sources include, but are not limited to: Substance Abuse and Mental Health Services Administration, Ryan White Title I, Ryan White Title II, Ryan White Title III, and TRICARE Foundation Health, Medicare, and Medicare/Medicaid contractual funds and allowances. The commission or its designee adjusts tax dollars for hospitals that report all or none of their tax dollars received as inpatient tax dollars. To make adjustments, the commission or its designee uses the appropriate parts of the Medicaid cost report that the hospital submitted for its fiscal year ending in the previous calendar year.

(27) Urban--Area inside an MSA or PMSA.

(28) Weighted low-income days--Low-income days multiplied by an appropriate weighing factor.

(29) Weighted Medicaid days--Medicaid days multiplied by an appropriate weighing factor.

(30) Available fund (state mental and chest hospitals)--Sum of 100% of their adjusted hospital specific limits.

(31) Available fund (hospitals other than mental and chest hospitals)--Total federal fiscal year cap (state disproportionate share hospital allotment) minus the available fund for state teaching hospitals minus the available fund for state mental and chest hospitals.

(c) Conditions of participation. Before the beginning of each state fiscal year, which begins September 1, the single state agency or its designee shall survey Medicaid hospitals to determine which hospitals meet the state's conditions of participation. Hospitals must allow state personnel access to the hospital and its records to ensure compliance with the conditions of participation. Failure to meet all of the conditions of participation shall result in ineligibility for participation in the program. These conditions of participation do not apply to state-owned teaching hospitals as specified in §355.8067 of this title (relating to Disproportionate Share Hospital Reimbursement Methodology for State-Owned Teaching Hospitals). The conditions of participation are as follows.

(1) Hospital eligibility criteria for indigent patients needing medical care. Each Medicaid hospital must submit to the state Medicaid director its hospital eligibility criteria for indigent patients and the procedures for identifying those indigent patients eligible for emergency and nonemergency medical care. Hospital eligibility criteria should address financially indigent people as well as the medically indigent and are indexed to the federal poverty guidelines. Hospitals must identify the number of patients to whom they provide charity care and must make available to state personnel sufficient records to document the amount of charity care provided to those patients. A hospital must allow state personnel to observe the implementation of its stated charity policy and must permit state personnel access to the hospital or its records evidencing charity care. Exception: State mental hospitals and state chest hospitals are exempt. Indigent care criteria for these hospitals are defined in state law.

(2) Charity charge requirements. Exceptions: Urban hospitals with combined Medicaid and Medicare inpatient utilization rates equal to or greater than 80% are exempt. Rural and children's hospitals with combined Medicare and Medicaid inpatient utilization rates equal to or greater than 65% are exempt. Any hospital that qualifies for Medicaid disproportionate share funds in a state fiscal year, and that did not get Medicaid disproportionate share funds in the previous year, is exempt from this specific condition. State mental hospitals and state chest hospitals are exempt. The ratio of a hospital's total inpatient and outpatient charity charges of a hospital fiscal year must be equal to or greater than 25% of its net disproportionate share payments received in the next state fiscal year.

(3) Posting requirements. Each hospital must annually provide assurances to the state Medicaid director that it posts policies informing patients and prospective patients of its eligibility and charity care. These policies must be posted prominently and continuously in common, patient-entry points. Hospitals must advise all patients of the availability of no-cost medical care and the application procedures. The posting must be in English and Spanish.

(4) Reporting requirements. Each hospital must report receipt and expenditure of Medicaid disproportionate share funds to the commission or its designee at least once a year. Each hospital must maintain records for the receipt and expenditure of its disproportionate share funds for five years.

(5) Community health care assessment. Each hospital, or group of hospitals, must annually furnish to the commission or its designee a copy, developed at the direction of the hospital's governing board, of its assessment of the health care needs of its community. The assessment must contain a socioeconomic and demographic description of the hospital's service area and an assessment of the service area's existing health care resources. The assessment must demonstrate how the hospital is using its disproportionate share funds to address its

community health needs. Exceptions: State mental hospitals and state chest hospitals are exempt because their expenditures are governed by state law.

(6) Alternative access to primary care. Each hospital must annually report to the commission or its designee the availability of alternative access (other than emergency care) to primary care in its community. Alternative access to primary care includes, but is not limited to, primary care physician offices, minor emergency centers, and primary care clinics. Hospitals must have plans to arrange for nonemergency patients to receive care that is not in their emergency rooms, unless they can demonstrate that there is no feasible alternative in the community. This kind of plan includes, but is not limited to, a hospital-based clinic for nonemergent patients referred to after triage. Hospitals also must report their progress in treating nonemergency patients apart from their emergency rooms. Exceptions: The following hospitals are exempt from this condition: State mental and state chest hospitals; psychiatric hospitals licensed by the Texas Department of Mental Health and Mental Retardation (TXMHMR); and certain hospitals licensed as "special" by the Texas Department of Health (department) (i.e., long-term care hospitals, ventilator hospitals, burn institutes, and alcohol-chemical dependency hospitals); rehabilitation hospitals; maternity hospitals; college infirmaries; contagious disease hospitals; and hospitals for the terminally ill.

(7) Trauma system. Disproportionate share hospitals must actively participate in the development of a regional trauma system, which includes trauma facility designation as defined in the state trauma laws (Health and Safety Code, §§773.111 - 773.120) and department rules. This condition shall apply only if rules and procedures to designate facilities have been adopted. Exceptions: The following hospitals are exempt from the trauma system condition: State mental and state chest hospitals; psychiatric hospitals licensed by TXMHMR; and certain hospitals licensed as "special" by the department (i.e., long term care hospitals, ventilator hospitals, burn institutes, and alcohol-chemical dependency hospitals); rehabilitation hospitals; maternity hospitals; college infirmaries; contagious disease hospitals; and hospitals for the terminally ill. Pediatric and adolescent facilities are exempt from trauma facility designation requirements until the time that state law authorizes the designation of pediatric and/or adolescent trauma facilities.

(A) Hospitals qualifying for the disproportionate share program for the first time must meet the regional trauma system development participation requirement in the first year of their participation in the disproportionate share program, regional trauma system development participation and application for trauma facility designation in the second year of their participation in the disproportionate share program, regional trauma system development participation and confirmation that a consultation survey has been scheduled or a complete designation application packet has been submitted to the Bureau of Emergency Management in the third year of their participation in the disproportionate share program, regional trauma system development participation and confirmation that a verification or designation survey has been scheduled in the fourth year of their participation in the disproportionate share program and continued participation and completed verification or designation survey in the fifth year of their participation in the disproportionate share program, continued participation and trauma facility designation in the sixth year of their participation in the disproportionate share program, and continued participation and maintenance of trauma facility designation in their subsequent years of participation in the disproportionate share program. By March 1 of each year, the Bureau of Emergency Management reports hospital participation in regional trauma system development, application for trauma facility designation, and trauma facility designation status to the disproportionate share program.

(B) Hospitals shall be designated as trauma facilities under four levels that range from "basic" (stabilization and transfer of major and severe trauma patients) to "comprehensive" (care and management of all trauma patients, plus education and research

(8) Maintenance of effort. Hospital districts and city/county hospitals with greater than 250 licensed beds in the state's largest MSAs and PMSAs are not eligible for disproportionate share payments if local revenues are reduced as a result of disproportionate share funds received.

(9) Two-physician requirement. In order to qualify for disproportionate share hospital payments, each hospital must have at least two physicians (M.D. or D.O.) who have hospital staff privileges and who have agreed to provide nonemergency obstetrical services to Medicaid clients. The two-physician requirement does not apply to hospitals whose inpatients are predominantly under 18 years old or that did not offer nonemergency obstetrical services as of December 22, 1987.

(d) Qualifying formulas for determining disproportionate share status. Each hospital must have a Medicaid inpatient utilization rate, at a minimum, of 1.0%. The single state agency or its designee shall identify the qualifying Medicaid disproportionate share providers from among the hospitals that meet the two-physician requirement and the state's conditions of participation, as specified in subsection (c)(1) - (9) of this section, by using the following formulas. In the case of hospitals that have merged to form a single Medicaid provider, the single state agency or its designee shall aggregate the data points from the individual hospitals that now make up the single provider to determine whether the single Medicaid provider qualifies as a Medicaid disproportionate share hospital. Medicaid disproportionate share hospitals shall receive payments if they merge with other hospitals during the fiscal year, if they continue to meet the two-physician requirement, and if they meet the other conditions of participation. Children's hospitals that do not otherwise qualify as disproportionate share hospitals shall be deemed disproportionate share hospitals. The formulas are as follows:

(1) a Medicaid inpatient utilization rate at least one standard deviation above the mean Medicaid inpatient utilization rate for all hospitals participating in the Medicaid program: Title XIX Inpatient Days/Total Inpatient Census Days;

(2) for rural hospitals, a Medicaid inpatient utilization rate greater than the mean Medicaid inpatient utilization rate for all hospitals participating in the Medicaid program; or

(3) a low-income utilization rate exceeding 25% but not more than 100%. For a hospital, the low-income utilization rate is the sum (expressed as a percentage) of the fractions calculated as follows:

(A) the total Medicaid inpatient payments paid to the hospital, plus the amount of payments received directly from state and local governments for inpatient hospital care, excluding all Title XIX payments, in a hospital fiscal year, divided by a hospital's gross inpatient revenue multiplied by the hospital's inpatient cost-to-charge ratio for the same cost-reporting period: (Title XIX Inpatient Hospital Payments + Total State and Local Revenue)/(Gross Inpatient Revenue x Cost to Charge Ratio).

(B) the total amount of the hospital's charges for inpatient hospital services attributable to charity care (care provided to individuals who have no source of payment, third-party or personal resources), excluding bad debt charges, in a cost reporting period, minus the amount of payments for inpatient hospital services received directly from state and local governments, excluding all Title XIX payments, in a hospital fiscal year, divided by the total amount of the hospital's charges for inpatient services in the hospital in the same period. The

total inpatient charges attributable to charity care will not include contractual allowances and discounts (other than for indigent patients not eligible for medical assistance under an approved Medicaid state plan); that is, reductions or discounts in charges given to other third-party payers such as but not limited to HMOs, Medicare, or Blue Cross: (Total Inpatient Charity Charges - Total State and Local Payments)/Gross Inpatient Revenue.

(4) total Medicaid inpatient days at least one standard deviation above the mean Medicaid inpatient days for all hospitals participating in the Medicaid program.

(5) Total Medicaid inpatient days at least 75 percent of one standard deviation above the mean Medicaid inpatient days for all hospitals, participating in the Medicaid program, in urban counties with populations of 250,000 persons or less, according to the most recent decennial census.

(e) Determining disproportionate share status. To determine Medicaid disproportionate share status:

(1) the single state agency arrays each hospital's Medicaid utilization rate in descending order. The single state agency first selects hospitals meeting the two-physician requirement or one of the exceptions to the requirement whose Medicaid utilization rates are at least one standard deviation above the mean Medicaid inpatient utilization rate for all hospitals participating in the Medicaid program. The state considers these hospitals to be Medicaid disproportionate share hospitals;

(2) the single state agency arrays each rural hospital's Medicaid utilization rate in descending order. The single state agency then selects rural hospitals meeting the two-physician requirement or one of the exceptions to the requirement whose Medicaid utilization rate is above the mean Medicaid utilization rate for all hospitals participating in the Medicaid program. The state considers these hospitals to be Medicaid disproportionate share hospitals;

(3) the single state agency then arrays each remaining hospital's low income utilization rate in descending order. The single state agency selects hospitals meeting the two-physician requirement or one of the exceptions to the requirement whose low income utilization rates are greater than 25%. The state considers these hospitals to be Medicaid disproportionate share hospitals;

(4) the single state agency arrays each remaining hospital's total Medicaid inpatient days in descending order. The single state agency selects hospitals meeting the two-physician requirement or one of the exceptions to the requirement whose total inpatient Medicaid days is at least one standard deviation above the mean Medicaid inpatient days for all hospitals participating in the Medicaid program. The state considers these hospitals to be Medicaid disproportionate share hospitals.

(5) the single state agency arrays each remaining hospital's total Medicaid inpatient days in descending order. The single state agency selects hospitals, located in urban counties with populations of 250,000 persons or less, meeting the two-physician requirement or one of the exceptions to the requirement, whose total Medicaid inpatient days is at least 75 percent of one standard deviation above the mean Medicaid inpatient days for all hospitals participating in the Medicaid program in urban counties of 250,000 persons or less, according to the most recent decennial census. The state considers these hospitals to be Medicaid disproportionate share hospitals.

(f) Reimbursing Medicaid disproportionate share hospitals. The commission shall reimburse Medicaid disproportionate share hospitals on a monthly basis. Monthly payments will equal one twelfth of annual payments unless it is necessary to adjust the amount because payments will not be made for a full 12-month period, to comply with the annual state disproportionate share hospital allotment, or to comply with other state or federal disproportionate share hospital program requirements. Before the start of the next state fiscal year, the commission determines the size of the available funds to reimburse disproportionate share hospitals for the next state fiscal year, which begins each September 1. The funds available to reimburse the state chest hospitals and state mental hospitals equal the total of their adjusted hospital specific limits. The available fund for the remaining hospitals equals the lesser of the funds remaining in the state's annual disproportionate share hospital allotment or the sum of qualifying hospitals' adjusted hospital specific limits. Payments shall be made in the following manner, unless the commission determines the hospital's proposed reimbursement has exceeded its specific limit.

(1) A state chest hospital (facility of the Texas Department of Health) or a state mental hospital (facility of the Texas Department of Mental Health and Mental Retardation) that meets the requirements for disproportionate share status and provides inpatient psychiatric care or inpatient hospital services receives annually 100% of its adjusted hospital specific limit.

(2) For the remaining hospitals, payments will be made based on both weighted inpatient Medicaid days and weighted low-income days. The commission weighs each hospital's total inpatient Medicaid days and low-income days by the appropriate weighting factor. The commission defines a low-income day as a day derived by multiplying a hospital's total inpatient census days from its fiscal year ending in the previous calendar year by its low-income utilization rate. Hospital districts and city/county hospitals with greater than 250 licensed beds in the state's largest MSAs shall receive weights based proportionally on the MSA population according to the most recent decennial census. MSAs with populations greater than or equal to 150,000, according to the most recent decennial census, are considered "the largest MSAs." Children's hospitals also shall receive weights because of the special nature of the services they provide. All other hospitals receive weighting factors of 1.0. The inpatient Medicaid days of each hospital shall be based on the latest available state fiscal year data for patients entitled to Title XIX benefits. The available fund shall be divided into two parts. One half of the available fund will reimburse each qualifying hospital by its percent of the total inpatient Medicaid days. One-half of the available fund will reimburse each qualifying hospital by its percent of the total low income days. The commission determines whether hospitals in rural areas will receive 5.5% or more of the gross disproportionate share hospital funds for non-state hospitals. If hospitals in rural areas will receive at least 5.5% of the gross non-state hospital funds, the commission will reimburse them using existing principles. If hospitals in rural areas will not receive at least 5.5% of gross non-state hospital funds, the commission will reimburse them at 5.5% of non-state hospital funds, using existing principles. Reimbursement for the remaining hospitals is determined as follows:

(A) The single state agency or its designee determines the average monthly number of weighted Medicaid inpatient days and weighted low-income days of each qualifying hospital.

(B) A qualifying hospital receives a monthly disproportionate share payment based on the following formula:
Figure: 1 TAC §355.8065(f)(2)(B) (No change.)

(C) All MSA population data are from the most recent decennial census. The specific weights for certain hospital districts and children's hospitals are as follows:

(D) For state fiscal year 2004, (September 1, 2003 through August 31, 2004), and state fiscal year 2005, (September 1, 2004 through August 31, 2005), the monthly disproportionate

share payment calculated under subparagraph (C) of this paragraph is subject to a conversion factor that is applied as follows:

(i) A conversion factor of 1.10 is applied to payments made to hospital districts located in MSAs with populations greater than 3 million

(ii) A conversion factor of 1.163881 is applied to payments made to hospital districts located in MSAs with populations between 1 and 3 million.

(iii) A conversion factor of .974 is applied to payments made to children's hospitals.

(iv) A conversion factor of .798724 is applied to payments made to private, urban, general hospitals located in a MSA.

(v) A conversion factor of 1.0 is applied to payments made to all other hospitals.

(vi) For purposes of this section, a private, urban, general hospital is defined as a hospital that is not operated by a political subdivision of the state, is not licensed under Chapter 577, Health and Safety Code, to provide mental health services or is not exempted from the Medicare and Medicaid prospective payment systems as a children's hospital, and is eligible for additional reimbursement from the disproportionate share hospital fund.

(E) The commission or its designee determines the hospital specific limit for each disproportionate share hospital. This limit is the sum of a hospital's Medicaid shortfall, as defined in subsection (b)(16) of this section, and its cost of services to uninsured patients, as defined in subsection (b)(5) of this section, multiplied by the appropriate inflation update factor, as provided for in subsection (g)(2)(E) of this section.

(i) The Medicaid shortfall includes total Medicaid billed charges and any Medicaid payment made for the corresponding inpatient and outpatient services delivered to Texas Medicaid clients, as determined from the hospital's fiscal year claims data, regardless of whether the claim was paid. These denied claims include, but are not limited to, patients whose spell of illness claims were exhausted, or payments were denied due to late filing. See subsection (b)(16) of this section for definition of "Medicaid shortfall."

(ii) The total Medicaid billed charges for each hospital are converted to cost, utilizing a calculated cost-to-charge ratio (inpatient and outpatient). The commission or its designee determines that ratio by using the hospital's Form HCFA 2552, Hospital and Hospital Health Care Complex Cost Report, that was submitted for the fiscal year ending in the previous calendar year. The commission or its designee uses the latest available Medicaid cost report in the absence of the Medicaid cost report submitted in the fiscal year ending in the previous calendar year. To determine the cost-to-charge ratio (inpatient and outpatient) for each hospital, the commission or its designee uses the total cost from the HCFA 2552, Worksheet B, Part I, Column 25, and total charges from the HCFA 2552, Worksheet C Part I, Column 6. The ratio is the total cost divided by the total gross patient charges.

(iii) The commission or its designee determines the cost of services to patients who have no health insurance or source of third party payments for services provided during the fiscal year for each hospital. Hospitals are surveyed each year to determine charges that can be attributed to patients without insurance or other third party resources. The charges from reporting hospitals are multiplied by each hospital's cost-to-charge ratio (inpatient and outpatient) to determine the cost.

(iv) Hospitals that do not respond to the survey, or that are unable to determine accurately the charges attributed to patients without insurance, shall have their bad debt charges as defined in subsection (b)(2) of this section, and their charity charges as defined in subsection (b)(4) of this section, reduced by a percentage derived from a representative sample of hospitals to be determined annually by the commission or its designee. The commission or its designee derives the percentages using the following formula; for each specific category of hospitals listed in clause (v) of this subparagraph, the commission or its designee sums the total amount of charges for patients without health insurance or other third party payments. For each specific category of hospitals listed in clause (v) of this subparagraph, the commission or its designee sums the charity and bad debt charges. For each specific category of hospitals listed in clause (v) of this subparagraph, the department then divides the charges for patients without health insurance or other third party payments by the sum of charity and bad debt charges. The commission or its designee then uses the resulting ratio for each specific category of hospitals listed in clause (v) of this subparagraph in the following manner. Individual hospitals that do not respond to the survey, or that are unable to accurately determine the charges attributed to patients without insurance have their hospital's individual sum of bad debt and charity charges multiplied by the appropriate ratio for the specific hospital category. After the commission or its designee has calculated a value for the charges for patients without health insurance or other source of third party payment for each individual hospital, the commission or its designee multiplies each hospital's calculated value by that hospital's cost-to-charge ratio (inpatient and outpatient) to obtain the proxy cost of services delivered to uninsured patients at each hospital.

(v) The representative sample of hospitals is one of the following specific categories of hospitals: urban public, other urban, rural, state-operated psychiatric and nonstate psychiatric. In the event that less than 20% of the hospitals in a specific category provide data to the commission or its designee, the commission or its designee uses the overall ratio calculated for all responding hospitals. The commission or its designee creates additional categories, by submitting a state plan amendment, as it deems appropriate for the economic and efficient operation of the Medicaid disproportionate share hospital program.

(vi) After the commission or its designee determines each disproportionate share hospital's cost of services to patients who have no health insurance or source of third party payments for services provided during the year, the commission or its designee subtracts from each hospital's cost of services the amount of payments made by or on behalf of those patients who have no health insurance or source of third party payments for services provided during the year.

(F) The commission or its designee shall trend each hospital's "hospital specific limit" calculated from its historical base period cost report to the state's fiscal year disproportionate share program. For hospitals without a full 12-month fiscal year cost report, the commission or its designee shall convert their costs to annualized hospital specific limits. The commission or its designee shall use the inflation rates described in subsection (b)(12) of this section. The commission or its designee shall calculate the number of months from the mid-point of the hospital's cost reporting period to the mid-point of the state fiscal year disproportionate share program. The commission or its designee shall then multiply the portion of the hospital's cost report year occurring in the state fiscal year by the inflation update factor used for each state fiscal year in the calculation of hospital reimbursement rates for each state fiscal year. The product of these calculations shall be multiplied by each hospital's "hospital specific limit" to obtain each hospital's "adjusted hospital specific limit."

(G) The commission or its designee compares the projected payment for each disproportionate share hospital, as determined by subsections (d) and (e) of this section, with its adjusted hospital specific limit, as determined by subparagraphs (E) and (F) of this paragraph. If the hospital's projected payment is greater than its adjusted hospital specific limit, the commission or its designee reduces the hospital's payment to its adjusted hospital specific limit.

(H) If there are disproportionate share hospital funds left in the available fund for the remaining hospitals, because some hospitals have had their disproportionate share hospital payments reduced to their adjusted hospital specific limits, the commission or its designee distributes the excess funds according to the provisions in this section. For hospitals whose projected disproportionate share hospital payments are less than their adjusted hospital specific limits, the commission or its designee does the following:

(i) calculate the difference between its adjusted hospital specific limit and its projected disproportionate share hospital payment;

(ii) add all of the differences from clause (i) of this subparagraph;

(iii) calculate a ratio for each hospital by dividing the difference from clause (i) of this subparagraph by the sum for clause (ii) of this subparagraph; and

(iv) multiply the ratio from clause (iii) of this subparagraph by the remaining available fund. Remaining Available Fund x

(I) Only those hospitals that are below their adjusted hospital specific limits are eligible to participate in this distribution. The disproportionate share hospital funds remaining in the available fund are distributed to the hospitals that have not already reached their adjusted hospital specific limits. Each hospital's total disproportionate share payment (including the redistribution of excess funds) cannot exceed its adjusted hospital specific limit.

(g) Review of agency determination. The commission or its designee notified hospitals of their tentative eligibility or ineligibility and the estimated amount of payment before the beginning of the state fiscal year. Any hospital, including those hospitals that do not qualify or that contend the amount of payment is incorrect, is allowed to request a review by the state. The actual amount of payment also may vary if a successful review request by one or more hospitals necessitates an adjustment in the amount of payments to the other hospitals in the program. Because of the state's ongoing review of data elements used in the formulas before the first monthly payment, it is possible that a hospital may either gain or lose eligibility after receiving tentative notification, which would also affect payment amounts. The hospital's written request for a review must be made to commission or its designee and must be received within 10 business days after the hospital receives notification of its eligibility or ineligibility. The hospital's request must contain specific documentation supporting its contention that factual or calculation errors were made, which, if corrected, would result in the hospital qualifying for payments or receiving payment in a corrected amount. The state will accept documentation from hospitals seeking reviews for 30 business days after the hospital receives notification of its eligibility or ineligibility.

(1) The hospital's written request for a review must be made to the director of acute care services and must be received by the director within 10 business days after the hospital receives notification of its eligibility or ineligibility. The hospital's request must contain specific documentation supporting its contention that factual or calculation errors were made, which, if corrected, would result in the hospital qualifying for payments or receiving payment in a corrected amount.

(2) The review is:

(A) limited to allegations of factual or calculation errors;

(B) limited to a review of documentation submitted by the hospital or used by the single state agency or its designee in making its original determination; and

(C) not conducted as an adversary hearing.

(3) The commission or its designee conducts the review as quickly as possible and makes its decision before the first monthly payment is made for that fiscal year. Hospitals that have requested a review are notified of the results of the review at the time of the first monthly payment. Any adjustments made as a result of these reviews will not exceed the limits of available funds for implementing the applicable disproportionate share program. Once the first monthly payment is made, no additional review or appeal is available to hospitals, with one exception. If a hospital, receiving a tentative eligibility letter and not requesting a review, then receives a letter stating the hospital is now ineligible for DSH funding, that hospital may now request a review of eligibility determination according to the terms of paragraph (1) of this subsection.

(h) Disproportionate share funds held in reserve.

(1) Hospitals participating in the disproportionate share program are required to comply at all times with the conditions of participation specified in subsection (c) of this section. If the commission or its designee has reason to believe that a hospital is not complying with the conditions of participation, the commission or its designee notifies the hospital of possible noncompliance. Upon receipt of the notice of possible noncompliance, the hospital has 30 days to demonstrate its compliance with conditions of participation. If the hospital fails to demonstrate its compliance within 30 days, the commission or its designee has the authority to hold that hospital's disproportionate share payments in reserve until the:

(A) hospital can demonstrate its compliance with the conditions of participation;

(B) decision to hold payments in reserve is reviewed and the decision results in favor of the hospital; or

(C) date the last monthly payment in the relevant state fiscal year occurs; whichever occurs first.

(2) If a hospital's disproportionate share payments are being held in reserve on the date of the last monthly payment in the state fiscal year, the amount of the payments is divided proportionately among the hospitals receiving a last monthly payment and is not restored to the hospital. If the hospital demonstrates its compliance with the conditions of participation or if the hospital receives a favorable review decision, the funds are restored to the hospital.

(3) Hospitals that have had disproportionate share payments held in reserve may request a review by the single state agency or its designee.

(A) The hospital's written request for a review must:

(i) be made to the commission or its designee;

(ii) be received by the commission or its designee within 10 days after the hospital's disproportionate share payments are held in reserve; and

(iii) contain specific documentation supporting its contention that it is in compliance with the conditions of participation.

(B) The review is:

(i) limited to allegations of compliance with conditions of participation;

(ii) limited to a review of documentation submitted by the hospital or used by the commission or its designee in making its original determination; and

(iii) not conducted as an adversary hearing.

(C) The commission or its designee conducts the review as quickly as possible and notifies hospitals requesting the review of the results. Once the last monthly payment for the relevant state fiscal year is made, no additional review or appeal is available to hospitals.

(4) If a hospital that is already receiving Medicaid disproportionate share funds closes, loses its license, loses its Medicare or Medicaid eligibility, that hospital's disproportionate share funds are reallocated among the remaining disproportionate share hospitals. If the hospital reopens, as the same hospital type, regains similar licensure or Medicare and Medicaid eligibility during the same fiscal year, that hospital receives monthly disproportionate share payments for the remaining months in the state fiscal year, as determined by the appropriate reimbursement formula and from available funds.

(i) Provision for reduction in federal disproportionate share cap. If the federal government reduces the amount of Medicaid disproportionate share funds allotted to Texas, the state must reduce the net amount allotted to each disproportionate share hospital during the state fiscal year by the same percentage.

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 August 11, 2003.

TRD-200304993
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

1 TAC §355.8067

The Health and Human Services Commission (HHSC) or Commission adopts an amendment to §355.8067, concerning disproportionate share hospital reimbursement methodology, with changes to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4732). The text of the rule will be republished.

The amendment incorporates existing practice into rule language and clarifies current administrative policy. It establishes the reimbursement of state teaching hospitals at 100 percent of their adjusted hospital specific limits.

The Commission is not adopting its proposed amendments to §355.8067(d)(4) and (5). These proposed rule changes would have allowed the state to offset a hospital's Medicaid reimbursement that is in excess of its Medicaid costs against its cost of treating uninsured patients. They also would have allowed the state to include third party payments as part of its calculation of a hospital's un-reimbursed Medicaid cost. The Commission plans further study of these proposed changes and their effects on hospitals.

During the public comment period, which included a public hearing on July 16, 2003, one comment was received from the Texas Hospital Association.

Comment: The commenter asked for a fiscal note on the proposed rule changes. These proposed changes are in §355.8067(d)(3), (11), (e), and (e)(1) - (2).

Response: The proposed changes codify existing administrative practice and will not change the method by which the state calculates future reimbursement to non-state hospitals and state teaching hospitals.

The amendment is adopted under the Texas Governing Code, §531.033, which provides the commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code, §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursement.

§355.8067. Disproportionate Share Hospital Reimbursement Methodology.

(a) A hospital owned and operated by a state university or other agency of the state is eligible for disproportionate share reimbursement. A state-owned teaching hospital is a hospital owned and operated by a state university or other agency of the state.

(b) Each hospital must have a Medicaid inpatient utilization rate defined at a minimum of 1.0%

(c) To qualify for disproportionate share payments, each hospital must have at least two physicians (M.D. or D.O.), with staff privileges at the hospital, who have agreed to provide nonemergency obstetrical services to Medicaid clients. The two-physician requirement does not apply to hospitals whose inpatients are predominantly under 18 years old or that did not offer nonemergency obstetrical services to the general population as of December 22, 1987.

(d) For purposes of this section, the following words and terms, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Total Medicaid inpatient days--Total Medicaid inpatient days means the total number of billed Title XIX inpatient days based on the latest available state fiscal year data for patients eligible for Title XIX benefits. Total Medicaid inpatient days includes days that were denied payment for reasons other than eligibility. Included are inpatient days of care provided to patients eligible for Medicaid at the time the service was provided, regardless of whether the claim was paid. These denied claims include, but are not limited to, claims for patients whose spell of illness limits are exhausted, or claims that were filed late. The term excludes days attributable to Medicaid patients between the ages of 21 and 65 who live in an institution for mental diseases. The term includes days attributable to individuals eligible for Medicaid in other states.

(2) Total inpatient census days--Total inpatient census days means the total number of a hospital's inpatient census days during its fiscal year ending in the previous calendar year.

(3) Cost of services-Cost of services to uninsured patients is the inpatient and outpatient charges to patients who have no health

insurance or other source of third party payment for services provided during the year, multiplied by the hospital's ratio of costs to charges (inpatient and outpatient), less the amount of payments made by or on behalf of those patients. Uninsured patients are those patients who have no health insurance or other source of third party payments for services provided during the year. Uninsured patients include those patients who do not possess health insurance that would apply to the service for which the individual sought treatment.

(4) Hospital specific limit - Hospital specific limit is the sum of the following two measurements: Medicaid shortfall and costs of services to uninsured patients.

(5) Medicaid shortfall-Medicaid shortfall is the cost of services (inpatient and outpatient) furnished to Medicaid patients, less the amount paid under the non-disproportionate share hospital payment method under this same plan.

(6) Cost-to-charge ratio (inpatient and outpatient)--Cost-to-charge ratio is the hospital's overall cost-to-charge ratio, as determined from its Medicare cost report submitted for the fiscal year ending in the previous calendar year. The latest available Medicare cost report is used in the absence of the cost report for the hospital's fiscal year ending in the previous calendar year.

(7) Adjusted hospital specific limit--Adjusted hospital specific limit is a hospital specific limit trended forward to account for the inflation update factor since the base year.

(8) Inflation update factor--Inflation update factor is a general increase in prices as determined by the department.

(9) Medicaid inpatient utilization rate--Medicaid inpatient utilization rate is the fraction expressed as a percentage, the numerator of which is the hospital's number of inpatient days attributable to patients who (for these days) were eligible for medical assistance under a state plan, and the denominator of which is the total number of the hospital's inpatient days in that period. The term "inpatient day" includes each day in which an individual (including a newborn) is an inpatient in the hospital, whether or not the individual is in a specialized ward and whether or not the individual remains in the hospital for lack of suitable placement elsewhere.

(10) Payments received--Payments received from uninsured patients are those payments received from or on behalf of uninsured patients as defined in paragraph (3) of this subsection.

(11) Charity charges-Charity charges are the total amount of hospital charges for inpatient and outpatient services attributed to charity care in a cost reporting period.

(12) Allowable cost--Allowable cost is defined by the department using the rates that are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated providers when providing services in conformity with applicable state and federal laws, regulations, and quality and safety standards.

(13) Available fund--The available fund for state teaching hospitals is the total amount of funds that may be reimbursed to the state teaching hospitals as determined below.

(e) The department reimburses state-owned teaching hospitals on a monthly basis from the available fund for state teaching hospitals. Monthly payments equal one-twelfth of annual payments unless it is necessary to adjust the amount because payments are not made for a full 12-month period, to comply with the annual state disproportionate share hospital allotment, or to comply with other state or federal disproportionate share hospital program requirements. Prior to the start of the next federal fiscal year, the department determines the size of the fund to reimburse state-owned teaching hospitals for the next federal fiscal year. The available fund to reimburse the state teaching hospitals equals the total of their disproportionate share hospital payments, as follows: a state-owned teaching hospital that meets the requirements for disproportionate share status receives annually 100 percent of its adjusted hospital specific limit.

(f) The department or its designee determines the hospital specific limit for each disproportionate share hospital. This limit is the sum of a hospital's Medicaid shortfall, as defined in subsection (d)(5) of this section, and its cost of services to uninsured patients as defined in subsection (d)(3) of this section, multiplied by the appropriate inflation update factor, as provided for in subsection (g) of this section.

(1) The Medicaid shortfall includes total Medicaid billed charges and any Medicaid payments made for the corresponding inpatient and outpatient services delivered to Texas Medicaid clients, as determined from the hospital's fiscal year claims data, regardless of whether the claim was paid. These denied claims include, but are not limited to, patients whose spell of illness claims were exhausted, or payments were denied due to late filing. Refer to subsection (d)(5) of this section.

(A) The total billed Medicaid charges for each hospital are converted to cost, utilizing a calculated cost-to-charge ratio (inpatient and outpatient). The department or its designee determines that ratio by using the hospital's HCFA 2552-92, Hospital and Hospital Health Care Complex Cost Report, that was submitted for the fiscal year ending in the previous calendar year. The department or its designee uses the latest available Medicare cost report in the absence of the Medicare cost report submitted in the fiscal year ending in the previous calendar year. To determine the cost-to-charge ratio (inpatient and outpatient) for each hospital, the department or its designee uses the total cost from the HCFA 2552-92, Worksheet B, Part 1, Column 25, and total charges from the HCFA 2552-92, Worksheet C, Part 1, Column 6. The ratio is the total cost divided by the total gross patient charges.

(B) The department or its designee determines the cost of services to patients who have no health insurance or source of third party payments for services provided during the year for each hospital. Hospitals are surveyed each year to determine charges that can be attributed to patients without insurance or other third party resources. The charges are multiplied by each hospital's cost-to-charge ratio (inpatient and outpatient) to determine the cost.

(2) After the department or its designee determines each disproportionate share hospital's cost of services to patients who have no health insurance or source of third party payments for services provided during the year, the department subtracts from each hospital's cost of services the amount of payments made by or on behalf of those patients who have no health insurance or source of third party payments for services provided during the year.

(g) The department or its designee trends each hospital's "hospital specific limit" calculated from its historical base period cost report from subsection (f) of this section to the state's fiscal year disproportionate share program. For hospitals without full 12-month fiscal year cost reports, the department or its designee annualizes the cost to calculate the hospital specific limit. The department or its designee uses the inflation update factor, as defined in subsection (d)(8) of this section, in calculating the adjusted hospital specific limit. The department or its designee calculates the number of months from the mid-point of the hospital's cost reporting period to the mid-point of the state fiscal year disproportionate share program. The department or its designee then multiplies the portion of the hospital's cost report year occurring in the state fiscal year by the inflation update factor used for each state fiscal year in the calculation of hospital reimbursement rates for each

state fiscal year. The product of these calculations is multiplied by each hospital's hospital specific limit to obtain each hospital's adjusted hospital specific limit.

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 August 11, 2003.

TRD-200304994
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

SUBCHAPTER J. PURCHASED HEALTH SERVICES

The Texas Health and Human Services Commission (HHSC) adopts amendments to §355.8081, Payments for Laboratory and X-ray Services, Radiation Therapy, Physical Therapists' Services, Podiatry Services, Chiropractic Services, Optometric Services, Ambulance Services, Dentists' Services, and Psychologists' Services and §355.8085, Texas Medicaid Reimbursement Methodology (TMRM) for Physicians and Certain Other Practitioners; and new §355.8600, Reimbursement for Ambulance Services and §355.8610, Reimbursement for Clinical Laboratory Services. Section 355.8081 and §355.8600 are adopted without changes to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4734). The text of the rules will not be republished. HHSC adopts the amendment to §355.8085 with a minor change and adopts new §355.8610, Reimbursement for Clinical Laboratory Services, with one change to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4734). The text of the rules will be republished.

HHSC is adopting the amendments and new sections to transfer reimbursement methodologies for ambulance and clinical diagnostic laboratory services that do not follow Texas Medicaid Reimbursement Methodology (TMRM) out of the TMRM rule into new sections of their own. Since the TMRM applies only to covered services provided by physicians and certain other practitioners, the title of the §355.8085 is being changed to reflect that. The amendments and new sections also replace references to the "Texas Department of Health" and "department" with references to "HHSC and/or its designee." The amendments and new sections provide HHSC with more flexibility in making inflation adjustments to the TMRM conversion factor. The new §355.8610, concerning Reimbursement for Clinical Laboratory Services, allows HHSC more flexibility in reviewing, determining, and updating these fees by removing the requirement that the fees be based solely on the Medicare-established fee schedule, by changing the required period for review to at least every two years, and by adding the requirement that fees must be established within available funding and not exceed the Medicare fee schedule. Revisions to §355.8085 and §355.8081 add the requirement that fees must be established within available funding. The revisions to §355.8081 update rule citations for TMRM for Physicians and Certain Other Practitioners at §355.8085, for ambulance services at §355.8600, and for clinical laboratory services at §355.8610. The rules are effective 20 days after submission to the Secretary of State.

The minor change to §355.8085 falls under paragraph (2)(D). The change is grammatical and allows the paragraph read more clearly.

HHSC received one written comment from the Coalition for Nurses in Advanced Practice regarding §355.8610. A summary of the comment and HHSC's response follows.

Comment: Concerning §355.8610, the Coalition for Nurses in Advanced Practice suggested that the first sentence of the rule be changed to read, "Clinical diagnostic laboratory tests performed in a physician's office, by an independent laboratory, or by a hospital laboratory for its outpatients shall be reimbursed the lower of the provider's usual customary charge for that service or a maximum fee determined by the Texas Health and Human Services Commission (HHSC) or its designee." By limiting the reimbursable locations for these services, the rule seems to exclude clinics and other providers, such as advanced practice nurses, who perform some basic laboratory tests and are currently reimbursed for those tests.

Response: HHSC agrees with the commenter and is adopting the rule with the following change, "Clinical diagnostic laboratory tests performed in a practitioner's office, by an independent laboratory, or by a hospital laboratory for its outpatients shall be reimbursed the lower of the provider's usual customary charge for that service or a maximum fee determined by the Texas Health and Human Services Commission (HHSC) or its designee."

DIVISION 5. GENERAL ADMINISTRATION

1 TAC §355.8081, §355.8085

The amendments are adopted under the Government Code, §531.033, which authorizes the commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.021(b), which established HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under Chapter 32, Human Resources Code, and Government Code §2001.006, which allows state agencies to adopt rules in preparation for the implementation of legislation.

§355.8085. Texas Medicaid Reimbursement Methodology (TMRM) for Physicians and Certain Other Practitioners.

Reimbursement for physicians and certain other practitioners.

(1) Introduction. Except as otherwise specified, the TMRM for covered services provided by physicians and certain other practitioners shall employ a prospective payment system based upon the determination of adequacy of access to health care services by the Texas Health and Human Services Commission (HHSC) or its designee as described in this section.

(A) There shall be no geographical or specialty reimbursement differential for individual services.

(B) The fees for individual services will be reviewed at least every two years and will be based upon either:

(i) historical payments, with adjustments, to ensure adequate access to appropriate health care services; or

(ii) actual resources required by an economically efficient provider to provide each individual service.

(C) The fees for individual services or adjustments thereto must be made within available funding.

(2) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(A) Access-based reimbursement fees (ABRF)--Fees for individual services based upon historical payments adjusted, where HHSC or its designee deems necessary, to account for deficiencies relating to the adequacy of access to health care services as defined in subparagraph (B) of this paragraph.

(B) Adequacy of access--Measures of adequacy of access to health care services include, but are not limited to, the following determinations:

(i) adequate participation in the Medicaid program by physicians and other practitioners; and/or

(ii) the ability of the eligible Medicaid population to receive adequate health care services in an appropriate setting.

(C) Resource-based reimbursement fees (RBRF)--Fees for individual services based upon the determination by HHSC or its designee of the resources required by an economically efficient provider to provide individual services. An RBRF is defined mathematically by the following formula: RBRF1 = (RVUw-1 + RVUo-1 + RVUm-1) * CF where, RBRF1 = Resource-Based Reimbursement Fee for Service 1, RVUw-1 = Relative Value Unit for Work for Service 1, RVUo-1 = Relative Value Unit for Overhead for Service 1, RVUm-1 = Relative Value Unit for Malpractice for Service 1, and CF = Conversion Factor.

(D) Conversion factor--The dollar amount by which the sum of the three cost component RVUs is multiplied in order to obtain a reimbursement fee for each individual service. The initial value of the conversion factor is $26.873 for fiscal years 1992 and 1993. The conversion factor will be reviewed at the beginning of each state fiscal year biennium, with any adjustments made within available funding and based on the adjustments described in subparagraph (E) of this paragraph or such other percentage approved by HHSC or its designee. HHSC or its designee may develop and apply multiple conversion factors for various classes of service such as obstetrics, pediatrics, general surgeries, and/or primary care services.

(E) Conversion factor adjustments-If funding is available and adjustments are made to the conversion factor(s), the adjustments include inflation and/or access-based adjustments.

(i) Inflation adjustment--To account for general inflation, the conversion factor is adjusted by the forecasted rate of change of a specific inflation factor appropriate to physician or other professional services covered by the TMRM, the Personal Consumption Expenditures (PCE) chain-type price index, or some percentage thereof. To inflate the conversion factor for the prospective period, HHSC or its designee uses the lowest feasible inflation factor forecast consistent with the forecasts of nationally recognized sources available to HHSC or its designee at the time of preparation of the conversion factor(s).

(ii) Access-based adjustment--Adjustments to the conversion factor may also be made to ensure adequacy of access as defined in subparagraph (B) of this paragraph.

(F) Relative units (RVUs)--The relative value assigned to each of the three individual components that comprise the cost of providing individual Medicaid services. The three cost components of each reimbursement fee are intended to reflect the work, overhead, and professional liability expense required to provide each individual service. The RVUs that are employed in the TMRM must, except as otherwise specified, be based upon the RVUs of the individual services as specified in the Medicare Fee Schedule. HHSC or its designee will review any changes to or revisions of the various Medicare RVUs and, if applicable, adopt the changes as part of the TMRM, within available funding.

(3) Calculating the payment amounts. The fee schedule that results from the TMRM must be composed of two separate components:

(A) the access-based fees; and

(B) the resource-based fees composed of RVUs for the work, overhead, and malpractice components. The sum of these components must then be multiplied by the conversion factor to produce a reimbursement fee for each individual service.

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 August 11, 2003.

TRD-200304995
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

DIVISION 31. AMBULANCE SERVICES

1 TAC §355.8600

The new section is adopted under the Government Code, §531.033, which authorizes the commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.021(b), which established HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under Chapter 32, Human Resources Code, and Government Code §2001.006, which allows state agencies to adopt rules in preparation for the implementation of legislation.

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 August 11, 2003.

TRD-200304996
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

DIVISION 32. CLINICAL LABORATORY SERVICES

1 TAC §355.8610

The new section is adopted under the Government Code, §531.033, which authorizes the commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.021(b), which established HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under Chapter 32, Human Resources Code, and Government Code §2001.006, which allows state agencies to adopt rules in preparation for the implementation of legislation.

§355.8610. Reimbursement for Clinical Laboratory Services.

Clinical diagnostic laboratory tests performed in a practitioner's office, by an independent laboratory, or by a hospital laboratory for its outpatients shall be reimbursed the lower of the provider's usual customary charge for that service or a maximum fee determined by the Texas Health and Human Services Commission (HHSC) or its designee. HHSC or its designee will review maximum fees at least every two years, with any adjustments made within available funding. Payments for services provided must not exceed the Medicare fee 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 August 11, 2003.

TRD-200304997
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

CHAPTER 370. STATE CHILDREN'S HEALTH INSURANCE PROGRAM

The Health and Human Services Commission (HHSC or Commission) adopts amendments to Chapter 370, State Children's Health Insurance Program (CHIP). Specifically, HHSC adopts amendments to: Subchapter A, §370.4 and §370.10, concerning Program Administration; Subchapter B, Division 1, §§370.20-370.25, concerning TexCare Partnership Application Process; Division 2, §370.30 and §370.31, concerning Applicant Rights and Responsibilities Regarding Application and Eligibility; Division 3, §370.40, concerning Eligibility Determination; Division 4, §§370.43, 370.44, 370.46, 370.48, and 370.49, concerning Eligibility Criteria; and Division 5, §§370.51-370.54, concerning Review and Reconsideration of Eligibility Denials and Temporary Enrollment. In addition, the Commission adopts new Subchapter C, Division 1, §§370.301, 370.303, 370.305, 370.307, and 370.309, concerning TexCare Enrollment and Division 2, §§370.321, 370.323, and 370.325, concerning Cost-Sharing Requirements. Sections 370.23, 370.43, 370.46, 370.301 and 370.303, are adopted with changes to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4748). The text of the rules will be republished. The new text of the amended rules §§370.23, 370.43, 370.46 and 370.301, with changes in response to comments, is set out below. Sections 370.4, 370.10, 370.20-370.22, 370.24, 370.25, 370.30, 370.31, 370.40, 370.44, 370.48, 370.49, 370.51-370.54, 370.305, 370.307, 370.309, 370.321, 370.323 and 370.325 are adopted without changes to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4748). The text of the rules will not be republished. Section 370.303(d) is adopted with changes. In the proposal process, the last sentence was inadvertently left incomplete.

The adopted rules amend Subchapters A and B to reflect legislative changes to income eligibility standards and the removal of deduction allowances. The new subchapter C addresses enrollment issues and cost sharing issues. The adoption of these sections brings CHIP into compliance with HB 2292, 78th Leg., Regular Session (2003) and the General Appropriations Act, 78th Leg., Regular Session (2003). These adopted rules also update references, delete unnecessary terms and provisions, and make other non-substantive changes for clarification.

The following comments were received by HHSC concerning the proposed rules: Advocacy, Inc. opposes the adoption of the proposed amendments. Comments both in support of and in opposition to various amendments were received from the Center for Public Policy Priorities, Affiliated Computer Services (ACS), and individual commenters. Following each comment is the response from HHSC.

Comment: One commenter expressed concern regarding §370.325. The commenter stated that many families with incomes between 101% and 150% of Federal Poverty Level (FPL) who need CHIP coverage would not be able to afford a $15 per month premium and recommended going back to a one-time enrollment fee instead.

Response: HHSC acknowledges the commenter's concern about the cost of a monthly premium, but believes that the commenter cited §370.325 in error. New rule §370.321 does refer to a monthly premium that a member may be required to pay as part of their CHIP cost-share obligation, but does not state any specific dollar amounts. Program changes occurring on or after September 1, 2003, are due to severe fiscal constraints facing CHIP in the FY 2004-2005 biennium. In order to reduce program administration costs, HHSC must determine new cost-share amounts for all CHIP FPL ranges based on maximum levels authorized under federal law. HHSC cannot return to a position of collecting an annual enrollment fee from families in the 100-150% FPL range as HHSC is eliminating the concept of the annual enrollment fee in order to operate within budget restrictions. All FPL groups above 100% FPL will pay a monthly premium, effective September 1, 2003. No changes were made in response to the comment.

Comment: One commenter expressed concern that the term "entrant" was unfamiliar and would cause confusion.

Response: HHSC acknowledges the comment regarding the use of the new term "entrant" rather than the former "alien" and the potential for confusion. In recognition of that, HHSC provided a definition of the term "entrant" in §370.4 in order to avoid any possible confusion regarding the use of the term within these rules. No changes were made as a result of this comment.

Comment: Two comments were received regarding the removal of the income disregard for child support or alimony. The commenters believed that this income should not be counted in determining income level, as it was unavailable to the CHIP family.

Response: HHSC acknowledges the concern expressed by the commenter and the potential for counting "non-available" outbound child support or alimony payments as "available" income for the paying family. However, effective September 1, 2003,

HHSC will not have the statutory authority to apply offsets to reported income when determining CHIP eligibility for an applying child. As a result, HHSC cannot retain the existing income offsets. No change was made as a result of these comments.

Comment: One comment was received on the complexity of immigration laws. The commenter expressed appreciation for the Commission staff's attempt to clarify the use of some of these documents to establish eligibility but wanted more examples added to the list of documents that could be used to establish eligibility.

Response: HHSC agrees with the commenter's remarks concerning the complexity of immigration documents and acknowledges the practical difficulty associated with making an exhaustive list of acceptable documents. The list of acceptable documents published in the proposed version §370.43 was intended to provide a sample of documents that CHIP may use in determining whether or not a non-citizen child has qualified legal entrant status. Rather than complicating the matter further by expanding a partial listing of acceptable documents, HHSC has revised §370.43 to require that a non-citizen child provide a document approved by the Bureau of Citizenship and Immigration Services (formerly the U.S. Immigration and Naturalization Service) demonstrating qualified legal entrant status.

Comment: One comment was received expressing concern that the assets test for the families above 150% of FPL had not been well researched and that there was no reliable data on what the actual impact of applying this test would be. The commenter recommended that the Commission collect data on this and report on the actual impact of applying the assets test. The commenter also believed that HHSC's application of the Food Stamp Policy for disregard of vehicle value was not appropriate for the CHIP group and recommended the Commission modify the vehicle policy to be less restrictive.

Response: The Commission acknowledges the commenter's concern Program changes occurring on or after September 1, 2003, are due to severe fiscal constraints facing CHIP in the FY 2004-2005 biennium. Section 2.46 of HB 2292, 78th Leg., Regular Session (2003) allows HHSC to establish eligibility standards regarding the amount and types of allowable assets for a family whose gross family income is above 150% of the federal poverty level. HHSC has determined that the proposed assets test for these families will assist HHSC in operating CHIP within budget restrictions. The proposed assets test requires the family to own $5000 or less in countable liquid resources, combined with excess vehicle value; real property is not countable. $15,000 of the fair market value is exempt for the household's highest valued countable vehicle. Exemptions for vehicles include a vehicle used as the only home, a vehicle modified to provide transportation for a disabled household member, a vehicle necessary to carry fuel or water for household daily use, or a vehicle used more that 50% of the time to produce income. The assets tests will not be implemented prior to the January 2004 eligibility cut-off date. HHSC recognizes the limitations of available data to project the impact of the assets test on CHIP eligibility. After implementation, data will be available over time to identify the number of families who are ineligible for CHIP due to assets although their gross income is between 150%-200% FPL. Data can be evaluated and policy reviewed when this information is available. No changes were made in response to the comment.

Comment: The Commission received one comment regarding the 90-day waiting period for coverage. The commenter believed this new waiting period would increase the burden on providers to provide uncompensated care and recommended encouraging families to enroll their children before a health crisis. The commenter also believed the policy description was not clear with regard to the enrollment of newborns.

Response: HHSC acknowledges the commenter's remarks and concerns about the 90-day waiting period. However, HHSC believes it is important to note that CHIP was never intended to be, nor is it today, an emergency assistance program. The idea behind getting CHIP coverage is similar to the idea behind getting private health insurance: to be protected and prepared in the event of a future illness. CHIP has never provided coverage back to the date of or before application to the program. Coverage in CHIP has always been prospective. Since CHIP began, the vast majority of CHIP families have waited two months between the initial application and the start of CHIP coverage. A smaller number of families have had to wait three months or more due to a lack of prompt responses to CHIP mailings seeking necessary application information. The practical effect, therefore, of the new waiting period is either no extra waiting time or approximately an additional month of waiting time. In addition, HHSC is statutorily bound to enact this waiting period. As far as the enrollment of newborns is concerned, CHIP policy will clearly differentiate between (1) children born to CHIP enrolled teen mothers and (2) children born to the parents of CHIP enrolled children. In the case of (1), CHIP policy will be to pursue the referral of the newborn children to the Medicaid program for eligibility determination. In the case of (2), CHIP policy will be to enroll the children in their sibling's CHIP participation and not subject those children to the new waiting period. The only exceptions in (2) are those children that are determined to be tentatively eligible for Medicaid. They will be referred to the Texas Department of Human Services (DHS) for final determination of Medicaid eligibility. No changes were made in response to the comment.

Comment: One commenter questioned the Legislature's decision regarding the reduction of the eligibility period from twelve to six months.

Response: HHSC acknowledges the commenter's concern but notes that HHSC must comply with applicable statutes. Therefore, HHSC reduced the eligibility period from 12 to 6 months in order to be in compliance with recently enacted statutory changes.

Comment: The Commission received a compliment from one commenter on the cost sharing changes. The commenter also expressed regret that the annual cap would now be more complex since it will be calculated based on income rather than being a fixed dollar amount.

Response: HHSC appreciates the compliment related to cost-sharing requirement rules and agrees in part with the commenter's views about the annual cap. As noted by the commenter, the annual cap will be calculated as a percentage of income rather than being a fixed dollar amount. Although more administratively complex, the burden of the complexity will be borne by the state and its contractors. Members will receive notification by letter of their individually computed cost cap. No changes were made as a result of the comment.

Comment: One commenter opposed the implementation of the Income Disregards and Assets Test on a separate schedule from the six month eligibility period's implementation. The commenter believed it would result in disenrolling children based on outdated

information, would necessitate additional notifications to families, would leave families with inadequate time to arrange alternate coverages, and would create additional costs and problems for the MCOs. The commenter also believed the "disjointed" effective dates of the benefit and cost-sharing changes would create additional complexities and administrative burdens for families and recommended the Commission coordinate these time frames and send out a notice to CHIP families that identifies all of the planned CHIP policy changes.

Response: HHSC acknowledges the commenter's concerns, but disagrees with the commenter's conclusions concerning the changes. Due to the major processing impact of those changes, HHSC has determined that it must proceed with implementation timelines for the disregard elimination and assets test separate and apart from the timeline for implementing the 6-month term of coverage. However, HHSC's plans regarding the notification of CHIP families and implementation timelines should ease the concerns of the commenter. The general notification letter sent to CHIP enrolled and eligible families in late July-early August contains information about the upcoming disregard elimination and the potential for disenrollment. Additionally, the letter also urges families to report any changes in income as soon as possible in order to have their eligibility re-determined without use of the income disregards. Effective November 1, 2003, HHSC plans to disenroll children who, without disregards, are over 200% FPL. CHIP will re-calculate the FPL of all enrolled families after the September 2003 cut-off. All children found to be ineligible due to a new FPL over 200%, or found to be in a to a higher FPL band (with a higher cost-share), will receive a notice in late September-early October. The notice will inform them of their impending disenrollment or FPL band switch and ask for new income data prior to cut-off in October. In addition to this late September run, the program will also identify all enrolled children who appear to be ineligible without disregards after the August 2003 cut-off. The families of these children will also receive advance notice of the need to update their income data by October cut-off to best avoid the possibility of disenrollment on November 1. Finally, HHSC will use the new assets test for the 150%+ FPL population after January 2004 cut-off. At that point, CHIP will apply the new test to all new applicants and CHIP renewal applicants. No currently enrolled child will face the threat of disenrollment prior to completing his/her current 6-month or 12 month term of coverage. No changes were made to the rules in response to the comments.

Comment: One comment noted that the text that was deleted in §370.23 (2) (H) is still applicable in the application process and should be restored.

Response: HHSC agrees with the comment. HHSC has revised the proposed rule to restore the information deleted; it is required on the combined CHIP/Medicaid application for the purpose of determining Medicaid eligibility. The revised CHIP rule indicates that this information will not be used to determine CHIP eligibility. This change is reflected in §370.46. The deleted section (a) is restored, as this provision will relate to any child who may be participating in a premium assistance program that may be implemented by HHSC.

Comment: One commenter noted that the text that was deleted in §370.23 (3) (C) and §370.22 (3) (D) was still applicable and should be restored.

Response: HHSC agrees with the comment and has revised the proposed rule to restore the deleted item. The information included in this item is required to be for the combined CHIP/Medicaid application for the purpose of determining Medicaid eligibility. The revision indicates that this information is not used to determine CHIP eligibility.

Comment: One commenter believed the 90 day waiting period is an imprecise calculation, and that the actual waiting period will vary under the rule. They recommended using three calendar months instead of 90 days to describe the waiting period.

Response: HHSC acknowledges the commenter's concern, but disagrees with the commenter's recommendation. Revised §370.46 governs the waiting period and reflects legislative changes requiring a 90-day waiting period for applicants determined to be CHIP eligible, but who do not fall within certain exceptions. The waiting period would begin on the first day of the month in which or after which the child is enrolled in CHIP, depending on whether enrollment is before or after the 15th of the month; the waiting period then extends for 90 days. No changes were made to the rule in response to the comment.

Comment: One comment was received on §340.46 (a). The commenter noted that the deleted text contained correct information regarding the enrollment of children otherwise eligible for CHIP.

Response: HHSC agrees with the commenter. HHSC has revised the proposed rule to reflect the restoration of the deleted information to reflect current policy. As noted above, this provision will not apply to CHIP applicants who may be enrolled in a premium payment plan that may be implemented by HHSC as reflected in §371.46 (b) (4).

Comment: Comments were received on two sections of §370.46 regarding Medicaid eligibility and involuntary loss of insurance that had no proposed changes.

Response: The Commission did not propose changes to these two sections, but will review these policies for future clarification. No changes were made to the rule in response to the comment.

Comment: One commenter was confused about the implementation of §371.46 (b) (4).

Response: HHSC recognizes that confusion may exist. This provision is required as an exemption to the current rule if HHSC implements other rule provisions concerning a premium assistance program. §371.46 (b) (4) is not a change in the current rule but will be implemented if a premium assistance program is developed.

Comment: The Commission received one comment that the information relating to the form to help applicant's track cost sharing expenditure in §370.301 6 (C) should be deleted.

Response: HHSC agrees that this rule should be clarified and that the requirements of this section should specify the types of information included in the enrollment packet rather than the means for providing the information. The section has been revised accordingly.

SUBCHAPTER A. PROGRAM ADMINISTRATION

1 TAC §370.4, §370.10

The amendments are adopted under §531.033, Government Code, which authorizes the commissioner of health and human

services to adopt rules necessary to carry out HHSC's duties under Chapter 531; under §62.051(d), Health and Safety Code, which directs HHSC to adopt rules necessary to implement Chapter 62, Health and Safety Code, concerning CHIP; and under §2001.006, Government Code, which allows state agencies to adopt rules in preparation for the implementation of legislation.

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 August 12, 2003.

TRD-200305084
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

SUBCHAPTER B. APPLICATION SCREENING, REFERRAL AND PROCESSING
DIVISION 1. TEXCARE PARTNERSHIP APPLICATION PROCESS

1 TAC §§370.20 - 370.25

The amendments are adopted under §531.033, Government Code, which authorizes the commissioner of health and human services to adopt rules necessary to carry out HHSC's duties under Chapter 531; under §62.051(d), Health and Safety Code, which directs HHSC to adopt rules necessary to implement Chapter 62, Health and Safety Code, concerning CHIP; and under §2001.006, Government Code, which allows state agencies to adopt rules in preparation for the implementation of legislation.

§370.23. Contents of completed applications.

A completed application must include the following:

(1) Information concerning the applicant, consisting of:

(A) The applicant's full name;

(B) The applicant's home address (including city, county, state and zip code); and

(C) The applicant's mailing address (including city, county, state, and zip code) if different from the home address;

(2) Information concerning each child for whom an application is filed, consisting of:

(A) The child's full name;

(B) A description of the applicant's relationship to the child;

(C) The child's date of birth;

(D) The child's Social Security Number or proof of application to the Social Security Administration to receive a social security number;

(E) The child's status as a United States citizen or a legal resident;

(F) The full name of the child's mother or father;

(G) If the child has income reported on the application, the child's school status; and

(H) Confirmation by the applicant whether the child currently has health insurance, or had health insurance within 90 days prior to the date the application is being completed for Medicaid.

(3) Information concerning the budget group, including:

(A) budget group income, including the name of the person receiving the income, the employer or source of the income, the amount received, and the frequency of receipt; and

(B) whether anyone in the budget group is pregnant;

(C) whether anyone in the budget group pays for child or disabled adult care to permit a budget group member to work or receive training; this information is not used for the CHIP eligibility determination but is used to screen for Medicaid eligibility;

(D) whether anyone in the budget group pays child support and/or alimony to anyone outside the home; this information is not used for the CHIP eligibility determination but is used to screen for Medicaid eligibility;

(4) the applicant's original signature and the date of signature; and

(5) required income, immigration status, and income deduction verifications.

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 August 12, 2003.

TRD-200305085
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

DIVISION 2. APPLICANT RIGHTS AND RESPONSIBILITIES REGARDING APPLICATION AND ELIGIBILITY

1 TAC §370.30, §370.31

The amendments are adopted under §531.033, Government Code, which authorizes the commissioner of health and human services to adopt rules necessary to carry out HHSC's duties under Chapter 531; under §62.051(d), Health and Safety Code, which directs HHSC to adopt rules necessary to implement Chapter 62, Health and Safety Code, concerning CHIP; and under §2001.006, Government Code, which allows state agencies to adopt rules in preparation for the implementation of legislation.

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 August 12, 2003.

TRD-200305086
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

DIVISION 3. ELIGIBILITY DETERMINATION

1 TAC §370.40

The amendment is adopted under §531.033, Government Code, which authorizes the commissioner of health and human services to adopt rules necessary to carry out HHSC's duties under Chapter 531; under §62.051(d), Health and Safety Code, which directs HHSC to adopt rules necessary to implement Chapter 62, Health and Safety Code, concerning CHIP; and under §2001.006, Government Code, which allows state agencies to adopt rules in preparation for the implementation of legislation.

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 August 12, 2003.

TRD-200305087
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

DIVISION 4. ELIGIBILITY CRITERIA

1 TAC §§370.43, 370.44, 370.46, 370.48, 370.49

The amendments are adopted under §531.033, Government Code, which authorizes the commissioner of health and human services to adopt rules necessary to carry out HHSC's duties under Chapter 531; under §62.051(d), Health and Safety Code, which directs HHSC to adopt rules necessary to implement Chapter 62, Health and Safety Code, concerning CHIP; and under §2001.006, Government Code, which allows state agencies to adopt rules in preparation for the implementation of legislation.

§370.43. Citizenship and residency.

(a) An eligible CHIP child must be a citizen of the United States of America or a non-citizen who is a qualified alien.

(b) An eligible CHIP child must be a Texas resident. A child is a Texas resident if:

(1) the child's fixed residence is located in Texas and the child's family intends for the child to return to Texas after any temporary absences;

(2) the child has no fixed residence but the child's family intends to remain in the state; or

(3) the child has recently moved to Texas and the child's family intends to remain in the state.

(c) A child does not lose status as a state resident because of temporary absences from the state. No time limits are placed on a child's temporary absence from the state.

(d) There are no durational requirements for residency. A child without a fixed residence or a new resident in the state who intends to remain in the state is considered a Texas resident.

(e) The applicant states the child's citizenship, lawful resident status and Texas residency on the TCP application form. If the applicant states that the child is a United States citizen and a Texas resident, no verification of this status is required. If the applicant states the child is not a United States citizen, the applicant must provide a Bureau of Citizenship and Immigration Services (formally know as the U.S. Immigration and Naturalization Service) approved document that demonstrates that the child is a qualified alien.

§370.46. Waiting period.

(a) The waiting period is a delay in the start of health insurance coverage and applies to a child determined to be CHIP eligible and extends for a period of 90-days after:

(1) the first day of the month in which the applicant is determined eligible for CHIP, if the day of eligibility is on or before the 15th day of the month; or

(2) the first day of the month after which the applicant is determined eligible for CHIP, if the day of eligibility is after the 15th day of the month

(b) A child who is otherwise eligible for CHIP may not be enrolled if the child was covered by health insurance at any time within the 90 days immediately preceding the submission of a CHIP application. After the 90-day waiting period, the child may be enrolled. This provision does not apply to any child participating in any premium assistance program implemented by HHSC.

(c) Collateral health benefits provided to a CHIP-eligible child under a different type of insurance, such as workers compensation or personal injury protection under an automobile policy, is not health insurance coverage for purposes of this section.

(d) The 90-day waiting period specified in paragraph (a) of this section does not apply to a child under the following circumstances:

(1) The child's budget group lost insurance coverage for the child because:

(A) The employment of a member of the Budget Group was terminated due to:

(i) a layoff;

(ii) a reduction-in-force; or

(iii) a business closure;

(B) Insurance benefits under the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. No. 99-272) terminated;

(C) The marital status of a parent of the child has changed;

(D) The child's Medicaid eligibility was terminated because:

(i) the budget group's earnings or resources exceed allowable amounts for Medicaid eligibility; or

(ii) the child reached an age for which Medicaid benefits are no longer available; or

(E) Other circumstances similar to those described in this subparagraph that result in an involuntary loss of insurance coverage;

(2) The child had insurance coverage provided by ERS, or CHIP in another state;

(3) The child's health insurance coverage costs more than 10 percent of the budget group's gross monthly income;

(4) The child has access to group-based health benefits plan coverage and will participate in the premium payment reimbursement program administered by the Commission; or

(5) The Commission grants an exception to the waiting period under subsection (d) of this section.

(e) The Commission may grant an exception to the 90-day waiting period prescribed by this section if it determines good cause exists to grant an exception and either:

(1) An applicant requests an exception:

(A) Prior to submission of an application;

(B) At the time of application; or

(C) As part of a request for review or reconsideration of a denial of eligibility under sections 370.52 or 370.54 of this chapter; or

(2) The Commission reaches a determination based either on information provided by an applicant or information obtained 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 August 12, 2003.

TRD-200305088
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

DIVISION 5. REVIEW AND RECONSIDERATION OF ELIGIBILITY DENIALS AND TEMPORARY ENROLLMENT

1 TAC §§370.51 - 370.54

The amendments are adopted under §531.033, Government Code, which authorizes the commissioner of health and human services to adopt rules necessary to carry out HHSC's duties under Chapter 531; under §62.051(d), Health and Safety Code, which directs HHSC to adopt rules necessary to implement Chapter 62, Health and Safety Code, concerning CHIP; and under §2001.006, Government Code, which allows state agencies to adopt rules in preparation for the implementation of legislation.

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 August 12, 2003.

TRD-200305089
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

SUBCHAPTER C. ENROLLMENT, DISENROLLMENT, AND RENEWAL OF MEMBERSHIP

DIVISION 1. TEXCARE ENROLLMENT

1 TAC §§370.301, 370.303, 370.305, 370.307, 370.309

The new sections are adopted under §531.033, Government Code, which authorizes the commissioner of health and human services to adopt rules necessary to carry out HHSC's duties under Chapter 531; under §62.051(d), Health and Safety Code, which directs HHSC to adopt rules necessary to implement Chapter 62, Health and Safety Code, concerning CHIP; and under §2001.006, Government Code, which allows state agencies to adopt rules in preparation for the implementation of legislation.

§370.301. CHIP Enrollment Packet.

Within 5 business days of determining a child is CHIP eligible, TexCare must send the applicant a CHIP enrollment packet containing:

(1) an explanation of CHIP benefits;

(2) information about the value-added services provided by health plans in areas where there is a choice of health plans;

(3) an enrollment form and instructions for completing the form;

(4) a provider directory for each health plan available in the applicant's CHIP Service Area (CSA);

(5) a CHIP member guide;

(6) cost-sharing information specific to the budget group's Federal Poverty Level (FPL), which includes:

(A) the monthly premium amount, if any;

(B) a schedule of co-payments, if any (e.g., Native Americans have no cost-sharing)

(C) information about the cost-sharing cap; and

(D) the disenrollment process for non-payment of monthly premiums

(7) the process for requesting review by TexCare of an unfavorable eligibility or enrollment decision or filing a complaint or an appeal of an adverse determination with the member's Health Maintenance Organization (HMO) or Exclusive Provider Organization (EPO) plan; and

(8) information specifying the date by which the completed enrollment form must be received by TexCare to ensure enrollment on the first day of the following month and that summarizes the importance of appropriate health plan and Primary Care Provider (PCP) choices for applicants who live in CSAs covered by more than one HMO.

§370.303. Completion of Enrollment Process.

(a) To complete the enrollment process in a CSA with health plan choice, an applicant must:

(1) select and indicate on the enrollment form, a single health plan to cover all eligible children, regardless of the number of eligible children in the budget group;

(2) select a PCP and place the name on the enrollment form; and

(3) sign and return the enrollment form to TexCare.

(b) To complete the enrollment process in a CSA without health plan choice, an applicant must sign and return the enrollment form and select a PCP.

(c) An applicant may return the enrollment form to TexCare either by mail, in the postage paid envelope enclosed with the enrollment packet, or by facsimile.

(d) If an applicant who lives in a CSA covered by an HMO fails to choose a PCP, or if the chosen PCP is not accepting new members, the health plan must assign a PCP to each member in the budget group and inform the applicant. The health plan will send the member a health plan identification card by no later than the 5th business day following the receipt of the Enrollment File by the contractor.

(e) The enrollment process is closed 90 calendar days after a child is determined eligible for CHIP if the applicant has not completed the enrollment process. An applicant who fails to complete the enrollment process must initiate a new application for CHIP.

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 August 12, 2003.

TRD-200305090
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

DIVISION 2. COST-SHARING REQUIREMENTS

1 TAC §§370.321, 370.323, 370.325

The amendments are adopted under §531.033, Government Code, which authorizes the commissioner of health and human services to adopt rules necessary to carry out HHSC's duties under Chapter 531; under §62.051(d), Health and Safety Code, which directs HHSC to adopt rules necessary to implement Chapter 62, Health and Safety Code, concerning CHIP; and under §2001.006, Government Code, which allows state agencies to adopt rules in preparation for the implementation of legislation.

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 August 12, 2003.

TRD-200305091
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 424-6576

♦ ♦ ♦

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 6. SEED ARBITRATION

4 TAC §6.4

The Texas Department of Agriculture (the department) adopts an amendment to §6.4, concerning the seed arbitration filing fee under the Texas Arbitration Law, without changes to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4758). The amendment to §6.4 is adopted to increase the seed arbitration filing fee by 20%. The fee increased by this adoption has not been increased by the department since 1997. The amendment will allow the department to recover some of its costs associated with arbitration, as directed by the Texas Legislature 78th Session, 2003. The adopted amendment increases the seed arbitration filing fee from $250 to $300.

Comments were received from Texas Farm Bureau (TFB) in opposition to the proposed fee increase. The TFB, through its president, Kenneth Dierschke, commented that it supports and appreciates the department's functions and services, but that it feels the increased fees are not appropriate and do not reflect the instructions of the state leadership not to raise taxes. The TFB further stated its belief that fees collected by the department should be used to fund the services provided to the segment of the population paying the fees and not to fund services to the general public, and that agency services should be funded by general revenue.

The department appreciates the TFB's support of the department's functions and services, and is understanding of the TFB's concern over the affect of fee increases on its members. However, the department was directed by the Legislature to increase its fees in order to recover direct and indirect costs to state government to implement state programs. Due to the large budget shortfall, during the course of the appropriations process all agencies were asked to do their part to contribute toward eliminating the budget shortfall, including cutting agency costs and raising agency fees. Moreover, in reviewing revenue generated by agency fees, the department discovered that some agency fees, such as the seed arbitration filing fee, had not been increased for a number of years, while costs to the state as a whole to implement programs have continued to increase.

The department does agree with the TFB that services should be funded by the General Revenue Fund. What may not be clear is that the department's regulatory programs are not funded directly by fees, but by general revenue. All but a small percentage of fee revenue collected by the department and other state agencies goes into the General Revenue Fund and from that fund is then appropriated to agencies to cover their costs. Also, while

the TFB is correct that the state leadership, including the Governor and the Legislature, were clear in their instruction not to raise taxes, the TFB is not correct in viewing license and permit fees as taxes. Such fees, by definition, are not taxes and have often been used as vehicles for the generation of state revenue, as was the case in the 78th legislative session.

The amendment is adopted under the Texas Agriculture Code, §64.006, which provides the Texas Department of Agriculture with the authority to set and collect a filing fee for the filing of a seed arbitration complaint.

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 August 11, 2003.

TRD-200304985
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 463-4075

♦ ♦ ♦

CHAPTER 7. PESTICIDES

The Texas Department of Agriculture (the department) adopts amendments to §7.10, §7.20, and §7.22, concerning pesticide regulations, without changes to the proposal as published in the June 20, 2003, issue of the *Texas Register* (28 TexReg 4618). The amendments are adopted to increase the current fees for a pesticide product registration, pesticide applicator licenses, pesticide dealer licenses and testing fees for applicators in order to allow the department to recover more of costs of implementing the department's pesticide registration and application programs, as directed by the 78th Legislature, Regular Session, 2003. The amendment to §7.10(a)(4) increases the fee for a pesticide product registration from $350 to $420 for a two-year registration. The amendment to §7.20 (d)(1) increases the fee for a pesticide dealer license from $200 to $240. The amendments to §7.20(d)(2)(A)-(D) increase the fees for a commercial, noncommercial, noncommercial political subdivision, and private pesticide applicator licenses by 20% of the current fee. The amendment to §7.22(d)(2) increases the pesticide applicator testing fee from $20 to $24.

Comments were received on the proposal from the Texas Farm Bureau (TFB) in opposition the fee increases in general. Comments were received from the American Pet Products Manufacturers Association (APPMA), Crop Life America, Consumer Specialty Products Association (CSPA), International Sanity Supply Association, Inc. (ISSA), Responsible Industry for a Sound Environment (RISE) and four individual companies specifically in opposition to the increase in pesticide product registration fees proposed in the amendment to §7.10(a)(4). These entities primarily represent manufacturers and suppliers of institutional cleaning products. Comments were also received from the American Pet Products Manufacturers Association (APPMA) in opposition to the pesticide product registration fee increase. The APPMA represents manufacturers and distributors of pet products.

The TFB, through its president, Kenneth Dierschke, commented that it supports and appreciates the department's functions and services, but that it feels the increased fees are not appropriate and do not reflect the instructions of the state leadership not to raise taxes. The TFB further stated its belief that fees collected by the department should be used to fund the services provided to the segment of the population paying the fees and not to fund services to the general public, and that agency services should be funded by general revenue. Similar issues regarding the justification for fee increases and that fees collected should only be used to fund the pesticide programs were raised by the entities representing manufacturers and distributors of institutional cleaning products (antimicrobial pesticide products). These entities, commenting specifically on the increase of the product registration fee, generally commented that the industry would be severely impacted by the fee increase because these products are traditionally sold a low volumes and at low margins and are typically sold by small businesses that cannot absorb a fee increase in same manner as larger businesses, and because the Environmental Protection Agency (EPA) will be in the near future imposing additional disposal and labeling requirements and additional fees on the industry. They further commented that this additional burden posed by a fee increase on product could result in the reduction in the number of antimicrobial pesticide products sold in Texas, to the detriment of the sanitation and health of Texans.

The department appreciates the industry's support of the department's functions and services, and is understanding of the concern over the affect of fee increases on its members. However, the department was directed by the Legislature to increase its fees in order to recover direct and indirect costs to state government to implement state programs. Due to the large budget shortfall, during the course of the appropriations process all agencies were asked to do their part to contribute toward eliminating the budget shortfall, including cutting agency costs and raising agency fees. Moreover, in reviewing revenue generated by agency fees, the department discovered that some agency fees, such as fees assessed by the department for its pesticide licenses, had not been increased for a number of years, while costs to the state as a whole to implement programs have continued to increase.

The department does agree with the TFB that services should be funded by the General Revenue Fund. What may not be clear to all those commenting is that the department's regulatory programs are not funded directly by fees, but by general revenue. All but a small percentage of fee revenue collected by the department and other state agencies goes directly into the General Revenue Fund and from that fund is then appropriated back to agencies to cover their budgeted costs. Also, while the TFB is correct that the state leadership, including the Governor and the Legislature, were clear in their instruction not to raise taxes, the TFB is not correct in viewing license and permit fees as taxes. Such fees, by definition, are not taxes and have often been used as vehicles for the generation of state revenue, as was the case in the 78th legislative session.

Other comments, from the ISSA, argued that antimicrobial pesticide products should be considered in a different fees scale than traditional pesticide products used in agriculture due to the unique properties of the products which make their use a benefit to the public and promote health and safety and the fact that they are non-toxic and do not pose a threat to the environment because they biodegrade quickly. The APPMA submitted similar comments in regard to pet products, arguing that pet products are used in a much smaller quantity than agricultural pesticides making them more friendly to the environment and that

pet products serve to benefit pet owners by reducing the number of pathogen-carrying insects that are brought into the home by pets. The APPMA also requested a registration fee scheme that distinguishes between agricultural and nonagricultural products and is based on the amount of pesticide used.

The department understands that there are differing levels of toxicity and potential harm to the environment among the various products on the market. However, the infrastructure and activities required to do all the regulatory functions required by state and federal laws is the same for all products and is not based on the attributes of each individual product. These required regulatory activities are also not based on the quantities of the products used or sold in the state. A scheme to base registration fees on quantity used or sold in the state would require the department to gather sales information and have some mechanism to verify that information. A mechanism for gathering and verifying information on use quantities does not currently exist. The costs associated with such a scheme might exceed the current cost and result in even higher registration fees.

The department conducted five regional public hearings to receive public comment on the proposal, in accordance with the Texas Agriculture Code, §76.004. No one attended any of the public hearings held on the proposal.

SUBCHAPTER B. REGISTRATION

4 TAC §7.10

The amendment to §7.10 is adopted under the Texas Agriculture Code, §76.044, which provides the department with the authority to set by rule a fee for each pesticide to be registered with 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 August 11, 2003.

TRD-200304986
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: September 1, 2003
Proposal publication date: June 20, 2003
For further information, please call: (512) 463-4075

♦ ♦ ♦

SUBCHAPTER C. LICENSING

4 TAC §7.20, §7.22

The amendments to §7.20 and §7.22 are adopted under the Texas Agriculture Code, (the Code), §76.073, which provides the department with the authority to set by rule a fee for a pesticide dealer license; the Code, §76.108, which authorizes the department to set an annual license fee for commercial pesticide applicators; the Code, §76.109, which authorizes the department to set an annual license fee for noncommercial pesticide applicators and authorizes the department to set other fees as necessary to defray the costs of administering a pesticide applicator certification program.

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 August 11, 2003.

TRD-200304987
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: September 1, 2003
Proposal publication date: June 20, 2003
For further information, please call: (512) 463-4075

♦ ♦ ♦

CHAPTER 9. SEED QUALITY

The Texas Department of Agriculture (the department) adopts amendments to §§9.2-9.3, and §§9.4-9.5, concerning seed quality licensing fees, testing fees and tolerances for prohibited noxious weeds under the Texas Seed Law, without change to the proposed text as published in the June 27, 2003 issue of the *Texas Register* (28 TexReg 4759). The amendments to §§9.2-9.3, and §§9.4-9.5, are adopted to increase seed quality licensing fees and testing fees by a minimum of 20%. The fees increased by this adoption have not been increased by the department since 1986. The adopted increase in fees will allow the department to recover some of its costs associated with seed testing, as directed by the Texas Legislature, 78th Session, 2003. The adopted amendments to §9.2 increase the cost of Texas Tested Seed Labels from $.03 to $.07 per 100 pounds of seed or fraction thereof, increase the inspection fees for the same from $.06 to $.07, and increase the base penalty for the filing of late reports from $25 to $30. The adopted amendment to §9.3 increases the fee for the vegetable seed license from $100 to $120. The adopted amendments to §9.4 disallow a tolerance in enforcement of the prohibited noxious weeds; caster, field bindweed, hedge bindweed and tropical soda apple. The amendment will allow for increased enforcement thereby promoting higher quality seed for consumers. The amendments to §9.5 increase service testing fees, and clarify that testing fees are charged on a per-sample component basis.

Comments were received from Texas Farm Bureau in opposition to the proposed fee increases. The TFB, through its president, Kenneth Dierschke, commented that it supports and appreciates the department's functions and services, but that it feels the increased fees are not appropriate and do not reflect the instructions of the state leadership not to raise taxes. The TFB further stated its belief that fees collected by the department should be used to fund the services provided to the segment of the population paying the fees and not to fund services to the general public, and that agency services should be funded by general revenue.

The department appreciates the TFB's support of the department's functions and services, and is understanding of the TFB's concern over the affect of fee increases on its members. However, the department was directed by the Legislature to increase its fees in order to recover direct and indirect costs to state government to implement state programs. Due to the large budget shortfall, during the course of the appropriations process all agencies were asked to do their part to contribute toward eliminating the budget shortfall, including cutting agency costs and raising agency fees. Moreover, in reviewing revenue generated by agency fees, the department discovered that some agency fees, including seed quality licensing and testing fees, had not been increased for a number of years, while costs to the state as a whole to implement programs have continued to increase.

The department does agree with the TFB that services should be funded by the General Revenue Fund. What may not be clear is that the department's regulatory programs are not funded directly by fees, but by general revenue. All but a small percentage of fee revenue collected by the department and other state agencies goes into the General Revenue Fund and from that fund is then appropriated to agencies to cover their costs. Also, while the TFB is correct that the state leadership, including the Governor and the Legislature, were clear in their instruction not to raise taxes, the TFB is not correct in viewing license and permit fees as taxes. Such fees, by definition, are not taxes and have often been used as vehicles for the generation of state revenue, as was the case in the 78th legislative session.

SUBCHAPTER B. CLASSIFICATION OF LICENSES

4 TAC §9.2, §9.3

The amendments to §9.2 and §9.3 are adopted under the Texas Agriculture Code (the Code), §61.002, which provides the Texas Department of Agriculture with the authority to adopt rules as necessary for the efficient enforcement of the Code, Chapter 61; the Code §61.011, which provides the department with the authority to set and collect a fee for purchase of Texas Tested Seed Labels, a penalty fee for late filing of required reports and a fee for an inspection of seed; and §61.013, which provides the department with the authority to set and collect a fee for issuance of a vegetable seed license.

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 August 11, 2003.

TRD-200305016
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 463-4075

♦ ♦ ♦

SUBCHAPTER C. SEED TESTING

4 TAC §9.4, §9.5

The amendments to §9.4 and §9.5 are adopted under the Texas Agriculture Code (the Code), §61.002, which provides the Texas Department of Agriculture with the authority to adopt rules as necessary for the efficient enforcement of the Code, Chapter 61; the Code §61.011, which provides the department with the authority to set and collect a fee for purity and germination testing.

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 August 11, 2003.

TRD-200305015
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 463-4075

♦ ♦ ♦

CHAPTER 10. SEED CERTIFICATION STANDARDS

The Texas Department of Agriculture (the department) and the Texas State Seed and Plant Board adopts the amendments to §§10.2, 10.5, 10.10, 10.11, 10.13, 10.21 and 10.22, concerning seed certification, without changes to the proposal published in June 27, 2003, issue of the *Texas Register* (28 TexReg 4760). The amendments are adopted to increase fees for certification and to include in §10.13 the category of "other kinds not listed" and the previously excluded kind "cantaloupe" which was inadvertently left out of the 2001 amendments to §10.13. The department is the certifying agency in the administration of the Seed and Plant Certification Act, and is charged with administering and enforcing the standards adopted by the Board. The fees increased by this adoption have not been increased by the department since 1987. The increase in fees will allow the department to recover costs associated with enforcing the standards adopted by the Board, as directed by the 78th Legislature, Regular Session, 2003. Sections 10.3 and 10.8 will be adopted in separate submissions at a later date.

The amendment to §10.2 increases from $75 to $100 the per lot fee for interagency certification. The amendments to §10.5 increase from $20 to $25 the late fee assessed on each field on which certification is requested after the deadline date and increase from $20 to $25 the minimum charge for a reinspection. The amendment to §10.10 increases the fee for certification labels from $.08 to $.10 per 100 pounds or fraction thereof. The amendments to §10.11 increase the bulk sales certificate fee from $.08 to $.10 per 100 pounds or fraction thereof, increase the agricultural seed inspection fee from $.06 to $.07 per one hundred pounds or fraction thereof, if on the reporting system and increase the seed inspection fee from $.03 to $.07 per one hundred pounds or fraction thereof, if using seed fee labels. The amendments to §10.13 increase by 20% the acreage inspection fees for certification, add a fee for cantaloupe, and add a category for "other kinds not listed". The amendments to §10.21 increase from $50 to $60 the per sample fee for hybrid sorghum varietal purity grow-outs. The amendments to §10.22 increase from $50 to $60 the per sample fee for sunflower varietal purity grow-outs.

Comments were received regarding the proposed fee increases from Texas Farm Bureau (TFB) and, the Texas Seed Trade Association (TSTA). The TFB, through its President, Kenneth Dierschke, commented that it supports and appreciates the department's functions and services, but that it feels the increased fees are not appropriate and do not reflect the instructions of the state leadership not to raise taxes. The TFB further stated its belief that fees collected by the department should be used to fund the services provided to the segment of the population paying the fees and not to fund services to the general public, and that agency services should be funded by general revenue. The TSTA, through its Executive Director, Charles Leamons, also

voiced similar concerns regarding the fee increases, which included that fees collected exceed the department's expenses for the certification program. Mr. Leamons noted that the legislature has in past exempted seed testing from cost recovery. Mr. Leamons also noted that his organization supports and appreciates the services the department provides to the industry.

The department appreciates the TFB's and TSTA's support of the department's functions and services, and is understanding of the TFB's and TSTA's concern over the affect of fee increases on its members. However, the department was directed by the Legislature to increase its fees in order to recover direct and indirect costs to state government to implement state programs. Due to the large budget shortfall, during the course of the appropriations process all agencies were asked to do their part to contribute toward eliminating the budget shortfall, including cutting agency costs and raising agency fees. Moreover, in reviewing revenue generated by agency fees, the department discovered that some agency fees, such as fees assessed by the department for seed certification, had not been increased for a number of years, while costs to the state as a whole to implement programs have continued to increase. While seed testing fees are exempt from the requirement that program fees offset direct and indirect costs of administering a program, this exemption from the requirement does not preclude the agency from raising such fees in order to recover costs to state government.

The department does agree that services should be funded by the General Revenue Fund. What may not be clear is that the department's regulatory programs are not funded directly by fees, but by general revenue. All but a small percentage of fee revenue collected by the department and other state agencies goes into the General Revenue Fund and from that fund is then appropriated to agencies to cover their costs. Also, while the TFB is correct that the state leadership, including the Governor and the Legislature, were clear in their instruction not to raise taxes, the TFB is not correct in viewing license and permit fees as taxes. Such fees, by definition, are not taxes and have often been used as vehicles for the generation of state revenue, as was the case in the 78th legislative session.

SUBCHAPTER A. GENERAL REQUIREMENTS

4 TAC §§10.2, 10.5, 10.10, 10.11

The amendments to §§10.2, 10.5, 10.10 and 10.11, are adopted under the Texas Agriculture Code (the Code), §12.016, which provides the department with the authority to adopt rules for administration of the code; and the Code, §62.008, which provides the department with the authority to charge fees for certification of seed and plants.

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 August 12, 2003.

TRD-200305094
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 463-4075

♦ ♦ ♦

SUBCHAPTER C. ACREAGE INSPECTION FEES FOR CERTIFICATION

4 TAC §10.13

The amendments to §10.13 are adopted under the Texas Agriculture Code, §12.016, which provides the department with the authority to adopt rules for administration of the code; the code, §62.002, which provides the Board with the authority to establish standards of genetic purity and identity as necessary for the efficient enforcement of agricultural interests, and §62.008, which provides the department with the authority to charge fees for cost of certification of seed and plants.

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 August 12, 2003.

TRD-200305095
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 463-4075

♦ ♦ ♦

SUBCHAPTER F. ADDITIONAL REQUIREMENTS FOR THE CERTIFICATION OF CERTAIN CROPS

4 TAC §10.21, §10.22

The amendments to §10.21 and §10.22 are adopted under the Texas Agriculture Code (the Code), §12.016, which provides the department with the authority to adopt rules for administration of the code; and the Code, §62.008, which provides the department with the authority to charge fees for cost of certification of seed and plants.

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 August 12, 2003.

TRD-200305096
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 463-4075

♦ ♦ ♦

TITLE 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 3. STATE BANK REGULATION
SUBCHAPTER B. GENERAL

7 TAC §3.36, §3.37

The Finance Commission of Texas (commission) adopts amendments to §3.36, concerning annual assessments and specialty examination fees, and §3.37, concerning the calculation of annual assessment for banks, without changes to the proposed text as previously published in the July 4, 2003, issue of the *Texas Register* (28 TexReg 5018). The text will not be republished.

Sections 3.36 and 3.37 govern the calculation and payment of fees that the Texas Department of Banking (department) is authorized to recover for maintaining and operating the department and enforcing applicable provisions of the Finance Code. The amendments to §3.36 address needed clarifications and revisions regarding the due dates and method of payment of assessment fees, and increase the fee charged for specialty examinations. The amendments to §3.37 change the assessment rates applicable to state banks and increase the amount of a bank's annual assessment.

Amended §3.36(d)(1) requires a bank to pay its annual assessment to the department by electronic payment/ACH transfer in quarterly installments to be debited effective September 15, December 15, March 15, and June 15 of each year, or by other means directed by the department, and formalizes current practice.

Amended §3.36(d)(2)-(3) changes the due dates that foreign bank branches, agencies and representative offices must pay their quarterly installments from the first day of September, December, March, and June to the 15th day of those months. The amendment to §3.36(d)(3) also moves the current §3.36(j) into subsection (d).

Amended §3.36(h)(1) increases the fee the department imposes for specialty examinations from $500 per examiner per day to $600 per examiner per day. The increase is necessary because the existing fee does not generate sufficient revenue to cover the costs of the examinations, including the salary expense of examiners plus a proportionate share of department overhead allocable to the examination function. The department reviewed the aggregate costs incurred in conducting specialty examinations and the aggregate collections from examinations conducted during fiscal year 2003, and determined that the $100 per examiner per day increase would enable the department to more fully recover its examination costs.

The remaining amendments to §3.36 are intended as either conforming changes or clarifications without substantive effect.

Amended §3.37 adjusts certain variables used to calculate the annual assessment fees the department imposes on state banks. A state bank's assessment is calculated on the basis of its assessable assets using three factors: (1) a base assessment amount; (2) a multiplication factor; and (3) the examination frequency. The amendments to §3.37 increase the base assessment amounts and the multiplication factors applicable to the assessable asset groups and increase the assessment for all state banks. Amended §3.37 also changes the policy memorandum reference in the existing §3.37 table to Supervisory Memorandum 1003 to conform the reference to the memorandum currently in effect. The changes are shown in amended Figure: 7 TAC §3.37, which replaces the table in existing 7 TAC §3.37.

The increase in assessments effected by the amendments is necessary to cover the salary expenses and recover the cost of the department's operations related to its supervision of the banking industry. To determine the needed increase in base assessment amounts and multiplication factors reflected in amended §3.37, the department reviewed current and projected staffing needs and projected the future cost of maintaining and operating the department and enforcing Finance Code, Title 3, Subtitles A and G. The department determined the aggregate annual assessment fees it must collect starting in fiscal year 2004 to cover anticipated costs, then projected the aggregate annual assessment fees it was likely to collect based upon the existing rates and calculations in §3.37. In order to meet the projected shortfall in revenue, the department determined to increase the annual assessment fees for all state banks. Amended §3.37 does so in a manner that is ratable and equitable.

The specialty examination fee and annual assessment rate increases are established by the commission and not mandated by the Legislature.

Two state banks submitted comments regarding the proposed fee and assessment increases. One commenter specifically supported the increases, and the other recognized the need for them and the absence of alternative means by which the department could secure the revenue necessary to discharge its supervisory responsibilities.

The amendments are adopted pursuant to Finance Code, §§11.301, 31.003(a)(4), 31.106, and 201.003(a)(4), which authorize the commission to adopt rules necessary or reasonable to recover the cost of supervision and regulation by imposing and collecting ratable and equitable fees.

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 August 15, 2003.

TRD-200305222
Everette D. Jobe
Certifying Official
Finance Commission of Texas
Effective date: September 4, 2003
Proposal publication date: July 4, 2003
For further information, please call: (512) 475-1300

♦ ♦ ♦

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 17. TRUST COMPANY REGULATION
SUBCHAPTER B. EXAMINATION AND CALL REPORTS

7 TAC §17.22

The Finance Commission of Texas (commission) adopts an amendment to §17.22, concerning examination and investigation fees, without changes to the proposed text as published in

the July 4, 2003 issue of the *Texas Register* (28 TexReg 5026). The text will not be republished.

Section 17.22 establishes the fee state-chartered trust companies must pay the Texas Department of Banking (the department) for examinations and investigations related to applications. Amended §17.22(a) increases the fee for examinations and investigations from $500 per examiner per day to $600 per examiner per day. The increase is necessary because the existing fee does not generate sufficient revenue to cover the costs of the examinations and investigations, including the salary expense of examiners plus a proportionate share of department overhead allocable to the examination and investigation functions.

The department reviewed the aggregate costs incurred in conducting trust company examinations and investigations and the aggregate collections from examinations and investigations conducted during fiscal year 2002. Based upon the information available, and assuming that the number and duration of examinations and investigations remains relatively constant, the department determined that the proposed $100 per examiner per day increase would enable the department to more fully recover its examination and investigation costs.

No comments were received concerning the proposed amendment.

The examination and investigation fee increase is established by the commission and not mandated by the Legislature.

The amendment is adopted under Finance Code, §§181.003(a)(4), 181.105, and 181.106, which authorize the commission to adopt rules necessary or reasonable to recover the cost of trust company supervision and regulation by imposing and collecting ratable and equitable fees.

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 August 15, 2003.

TRD-200305216
Everette D. Jobe
Certifying Official
Texas Department of Banking
Effective date: September 4, 2003
Proposal publication date: July 4, 2003
For further information, please call: (512) 475-1300

♦ ♦ ♦

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 80. MANUFACTURED HOUSING
SUBCHAPTER D. STANDARDS AND REQUIREMENTS

10 TAC §80.54

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (Department) adopts amendments to §80.54 with changes to the proposed rule as published in the April 11, 2003 issue of the *Texas Register* (28 TexReg 3022). The text will be republished.

The effective date of rules relating to installation standards is sixty (60) days following the date of publication with the *Texas Register* of notice that the rule has been adopted.

A public hearing was held on May 13, 2003. The following interested groups or associations presented comments: Texas Manufactured Housing Association ("TMHA").

Comment on Figure 10 TAC §80.54(g): At the public hearing on this rule a comment was made by the Texas Manufactured Housing Association, suggesting that the portion of the site preparation notice advising the consumer that if the home is already installed, they need to check to be sure that the site was properly prepared first be revised to have the consumer confirm that the legal requirements for the installation were met.

Staff Response: Since this form is directed to site preparation, which is a necessary step preceding installation, the department does not believe that any change is appropriate. The department does not believe it should be a responsibility of a consumer to verify that a previously engaged installer has complied with legal requirements. If the Department detects a failure to comply, the Department will assign responsibility.

Except as noted below, the rule as proposed on April 11, 2003 is adopted as final rule with the following non-substantive changes.

In §80.54(b)(1)(B) the word "the" was added after the word "seller" in the second sentence that reads ".... Therefore, it is the responsibility of the seller...."

In Figure 10 TAC §80.54(g) a parenthesis was added at the end of the fourth paragraph.

The following is a restatement of the rules' factual basis:

Section 80.54(b)(1) is adopted *(with changes)* to update the Department's rules regarding site preparation for the installation of a manufactured home to address those situations where, because the home has already been installed or the home will be installed under circumstances that the consumer cannot control, the consumer needs to make sure that the party in a position to prepare the site has done so or will do so rather than assuming a responsibility that the consumer is unable to carry out.

Figure: 10 TAC §80.54(g) - Moved from §80.54(c) and is adopted *(with changes)* to improve the language in the Site Preparation Notice for better clarification. The revised language alerts the consumer to instances where they may need to do additional work to be sure of the accuracy of their site preparation.

Figure: 10 TAC §80.54(h)(3) - Moved from §80.54(d)(3) and is adopted *(without changes)* in the content.

Figure: 10 TAC §80.54(h)(4) - Moved from §80.54(d)(4) and is adopted *(without changes)* in the content.

Figure: 10 TAC §80.54(h)(6) - Moved from §80.54(d)(6) and is adopted *(without changes)* in the content.

Figure: 10 TAC §80.54(h)(6)(B) - Moved from §80.54(d)(6)(B) and is adopted *(without changes)* in the content.

Figure: 10 TAC §80.54(h)(6)(C) - Moved from §80.54(d)(6)(C) and is adopted *(without changes)* in the content.

Figure: 10 TAC §80.54(h)(7) - Moved from §80.54(d)(7) and is adopted *(without changes)* in the content.

Figure: 10 TAC §80.54(h)(8) - Moved from §80.54(d)(8) and is adopted *(without changes)* in the content.

Figure: 10 TAC §80.54(h)(9)(A) - Moved from §80.54(d)(9)(A) and is adopted *(without changes)*. No change in the content.

Figure: 10 TAC §80.54(h)(9)(D) - Moved from §80.54(d)(9)(D) and is adopted *(without changes)* in the content.

The amended section is adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Subtitle C, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.603, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the adopted rule.

§80.54. Standards for the Installation of Manufactured Homes.

(a) All manufactured homes shall be installed in accordance with one of the following:

(1) the home manufacturer's installation instructions;

(2) the state's generic standards set forth in this section, §80.55 of this title (relating to Anchoring Systems), §80.56 of this title (relating to Multi-Section Connection Standards), and modified by any appendix filed in accordance with §80.51(a)(2) of this title (relating to Manufactured Home Installation Requirements);

(3) a custom designed stabilization system;

(4) a stabilization system pre-approved by the department; or

(5) on a permanent foundation.

(b) Site Preparation Responsibilities and Requirements:

(1) The purchaser of a manufactured home, new or used, is responsible for the proper preparation of the site where the manufactured home will be installed except as set forth in subsection (g) of this section:

(A) In the case of a manufactured home that is to be installed in a manufactured home rental community (as defined in Local Government Code §232.007), the purchaser may not have the ability to control the preparation of the site. Therefore, the purchaser should confirm with the person who owns, leases, or manages the rental community that the site has been properly prepared as required by Property Code, §94.151.

(B) When a manufactured home is sold already installed it is not possible for the purchaser to prepare the site. Therefore, it is the responsibility of the seller, if the seller is a licensed retailer, to ensure that the site has been properly prepared.

(2) Whenever a licensed retailer intends to sell a manufactured home, regardless of where it is located or is to be located, the retailer is required to give the proposed purchaser the Site Preparation Notice, for signature by the consumer, in the form set forth in subsection (g) of this section PRIOR to the execution of any binding sales agreement.

(3) Whenever a licensed installer proposes to move a used manufactured home, the installer is required to give the proposed purchaser the Site Preparation Notice, for signature by the consumer, in the form set forth in subsection (g) of this section PRIOR to entering into a binding agreement to move that home.

(c) If the retailer or installer provides the materials for skirting or contracts for the installation of skirting, the retailer or installer is responsible for the following: The retailer or installer shall install any required moisture and ground vapor control measures in accordance with the home installation instructions, specifications of an approved stabilization system, or the generic standards and shall provide for the proper cross ventilation of the crawl space. If the purchaser or homeowner contracts with a person other than the retailer or installer for the skirting, the purchaser or homeowner is responsible for installing the moisture and ground vapor control measures and for providing for the proper cross ventilation of the crawl space.

(d) Clearance: If the manufactured home is installed according to the state's generic standards, a minimum clearance of 18 inches between the ground and the bottom of the floor joists must be maintained. In addition, the installer shall be responsible for installing the home with sufficient clearance between the I-Beams and the ground so that after the crossover duct prescribed by the manufacturer is properly installed it will not be in contact with the ground. Refer to §80.56 of this title (relating to Multi-Section Connection Standards) for additional requirements for utility connections. It is strongly recommended that the installer not install the home unless all debris, sod, tree stumps and other organic materials are removed from all areas where footings are to be located.

(e) Drainage: The purchaser is responsible for proper site drainage where the manufactured home (new or used) is to be installed unless the home is installed in a rental community. It is strongly recommended that the installer not install the home unless the exterior grade is sloped away from the home or another approved method to prohibit surface runoff from draining under the home is provided. Drainage prevents water build-up under the home. Water build-up may cause shifting or settling of the foundation, dampness in the home, damage to siding and bottom board, buckling of walls and floors, delamination of floor decking and problems with the operation of windows and doors.

(f) Generic Moisture and Ground Vapor Controls:

(1) If the manufactured home is installed according to the state's generic standards and the space under the home is to be enclosed with skirting and/or other materials provided by the retailer and/or installer, an access opening not less than 18 inches in any dimension and not less than three square feet in area shall be provided by the installer. The access opening shall be located so that any water supply and sewer drain connections located under the home are accessible for inspections. If a clothes dryer exhaust duct, air conditioning condensation drain, or combustion air inlet is present, the installer must pass it through the skirting to the outside. In addition, crawl space ventilation must be provided at the rate of minimum 1 square foot of net free area, for every 150 square feet of floor area. At least six openings shall be provided, one at each end of the home and two on each side of the home. The openings shall be screened or otherwise covered to prevent entrance of rodents (note: screening will reduce net free area). For example, a 16'x76' single section home has 1216 square feet of floor area. This 1216 square feet divided by 150 equals 8.1 square feet or 1166 square inches of net free area crawl space ventilation.

(2) The retailer and/or installer must notify the purchaser that moisture and ground vapor control measures are required if the space under the home is to be enclosed. Water vapor build-up may cause dampness in the home, damage to siding and bottom board, buckling of walls and floors, delamination of floor decking and problems with the operation of windows and doors. The generic ground vapor control measure shall consist of a ground vapor retarder that is minimum 6 mil polyethylene sheeting or its equivalent, installed so that the

area under the home is covered with sheeting and overlapped approximately 12 inches at all joints. Any tear larger than 18 inches long or wide must be taped using a material appropriate for the sheeting used. The laps should be weighted down to prevent movement. Any small tears and/or voids around construction (footings, anchor heads, etc.) are acceptable.

(g) Notice: The site preparation notice to be given to the consumer shall be as follows:
Figure: 10 TAC §80.54(g)

(h) Footers and Piers:

(1) Proper sizing of footings depends on the load carrying capacity of both the piers and the soil. To determine the load bearing capacity of the soil, the installer may use any of the following methods:

(A) Pocket penetrometer:

(i) Test a typical area adjacent to or within 10 feet of the perimeter of the unit;

(ii) Dig down to undisturbed soil. This should be a minimum of 1 square foot surface area; and

(iii) Using the pocket penetrometer take seven (7) readings, eliminate the highest and the lowest and average the remaining five (5).

(B) Soil surveys from the U.S. Department of Agriculture;

(C) Values from tables of allowable or presumptive bearing capacities given in local building codes. Such tables are commonly available from the local authority having jurisdiction; or

(D) Any other test data from soil analysis reports.

(2) The footing must be placed on firm, undisturbed soil, or fill compacted to at least 90% of its maximum relative density. Installation on loose, noncompacted fill may invalidate the home's limited warranty.

(3) Footer configurations:
Figure: 10 TAC §80.54(h)(3)

(4) Footer sizing and capacities: The following tables represent maximum loads and spacings based on footer size and soil bearing capacity. Other approved footers may be used if equal or greater in bearing area than those footer sizes tabulated.
Figure: 10 TAC §80.54(h)(4)

(5) Piers and pier spacings: One of the most important parts of home installation is proper pier installation. Incorrect size, location or spacing of piers may cause serious structural damage to the home. Spacing and location of piers shall be in accordance with the tables listed in these standards (Table 3B, without perimeter piers; Table 3C, with perimeter piers).

(A) Spacing shall be as even as practicable along each main I-Beam. Pier spacing may exceed tabulated values up to 30% so long as the total pier count remains the same. End piers are to be located within 24 inches of the end of the main frame.

(B) Piers shall extend at least 6 inches from the centerline of the I-Beam or be designed to prevent dislodgment due to horizontal movement of less than 4 inches.

(C) Load bearing supports or devices shall be listed by an independent testing laboratory, nationally recognized inspection agency, or other nationally recognized organization and approved by the department. Engineers or architects licensed in Texas may design load bearing supports or devices for a single installation. A copy of the design for this particular home and site shall be provided to the department before the home is installed, but department approval is not required.

(D) Sidewall openings greater than 4 feet shall have perimeter piers located under each side of the opening, i.e. patio doors, recessed porches/entries, bay windows and porch posts. Perimeter piers for openings are not required for endwalls.

(6) Pier design: Piers shall be constructed per the following details:
Figure: 10 TAC §80.54(h)(6)

(A) Shimming (if needed): Hardwood shims are commonly used as a means for leveling the home and filling any voids left between the bottom flange of the I-Beam and the top of the pier cap. Wedge shaped shims must be installed from both sides of the I-Beam to provide a level bearing surface. The allowable height must not exceed 1 inch. Shims shall be a minimum of 3 inches wide and 6 inches long. Over shimming should be avoided.

(B) Table 3B - Pier loads (pounds) at tabulated spacings WITHOUT perimeter supports:
Figure: 10 TAC §80.54(h)(6)(B)

(C) Table 3C - Pier loads (pounds) at tabulated spacings WITH perimeter supports:
Figure: 10 TAC §80.54(h)(6)(C)

(7) Typical multi-section pier layout:
Figure: 10 TAC §80.54(h)(7)

(8) Typical single section pier layout:
Figure: 10 TAC §80.54(h)(8)

(9) Multi-section units mating line column supports:

(A) On multi-section units, openings larger than 4 feet must have piers installed at each end of the opening. To determine the pier loads, refer to Table 3D in subparagraph (D) of this paragraph.
Figure: 10 TAC §80.54(h)(9)(A)

(B) Column loads for each section may be combined when the columns are opposite each other. The footer must be sized for the combined loading.

(C) Additional piers are required under marriage walls (see wall between column #3 and #4 in the Marriage Line Elevation drawing in subparagraph (A) of this paragraph). The maximum spacing is the same as the spacing at the main I-Beams, without perimeter piers, and one half the spacing of the perimeter piers, with perimeter piers installed.

(D) Table 3D: Mating line column loads (pounds).
Figure: 10 TAC §80.54(h)(9)(D)

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 August 18, 2003.

TRD-200305269
Timothy K. Irvine
Executive Director, Manufactured Housing Division of TDHCA
Texas Department of Housing and Community Affairs
Effective date: October 28, 2003
Proposal publication date: April 11, 2003
For further information, please call: (512) 475-2206

♦ ♦ ♦

SUBCHAPTER E. GENERAL REQUIREMENTS

10 TAC §80.129

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (Department) adopts new §80.129 with changes to the proposed rule as published in the February 21, 2003 issue of the *Texas Register* (28 TexReg 1597). The text will be republished.

The effective date of the rule is thirty (30) days following the date of publication with the *Texas Register* of notice that the rule has been adopted.

A public hearing was held on May 13, 2003. The following interested groups or associations presented comments either at the hearing or in writing: Texas Manufactured Housing Association ("TMHA") and the Consumers Union.

The department received the following general comments:

The Consumers Union made several comments on this proposed rule. They suggested setting a minimum penalty as well as a maximum penalty for a given violation involving a recurring offender. They also suggested that board approval be required for any exceptions to the application of the rule. The Texas Manufactured Housing Association (TMHA) commented that the department cannot assess a penalty that exceeds $1,000 for each violation, unless imposed through a judicial ruling. Also, TMHA believes this new rule could have been included as an amendment to §80.127 (relating to Sanctions and Penalties).

Staff Response: The department believes that it is appropriate to retain the ability to take an enforcement action without respect to a minimum penalty. There may be situations where consideration of all of the factors which must, by statute, be considered in assessing a penalty indicates that a monetary penalty would not be appropriate. To address TMHA's comments the portion of the grid referring to the penal amounts for recurring violations involving injury to a consumer, the penal amount was revised to indicate that it could be up to the maximum allowed by law. The staff are aware that this could have done as amendment to existing §80.127 but believed that keeping it separate made it easier to follow.

The staff does not believe that referring all exceptions to the board would be a workable solution due to the delay that it could involve and the varying nature of exceptions. Staff intends that exceptions will be few (if any), will need to be thoroughly justified and documented, and will be reported to the board so that it may monitor this issue and determine, if appropriate, whether changes might be in order.

Set forth below are comments regarding specific subsections and the analysis and recommendations of staff.

Section 80.129(a) - TMHA suggest revising the phrase "When the Department has reason to believe..." to "When the Department has evidence that...."

Staff response: We do not believe that this change is needed. Reason to believe is based on evidence and includes such ancillary issues as the credibility of witnesses.

Section 80.129(c) - TMHA suggest revising the phrase at the end of the paragraph from "suspension or revocation." to "suspension or revocation of licensees."

Staff response: Agree.

Except as noted below, the rule as proposed on February 21, 2003 is adopted as final rule with the following non-substantive changes.

In §80.129(c) at the end of the subsection "of licenses" was added per comments received.

In Figure 10 TAC §80.129(g) changes were made to the matrix referring to the penal amounts for recurring violations involving injury to a consumer, the penal amount was revised to indicate that it could be up to the maximum allowed by law.

The following is a restatement of the rules' factual basis:

Section 80.129 is adopted *(with changes)* and will set forth guidelines for the Department to use in determining the appropriate administrative penalty(ies) to pursue when a licensee is believed to have violated the Texas Manufactured Housing Standards Act (the "Act"), the rules (the "Rules") of the Department that implement the Act, or any order issued under the Act or the Rules.

Figure: 10 TAC §80.129(g) - The Enforcement Matrix is adopted *(with changes)* to determine appropriate administrative penalty(ies).

The new rule is adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Subtitle C, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.603, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the new rule.

§80.129. Determinations Regarding the Pursuit of Administrative Penalties and Enforcement Actions.

(a) When the Department has reason to believe that a violation of the Standards Act, these Rules, or an administrative order has occurred, the Department shall determine what, if any, administrative action or actions may be appropriate to see that the purposes of the Standards Act are carried out. In that regard, in order to promote the uniform application of the Standards Act, the Department will follow these guidelines. The only time that the Department will deviate from these guidelines is when with either the Director or the Board determines, for documented bona fide reasons, that some other course of action, consistent with the Standards Act and any other applicable legal requirements would be more appropriate.

(b) As used herein, "dangerous conditions" means any condition which, if present, would constitute an imminent threat to health or safety, and "loss" means actual financial loss or damage, not including exemplary, punitive, special, or consequential damages. "Significant" means significant in relationship to the financial resources of the person who incurs a loss. "Promptly" means within the time prescribed by the Standards Act, these Rules, and any administrative order (including any properly granted extension) or, in the case of a matter that constitutes an imminent threat to health or safety, as quickly as reasonably possible.

(c) Any exceptionally flagrant, willful violation that constitutes an imminent threat to health or safety may be a basis for pursuit of maximum statutory penalties and/or suspension or revocation of licenses.

(d) Anytime the record indicates that there is a high likelihood that a licensee's violation is a direct result of a systemic problem, it is appropriate to request the licensee to develop a plan to prevent future

occurrences. Undertaking to develop such a system is an appropriate factor to be taken into account in determining what penalty to pursue.

(e) Any and all penalties are IN ADDITION to full compliance with the Standards Act and Rules (i.e., full, prompt corrective action, restitution, or whatever else the Standards Act and rules would have required in the first place). Failure to provide such compliance on a timely basis, as specified in the applicable order, will be deemed to be a violation of the order and serve as a basis for pursuing additional administrative action, including the assessing of additional penalties and the pursuit of suspension or revocation of licensees.

(f) In determining the appropriate amount of a penalty or other action, all relevant factors shall be considered, including, but not limited to: the resources of the licensee and their ability to pay fines, efforts to achieve compliance, the nature and frequency of recurring violations, and monetary impact on consumers.

(g) Enforcement Matrix.
Figure: 10 TAC §80.129(g)

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 August 18, 2003.

TRD-200305268
Timothy K. Irvine
Executive Director, Manufactured Housing Division of TDHCA
Texas Department of Housing and Community Affairs
Effective date: September 28, 2003
Proposal publication date: February 21, 2003
For further information, please call: (512) 475-2206

♦ ♦ ♦

10 TAC §80.133

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (Department) adopts new §80.133 with changes to the proposed rule as published in the February 21, 2003 issue of the *Texas Register* (28 TexReg 1598). The text will be republished.

The effective date of the rule is thirty (30) days following the date of publication with the *Texas Register* of notice that the rule has been adopted.

A public hearing was held on May 13, 2003. The following interested groups or associations presented comments either at the hearing or in writing: Texas Manufactured Housing Association ("TMHA") and the Consumers Union.

The department received the following general comments:

The Consumers Union stated the department should ensure the consumer's rights under §80.133(b)(5) are clear to them. They stated that some consumers may want to perform the repairs themselves or arrange for the work to be done and file a claim for actual reasonable expenses under this section, instead of the department assigning warranty repairs to licensees. TMHA stated that the rule does not mention the method to be used to submit repair estimates or how the department will signify that a repair bid has been approved.

Staff response: Staff believes that the primary purpose of this section is to delineate staff responsibilities in reviewing direct claims by consumers. Staff believes that the most effective way to advise consumers of their rights will be through dissemination of consumer education materials, not through this rule provision. Staff does not agree with the Consumers Union as to the importance of advising consumers of their rights. However, those rights, as set out in the statute, are rights to reimbursement for certain specified claims. Staff does not believe it appropriate to subject consumers to the complexities and delays of bid review.

Set forth below are comments from TMHA suggesting revisions to specific subsections and the analysis and recommendations of staff.

Section 80.133(b) - TMHA suggested changing "the licensee" to "a licensee."

Staff response: Agree.

Section 80.133(b)(2)(A) - TMHA suggested rewording the subparagraph to "the amount billed shall not exceed the amount authorized by the director. The director must also approve additional items in need of repair discovered during the repair process and not included in the original authorization before the additional repair is billed."

Staff response: No, you cannot bill more than the time spent and costs incurred and executive director ought not be allowed to approve more than that.

Section 80.133(b)(4) - TMHA suggest deleting the rule. They commented that reassigned work should be voluntary and if no estimate is submitted it should indicate that a licensee is not interested or is unable to perform the work necessary. They do not believe that this should result in administrative action by the department.

Staff response: We do not believe that compliance with an order reassigning warranty work is or should be voluntary. The Standards Act provides no latitude to reassign such work to anyone other than the manufacturer or retailer that is still in business. Without the ability to direct such work, the Department would not have a way to see that consumers' problems were addressed, and consumers would be forced to assume the expense and burden of arranging for their own repairs.

Section 80.133(b)(5) - TMHA does not understand the rule and suggest rewording it so the rule can be clearly interpreted.

Staff response: The Fund may reimburse consumers directly for covered losses. Although most claims paid are to licensees designated as consumers in connection with reassigned warranty work, there are situations where the consumer makes claim directly for reimbursement. The staff believes that this will clarify the type of documentation that the Department ought to obtain to substantiate any such claim for reimbursement.

Section 80.133(g)(1) - TMHA suggested rewording to "When a follow-up inspection is to be conducted, the Department shall notify each licensee that has been assigned responsibility for warranty items, provided that the licensee still holds an active license, by regular mail to the address on file with the Department. If the party is no longer licensed but has left a mailing address on file with the Department, such party shall be given notice of the follow-up inspection by first class mail to that address."

Staff response: The paragraph is clear as proposed.

Section 80.133(g)(2) - TMHA suggested rewording to "When the department authorizes warranty work orders the work orders will be sent to each licensee or consumer to whom responsibility has

been assigned. They shall be sent by regular mail to the address of record on file with Department."

Staff response: The paragraph is clear as intended, since all orders will be to licensees.

Section 80.133(g)(3) - TMHA suggested rewording to "...The party to whom the [re-]warranty work is re-assigned shall perform the warranty work and shall be a consumer, as provided for in the Standards Act, entitled to be reimbursed from the HORF."

Staff response: Agree.

The sections are now appropriately numbered in the format required.

Except as noted below, the rule as proposed on February 21, 2003 is adopted as final rule with the following non-substantive changes.

In §80.133 the name of the recovery fund and the Standards Act statute were changed to comply with revisions made by the 78th Legislature. The Standards Act is now under the Occupations Code, Chapter 1201, which replaces Article 5221f, Vernon's Texas Civil Statutes. The heading of the new rule has also been revised to reflect changes made by the 78th Legislature.

Section 80.133(a) is revised to reflect changes made by the 78th Legislature.

Section 80.133(b), is revised to reflect changes made by the 78th Legislature and comments received.

Section 80.133(b)(5) is revised to reflect changes made by the 78th Legislature and for clarification purposes.

Section 80.133(b)(6) changed to (b)(5)(A) and is revised to reflect changes made by the 78th Legislature and for clarification purposes.

Section 80.133(b)(7) changed to (b)(5)(B) and is revised to reflect changes made by the 78th Legislature and for clarification purposes.

Section 80.133(c) is revised to reflect changes made by the 78th Legislature.

Section 80.133(d) is revised to reflect changes made by the 78th Legislature.

Section 80.133(e) is revised to reflect changes made by the 78th Legislature.

Section 80.133(g)(3) is revised to reflect changes made by the 78th Legislature and comments received.

Section 80.133(g)(4) is revised to reflect changes made by the 78th Legislature.

Section 80.133(g)(6) is deleted and original paragraphs (7) and (8) are renumbered (6) and (7). Section 80.133(g)(6) that was originally (7) is revised to reflect changes made by the 78th Legislature.

The following is a restatement of the rules' factual basis:

Section 80.133 is adopted *(with changes)* that set forth the procedural requirements for the handling of claims that are subject to reimbursement or payment from the Manufactured Homeowners' Recovery Trust Fund (the "Fund"), administered by the Division of Manufactured Housing, Texas Department of Housing and Community Affairs (the "Department"). The Fund is established under §1201.405 of the Standards Act.

The new rule is adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Subtitle C, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.603, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the new rule.

§80.133. Administration of Claims under the Manufactured Homeowners' Recovery Trust Fund.

(a) The Manufactured Homeowners' Recovery Trust Fund (the "Fund") is established to reimburse consumers for actual unsatisfied claims against licensed manufacturers, retailers, brokers, and installers for violations of the Standards Act, these rules, the FMHCSS and its implementing regulations, and the Texas Deceptive Trade Practices-Consumer Protection Act. Payments from the Fund are subject to limitations, as set forth in §1201.405 of the Standards Act.

(b) Documentation of a claim by a Licensee who is deemed to be a "consumer" under §1201.358(d) of the Standards Act - When either a manufacturer or a retailer has their license revoked or goes out of business and the party that went out of business or had its license revoked has failed to perform required warranty work on a timely basis, the Director may direct a licensee that is still in business to perform the warranty work. A licensee so directed will be deemed to be a "consumer" under §1201.358(d) of the Standards Act and entitled to be reimbursed from the Fund for the costs of performing such re-assigned warranty work.

(1) The Director, before authorizing any party performing re-assigned warranty work to proceed, will require that an estimate be submitted, itemizing the hourly cost of labor required, the estimated time to complete the work, the itemized costs of any material, equipment, and supplies, and such additional out-of-pocket expenses as the licensee believes it will incur. Overhead costs may be included, not to exceed 20% of the cost of labor and materials. If the required estimate is not submitted and approved prior to the commencement of re-assigned warranty work, the party performing the work may not be reimbursed for that work until the Director has been provided with evidence establishing that the amount billed was justifiable in all respects. The estimate must be on the form prescribed by the Department, properly completed and executed.

(2) An order by the Director authorizing re-assigned warranty work to be performed will specify that:

(A) the amount billed shall not exceed the actual hours required and the actual out-of-pocket expenses incurred;

(B) the licensee should keep complete records, subject to audit by the Department for three years;

(C) the re-assigned warranty work should be performed within forty (40) days;

(D) the required evidence that the re-assigned warranty work was performed should be supplied to the Department within ten (10) days of completion; and

(E) re-assigned warranty work, once completed, is subject to being re-inspected.

(3) An order re-assigning warranty work and designating the party responsible for the re-assigned warranty work as a "consumer" under §1201.358(d) of the Standards Act becomes final if not appealed within thirty (30) days.

(4) Failure to provide a required estimate in connection with an order to perform re-assigned warranty work, once that order has become final, may serve as grounds for an administrative action against the licensee.

(5) Claims made by a consumer who is not a licensee and documentation of Fund claims -- when a consumer has a covered claim against a licensee and the licensee has not satisfied the claim, the Department shall take appropriate steps to make sure that the claim is proper and that all reasonable steps to satisfy the claim have been exhausted. In that regard:

(A) The Department, working with the consumer, shall identify the specific section(s) of law or rule that gave rise to the damages;

(B) If the damages arose as a result of a violation of the Texas Deceptive Trade Practice - Consumer Protection Act, the specific violation must be adequately documented. Acceptable documentation would include a court order finding that such a violation had occurred or the establishing of confirmed facts that would specifically constitute such a violation, along with proof that the court order could not be satisfied. The specific violation must relate directly to the manufactured home or the sale transaction regarding the manufactured home. Tangentially related matters, such as deception in connection with actions as a mortgage broker or real estate broker, are generally not covered and the person responsible should be pursued in the other capacity though appropriate means.

(c) Attorneys' fees are subject to reimbursement from the Fund, subject to certain limitations. Before reimbursing a consumer for attorneys' fees, the Department shall review the fee statement(s), which must indicate the specific services performed, the amount of work required, and the hourly rate(s) charged. Fees not directly relating to efforts to recover the unsatisfied claims are not reimbursable.

(d) The Department shall require reasonable proof of efforts to collect the damages for which reimbursement from the Fund is sought.

(e) The Department may require the assignment of claims against licensees for any amounts for which payments are made from the Fund. The Department may re-assign any and all such claims to any bonding company or other surety that reimburses the Fund for such payments.

(f) If there is no licensee that can be assigned responsibility for warranty work or corrective action, the Department may enter into agreements with one or more licensees to perform such work after requesting bids from the qualified licensee(s) in the immediate area where the work is to be performed or if, because of the scope and nature of the work, there are no qualified local licensees, with such other licensees as may possess the resources and expertise to submit bids and perform the work. If the only acceptable remedy is the replacement of a home, the Department may negotiate with qualified manufacturers to identify the lowest cost acceptable resolution.

(g) Notification of warranty work orders, inspections, and re-assigned warranty work

(1) When an inspection is to be conducted, other than an initial installation inspection, such as a follow-up installation inspection or a complaint inspection, the Department shall notify each licensee that has been assigned responsibility for warranty items, provided that the licensee still holds an active license, by notifying the licensee, by regular mail to their address of record, as on file with Department. If a party to be notified of an inspection is no longer licensed but has left a mailing address on file with the Department, such party shall be given notice of any such inspection by first class mail to that address.

(2) When warranty work orders are issued, they will be sent to each licensee to whom responsibility has been assigned. They shall be sent to the licensee by regular mail to their address of record, as on file with Department.

(3) If a licensee who has been assigned warranty responsibilities is no longer in business, the Department will, in addition to notifying their surety, notify them of the time and place of the inspection. Such notification to the out-of-business licensee shall be sent to them at their latest business address of record on file with the Department. Unless the out-of-business licensee advises the Department, in writing, on or before the date of the inspection or actually attends the inspection, the Department will re-assign the warranty work, if any, arising from the findings of the inspection to the retailer or manufacturer who is not out-of-business. The party to whom the warranty work is re-assigned shall perform the warranty work and shall be a consumer, as provided for in §1201.358(d) of the Standards Act, entitled to be reimbursed from the Fund.

(4) Notification of the surety of an out-of-business or no longer licensed licensee is given in order to afford the surety an opportunity, in accordance with §1201.407 of the Standards Act, to participation in the informal dispute resolution process.

(5) The Director shall consider the views of the surety, if any, as expressed in the informal dispute resolution process. However, the ultimate responsibility to determine how best to proceed rests with the Director, who shall make his or her decision based on a consideration of all relevant factors and the need to protect the health and safety of consumers and to carry out the purposes of the Standards Act.

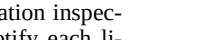
(6) Once a payment is made from the Fund, the Department shall file a claim under the bond of the party primarily responsible for the unsatisfied claim. In the case of re-assigned warranty work reimbursed by the Fund, the claim shall be against the bond of the party that is no longer in business or whose license has been revoked.

(7) A surety bond issued in connection with a person or entity that is a licensee shall remain in effect with respect to that person or entity, even though the surety bond may be amended to cover one or more additional person or entities or to cover that person operating under one or more different names or identities UNLESS the amendment to the bond specifically terminates the bond with respect to such person or entity.

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 August 18, 2003.

TRD-200305267
Timothy K. Irvine
Executive Director, Manufactured Housing Division of TDHCA
Texas Department of Housing and Community Affairs
Effective date: September 28, 2003
Proposal publication date: February 21, 2003
For further information, please call: (512) 475-2206



10 TAC §80.134

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (Department) adopts new §80.134 with changes to the proposed rule as published in the February 21, 2003 issue of the *Texas Register* (28 TexReg 1600). The text will be republished.

The effective date of the rule is thirty (30) days following the date of publication with the *Texas Register* of notice that the rule has been adopted.

A public hearing was held on May 13, 2003. The following interested groups or associations presented comments either at the hearing or in writing: Texas Manufactured Housing Association ("TMHA") and the Consumers Union.

The department received the following general comments:

This proposed rule generated significant comments. The Consumers Union filed a comment in support of the rule, stating the belief that it neither narrowed nor expanded the application of the Deceptive Trade Practices Act to the activities of licensees. That was the intent of staff in drafting the rule, and the rule was proposed primarily to provide more detailed guidance as to practices that staff had identified as needing to be more closely monitored and limited. However, comments from the Texas Manufactured Housing Association and members of the industry expressed concerns that the proposed rule did not adequately address the ability to continue certain legitimate business practices and could subject the industry to added exposure under the Deceptive Trade Practices Act. TMHA states the department has no judicial authority to label any activity "deceptive." They state it is up to a court of law to determine if DTPA applies to a given situation. Also, they state that some proposed violations could be simple mistakes and to arbitrarily label them as deceptive is to deny the accused due process. They state that many proposed violations are currently addressed in existing department rules and are referenced in the Standards Act. TMHA suggest the entire rule be withdrawn.

Staff Response: The staff has made appropriate revisions to clarify that these are practices which they would regard as evidentiary of deceptive or abusive practices. The staff certainly understands that any preliminary finding or determination is subject to review and right to a hearing. It is also understood that there are existing laws that to varying degrees address these practices, but the staff believes that it is appropriate to provide specific guidance as to how it would view these practices, most of which have arisen in the context of actual complaints. It is believed that the rule will provide useful guidance to licensees regarding enforcement practices of the Department.

Set forth below are comments regarding specific subsections and the analysis and recommendations of staff.

80.134(a)(1) - One commenter expressed the view that a retailer would be unlikely to make a sale financed by an interim loan if there were any question about the likelihood of permanent financing being approved. They also pointed out the difficulty in "unwinding" a transaction financed by an improper interim loan. It was pointed out that in the interim lending phase, it is the dealer who is largely at risk, and that legitimate costs, such as construction of foundations, are being incurred and may not be readily unwound. Another commenter observed that this subsection turns on questions of the seller's belief or perception and questioned what was being attempted by this rule. A third commenter expressed the view that interim lending practices were already regulated by other agencies.

Staff response: Although the majority of licensees are probably avoiding this practice, we have seen instances where retailers were involved in arranging questionable interim financing. The proposed provision regarding escrowing and unwinding such transactions was an attempt to create a mechanism to protect the retailer. We recommend that this portion of the subsection be deleted, but it is the staff's position that if a retailer participates in making or arranging an interim loan when they have actual knowledge of facts that would indicate that the borrower will be unable to obtain permanent financing is a deceptive practice.

80.134(a)(2) - A number of commenters pointed out that there may be legitimate situations in which a discount from the stated price may be appropriate. TMHA commented that negotiating a discount on a sale would be a deceptive trade.

Staff response: The staff recommends that the subsection be revised to read "To sell or offer to sell manufactured home at a price in excess of its advertised price based on whether the sale is for cash or financed." The staff does not believe that this prohibition limits the ability or right of a seller or lender to charge additional fees, subject to applicable law, for costs other than the basic cost of the home itself, such as appraisal fees, lender's fees, installation fees, or even options on the home, as long as they are not advertised or represented as being included in the price of the home.

80.134(a)(3) - Several commenters objected to this provision, questioning whether it was even within the province of the Division of Manufactured Housing to address such issues. One commenter asked what the purposes of the subsection was, and another commenter asked if it would extend to disclosing an interest in a title company.

Staff response: The staff very much believes that it is appropriate for this Division to require licensees to disclose when they have an interest in providing financing or settlement services and to inform customers of that interest so that customers may, if they wish, obtain financing and/or settlement services elsewhere without being penalized for doing so. We believe that the inclusion of settlement services would extend to any settlement service covered by the Real Estate Settlement Procedures Act.

80.134(a)(4) - One commenter questioned whether changes in components, to comparable items of equal or better quality would be a material misrepresentation. Another commenter said that this would open a "can of worms," turning disputes into "he said/she said" situations. A third commenter said that this was already adequately covered under the Deceptive Trade Practices Act. TMHA asked how the department will enforce the rule if the consumer receives information that is not in writing. It will always be "my word against yours."

Staff response: The commenter is absolutely right that it has the potential to open a can of worms, but the staff believes that is appropriate. If a retailer represents that a particular valuable good and/or service will be "thrown in" as an inducement to buy a home (free big screen TV, free driveway, etc.) and this is not set out in the documents, how does the consumer enforce it? Almost all standard forms have a "boilerplate" statement that the contract is the full and final agreement and no oral side agreements are enforceable, yet we all know that some sellers persist in making oral side agreements that they do not ultimately deliver. When this occurs, we believe that the consumer has been deceived. All that this provision says is that if we establish that such a representation was made, that it was material, and that it was never put in writing, we believe that the consumer was deceived and that the party who made the representation should not be allowed to hide behind boilerplate contractual provisions stating that oral agreements are not enforceable. Of course, if the Division cannot establish that the material misrepresentation

was made, which would require more than the mere statement of the consumer, there would be no issue. Sometimes allegations come down to issues of "he said/she said," and the Department does not believe that the consumer's ability to pursue the matter should be summarily foreclosed for failure to "get it in writing."

80.134(a)(5) - One commenter stated that this was already covered by existing laws and rules. TMHA commented that is this is covered in §80.121 (relating to Retailer's Responsibilities).

Staff response: Clearly, existing laws and rules require delivery of good and marketable title within a specified timeframe, but in instances where the seller delays the submission of the required paperwork, the consumer is victimized. The title they ultimately get may be adequate, but they did not receive the benefit of the timeframe specified by law. Too often sellers are finally forced to submit title information long after the 30 day period has expired, and they claim that having delivered title they should be deemed to be in compliance. The inclusion of this provision will make it clear that delay is inherently abusive and will not be tolerated. However, to accommodate those unlikely but theoretically possible instances where the seller is unable to avoid delay, staff has re-worded the paragraph to "Except for good cause shown, failure to submit the required forms to enable the purchaser to obtain evidence of good and marketable title within the time required by the Standards Act."

Section 80.134(a)(6) - A commenter stated that the notice requirements are already addressed under the rules. TMHA commented that this is covered under the Standards Act.

Staff response: Even though the rules underscore the statutory requirements to give the notices, staff believes that proceeding with a transaction when the notices have not been given is both deceptive and abusive. When a notice has not been timely given, the requirement about timely notice cannot be cured but to proceed with no curative effort at all would be improper, and that is what this section addresses.

Section 80.134(a)(7) - A commenter states that this provision is already addressed under other rules.

Staff response: A misrepresentation is deceptive. When a consumer comes to a licensed seller, they ought to be able to assume that their transaction is handled as a regulated transaction with that licensee. If that is not the case, it should be the responsibility of the licensee to tell the consumer what is going on, whom they are dealing with, and what their capacity is.

Section 80.134(a)(8) - A commenter states that this is already regulated.

Staff response: The thermal and wind zone requirements are already addressed, but the deceptive nature of proceeding when an improper zone is involved is the subject of this rule. We have encountered situations where retailers have proceeded with sales and installations into improper locations and have then argued that the consumers had agreed to it. Because the remedy, replacing the home with a conforming home, is often beyond the scope of what can be addressed through the Homeowners' Recovery Fund this is a serious problem, and staff believes that this rule will help curtail such practices.

Section 80.134(a)(9) - A commenter stated that this was already regulated. Several commenters also raised the issue of contingencies, such as weather, delaying the date by which something would be provided. Several commenters said this proposed requirement was burdensome. A commenter noted that it could be difficult to identify at closing a third party that would be providing something. One commenter stated they would need the phrase "after the fact" defined for clarification.

Staff response: Obviously, a licensee is not expected to provide information about something that is not known and cannot be known. If, however, the licensee knows who is to provide something or when it is supposed to be provided, they ought to be willing to share that information with the consumer. If an unforeseen contingency beyond someone's control, such as weather, a personal emergency, or a failure of a supplier, results in something being delayed, there should be no problem, and it certainly is not the intention of the Division to hold people accountable for timetables that are frustrated by events beyond their control. Staff believes that "after the fact" is sufficiently clear in the context. If something is to be provided after a disclosure is given, the disclosure, by its nature can only provide the best information available, i.e., an estimate.

Section 80.134(a)(10) - A commenter offered that by allowing the consumer to require detailed specifications on any item, regardless of value, this could put the retailer at the consumer's mercy while they asked for extensive and meaningless data, such as the specifications of screws of screws used in assembly. A commenter argued that it was excessive to require a disclosure if an item was new or used, proceeding on the assumption that all items in new homes are new and all items in used homes are used. One commenter stated it was burdensome and duplicates current laws. One commenter suggested the term "detailed specifications" be more clearly defined. One commenter suggested requiring retailers to provide the size and type of a new appliance rather than the make and model because the make and model may not be known at the time of disclosure.

Staff response: Staff has determined that the ability to ask for detailed written specifications items of less than $250 in value should still provide adequate consumer protection without burdening retailers. However, we will monitor this to see if the threshold ought to be adjusted. As for disclosing if an item is not "new," staff believes this is appropriate. If all items are used, the disclosure can simply be that the home and all items in the home are "used," "not new" or the like. This will avoid the situation where a consumer is shown and thinks they are buying a used home with new appliances, only to receive the same home with old appliances. The language has been revised to provide more flexibility in describing items.

Section 80.134(a)(11) - A commenter argued that this is already covered by other laws.

Staff response: While this may be covered by other laws, the fact remains that the Division continues to encounter situations where consumers are asked to sign incomplete disclosures, rendering the whole disclosure process meaningless at best and potentially misleading.

Section 80.134(a)(12) - A commenter argued that this is covered by existing law.

Staff response: While this may be covered by existing law, staff believes it is appropriate to identify as a deceptive practice because it is often used to document a transaction that the consumer should not even consider since they do not, in fact, have the financial resources presented. Moreover, by bringing a consumer into what is in essence a fraud, unscrupulous parties may feel that they gain a degree of power over consumers.

Section 80.134(a)(13) - A commenter said that this was covered by existing laws.

Staff response: Although it may be covered by existing laws, the Division had identified several very specific issues that form the basis for this rule such as: situations where the licensee argues that there was no down payment or deposit because it was called something else, situations where the licensee asserts that is entitled to a deduction or set-off because there was an understanding that some portion of what was collected was to pay for other services, and situations where the licensee is out of business and the only evidence of money being taken is an inconclusive document that does not make it clear who got the money and in what capacity they were acting.

Section 80.134(a)(14) - A commenter said this was covered by existing regulations. Another commenter said that this might be prejudicial in the instance of a small operator threatened with closing its operations down. A reduced refund might be better for the consumer than being forced to become a creditor in a bankruptcy.

Staff response: If a consumer had to decide between a negotiated settlement and becoming a claimant in a bankruptcy proceeding, this rule might be a bad idea. However, since the consumer can obtain a full recovery from the Texas Manufactured Homeowner's Recovery Trust Fund, which will in turn claim on the out of business licensee's bond, we believe that this is appropriate.

Section 80.134(a)(15) - A commenter expressed serious concern about the situation where the retailer goes to great trouble and expense to sell, deliver, and set a home, only to have the consumer refuse to accept it. A commenter said this was already regulated. Another commenter asked how this would be accomplished. Does it mean the home should be initially delivered and set-up at the sales center where the consumer can inspect it prior to delivery to the permanent site? They stated that the requirements are not clear and suggested defining "delivery," "accept," and "inspect."

Staff response: First, a non-substantive revision has been made to make it clear that this rule does not give a consumer *carte blanche* to reject a home for any reason, only if it does not conform to their contract. The Division has encountered numerous situations, especially on the sale of used homes, were the home actually delivered was not the home that the customer looked at and thought they had purchased. Given that all manufactured homes have unique identification, this should not be a problem for the conscientious dealer who documents on the contract and in their records the exact home they are acquiring and selling.

Section 80.134(a)(16) - This was duplicative and has been deleted.

Section 80.134(a)(17) - One commenter said this was already covered by existing rules, and another commenter said it was burdensome. They pointed out that people would need to get their cards re-printed. A commenter asked if it would apply to "line" advertisements. TMHA stated that advertising regulations are covered in §80.125, but there is no mention in §80.125 that failure to display your license in advertising is deceptive.

Staff response: This is in line with the requirement that other regulated industries utilize, such as real estate brokers and mortgage brokers. If someone wants to avoid or defer re-printing cards, they can simply write their license type and number, e.g., RBI 123. This will serve as integral part of ongoing consumer education efforts to get consumers to be sure they are dealing with licensed parties. In our view it would apply to all published advertisements (newspapers, flyers, radio, etc.). It would not apply to signage on an actual licensed location and relating to that location, at which the license itself must be displayed. It seemed unnecessary to place a twin provision in the advertising section.

Section 80.134(b) - One commenter said this was already required and regulated.

Staff response: We believe that it is appropriate to confirm if the retailer is or is not providing installation. As much as anything, this ought to protect retailers who elect to sell FOB and will serve to emphasize to the consumer the importance of installation, which comes with a warranty.

Except as noted below, the rule as proposed on February 21, 2003 is adopted as final rule with the following non-substantive changes.

Section 80.134(a) is reworded for clarification in response to comments received.

In Section 80.134(a)(1) the last half of the sentence is deleted starting at "...; PROVIDED, however, that such ..." in response to comments received.

Section 80.134(a)(2) is reworded for clarification in response to comments received.

Section 80.134(a)(5) through (a)(10) and (a)(15) are reworded for clarification in response to comments received.

Section 80.134(a)(16) is deleted in response to comments received.

Section 80.134(a)(17) is renumbered due to deleting paragraph (16).

The following is a restatement of the rules' factual basis:

Section 80.134 is adopted *(with changes)* which describe specific practices that the Department has observed to have taken place and which have been found to be deceptive. The adopted new rule provides greater clarity to licensees as to the manner in which they ought to conduct their businesses and it will enhance consumer protection.

The new rule is adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Subtitle C, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.603, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the new rule.

§80.134. Deceptive Practices.

(a) The following practices will be considered by the Department as indications of deceptive or abusive practices. This section in no way limits or affects whether practices not enumerated or addressed herein are deceptive, abusive, illegal, or the basis for a claim or cause of action.

(1) Interim lending - To sell a manufactured home in a transaction that utilizes interim financing while an application for permanent financing is pending if the seller has any reason to believe that the purchaser will not qualify for the permanent financing.

(2) Price alterations - To sell or offer to sell a manufactured home at a price in excess of its advertised price based on whether the sale is for cash or financed.

(3) Role in credit transaction - To have a role in the financing of a manufactured home or any interest, direct or indirect, in a party providing such financing or acting as a third party settlement service provider with respect thereto unless that role is disclosed in writing to the consumer and the consumer is advised, in writing, of the right to obtain financing elsewhere without affecting the contractual terms, including price, relating to the purchase of the manufactured home.

(4) Making any material representation about a manufactured home and failing to evidence it in a document that the purchaser may enforce.

(5) Except for good cause shown, failure to submit the required forms to enable the purchaser to obtain evidence of good and marketable title within the time required by the Standards Act.

(6) Failure to give the notice required by §1201.162 of the Standards Act, formaldehyde notice, or any other required notice.

(7) If title to the manufactured home is in the name of any party other than the person negotiating and completing the sale transaction or the business on whose behalf he or she is acting, that fact must be disclosed, the identity of the true owner must be disclosed, and the person acting in that capacity must be acting as a licensed broker with authority to negotiate a sale that will result in the delivery of good and marketable title.

(8) Installing a manufactured home in a wind zone or thermal zone for which it is not approved or delivering such a home to such a wind zone or thermal zone for installation by someone else.

(9) Failure to provide a single contractual document that evidences all items to be provided in connection with the manufactured home and, if any such items are to be provided after the fact, specifying the estimated date by which they will be provided and the identity of any party other than the retailer responsible for any such items.

(10) Failure to provide detailed specifications of any item to be delivered or provided in connection with the sale of a manufactured home if the item has a retail value in excess of $250. For example, disclosing that a refrigerator is provided is insufficient. The disclosure should specify the make and model or describe the size and features. If any item will not be "new" this must be disclosed in writing.

(11) Asking for or accepting any executed document that has not been completed or altering, without all parties' signed agreement, any executed document.

(12) Knowingly accepting or issuing any check or other instrument appearing on its face to be a bona fide payment but known not to represent good funds.

(13) Accepting from a consumer any deposit or down payment, regardless of what it is called, without first giving the consumer a written statement setting forth:

(A) The amount of that deposit or down payment;

(B) A clear statement as to whether the deposit or down payment is refundable;

(C) Any requirements or limitations relating to obtaining such refund; AND

(D) Providing a written receipt identifying the name and address of the licensee taking the deposit or down payment and describing the manufactured housing transaction to which it relates.

(14) Negotiating or offering any required refund of less than the full amount the consumer is entitled to receive by law.

(15) Requiring a purchaser to accept delivery of a manufactured home, whether new or used, without giving them an opportunity to inspect the home to make sure that it conforms to their contract. When the purchaser signs a document acknowledging that the home which has been delivered conforms to their contract, the sale becomes final, but this in no way affects the operation of any warranty required by law or granted contractually or affects or abridges any rights or obligations of either of the parties to the transaction.

(16) Failing to identify one's self as a licensee by displaying the type and license number on a business card or advertisement.

(b) Other disclosures: On the sale of a used home, the retailer or broker must provide the purchaser with a disclosure advising the consumer either that they will be responsible for the installation (which will have a written warranty of not less than one year) or, if they will not be installing the home, a statement that they will not be installing the home and therefore will not be providing any warranty as to installation.

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 August 18, 2003.

TRD-200305266
Timothy K. Irvine
Executive Director, Manufactured Housing Division of TDHCA
Texas Department of Housing and Community Affairs
Effective date: September 28, 2003
Proposal publication date: February 21, 2003
For further information, please call: (512) 475-2206

♦ ♦ ♦

10 TAC §80.137

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (Department) adopts new §80.137 with changes to the proposed rule as published in the April 11, 2003, issue of the *Texas Register* (28 TexReg 3025). The text will be republished.

The effective date of the rule is 30 days following the date of publication with the *Texas Register* of notice that the rule has been adopted.

A public hearing was held on May 13, 2003. The following interested groups or associations presented comments either at the hearing or in writing: Texas Manufactured Housing Association ("TMHA").

Set forth below are comments from TMHA suggesting revisions to specific subsections and the analysis and recommendations of staff.

Section 80.137(a)(2)--One commenter indicated that the Down Payment Verification Affidavit, as proposed in Figure: 10 TAC §80.137(a)(2), would place a licensee in the untenable position of having to swear to items outside of his or her knowledge and ability to verify.

Staff Response: The staff agreed to revise the form to make it possible for the licensee to sign it without taking on the task of verifying factual matters beyond the scope of what could be readily confirmed.

Except as noted below, the rule as proposed on April 11, 2003 is adopted as final rule with the following non-substantive changes.

Section 80.137(a)(1) and Figure: 10 TAC §80.137(a)(1) are revised to conform with revisions made to the Standards Act by the 78th Legislature and for clarification purposes.

Figure: 10 TAC §80.137(a)(2) is revised to conform with revisions made to the Standards Act by the 78th Legislature, in response to comments received, and for clarification purposes.

Figure: 10 TAC §80.137(a)(3) is deleted because the Covenant Disclosure Notice form is no longer needed.

Section 80.137(a)(4) and Figure: 10 TAC §80.137(a)(4) are renumber to subsection (a)(3) and the form is revised to confirm with revisions made to the Standards Act by the 78th Legislature.

The following is a restatement of the rules' factual basis:

Section 80.137 is adopted *(with changes)* to list and provide the format for all forms which the department requires to be used in connection with the administration of the Standards Act. The Department will, from time to time, make available on its website other forms which are suggested or "acceptable" sample forms that do not require the use of a specific format, and those forms are not included in this proposed regulation.

Section 80.137(a) is adopted *(with changes)* that sets forth those forms that are required forms to be used in connection with the installation of manufactured homes; that are required to be used in connection with the titling of manufactured homes; and that are required to be used in connection with the administration of the Manufactured Homeowners' Recovery Trust Fund, including the performing of reassigned warranty work under the Standards Act.

Figure: 10 TAC §80.137(a)(1) is adopted *(with changes)* to the Notice of Installation (Form T).

Figure: 10 TAC §80.137(a)(2) is adopted *(with changes)* Down Payment Verification Affidavit.

Figure: 10 TAC §80.137(a)(3)--Covenant Disclosure Notice is deleted.

Figure: 10 TAC §80.137(a)(4) is renumbered to subsection (a)(3) and is adopted *(with changes)* to the Estimate for Reassigned Warranty Work.

Section 80.137(b) is adopted *(without changes)* to provide for the approval of alternative forms.

The new rule is adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Subtitle C, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.603, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the new rule.

§80.137. Required Forms.

(a) The following forms are required by the Department to be used for the purposes described therein, as set forth in the Standards Act:

(1) Notice of Installation/Form T;
Figure: 10 TAC §80.137(a)(1)

(2) Down Payment Verification Affidavit;
Figure: 10 TAC §80.137(a)(2)

(3) Estimate for Reassigned Warranty Work.
Figure: 10 TAC §80.137(a)(3)

(b) Any alternative form or any modification of any of the foregoing forms may be accepted by the Department if the Director determines that all information necessary to the administration of the Standards Act has been provided and that in all other respects the alternative form or modified form is acceptable AND the director has evidenced such approval in writing prior to the acceptance of any such alternative or modified form. The director may require a legal opinion from counsel for the person seeking to use an alternative or modified form that it complies with the Standards Act and addressing such other legal issues as the director may determine. The director may place limitations or conditions on the approval of any alternative or modified form.

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 August 18, 2003.

TRD-200305265
Timothy K. Irvine
Executive Director, Manufactured Housing Division of TDHCA
Texas Department of Housing and Community Affairs
Effective date: September 28, 2003
Proposal publication date: April 11, 2003
For further information, please call: (512) 475-2206

♦ ♦ ♦

PART 5. TEXAS DEPARTMENT OF ECONOMIC DEVELOPMENT

CHAPTER 195. MEMORANDA OF UNDERSTANDING

10 TAC §§195.1, 195.2, 195.9

The Texas Department of Economic Development (department) adopts the repeal of §§195.1, 195.2, and 195.9 concerning the Memoranda of Understanding with the Texas Department of Agriculture, the Texas Workforce Commission, and the General Services Commission. The repeal is necessary to accurately reflect current law and to allow for the adoption of new Memorandums of Understanding. The repeal is being adopted without changes to the proposed text as published in the May 2, 2003 issue of the *Texas Register*, (28 TexReg 3676). The department received no comments regarding the proposed repeal.

The repeal of §§195.1, 195.2, and 195.9 is adopted under the authority of Texas Government Code, §481.0044(a) which gives the department the authority to adopt rules to carry out its responsibilities; Texas Government Code, §481.028(d) which directs that the Memoranda of Understanding be adopted as rules of the agencies; and Texas Government Code, Chapter 2001, Subchapter B which prescribes the standards for rulemaking by state agencies.

§481.028 is affected by the adopted repeal.

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 August 15, 2003.

TRD-200305214
Tracye McDaniel
Deputy Executive Director
Texas Department of Economic Development
Effective date: September 4, 2003
Proposal publication date: May 2, 2003
For further information, please call: (512) 936-0268

♦ ♦ ♦

10 TAC §§195.1 - 195.4, 195.8 - 195.11

The Texas Department of Economic Development adopts new Chapter 195, §§195.1, 195.2, and 195.9 concerning Memoranda of Understanding (MOU) with the Department of Agriculture, the Texas Workforce Commission and General Services Commission and adopts amendments to §§195.3, 195.4, 195.8 195.10 and 195.11, concerning Memoranda of Understanding with the Texas General Land Office, Texas Department of Housing and Community Affairs, Texas Historical Commission, Texas Alternative Fuels Council, and Texas Agricultural Finance Authority. The amendments are necessary to reflect current MOU terms and agreements. The new and amended rules are being adopted without changes to the proposed text as published in the May 2, 2003 issue of the *Texas Register*, (28 TexReg 3676) and will not be republished.

Texas Government Code, §481.028, requires that the Department enter into a Memoranda of Understanding with other state agencies involved in economic development to cooperate in planning and budgeting. Texas Government Code, §481.028, further directs that the MOU be adopted as rules of the agencies. The rules as adopted will have the effect of increasing cooperation and communication between the Department and other agencies involved with economic development with regard to program planning and budgeting.

No comments were received regarding the adoption of the new and amended rules.

The new and amended rules are adopted under the authority of Texas Government Code, §481.0044(a) which gives the Department the authority to adopt rules to carry out its responsibilities; Texas Government Code, §481.028(d) which directs Memoranda of Understanding to be adopted as rules of the agencies; and Texas Government Code, Chapter 2001, Subchapter B which prescribes the standards for rulemaking by state agencies.

Section 481.028 is affected by the adopted 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 August 15, 2003.

TRD-200305215
Tracye McDaniel
Deputy Executive Director
Texas Department of Economic Development
Effective date: September 4, 2003
Proposal publication date: May 2, 2003
For further information, please call: (512) 936-0268

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 60. TEXAS COMMISSION OF LICENSING AND REGULATION
SUBCHAPTER C. FEES

16 TAC §60.83

The Texas Department of Licensing and Regulation ("Department") adopts a new rule at 16 Texas Administrative Code, Subchapter C, §60.83 regarding late license renewal fees and requirements as published in the July 11, 2003, issue of the *Texas Register* (28 TexReg 5468), without changes, and will not be republished.

The new rule establishes the requirements and fees regarding late license renewals.

The new rule is necessary to implement Senate Bill 279, Acts of the 78th Legislature, §1.019, which addresses late license renewal requirements. Senate Bill 279 adds a new §51.401 to Chapter 51 of the Occupations Code that sets the requirements and fees for late renewal of Department licenses.

The Department drafted and distributed the proposed new rule to persons internal and external to the agency. No comments were received.

The new rule is adopted under Senate Bill 279, Acts of the 78th Legislature, Article 1, §1.019 which establishes late renewal fees and requirements and Texas Occupations Code, Chapter 51, §51.201 which requires the Commission to adopt rules as necessary to implement this chapter and §51.202 which requires the Commission to set fees for late license renewals.

The statutory provisions affected by the adoption are: Texas Occupations Code, Chapter 51; Texas Occupations Code, Chapter 1302, Texas Civil Statutes, Article 9102; Texas Occupations Code, Chapter 1802; Health and Safety Code, Chapter 755; Texas Occupations Code, Chapter 2502; Texas Government Code, Chapter 57; Texas Occupations Code, Chapter 2501; Texas Occupations Code, Chapter 1152; Texas Occupations Code, Chapter 1304; Texas Labor Code, Chapter 91; Texas Occupations Code, Chapter 2105; Texas Labor Code, Chapter 92; Texas Civil Statutes, Article 9035; Texas Occupations Code, Chapter 1901; Texas Occupations Code, Chapter 1902; and Texas Civil Statutes, Article 165c.

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 August 11, 2003.

TRD-200305024

William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 1, 2003
Proposal publication date: July 11, 2003
For further information, please call: (512) 463-7348

♦ ♦ ♦

CHAPTER 62. CAREER COUNSELING SERVICES

16 TAC §62.80

The Texas Department of Licensing and Regulation ("Department") adopts an amendment to an existing rule at 16 Texas Administrative Code, §62.80 concerning late renewal fees and requirements for the career counseling services program as published in the July 11, 2003, issue of the *Texas Register* (28 TexReg 5469), without changes, and will not be republished.

The amendment deletes the current fee for late renewals and adds language referring to §60.83 of the Department rules for late renewal requirements and fees.

The amendment is necessary to implement Senate Bill 279, Acts of the 78th Legislature, §1.019, which addresses provisions for establishing late license renewal requirements and fees for Department programs, including the career counseling services program.

The Department drafted and distributed the proposed rule to persons internal and external to the agency. No comments were received.

The amendment is adopted under Senate Bill 279, Acts of the 78th Legislature, Article 1, §1.019 which establishes late renewal fees and requirements and Texas Occupations Code, Chapter 51, §51.201 requires the Commission to adopt rules as necessary to implement this chapter and §51.202 which requires the Commission to set fees for late license renewals.

The statutory provisions affected by the adoption are Texas Occupations Code, Chapter 51 and Texas Occupations Code, Chapter 2502.

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 August 11, 2003.

TRD-200305025
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 1, 2003
Proposal publication date: July 11, 2003
For further information, please call: (512) 463-7348

♦ ♦ ♦

CHAPTER 63. PERSONNEL EMPLOYMENT SERVICES

16 TAC §63.81

The Texas Department of Licensing and Regulation ("Department") adopts an amendment to an existing rule at 16 Texas Administrative Code, §63.81 concerning late renewal fees and requirements for the personnel employment services program as published in the July 11, 2003, issue of the *Texas Register* (28 TexReg 5470), without changes, and will not be republished..

The amendment deletes the current fee for late renewals and adds language referring to §60.83 of the Department rules for late renewal requirements and fees.

The amendment is necessary to implement Senate Bill 279, Acts of the 78th Legislature, §1.019, which addresses provisions for establishing late license renewal requirements and fees for Department programs, including the personnel employment services program.

The Department drafted and distributed the proposed rule to persons internal and external to the agency. No comments were received.

The amendment is adopted under Senate Bill 279, Acts of the 78th Legislature, Article 1, §1.019 which establishes late renewal fees and requirements and Texas Occupations Code, Chapter 51, §51.201 requires the Commission to adopt rules as necessary to implement this chapter and §51.202 which requires the Commission to set fees for late license renewals.

The statutory provisions affected by the adoption are Texas Occupations Code, Chapter 51 and Texas Occupations Code, Chapter 2501.

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 August 11, 2003.

TRD-200305026
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 1, 2003
Proposal publication date: July 11, 2003
For further information, please call: (512) 463-7348

♦ ♦ ♦

CHAPTER 64. TEMPORARY COMMON WORKER EMPLOYERS

16 TAC §64.80

The Texas Department of Licensing and Regulation ("Department") adopts an amendment to an existing rule at 16 Texas Administrative Code, §64.80 concerning late renewal fees and requirements for the temporary common worker employers program as published in the July 11, 2003, issue of the *Texas Register* (28 TexReg 5470), without changes, and will not be republished.

The amendment deletes the current fee for late renewals and adds language referring to §60.83 of the Department rules for late renewal requirements and fees.

The amendment is necessary to implement Senate Bill 279, Acts of the 78th Legislature, §1.019, which addresses provisions for establishing late license renewal requirements and fees for

Department programs, including the temporary common worker employers program.

The Department drafted and distributed the proposed rule to persons internal and external to the agency. No comments were received.

The amendment is adopted under Senate Bill 279, Acts of the 78th Legislature, Article 1, §1.019 which establishes late renewal fees and requirements and Texas Occupations Code, Chapter 51, §51.201 requires the Commission to adopt rules as necessary to implement this chapter and §51.202 which requires the Commission to set fees for late license renewals.

The statutory provisions affected by the adoption are Texas Occupations Code, Chapter 51 and Texas Labor Code, Chapter 92.

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 August 11, 2003.

TRD-200305027
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 1, 2003
Proposal publication date: July 11, 2003
For further information, please call: (512) 463-7348

♦ ♦ ♦

CHAPTER 65. BOILER DIVISION

16 TAC §65.80

The Texas Department of Licensing and Regulation ("Department") adopts an amendment to an existing rule at 16 Texas Administrative Code, §65.80 concerning late renewal fees and requirements for the boiler program as published in the July 11, 2003, issue of the *Texas Register* (28 TexReg 5471), without changes, and will not be republished.

The amendment deletes the current fee for late renewals and adds language referring to §60.83 of the Department rules for late renewal requirements and fees.

The amendment is necessary to implement Senate Bill 279, Acts of the 78th Legislature, §1.019, which addresses provisions for establishing late license renewal requirements and fees for Department programs, including the boiler program.

The Department drafted and distributed the proposed rule to persons internal and external to the agency. No comments were received.

The amendment is adopted under Senate Bill 279, Acts of the 78th Legislature, Article 1, §1.019 which establishes late renewal fees and requirements and Texas Occupations Code, Chapter 51, §51.201 requires the Commission to adopt rules as necessary to implement this chapter and §51.202 which requires the Commission to set fees for late license renewals.

The statutory provisions affected by the adoption are Texas Occupations Code, Chapter 51 and Texas Health and Safety Code, Chapter 755.

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 August 11, 2003.

TRD-200305028
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 1, 2003
Proposal publication date: July 11, 2003
For further information, please call: (512) 463-7348

♦ ♦ ♦

CHAPTER 66. REGISTRATION OF PROPERTY TAX CONSULTANTS

The Texas Department of Licensing and Regulation ("Department") adopts the repeal of 16 Texas Administrative Code, §66.81 and §66.84 and amendments to §66.20 and §66.80, concerning fees in the property tax consultants program as published in the July 11, 2003, issue of the *Texas Register* (28 TexReg 5471), without changes, and will not be republished.

The repeal eliminates one section, parts of which are being deleted and parts of which are being modified and moved to another section. The repeal also removes a section concerning registration fee upgrades that is no longer needed with the conversion from a two-year to a one-year licensure period.

Late renewal language was moved from §66.20 that conflicted with the requirements of Senate Bill 279, §1.019 and language was added that directs a registrant seeking renewal information to Subchapter H, Chapter 51. In §66.80 the fees were converted from two year to one year fees and a $200 fee increase was added. Language was also added referring to §60.83 of the Department rules for late renewal requirements and fees.

The adoption is necessary to implement Section 14 of House Bill 3442, which requires the Department to charge a $200 professional fee for registrations and renewals under Chapter 1152 of the Occupations Code. In addition, the adoption is necessary to convert the registration period from two years to one year as required by Senate Bill 279, §§12.010 and 12.011. Finally, the adoption is necessary to implement Senate Bill 279, §1.019, which addresses provisions for establishing late renewal requirements and fees for Department programs, including the property tax consultant program.

The Department drafted and distributed the proposed repeal and amendments to persons internal and external to the agency. No comments were received.

16 TAC §66.20, §66.80

The amendments are adopted under House Bill 3442, which requires the Department to charge a $200 professional fee for registrations and renewals under Chapter 1152 of the Occupations Code; Senate Bill 279, Acts of the 78th Legislature, Article 1, §1.019 which establishes late renewal fees and requirements; Texas Occupations Code, Chapter 51, §51.201 which requires the Commission to adopt rules as necessary to implement this chapter; and §51.202 which requires the Commission to set fees for late license renewals.

The statutory provisions affected by the adoption are Texas Occupations Code, Chapter 51 and Texas Occupations Code, Chapter 1302.

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 August 11, 2003.

TRD-200305029
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 1, 2003
Proposal publication date: July 11, 2003
For further information, please call: (512) 463-7348

♦ ♦ ♦

16 TAC §66.81, §66.84

The repeal is adopted under Senate Bill 279, Acts of the 78th Legislature, Article 1, §1.019 which establishes late renewal fees and requirements and Texas Occupations Code, Chapter 51, §51.201 which requires the Commission to adopt rules as necessary to implement this chapter and §51.202 which requires the Commission to set fees for late license renewals.

The statutory provisions affected by the repeal are Texas Occupations Code, Chapter 51 and Texas Occupations Code, Chapter 1152.

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 August 11, 2003.

TRD-200305030
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 1, 2003
Proposal publication date: July 11, 2003
For further information, please call: (512) 463-7348

♦ ♦ ♦

CHAPTER 67. AUCTIONEERS

16 TAC §67.81

The Texas Department of Licensing and Regulation ("Department") adopts an amendment to an existing rule at 16 Texas Administrative Code, §67.81, concerning late renewal fees and requirements for the auctioneers program as published in the July 11, 2003, issue of the *Texas Register* (28 TexReg 5472), without changes, and will not be republished.

The amendment deletes the current fee for late renewals and adds language referring to §60.83 of the Department rules for late renewal requirements and fees.

The amendment is necessary to implement Senate Bill 279, Acts of the 78th Legislature, §1.019, which addresses provisions for establishing late license renewal requirements and fees for Department programs, including the auctioneers program.

The Department drafted and distributed the proposed rule to persons internal and external to the agency. No comments were received.

The amendment is adopted under Senate Bill 279, Acts of the 78th Legislature, Article 1, §1.019 which establishes late renewal fees and requirements and Texas Occupations Code, Chapter 51, §51.201 requires the Commission to adopt rules as necessary to implement this chapter and §51.202 which requires the Commission to set fees for late license renewals.

The statutory provisions affected by the adoption are Texas Occupations Code, Chapter 51 and Texas Occupations Code, Chapter 1802.

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 August 11, 2003.

TRD-200305031
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 1, 2003
Proposal publication date: July 11, 2003
For further information, please call: (512) 463-7348

♦ ♦ ♦

CHAPTER 68. ARCHITECTURAL BARRIERS

16 TAC §68.80

The Texas Department of Licensing and Regulation ("Department") adopts an amendment to an existing rule at 16 Texas Administrative Code, §68.80, concerning late renewal fees and requirements for the architectural barriers program as published in the July 11, 2003, issue of the *Texas Register* (28 TexReg 5473), without changes, and will not be republished.

The amendment deletes the current fee for late renewals and adds language referring to §60.83 of the Department rules for late renewal requirements and fees.

The amendment is necessary to implement Senate Bill 279, Acts of the 78th Legislature, §1.019, which addresses provisions for establishing late license renewal requirements and fees for Department programs, including the architectural barriers program.

The Department drafted and distributed the proposed rule to persons internal and external to the agency. No comments were received.

The amendment is adopted under Senate Bill 279, Acts of the 78th Legislature, Article 1, §1.019 which establishes late renewal fees and requirements and Texas Occupations Code, Chapter 51, §51.201 requires the Commission to adopt rules as necessary to implement this chapter and §51.202 which requires the Commission to set fees for late license renewals.

The statutory provisions affected by the adoption are Texas Occupations Code, Chapter 51 and Texas Civil Statutes, Article 9102.

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 August 11, 2003.

TRD-200305032

William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 1, 2003
Proposal publication date: July 11, 2003
For further information, please call: (512) 463-7348

♦ ♦ ♦

CHAPTER 71. WARRANTORS OF VEHICLE PROTECTION PRODUCTS

16 TAC §71.80

The Texas Department of Licensing and Regulation ("Department") adopts an amendment to an existing rule at 16 Texas Administrative Code, §71.80, concerning late renewal fees and requirements for the warrantors of vehicle protection products program as published in the July 11, 2003, issue of the *Texas Register* (28 TexReg 5473), with changes, and will be republished. The section is being adopted with changes to correct a typographical error in subsection (d).

The amendment deletes the current fee for late renewals and adds language referring to §60.83 of the Department rules for late renewal requirements and fees.

The amendment is necessary to implement Senate Bill 279, Acts of the 78th Legislature, §1.019, which addresses provisions for establishing late license renewal requirements and fees for Department programs, including the warrantors of vehicle protection products program.

The Department drafted and distributed the proposed rule to persons internal and external to the agency. No comments were received.

The amendment is adopted under Senate Bill 279, Acts of the 78th Legislature, Article 1, §1.019 which establishes late renewal fees and requirements and Texas Occupations Code, Chapter 51, §51.201 requires the Commission to adopt rules as necessary to implement this chapter and §51.202 which requires the Commission to set fees for late license renewals.

The statutory provisions affected by the adoption are Texas Occupations Code, Chapter 51 and Texas Civil Statutes, Article 9035.

§71.80. Fees.

(a) All fees are non-refundable.

(b) The original and renewal registration fees shall be:

(1) $500 for registrants who became obligated as warrantors of 0 to 999 vehicle protection product warranties during the twelve (12) months preceding the date of the application;

(2) $1,000 for registrants who became obligated as warrantors of 1,000 to 1,999 vehicle protection product warranties during the twelve (12) months preceding the date of the application; and

(3) $1,500 for registrants who became obligated as warrantors of 2,000 or more vehicle protection product warranties during the twelve (12) months preceding the date of the application.

(c) A $50 fee shall be charged for duplicate or amended registration certificates.

(d) Late renewal fees for registrations issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

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 August 11, 2003.

TRD-200305033
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 1, 2003
Proposal publication date: July 11, 2003
For further information, please call: (512) 463-7348

♦ ♦ ♦

CHAPTER 72. STAFF LEASING SERVICES

16 TAC §72.81

The Texas Department of Licensing and Regulation ("Department") adopts an amendment to an existing rule at 16 Texas Administrative Code, §72.81, concerning late renewal fees and requirements for the staff leasing services program as published in the July 11, 2003, issue of the *Texas Register* (28 TexReg 5474), without changes, and will not be republished.

The amendment deletes the current fee for late renewals and adds language referring to §60.83 of the Department rules for late renewal requirements and fees.

The amendment is necessary to implement Senate Bill 279, Acts of the 78th Legislature, §1.019, which addresses provisions for establishing late license renewal requirements and fees for Department programs, including the staff leasing services program.

The Department drafted and distributed the proposed rule to persons internal and external to the agency. No comments were received.

The amendment is adopted under Senate Bill 279, Acts of the 78th Legislature, Article 1, §1.019 which establishes late renewal fees and requirements and Texas Occupations Code, Chapter 51, §51.201 requires the Commission to adopt rules as necessary to implement this chapter and §51.202 which requires the Commission to set fees for late license renewals.

The statutory provisions affected by the adoption are Texas Occupations Code, Chapter 51 and Texas Labor Code, Chapter 91.

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 August 11, 2003.

TRD-200305034
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 1, 2003
Proposal publication date: July 11, 2003
For further information, please call: (512) 463-7348

♦ ♦ ♦

CHAPTER 75. AIR CONDITIONING AND REFRIGERATION CONTRACTOR LICENSE LAW

16 TAC §75.80

The Texas Department of Licensing and Regulation ("Department") adopts an amendment to an existing rule at 16 Texas Administrative Code, §75.80 concerning late renewal fees and requirements for the air conditioning and refrigeration contractor program as published in the July 11, 2003, issue of the *Texas Register* (28 TexReg 5474), without changes, and will not be republished.

The amendment deletes the current fee for late renewals and adds language referring to §60.83 of the Department rules for late renewal requirements and fees.

The amendment is necessary to implement Senate Bill 279, Acts of the 78th Legislature, §1.019, which addresses provisions for establishing late license renewal requirements and fees for Department programs, including the air conditioning and refrigeration contractor program.

The Department drafted and distributed the proposed rule to persons internal and external to the agency. No comments were received.

The amendment is adopted under Senate Bill 279, Acts of the 78th Legislature, Article 1, §1.019 which establishes late renewal fees and requirements and Texas Occupations Code, Chapter 51, §51.201 requires the Commission to adopt rules as necessary to implement this chapter and §51.202 which requires the Commission to set fees for late license renewals.

The statutory provisions affected by the adoption are Texas Occupations Code, Chapter 51 and Texas Occupations Code, Chapter 1302.

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 August 11, 2003.

TRD-200305035
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 1, 2003
Proposal publication date: July 11, 2003
For further information, please call: (512) 463-7348

♦ ♦ ♦

CHAPTER 76. WATER WELL DRILLERS AND WATER WELL PUMP INSTALLERS

16 TAC §76.204

The Texas Department of Licensing and Regulation ("Department") adopts an amendment to an existing rule at 16 Texas Administrative Code, §76.204 concerning late renewal fees and requirements for the water well drillers and water well pump installers program as published in the July 11, 2003, issue of the *Texas Register* (28 TexReg 5475), without changes, and will not be republished.

The amendment deletes the current fee for late renewals and adds language referring to §60.83 of the Department rules for late renewal requirements and fees.

The amendment is necessary to implement Senate Bill 279, Acts of the 78th Legislature, §1.019, which addresses provisions for establishing late license renewal requirements and fees for Department programs, including the water well drillers and water well pump installers program.

The Department drafted and distributed the proposed rule to persons internal and external to the agency. No comments were received.

The amendment is adopted under Senate Bill 279, Acts of the 78th Legislature, Article 1, §1.019 which establishes late renewal fees and requirements and Texas Occupations Code, Chapter 51, §51.201 requires the Commission to adopt rules as necessary to implement this chapter and §51.202 which requires the Commission to set fees for late license renewals.

The statutory provisions affected by the adoption are Texas Occupations Code, Chapter 51 and Texas Occupations Code, Chapter 1901 and 1902.

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 August 11, 2003.

TRD-200305036
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 1, 2003
Proposal publication date: July 11, 2003
For further information, please call: (512) 463-7348

♦ ♦ ♦

CHAPTER 77. SERVICE CONTRACT PROVIDERS

16 TAC §77.80

The Texas Department of Licensing and Regulation ("Department") adopts an amendment to an existing rule at 16 Texas Administrative Code, §77.80 concerning late renewal fees and requirements for the service contract providers program as published in the July 11, 2003, issue of the *Texas Register* (28 TexReg 5476), without changes, and will not be republished.

The amendment deletes the current fee for late renewals and adds language referring to §60.83 of the Department rules for late renewal requirements and fees.

The amendment is necessary to implement Senate Bill 279, Acts of the 78th Legislature, §1.019, which addresses provisions for establishing late license renewal requirements and fees for Department programs, including the service contract providers program.

The Department drafted and distributed the proposed rule to persons internal and external to the agency. No comments were received.

The amendment is adopted under Senate Bill 279, Acts of the 78th Legislature, Article 1, §1.019 which establishes late renewal fees and requirements and Texas Occupations Code, Chapter

51, §51.201 requires the Commission to adopt rules as necessary to implement this chapter and §51.202 which requires the Commission to set fees for late license renewals.

The statutory provisions affected by the adoption are Texas Occupations Code, Chapter 51 and Texas Occupations Code, Chapter 1304.

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 August 11, 2003.

TRD-200305037
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 1, 2003
Proposal publication date: July 11, 2003
For further information, please call: (512) 463-7348

♦ ♦ ♦

CHAPTER 78. TALENT AGENCIES

16 TAC §78.80

The Texas Department of Licensing and Regulation ("Department") adopts an amendment to an existing rule at 16 Texas Administrative Code, §78.80 concerning late renewal fees and requirements for the talent agencies program as published in the July 11, 2003, issue of the *Texas Register* (28 TexReg 5476), without changes, and will not be republished.

The amendment deletes the current fee for late renewals and adds language referring to §60.83 of the Department rules for late renewal requirements and fees.

The amendment is necessary to implement Senate Bill 279, Acts of the 78th Legislature, §1.019, which addresses provisions for establishing late license renewal requirements and fees for Department programs, including the talent agencies program.

The Department drafted and distributed the proposed rule to persons internal and external to the agency. No comments were received.

The amendment is adopted under Senate Bill 279, Acts of the 78th Legislature, Article 1, §1.019 which establishes late renewal fees and requirements and Texas Occupations Code, Chapter 51, §51.201 requires the Commission to adopt rules as necessary to implement this chapter and §51.202 which requires the Commission to set fees for late license renewals.

The statutory provisions affected by the adoption are Texas Occupations Code, Chapter 51 and Texas Occupations Code, Chapter 2105.

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 August 11, 2003.

TRD-200305038
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 1, 2003
Proposal publication date: July 11, 2003
For further information, please call: (512) 463-7348

♦ ♦ ♦

CHAPTER 79. WEATHER MODIFICATION

16 TAC §79.15

The Texas Department of Licensing and Regulation ("Department") adopts an amendment to an existing rule at 16 Texas Administrative Code, §79.80 concerning late renewal fees and requirements for the weather modification program as published in the July 11, 2003, issue of the *Texas Register* (28 TexReg 5477), without changes, and will not be republished.

The amendment deletes the current fee for late renewals and adds language referring to §60.83 of the Department rules for late renewal requirements and fees.

The amendment is necessary to implement Senate Bill 279, Acts of the 78th Legislature, §1.019, which addresses provisions for establishing late license renewal requirements and fees for Department programs, including the weather modification program.

The Department drafted and distributed the proposed rule to persons internal and external to the agency. No comments were received.

The amendment is adopted under Senate Bill 279, Acts of the 78th Legislature, Article 1, §1.019 which establishes late renewal fees and requirements and Texas Occupations Code, Chapter 51, §51.201 requires the Commission to adopt rules as necessary to implement this chapter and §51.202 which requires the Commission to set fees for late license renewals.

The statutory provisions affected by the adoption are Texas Occupations Code, Chapter 51 and Texas Civil Statutes, Article 165c.

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 August 11, 2003.

TRD-200305039
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 1, 2003
Proposal publication date: July 11, 2003
For further information, please call: (512) 463-7348

♦ ♦ ♦

CHAPTER 80. LICENSED COURT INTERPRETERS

16 TAC §80.25, §80.80

The Texas Department of Licensing and Regulation ("Department") adopts amendments to existing rules at 16 Texas Administrative Code, §§80.25 and 80.80 concerning late renewal fees and requirements for the licensed court interpreters program as

published in the July 11, 2003, issue of the *Texas Register* (28 TexReg 5477), without changes, and will not be republished.

The amendments delete the current fee for late renewals and add language referring to §60.83 of the Department rules for late renewal requirements and fees.

The amendments are necessary to implement Senate Bill 279, Acts of the 78th Legislature, §1.019, which address provisions for establishing late license renewal requirements and fees for Department programs, including the licensed court interpreters program.

The Department drafted and distributed the proposed rule to persons internal and external to the agency. No comments were received.

The amendments are adopted under Senate Bill 279, Acts of the 78th Legislature, Article 1, §1.019 which establish late renewal fees and requirements and Texas Occupations Code, Chapter 51, §51.201 require the Commission to adopt rules as necessary to implement this chapter and §51.202 which require the Commission to set fees for late license renewals.

The statutory provisions affected by the adoption are Texas Occupations Code, Chapter 51 and Texas Government Code, Chapter 57.

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 August 11, 2003.

TRD-200305040
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 1, 2003
Proposal publication date: July 11, 2003
For further information, please call: (512) 463-7348

♦ ♦ ♦

PART 8. TEXAS RACING COMMISSION

CHAPTER 303. GENERAL PROVISIONS

SUBCHAPTER A. ORGANIZATION OF THE COMMISSION

16 TAC §303.16

The Texas Racing Commission adopts a new rule §303.16, relating to the use of historically underutilized businesses in the purchasing of goods and services by the Commission with appropriated money. The new rule is adopted without changes to the proposal published in the June 13, 2003 issue of the *Texas Register* (28 TexReg 4502) and the new rule will not be republished.

The rule is adopted to encourage the use of historically underutilized businesses by state agencies.

The Commission is required to adopt the Texas Building and Procurement Commission's rules as its own under Texas Civil Statutes, Government Code, §2161.003, regarding historically underutilized businesses.

No comments were received regarding the adoption of the new rule.

The new rule is adopted under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules relating exclusively to horse and greyhound racing.

The new rule implements Texas Civil Statutes, Article 179e.

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 August 18, 2003.

TRD-200305273
Nicole Galwardi
General Counsel
Texas Racing Commission
Effective date: September 7, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 490-4009

♦ ♦ ♦

SUBCHAPTER D. TEXAS BRED INCENTIVE PROGRAMS

DIVISION 2. PROGRAM FOR HORSES

16 TAC §303.93

The Texas Racing Commission adopts an amendment to §303.93, relating to the payout of Accredited Texas Bred awards by the Texas Quarter Horse Association. The amendment is adopted without changes to the proposal published in the June 13, 2003 issue of the *Texas Register* (28 TexReg 4502) and the amendment will not be republished.

The amendment is adopted to enhance the efficiency of the payouts of the Accredited Texas Bred awards by the Texas Quarter Horse Association.

The amendment is adopted to allow the Texas Quarter Horse Association to consolidate the Accredited Texas Bred awards into one payout upon completion of the race meet, for race meets less than 18 days.

No comments were received regarding the adoption of the amendment.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules relating exclusively to horse and greyhound racing; and §6.08 which authorizes the Commission to adopt rules relating to the accounting, audit, and distribution of Texas Bred Incentive program funds.

The amendment implements Texas Civil Statutes, Article 179e.

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 August 18, 2003.

TRD-200305272

Nicole Galwardi
General Counsel
Texas Racing Commission
Effective date: September 7, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 490-4009

♦ ♦ ♦

CHAPTER 315. OFFICIALS AND RULES FOR GREYHOUND RACING
SUBCHAPTER A. OFFICIALS
DIVISION 2. DUTIES

16 TAC §315.31

The Texas Racing Commission adopts an amendment to §315.31, relating to the duties of the Racing Judges at weigh-in for greyhounds for each performance. The amendment is adopted without changes to the proposal published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4503) and the amendment will not be republished.

The amendment is adopted to increase the efficiency of the regulation of greyhound racing.

The amendment modifies the requirement regarding the number of the Racing Judges who are required to be present on the association grounds not later than the greyhound weigh-in time for each performance, reducing the requirement from two judges to one judge.

No comments were received regarding the adoption of the amendment.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules relating exclusively to horse and greyhound racing; and §3.07 which authorizes the Commission to adopt rules specifying the authority and duties of racing officials.

The adopted amendment implements Texas Civil Statutes, Article 179e.

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 August 18, 2003.

TRD-200305274
Nicole Galwardi
General Counsel
Texas Racing Commission
Effective date: September 7, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 490-4009

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 463. APPLICATIONS AND EXAMINATIONS

22 TAC §463.11

The Texas State Board of Examiners of Psychologists adopts amendments to §463.11, concerning Licensed Psychologists, without changes to the proposed text as published in the June 13, 2003 issue of the *Texas Register* (28 TexReg 4514).

The amendments are being adopted in order eliminate the exceptions for persons licensed for more than 15 years in another state, in that other rules have been passed to expedite the licensure of out-of-state licensees.

The adopted amendments will make the rule easier for the licensees and public to follow and understand.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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 August 12, 2003.

TRD-200305059
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 1, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 305-7700

♦ ♦ ♦

22 TAC §463.20

The Texas State Board of Examiners of Psychologists adopts new §463.20, concerning Refunds of Application and Examination Fees, with changes to the proposed text as published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4515).

The new rule is being adopted in order clarify the situations under which examination and application fees are either refundable or transferable.

The adopted rule will make the rules easier for the licensees and public to follow and understand.

No comments were received regarding the adoption of the new rule.

The new rule are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

§463.20. Refunds of Application and Examination Fees.

(a) Application fees are non-refundable and non-transferable.

(b) The national psychology examination fee is partially refundable if an applicant is scheduled for a computerized exam but fails to take the scheduled examination. A portion of the original examination fee to the Professional Examination Service (PES) for the exam is retained by PES; the remainder of the fee is refunded by PES to the applicant. The portion of the fee that is paid to the Board, which is referred to as the professional fee, is non-refundable. An exception is if the Board approves on a one time basis the transfer of the professional fee to another scheduled examination upon review of documentation from the applicant of extreme extenuating circumstances.

(c) The Jurisprudence examination fee is non-transferable and non-refundable. An exception is that if the applicant fails to return the exam by the postmark deadline date due to a mail delivery problem that the applicant can prove, the Board may approve the transfer of the fee to another take of the exam or refund the fee if a subsequent fee has been paid upon review of the applicant's explanation.

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 August 12, 2003.

TRD-200305060
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 1, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 305-7700

♦ ♦ ♦

CHAPTER 469. COMPLAINTS AND ENFORCEMENT

22 TAC §469.1

The Texas State Board of Examiners of Psychologists adopts amendments to §469.1, concerning Timeliness of Complaints without changes to the proposed text as published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4515).

The amendments are being adopted in order to clarify the situations under which the 10 year statute of limitations for the filing of a complaint applies.

The adopted amendments will make the rule easier for the licensees and public to follow and understand.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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 August 12, 2003.

TRD-200305061
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 1, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 305-7700

♦ ♦ ♦

22 TAC §469.3

The Texas State Board of Examiners of Psychologists adopts amendments to §469.3, concerning Standardized Complaint Form, without changes to the proposed text as published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4516).

The amendments are being adopted in order to clarify the ways in which a complaint may be submitted to the Board. In addition, subsection (d) is being deleted because the signing of a release is not essential to the investigation of all complaints.

The adopted amendments will make the rule easier for the licensees and public to follow and understand.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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 August 12, 2003.

TRD-200305062
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 1, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 305-7700

♦ ♦ ♦

22 TAC §469.4

The Texas State Board of Examiners of Psychologists adopts amendments to §469.4, concerning Complaint Investigation without changes to the proposed text as published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4516).

The amendments are being adopted in order to (1) properly identify the name of the division that investigates complaints, (2) comply with the statutory requirement that the basis for a dismissal be provided to the complainant, and (3) accurately reflect the current procurement requirements.

The adopted amendments will make the rule easier for the licensees and public to follow and understand.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State

Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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 August 12, 2003.

TRD-200305063
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 1, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 305-7700

♦ ♦ ♦

22 TAC §469.5

The Texas State Board of Examiners of Psychologists adopts amendments to §469.5, concerning Complaint Disposition without changes to the proposed text as published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4517).

The amendments are being adopted in order to (1) properly identify the name of the division that investigates complaints, (2) to clarify how complaints that do not state a violation are resolved.

The adopted amendments will make the rule easier for the licensees and public to follow and understand.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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 August 12, 2003.

TRD-200305064
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 1, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 305-7700

♦ ♦ ♦

22 TAC §469.6

The Texas State Board of Examiners of Psychologists adopts amendments to §469.6, concerning Temporary Suspension of a License, without changes to the proposed text as published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4517).

The amendment is being adopted in order to clarify the statutory requirements for the composition of a temporary suspension committee.

The adopted rule will make the rules easier for the licensees and public to follow and understand.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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 August 12, 2003.

TRD-200305065
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 1, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 305-7700

♦ ♦ ♦

22 TAC §469.7

The Texas State Board of Examiners of Psychologists adopts amendments to §469.7, concerning Persons with Criminal Backgrounds, without changes to the proposed text as published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4518).

The amendment is being adopted in order to (1) provide the appropriate statutory references for persons with criminal backgrounds and (2) clarify those crimes about which the Board may take notice in deciding what sanctions, if any, should be imposed on the licensee or applicant.

The adopted rule will make the rules easier for the licensees and public to follow and understand.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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 August 12, 2003.

TRD-200305066

Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 1, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 305-7700

♦ ♦ ♦

22 TAC §469.8

The Texas State Board of Examiners of Psychologists adopts amendments to §469.8, concerning Rehabilitation Guidelines, without changes to the proposed text as published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4519).

The amendment is being adopted in order to clarify that a licensee who has been revoked or suspended must address all outstanding complaints before the rehabilitation program can begin.

The adopted rule will make the rules easier for the licensees and public to follow and understand.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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 August 12, 2003.

TRD-200305067
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 1, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 305-7700

♦ ♦ ♦

22 TAC §469.13

The Texas State Board of Examiners of Psychologists adopts amendments to §469.13, concerning Non-Compliance with Continuing Education Requirements, without changes to the proposed text as published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4519).

The amendment is being adopted in order to clearly identify the name of the division that investigates complaints.

The adopted rule will make the rules easier for the licensees and public to follow and understand.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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 August 12, 2003.

TRD-200305068
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 1, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 305-7700

♦ ♦ ♦

22 TAC §469.14

The Texas State Board of Examiners of Psychologists adopts amendments to §469.14, concerning Monitoring of Licensees, without changes to the proposed text as published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4520).

The amendment is being adopted in order to properly identify the Board Committee that performs compliance monitoring.

The adopted rule will make the rules easier for the licensees and public to follow and understand.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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 August 12, 2003.

TRD-200305069
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 1, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 305-7700

♦ ♦ ♦

22 TAC §469.15

The Texas State Board of Examiners of Psychologists adopts new §469.15, concerning Disciplinary Action for Persons with Dual Licensure, without changes to the proposed text as published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4520).

The new rule is being adopted in order to clarify that disciplinary action against a licensee is considered disciplinary action against all licenses the licensee holds with the agency.

The adopted rule will make the rules easier for the licensees and public to follow and understand.

No comments were received regarding the adoption of the new rule.

The new rule is adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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 August 12, 2003.

TRD-200305070
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 1, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 305-7700

♦ ♦ ♦

TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 117. END STAGE RENAL DISEASE FACILITIES

The Texas Department of Health (department) adopts amendments to §§117.1-117.3, 117.11-117.17, 117.31-117.34, 117.41-117.46, 117.61-117.65, 117.81-117.86 and new §117.18, concerning the regulation of end stage renal disease facilities. Sections 117.2, 117.31 - 117.34, 117.43, 117.46 and 117.62 are adopted with changes to the proposed text as published in the March 14, 2003, issue of the *Texas Register* (28 TexReg 2219). Sections 117.1, 117.3, 117.11-117.18, 117.41-117.42, 117.44-117.45, 117.61, 117.63-117.65, and 117.81-117.86 are adopted without changes and 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). Sections 117.1-117.3, 117.11-117.17, 117.31-117.34, 117.41-117.46, 117.61-117.65, 117.81-117.86 have been reviewed and the department has determined that reasons for adopting the sections continue to exist; however, revisions to the sections were necessary as outlined in this preamble.

Specifically, the amendment to §117.1 is editorial. Amendments to §117.2 add definitions for action level, advanced practice nurse, biofilm, charge nurse, dialysate, dialysate supply system, empty bed contact time, governing body, LAL test, technical supervisor, ultrafilter, water distribution systems and water treatment system; delete the definition of chief technician as the term is no longer used in the rules; amend the definitions of change of ownership, interdisciplinary team, medical review board, patient care plan, and presurvey conference to delete obsolete references and for clarification purposes; and renumber definitions as necessary to accommodate the added and deleted definitions. The amendments to §117.3 are editorial and add a fee for a relocation.

The amendment to §117.11 is editorial. The amendments to §117.12 delete ambiguous language and add an additional requirement for licensure. The amendment to §117.13 is editorial. The amendments to §117.14 are editorial and update references. The amendments to §§117.15 -117.16 and 117.17 are editorial. Section 117.18 is new language regarding exceptions to the rules.

The amendments to §117.31 clarify the intent of the section, add new language regarding water systems, and update references. The amendments to §117.32 clarify existing language, update references and add automated external defibrillator to the list of emergency equipment. The amendments to §117.33 add new language relating to water treatment and update references. The amendments to §117.34 delete ambiguous language, update references, and add new language to clarify existing language.

The amendment to §117.41 adds language regarding incidents. The amendments to §117.42 add additional indicators for quality of care and is editorial. The amendments to §117.43 add language regarding disruptive patients or family members, patient care plans, emergency preparedness, medication storage and administration, amend the maximum patient load per full-time equivalent for dietitians, add new language relating to home dialysis, delete ambiguous language, and is editorial. The amendments to §117.44 add language relating to sharing of staff between facilities, add requirements of training curriculum for technical staff, add new language to clarify existing language and is editorial. The amendments to §117.45 add language regarding clinical records and delete ambiguous language. The amendment to §117.46 is editorial and modifies language to include only incidents relating to a death or hepatitis.

The amendment to §117.61 is editorial. The amendments to §117.62 update references and add additional training requirements. The amendment to §117.63 adds additional requirements to a checklist for dialysis technician trainees. The amendment to §117.64 clarifies existing language. The amendments to §117.65 are editorial and add additional acts prohibited for dialysis technicians.

The amendments to §§117.81, 117.82, 117.83, 117.84, 117.85, and 117.86 are all editorial.

The department published a Notice of Intention to Review for §§117.1-117.3, 117.11-117.17, 117.31-117.34, 117.41-117.46, 117.61-117.65, 117.81-117.86 in the *Texas Register* (25 TexReg 4195) on May 5, 2000. There were no comments received by the department on the sections following publication of the notice.

Due to staff comments, minor editorial changes were made for clarity and to improve the accuracy of the sections.

Change: Concerning §117.32(e), the citation "§§3-4.1" was deleted and the citation "§§3-3.2.1.2(a)(2) was added.

Change: Concerning §117.33(c)(6), the word "know" was deleted and the word "known" was added to correct the spelling.

Comments received during the 30 day comment period included representatives of American Nephrology Nurses' Association,

Council of Nephrology Social Workers, Dallas Dietetic Association, DaVita Cy-Fair Dialysis Clinic, Fort Worth Dialysis Associates Inc., Fresenius Medical Care of North America, Gambro Healthcare Southwest, National Kidney Foundation of South & Central Texas, Council on Renal Nutrition in San Antonio and Region 4, National Kidney Foundation, Council on Renal Nutrition, National Nephrology Associates of Texas LP, North Texas Council of Nephrology Social Workers, Renal Care Group, Scott & White Dialysis Clinic, Southeast Texas Council of Nephrology Social Workers, and Unity Medical Equipment & Services Inc. In addition, numerous individual social workers and dieticians commented. All commenters were not against the rules in their entirety, however they expressed concerns, asked questions, and suggested recommendations for change as discussed in the summary of comments. Following the comment is the department's response and any resulting changes.

Comment: Concerning the definition of "advanced practice nurse" in §117.2, the commenter suggested the rules be consistent with Chapter 301, Texas Government Code, Annotated, (Nursing Practice Act), §221.1, and changed to read: "A registered nurse approved by the board to practice as an advanced practice nurse based on completing an advanced educational program acceptable to the board. The term includes a nurse practitioner, nurse-midwife, nurse anesthetist, and a clinical nurse specialist. The advanced practice nurse is prepared to practice in an expanded role to provide health care to individuals, families, and/or groups in a variety of settings including but not limited to homes, hospitals, institutions, offices, industry, schools, community agencies, public and private clinics, and private practice. The advanced practice nurse acts independently and/or in collaboration with other health care professionals in the delivery of health care services."

Response: The department agrees with the commenter and has changed the definition of "advanced practice nurse" to be consistent with Chapter 301, Texas Government Code, Annotated, §221.1, by referencing the Board of Nurse Examiners Statute. (see final-1)

Comment: Concerning §117.2 Definitions, the commenter suggested that a definition be included for "charge nurse" since the term is used in §117.43(e). The commenter suggested the following: "A registered professional nurse practicing nursing in accordance with applicable provisions of law who is responsible for making daily staff assignments based on patient needs, providing immediate supervision of patient care, monitoring patients for changes in condition, and/or communicating with the physician, dietician, and social worker regarding patient needs."

Response: The department agrees with the commenter, and has added a definition for "charge nurse" to §117.2.

Comment: Concerning the definition of "delegation" in §117.2, the commenter suggested the wording of the sentence is awkward, and suggested new wording to read: "The transfer of the authority to perform a selected task or activity in a selected situation to a qualified and properly trained individual."

Response: The department does not agree with the commenter. No change was made as a result of this comment.

Comment: Concerning the definition of "interdisciplinary team" in §117.2, the commenter suggested that end stage renal disease patients were not a professional discipline, and should not be included in the definition of the interdisciplinary team. The commenter stated the language in §117.2(42) in this section and the language at §117.43 referred to the interdisciplinary team working with the patient, which was correct, but was inconsistent with the definition as currently written. The commenter suggested removal of the words "the patient and" from this language.

Response: The department agrees with the commenter's recommendation and has removed the words "the patient and" from the definition in renumbered §117.2(30).

Comment: Concerning the definition of "patient care plan" in §117.2, the commenter suggested adding "family member or guardian" after the word "patient" because it is often a family member or guardian who accompanies or represents the patient in care planning meetings or other dialysis related meetings or events.

Response: The department agrees with the commenter and has changed the definition to include "family member or guardian" in renumbered §117.2(43).

Comment: Concerning the definition of "technical supervisor in §117.2, the commenter disagreed the technical supervisor needed to be facility based. The commenter felt small, rural facilities do not warrant a full-time individual on-site with the experience required of a technical supervisor.

Response: The department agrees with the commenter, and has deleted "facility based" from the definition of technical supervisor in renumbered §117.2(60).

Comment: Concerning §117.18, two commenters stated this language seemed administratively burdensome for a facility in an "emergency situation" and response time of 90 days by the Department was not consistent with or acceptable for dealing with an emergency of any kind, and suggested clarifying language.

Response: The department does not agree with the commenter concerning the 90 day response time, as this section deals with pilot programs or research, not emergency situations. The proposed language was a consensus of the renal community in development of the revised rules. No change was made as a result of this comment.

Comment: One commenter felt the regulations should be revised to exclude existing facilities from the requirement that isolation rooms be outside traffic patterns.

Response: §117.31(a)(1) states the standards in this section shall apply to all facilities that provide outpatient dialysis services. Dialysis facilities in operation on or before September 1, 2003, shall meet the design and space requirements of this section which were in effect at the time the facility was constructed. No change was made as a result of this comment.

Comment: Concerning §117.31, the commenter stated that the language at §117.31(a)(5) contradicted the language at §117.33(b)(8)(C)(iii). The commenter concurred with the language and intent of §117.33(b)(8)(C)(iii), and recommended the language in §117.31(a)(5) be consistent with it.

Response: The department agrees with the commenter. Language at §117.31(a)(5) was changed to read: "Water treatment systems shall include a minimum of two carbon tanks in a series, with the total empty bed contact time (EBCT) of at least ten minutes, and the final tank providing at least five minutes EBCT."

Comment: Concerning §117.32(a), the commenter stated this language is too restrictive, especially as it relates to the RO unit/system. The commenter proposed the language of the regulation be expanded to allow for necessary and adjustable adjustments, and suggested the following, "All equipment used by

the facility, including back up equipment, shall be operated within manufacturer specifications, unless the age of the equipment, its components or seasonal/ or day-to-day changes in source water conditions warrant documented adjustments to those specifications, and that such equipment shall be maintained free of any defects which could be a potential hazard to patient, staff or visitors."

Response: The department does not agree with the commenter's suggestion that §117.32(a) is too restrictive. No change was made as a result of this comment.

Comment: Concerning §117.32(g)(1)(F), the commenter referred to the proposed requirement for an automated external defibrillator as emergency equipment for freestanding end stage renal disease facilities. The commenter asked if dialysis facilities within a hospital would be granted a waiver.

Response: The department agrees with the commenter. The rules apply only to freestanding end stage renal disease facilities. No change was made as a result of this comment.

Comment: Concerning §117.33(b)(5), the commenter stated that given the actions required in the event that performance did not fall within acceptable range can be lengthy, the commenter proposed the following language be added: "A description of actions to take in the event that performance is not within an acceptable range shall be clearly posted in the immediate vicinity of the system."

Response: The department does not agree with the commenter. No change was made as a result of this comment.

Comment: Concerning §117.33(b)(8)(C)(iv), for the monitoring of carbon tanks, the commenter recommended this proposed language and requirement be removed. The commenter felt the language was vague, and the requirement had already been addressed under §117.33(b)(8)(C)(v) and (vi).

Response: The department agrees with the commenter and has removed §117.33(b)(8)(C)(iv) from the rules.

Comment: Concerning §117.33(b)(19)(C), a commenter recommended the language concerning quarterly audits in the second sentence be deleted. Two commenters felt that quarterly auditing was excessive and the "repeated results" was vague. One commenter recommended new language to be added which required water testing results be routinely trended and reviewed by the Medical Director in order to determine if results seem questionable or if there was an opportunity for improvement. The commenter also recommended that it should be the responsibility of the Medical Director or the CQI Committee to call for retesting.

Response: The department agrees with the commenter, and has removed the language concerning quality audits in the second sentence and has added the following language: "Water testing results shall be routinely trended and reviewed by the Medical Director in order to determine if results seem questionable or if there is an opportunity for improvement. The Medical Director or the CQI Committee shall determine if there is a need for retesting."

Comment: Concerning §117.33(b)(19)(D), the commenter wanted the department to comment on their reasoning for establishing regulations that are more stringent than the established AAMI Standards, which the department is using to establish regulations regarding water treatment systems within end stage renal disease facilities. The commenter was unable to find the standards in the AAMI Standards and Recommended Practices, Dialysis, 2001 Edition, published by the Association for the Advancement of Medical Instrumentation.

Response: The proposed language for these rules was developed by an Ad Hoc Committee, consisting of renal community representatives. This proposed language was also reviewed and approved by the Network 14 Medical Review Board prior to being published for public comment. The department feels the proposed rules reflect current standards in the renal community. Endotoxin levels in water and dialysate were previously included in American National Standard, Water Treatment Equipment for Hemodialysis Applications, August, 2001 Edition, published by the Association for the Advancement of Medical Instrumentation, 1110 North Glebe Road, Suite 2000, Arlington, Virginia 22201, 703-525-4890. No change was made as a result of this comment.

Comment: Concerning §117.33(b)(23)(A), the commenter recommended the following be added: "New facilities or facilities that add or change the configuration of the water distribution system must draw samples at the most distal point for each water distribution loop on a one time basis."

Response: The department agrees with the commenter and has added the recommended language to §117.33(b)(23)(A).

Comment: Concerning §117.33(c)(4)(B), the commenter felt the rules were unclear and offered clarifying language.

Response: The department disagrees with the commenter and considers the proposed language to accurately reflect the requirement that an end stage renal disease facility must comply with. No change was made as a result of this comment.

Comment: Concerning §117.33(c)(5) , the commenter recommended changing the language to read "Only a licensed nurse may use an additive to increase concentrations of specific electrolytes in the acid concentrate. Mixing procedures shall be followed as specified by the additive manufacturer." The commenter felt that this would add a "label" to start, and would make it clearer that only a licensed nurse is to do this. A second commenter felt the current language was unclear, and wondered if the language referred to changing a bath during a treatment.

Response: The department has changed the language to reflect the commenter's suggestion of clarifying duties of a "licensed nurse". The rule also did not include changing a bath during a treatment.

Comment: Concerning §117.33(c)(11)(F)(iii), the commenter suggests the following language be added: "Testing for residual disinfectant should be done, and documented."

Response: The department agrees with the commenter, and has added the suggested language.

Comment: Concerning §117.34(b)(2)(A), two commenters suggested that the language be changed to clarify at the end of the sentence: "and the disinfectant removed."

Response: The department agrees and has changed the language to read, "Routine disinfections of active and backup dialysis machines shall be performed according to facility defined protocol, accomplishing at least intermediate level infection, and the disinfectant removed."

Comment: Concerning §117.34(d), one commenter suggested that language be added that states that once the staff had two

documented positive antibody tests, no further testing would be needed.

Response: The proposed rules refer to 29 Code of Federal Regulations, §1910.1030(f)(1)-(2) (concerning Bloodborne Pathogens). No change was made as a result of this comment.

Comment: Concerning §117.43(a)(13), two commenters recommended the proposed language "in lieu of dismissal from the facility" be changed to "prior to dismissal from the facility." The commenters stated that the rules should recognize that dismissal might be necessary when patients pose an immediate and serious threat to themselves and/or other patients and staff.

Response: The department agrees, and has changed the language to read "prior to dismissal from the facility." The department recognizes some patients may pose an immediate and serious threat to themselves and/or other patients and staff.

Comment: Concerning §117.43(b)(7), two commenters suggested deleting "non-compliant patient" and using the term "patient who does not conform to the treatment plan."

Response: The department agrees with the commenters and has changed the term to "patients who do not conform to the treatment plan" in §117.43(b)(7).

Comment: Concerning §117.43(e)(5) and (7), the commenter stated that although the current staffing requirements are working well, the documented nursing and healthcare workforce shortages and the restrictions imposed by the Board of Nurse Examiners on unlicensed patient care technicians can make it difficult for providers to meet them at all times and overall staffing patterns should be considered when evaluating compliance with this sections. Allowance should be made for a facility that routinely schedules staff consistent with the regulations but finds itself out of compliance at times due to unanticipated changes in patient census and/or unscheduled changes in on-duty personnel. In addition, providers should have the flexibility to manage clinical resources to best meet the needs of its patients.

Response: The department agrees with the commenter. The department has established these licensing rules as minimum requirements for facilities and surveyors are conducting outcome-based surveys. Providers have the flexibility to manage clinical resources while continuing to provide patient centered care which meet state laws. No change was made as a result of this comment.

Comment: Concerning §117.43(h)(5) and (i)(5), the commenter feels there is no data suggesting poor patient outcomes under the current ratios (for dieticians and social workers, respectively), and requests the current requirement and language be retained.

Response: The department disagrees with the commenter. The department has received over 23 letters with over 100 signatures in favor of the lowered ratios for dieticians and over 90 signatures in favor of a ratio for social workers. No change was made as a result of this comment.

Comment: Concerning §117.43(i), the commenter suggested the proposed ratio for social workers to patients was high with the maximum patient load per full-time equivalent of qualified social worker may be 125 patients.

Response: The department disagrees with the commenter since the current rules do not have a ratio and feels that any lower ratio may be too prescriptive. The department also received 90 signatures in favor of the proposed ratio of social workers to patients. No change was made as a result of this comment.

Comment: Concerning §117.44(a)(5), the commenter felt that an annual test should not be required of staff that was dialyzing patients on an ongoing basis in a facility. The commenter felt that knowledge as reflected decision-making and supervisory personnel evaluate technical/ clinical skill competency each day. The commenter stated that evidence of annual performance review in personnel files that specifically indicated acceptable and advancing levels of clinical performance, safety, and adherence to clinical policies and procedures was sufficient.

Response: The department feels that annual testing is congruent with other providers' requirements for staff assessment and evaluation, and will not lower the standards for ESRD facilities. No change was made as a result of this comment.

Comment: Concerning §117.45(b), the commenter stated there should be no distinction between "new" or "established" dialysis patients in terms of which professional is competent to perform a comprehensive medical history. The commenter felt that in times of decreasing numbers of nephrologists, and increasing numbers of dialysis patients, it seemed unwise to make the requirement that a physician was required to perform this task.

Response: The department feels there is a difference between physicians, and physician assistants and nurse practitioners. New patients need to have evidence they have been seen recently by the physician and that orders reflect the current needs of patients. No change was made as a result of this comment.

Comment: Concerning §117.46, two commenters suggested that a facility should report the only the following occurrence to the department within ten working days of the occurrence: (1) Any conversion of staff or patient to HbsAg positive; or (2) Any unusual death of a patient.

Response: The department agrees and has deleted "or hospitalization" in §117.46(a)(1) and paragraph (3) and (4) of the subsection.

Comment: Concerning §117.62(g)(4), the commenter felt that one-year full time experience is sufficient if the technician has successfully completed the facility's training program (as described in the language), related checklists and competency examination.

Response: The department agrees with the commenter, and has added language to include the following one year experience: "a technician with at least 12 months experience," qualified by training and experience in water treatment, dialysate preparation, reprocessing or other technical aspects of dialysis providing training within their area of expertise.

Comment: Concerning §117.83, the commenter recommended the addition of the following language: "The department will make every effort to appoint a temporary manager who is already familiar with the facility's patient, personnel, policies, procedures and operations to expedite compliance."

Response: The department disagrees with the commenter. The current language in §117.83(b) states the "court shall appoint a temporary manager to manage a facility if the court finds that the appointment of the manager is necessary." No change was made as a result of this comment.

Comment: Concerning the rules in general, five commenters expressed concern that patient care technicians who met certain criteria were not allowed to initiate and terminate dialysis via catheters. The commenters felt that the Ad Hoc Committee had

spent many hours developing an alternative to allowing only licensed nurses to perform these duties, only to have the Network 14 Medical Review Board to overturn these recommendations. The commenters felt that the department should reconsider this alternative.

Response: The department respects the expertise of the Network 14 Medical Review Board and will not reconsider the use of technicians to perform catheter care. No changes were made as a result of these comments.

Comment: Concerning §117.44, four commenters stated the original recommendation by the Ad Hoc Committee was to allow a nurse with 12 months experience in nursing to function in the role of a charge nurse after three months of training instead of the current six months. The commenters felt that the Medical Review Board's decision to overturn this recommendation was not acceptable and requested that the department consider this recommendation prior to making the rules final.

Response: The department respects the expertise of the Network 14 Medical Review Board and feels the proposed rules reflect the current needs of the renal community. No changes were made as a result of these comments.

Comment: Concerning §117.43(h), three commenters requested that staffing ratios for dieticians not be lowered. The commenters felt that the current requirements for 110-150 patients were sufficient and worked well.

Response: The department respects the feelings of the commenters but has received 23 letters with over 100 signatures in favor of the lowered ratios for dieticians due to the complexity of working with this population. No changes were made as a result of the comments.

Comment: Concerning the rules in general, one commenter recommended that all state mandated ratios for all healthcare workers including nurses, patient care technicians, dieticians and social workers be eliminated.

Response: The department respects the recommendations of the commenter but feels the proposed language reflects the requirements that facilities must meet to provide safe delivery of service. No change was made as a result of this comment.

Comment: Concerning §117.18, one commenter agreed with the ad hoc committee's recommendation that the rules should allow for mentoring programs in recognition of potential shortages in the resource pool of qualified candidates. The commenter recommended the following language be included: "Any facility employing a mentoring program must document its thorough and ongoing efforts to recruit a qualified candidate, define oversight and require structured supervision for the program."

Response: The department respects the commenter's suggestions, and refers the commenter to the proposed new section, §117.18. No change was made as a result of this comment.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §§117.1 - 117.3

The amendments are adopted under Health and Safety Code (HSC), Chapter 251, Texas End Stage Renal Disease (ESRD) Facility Licensing Act, which provides the Board of Health (board) with the authority to adopt rules governing the licensing and regulation of ESRDs; and HSC §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 commissioner of health. The review of these rules implements Government Code, §2001.039.

§117.2. Definitions.

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

(1) Action level--The point at which steps should be taken to interrupt the trend towards unacceptable levels.

(2) Advanced practice nurse--A registered nurse approved by the Board of Nurse Examiners for the State of Texas to practice as an advanced practice nurse.

(3) Administrator--A person who is delegated the responsibility for the implementation and proper application of policies, programs, and services established for the end stage renal disease facility.

(4) Affiliate--An applicant or owner which is:

(A) a corporation - includes each officer, consultant, stockholder with a direct ownership of at least 5.0%, subsidiary, and parent company;

(B) a limited liability company - includes each officer, member, and parent company;

(C) an individual - includes:

(i) the individual's spouse;

(ii) each partnership and each partner thereof of which the individual or any affiliate of the individual is a partner; and

(iii) each corporation in which the individual is an officer, consultant, or stockholder with a direct ownership of at least 5.0%;

(D) a partnership - includes each partner and any parent company; and

(E) a group of co-owners under any other business arrangement--includes each officer, consultant, or the equivalent under the specific business arrangement and each parent company.

(5) Applicant--The owner of an end stage renal disease facility which is applying for a license under the statute. This is the person in whose name the license is issued.

(6) Biofilm--A coating on surfaces consisting of microcolonies of bacteria embedded in a protective extracellular matrix. The matrix, a slimy material secreted by the cells, protects the bacteria from antibiotics and disinfectants.

(7) Board--The Texas Board of Health.

(8) Change of ownership--A sole proprietor who transfers all or part of the facility's ownership to another person or persons; the removal, addition, or substitution of a person or persons as a partner in a facility owned by a partnership and the tax identification number of the partnership changes; or a corporate sale, transfer, reorganization, or merger of the corporation which owns the facility if sale, transfer, reorganization, or merger causes a change in the facility's ownership to another person or persons and the tax identification number of the corporation changes.

(9) Charge nurse--A registered professional nurse practicing nursing in accordance with applicable provisions of law who is responsible for making daily staff assignments based on patient needs, providing immediate supervision of patient care, monitoring patients for changes in condition, and/or communicating with the physician, dietician, and social worker regarding patient needs.

(10) Commissioner--The commissioner of health.

(11) Competency--The demonstrated ability to carry out specified tasks or activities with reasonable skill and safety that adheres to the prevailing standard of practice.

(12) Core staff members--The facility's medical director, supervising nurse, dietitian, social worker, administrator, and chief technician.

(13) Corrective action plan--A written strategy for correcting a licensing violation. The corrective action plan is developed by the facility and addresses the system(s) operation(s) of the facility as the system(s) operation(s) applies to the deficiency.

(14) Delegation--The transfer to a qualified and properly trained individual of the authority to perform a selected task or activity in a selected situation.

(15) Department--The Texas Department of Health.

(16) Dialysate--An aqueous fluid containing electrolytes and usually dextrose, which is intended to exchange solutes with blood during hemodialysis. The word "dialysate" is used throughout this document to mean the fluid made from water and concentrate which is delivered to the dialyzer by the dialysate supply system. Such phrases as "dialyzing fluid" or "dialysis solution" may be used in place of dialysate. It does not include peritoneal dialysis fluid.

(17) Dialysate supply system--Devices that prepare dialysate on line from water and concentrates or store and distribute premixed dialysate; circulate the dialysate through the dialyzer; monitor the dialysate for temperature, conductivity, pressure, flow and blood leaks; and prevent dialysis during disinfection or cleaning modes. The term includes reservoirs; conduits; proportioning devices for the dialysate; and monitors, associated alarms, and controls assembled as a system for the characteristics listed above. The dialysate supply system is often an integral part of single-patient dialysis machines.

(18) Dialysis--A process by which dissolved substances are removed from a patient's body by diffusion, osmosis and convection (ultrafiltration) from one fluid compartment to another across a semipermeable membrane.

(19) Dialysis technician--An individual who is not a registered nurse or physician and who provides dialysis care under the direct supervision of a registered nurse or physician. If unlicensed, this individual may also be known as a patient care technician.

(20) Dietitian--A person who is currently licensed under the laws of this state to use the title of licensed dietitian, is eligible to be a registered dietitian, and has one year of experience in clinical dietetics after becoming eligible to be a registered dietitian.

(21) Director--The director of the Health Facility Licensing and Compliance Division of the department or his or her designee.

(22) Empty bed contact time (EBCT)--A measure of how much contact occurs between particles, such as activated carbon, and water as the water flows through a bed of the particles.

(23) End stage renal disease--That stage of renal impairment that appears irreversible and permanent and that requires a regular course of dialysis or kidney transplantation to maintain life.

(24) End stage renal disease (ESRD) facility--A facility that provides dialysis treatment or dialysis training to individuals with end stage renal disease.

(25) Full-time--The time period established by a facility as a full working week, as defined and specified in the facility's policies and procedures.

(26) Full-time equivalent--Work time equivalent to 2,080 hours per 12 consecutive months.

(27) Health care facility--Any type of facility or home and community support services agency licensed to provide health care in any state or is certified for Medicare (Title XVIII) or Medicaid (Title XIX) participation in any state.

(28) Governing body--An identified group, which includes the medical director and a representative(s) of the owner of the facility, with full legal authority and responsibility for the governance and operation of the facility.

(29) Hospital--A facility that is licensed under the Texas Hospital Licensing Law, Health and Safety Code, Chapter 241, or if exempt from licensure, certified by the United States Department of Health and Human Services as in compliance with conditions of participation for hospitals in Title XVIII, Social Security Act (42 United States Code, §1395 et seq.).

(30) Interdisciplinary team--A group composed of the primary physician, the registered nurse, the dietitian and the social worker who are responsible for planning care for the patient.

(31) Intermediate level disinfection--A surface treatment using chemical germicides or disinfectants which are capable of inactivating various classes of microorganisms including, but not limited to, viruses (primarily medium to large viruses and lipid-containing viruses), fungi, and actively growing bacteria (including tubercle bacteria) when such chemical germicides or disinfectants are used in accordance with the manufacturer's instructions or per established guidelines. Intermediate level disinfection is generally not effective in inactivating or eliminating bacterial endospores. Examples of intermediate level disinfectants include bleach, 70-90% ethanol or isopropanol, and certain phenolic or iodophor preparations.

(32) Inspection--An investigation or survey conducted by a representative of the department to determine if an applicant or licensee is in compliance with this chapter.

(33) LAL (Limulus Amoebocyte Lysate) test--An assay used to detect endotoxin which exploits the immune response of the horse shoe crab (Limulus polyphemus).

(34) Licensed nurse--A registered nurse or licensed vocational nurse.

(35) Licensed vocational nurse (LVN)--A person who is currently licensed under Texas Civil Statutes, Article 4528c to use the title licensed vocational nurse and who may provide dialysis treatment after meeting the competency requirements specified for dialysis technicians.

(36) Manager--An individual approved or selected by the department who assumes overall management of an end stage renal disease facility to ensure adequate and safe services are provided to patients.

(37) Medical director--A physician who:

(A) is board eligible or board certified in nephrology or pediatric nephrology by a professional board; or

(B) during the five-year period prior to September 1, 1996, has served for at least 12 months as director of a dialysis program.

(38) Medical review board (MRB)--A medical review board that is appointed by a renal disease network organization which

includes this state, with the network having a contract with the Centers for Medicare and Medicaid Services of the United States Department of Health and Human Services under 42 United States Code §1395rr.

(39) Monitor--An individual approved or selected by the department who observes, supervises, consults, and educates a facility to correct identified violations of the statute or this chapter.

(40) Notarized copy(ies)--A sworn affidavit stating that attached copy(ies) is a true and correct copy(ies) of the original documents.

(41) Owner--One of the following which holds or will hold a license issued under the statute in the person's name or the person's assumed name:

(A) a corporation;

(B) a limited liability company;

(C) an individual;

(D) a partnership if a partnership name is stated in a written partnership agreement or an assumed name certificate;

(E) all partners in a partnership if a partnership name is not stated in a written partnership agreement or an assumed name certificate; or

(F) all co-owners under any other business arrangement.

(42) Patient--An individual receiving dialysis treatment or training from an end stage renal disease facility.

(43) Patient care plan--Documentation of the interactive process whereby the interdisciplinary team and the patient and/or family member or guardian develop a plan to assist the end stage renal disease patient in managing the disease and its complications.

(44) Pediatric patient--An individual 18 years of age or younger under the care of a facility.

(45) Person--An individual, corporation, or other legal entity.

(46) Physician--An individual who is licensed to practice medicine under the Medical Practice Act, Texas Civil Statutes, Article 4495b.

(47) Physician assistant--A person who is licensed as a physician assistant under the Physician Assistant Licensing Act, Texas Civil Statutes, Article 4495b-1.

(48) Presurvey conference--A conference held with department staff and the applicant or his or her representatives to review licensure standards and survey documents and provide consultation prior to the issuance of the temporary license. The applicant's representatives shall include an individual who will be responsible for the day-to-day supervision of care by the facility.

(49) Product water--The effluent water from the last component of the facility's water treatment system.

(50) Progress note--A dated and signed written notation by a facility staff member summarizing facts about care and a patient's response during a given period of time.

(51) Quality--The degree to which health services for individuals and populations increase the likelihood of desired outcomes that are consistent with current professional knowledge.

(52) Quality assurance--An ongoing, objective, and systematic process of monitoring, evaluating, and improving the quality, appropriateness, and effectiveness of care. The term includes the quality management and quality improvement processes.

(53) Quality management--A management philosophy used to plan and achieve desired processes and outcomes based upon a quality plan, which establishes quality objectives and the means to achieve; quality control, which is a process to evaluate actual performance against expected performance; and quality improvement, which is a process to identify, plan, and implement change for improvement.

(54) Registered nurse (RN)--A person who is currently licensed under the Nursing Practice Act, Texas Civil Statutes, Article 4513 et seq. as a registered nurse.

(55) Social worker--A person who:

(A) is currently licensed as a social worker under the Human Resources Code, Chapter 50, and holds a masters degree from a graduate school of social work accredited by the Council on Social Work Education; or

(B) has worked for at least two years as a social worker, one year of which was in a dialysis facility or transplantation program prior to September 1, 1976, and has established a consultative relationship with a social worker who has a masters degree from a graduate school of social work accredited by the Council on Social Work Education.

(56) Supervising nurse (also may be known as the director of nursing)--An RN who:

(A) has at least 18 months experience as an RN, which includes at least 12 months experience in dialysis which has been obtained within the last 24 months; or

(B) has at least 18 months experience as an RN and holds a current certification from a nationally recognized board in nephrology nursing or hemodialysis.

(57) Supervision--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity with initial direction and periodic inspection of the actual act of accomplishing the function or activity. Immediate supervision means the supervisor is actually observing the task or activity as it is performed. Direct supervision means the supervisor is on the premises but not necessarily immediately physically present where the task or activity is being performed. Indirect supervision means the supervisor is not on the premises but is accessible by two-way communication and able to respond to an inquiry when made, and is readily available for consultation.

(58) Statute--The Health and Safety Code, Chapter 251.

(59) Training--The learning of tasks through on-the-job experience or instruction by an individual who has the capacity through education or experience to perform the task or activity to be delegated.

(60) Technical supervisor--The supervisor of the facility's mechanical, reuse and water treatment systems.

(61) Ultrafilter--A membrane filter with a pore size in the range 0.001 to 0.05 µm. Performance is usually rated in terms of a nominal molecular weight cut-off (MWCO), which is defined as the smallest molecular weight species for which the filter membrane has more than 90% rejection. Ultrafilters with a nominal MWCO of 20,000 or less are generally adequate for endotoxin removal.

(62) Water distribution systems--Components to include any storage tanks and piping used to distribute the product water from the purification cascade to or from its point of use, including

individual hemodialysis machines, dialyzer reprocessing equipment and dialysate concentrate preparation systems.

(63) Water treatment system--A collection of water purification devices and associated piping, pumps, valves, gauges, etc., that together produce purified water for hemodialysis applications and deliver it to the point of use.

(64) Working day--Any day of the calendar week excluding Saturday or Sunday.

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 August 18, 2003.

TRD-200305326
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: September 7, 2003
Proposal publication date: March 14, 2003
For further information, please call: (512) 458-7236

♦ ♦ ♦

SUBCHAPTER B. APPLICATION AND ISSUANCE OF A LICENSE

25 TAC §§117.11 - 117.18

The amendments and new section are adopted under Health and Safety Code (HSC), Chapter 251, Texas End Stage Renal Disease (ESRD) Facility Licensing Act, which provides the Board of Health (board) with the authority to adopt rules governing the licensing and regulation of ESRDs; and HSC §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 commissioner of health. The review of these rules 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 August 18, 2003.

TRD-200305327
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: September 7, 2003
Proposal publication date: March 14, 2003
For further information, please call: (512) 458-7236

♦ ♦ ♦

SUBCHAPTER C. MINIMUM STANDARDS FOR DESIGN AND SPACE, EQUIPMENT, WATER TREATMENT AND REUSE, AND SANITARY AND HYGIENIC CONDITIONS

25 TAC §§117.31 - 117.34

The amendments are adopted under Health and Safety Code (HSC), Chapter 251, Texas End Stage Renal Disease (ESRD) Facility Licensing Act, which provides the Board of Health (board) with the authority to adopt rules governing the licensing and regulation of ESRDs; and HSC §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 commissioner of health. The review of these rules implements Government Code, §2001.039.

§117.31. Design and Space Requirements.

(a) General.

(1) The standards in this section shall apply to all facilities that provide outpatient dialysis services. Dialysis facilities in operation on or before September 1, 2003 shall meet the design and space requirements of this section which were in effect at the time the facility was constructed.

(2) A facility must provide a physical environment that protects the health and safety of patients, personnel and the public. The physical premises of the facility and those areas of the facility's surrounding physical structure that are used by the patients (including all stairwells, corridors and passageways) must meet the local building and fire safety codes as they relate to design and space requirements for safe access and patient privacy.

(3) A facility shall comply with Chapter 38 of the National Fire Protection Association 101, Code for Safety to Life from Fire in Buildings and Structures, 2000 Edition (NFPA 101), relating to new business occupancies, published by the National Fire Protection Association. All documents published by the NFPA as referenced in this section may be obtained by writing or calling the NFPA at the following address and telephone number: Post Office Box 9101, Batterymarch Park, Quincy, Massachusetts 02169, 1-800-344-3555.

(4) Water distribution systems shall be configured as a continuous recirculation loop and designed to minimize bacterial proliferation and biofilm. A minimum of three feet per second water flow must be achieved in the distribution loop. This rule shall apply only to new facilities.

(5) Water treatment systems shall include a minimum of two carbon tanks in a series, with the total empty bed contact time (EBCT) of at least ten minutes, and the final tank providing at least five minutes EBCT.

(6) A facility shall provide a reception and information counter or desk and a waiting room separate from the patient treatment area. The waiting room shall provide adequate seating.

(7) The patient treatment area shall be designed and equipped to provide proper and safe treatment as well as privacy and comfort for patients. At a minimum, patient treatment stations shall be 70 square feet, with the smallest dimension at seven feet. The 70 square feet may include aisles or counters.

(8) If hepatitis B positive patients are treated, a separate room with its own designated machine(s), clamp(s), blood pressure cuff(s), sink(s) and other equipment shall be used.

(9) A facility shall provide a call system in patient areas outside the treatment area (e.g., patient restrooms, training rooms, and examination rooms) which is usable by a collapsed patient lying on the floor (e.g., inclusion of a pull cord). Calls shall register at and activate a visible signal in the central nurses station. Call systems which provide two-way communication shall be equipped with an indicating light at each call station which lights and remains lighted as long as the voice circuit is operating.

(10) A facility shall have separate toilet and lavatory facilities for staff and patients.

(11) A facility shall provide a private area for meetings with patients or family members.

(12) A facility shall have a room for medical examinations which includes an examination table, a work counter, and a hand washing sink or lavatory.

(13) Telephone access shall be available in the facility to patients and family members.

(14) A facility located above the ground floor must have an elevator of sufficient size to accommodate a gurney available at all times.

(15) A facility shall provide two exits remote from each other in accordance with NFPA 101, §7-5.1.3. At least one exit door shall be accessible by an ambulance from the outside. This door may also serve as an entry for loading or receiving goods.

(16) A facility shall provide a separate room for peritoneal dialysis patients if the facility provides on-site peritoneal dialysis training. This room shall include a lavatory or sink for hand washing.

(17) Doors to an isolation room or peritoneal dialysis room shall not be lockable from inside the room.

(18) Public corridor widths and all other areas where patients may traverse shall accommodate wheel chair or gurney passage.

(19) Items such as drinking fountains, telephone booths, vending machines and portable equipment (including patient care equipment) shall be located so that they do not project into, restrict, or obstruct exit corridor traffic.

(20) A facility shall utilize a ventilation system which provides adequate comfort to patients during treatment and which minimizes the potential of insect access.

(21) Floors that are subject to traffic while wet shall have nonslip surfaces.

(b) Storage areas.

(1) All storage areas shall be kept clean and orderly at all times.

(2) A facility premises shall be kept free from accumulations of combustible materials not necessary for immediate operation of the facility. Local supplies of combustible liquids shall be stored in cabinets or shelves which are well-ventilated from top to bottom.

(3) A facility shall have a separate space for wheel chair storage.

(4) A facility shall store oxygen in compliance with §4-3 of the National Fire Protection Association 99, Standard for Health Care Facilities, 1999 Edition (NFPA 99) published by the National Fire Protection Association.

(c) Provisions for the handicapped.

(1) If Texas Civil Statutes, Article 9102 applies, a facility shall be designed in accordance with 16 Texas Administrative Code, Chapter 68 (Elimination of Architectural Barriers) administered by the Texas Department of Licensing and Regulation, effective April 1, 1994.

(2) A facility shall meet applicable requirements of 29 United States Code, §794. When federal funds are used for construction, for program requirements, or for client services, the handicapped requirements of §794 will apply.

(3) A facility shall comply with the design and space requirements of the Americans with Disabilities Act, 42 United States Code, §12182(b)(2)(A)(iv) and (v) and §12183, and the regulations and guidelines promulgated under §12186(b) and (c) and §12204, effective July 28, 1991.

(d) Fire protection.

(1) All sprinkler systems, smoke detectors, and other fire-fighting equipment shall be inspected and tested at least once each year to maintain it in serviceable condition. If a facility has a sprinkler system, the sprinkler system shall be installed and maintained in accordance with the National Fire Protection Association 13, Standard for the Installation of Sprinkler Systems, 1999 Edition, published by the National Fire Protection Association.

(2) A facility shall have an emergency lighting system capable of providing sufficient illumination to allow safe evacuation from the building. Battery pack systems shall be maintained and tested quarterly. If a facility maintains a back-up generator, the generator must be installed, tested and maintained in accordance with the National Fire Protection Association 110, Standard for Emergency and Standby Power Systems, 1999 Edition (NFPA 110), published by the National Fire Protection Association.

(3) A facility housed in or adjacent to a building classified as a "high hazard industrial occupancy," as defined in §40-1.4.1 of the NFPA 101, must have a special feature such as a two-hour fire wall between the facility and the other occupancy and written approval by the fire authority having jurisdiction.

(e) Construction. If construction takes place in or near occupied areas, adequate provision shall be made for the safety and comfort of patients during the construction.

(f) Other standards. A facility may impose more stringent design and space standards than the minimum standards in this section.

§117.32. Equipment.

(a) All equipment used by a facility, including backup equipment, shall be operated within manufacturer's specifications, and maintained free of defects which could be a potential hazard to patients, staff, or visitors. Maintenance and repair of all equipment shall be performed by qualified staff or contract personnel.

(1) Staff shall be able to identify malfunctioning equipment and report such equipment to the appropriate staff for immediate repair.

(2) Medical equipment that malfunctions must be clearly labeled and immediately removed from service until the malfunction is identified and corrected.

(3) Written evidence of all maintenance and repairs shall be maintained.

(4) After repairs or alterations are made to any equipment or system, the equipment or system shall be thoroughly tested for proper operation before returning to service. This testing must be documented.

(5) A facility shall comply with the federal Food, Drug, and Cosmetic Act, 21 United States Code (USC), §360i(b), concerning reporting when a medical device as defined in 21 USC §321(h) has or may have caused or contributed to the injury or death of a patient of the facility.

(b) A facility shall develop, implement and enforce a written preventive maintenance program to ensure patient care related equipment used in a facility or provided by a facility for use by the patient in the patient's home receives electrical safety inspections, if appropriate, and maintenance at least annually or more frequently as recommended by the manufacturer. The preventive maintenance may be provided by facility staff or by contract.

(c) At least one complete dialysis machine shall be available on-site as backup for every ten dialysis machines in use. At least one of these backup machines must be completely operational during hours of treatment. Machines not in use during a patient shift may be counted as backup except at the time of an initial or an expansion survey.

(d) If pediatric patients are treated, a facility shall use equipment and supplies, to include blood pressure cuffs, dialyzers, and blood tubing, appropriate for this special population.

(e) All equipment and appliances shall be properly grounded in accordance with the National Fire Protection Association 99, Standard for Health Care Facilities, §§3-3.2.1.2(a)(2) and 7-5.1, 1999 Edition (NFPA 99), published by the National Fire Protection Association. All documents published by the NFPA as referenced in this section may be obtained by writing or calling the NFPA at the following address and telephone number: Post Office Box 9101, Batterymarch Park, Quincy, Massachusetts 02169, 1-800-344-3555.

(f) Extension cords and cables shall not be used for permanent wiring.

(g) A facility shall have emergency equipment and supplies immediately accessible in the treatment area.

(1) At a minimum, the emergency equipment and supplies shall include the following:

(A) oxygen;

(B) ventilatory assistance equipment, to include airways, manual breathing bag, and mask;

(C) suction equipment;

(D) supplies specified by the medical director;

(E) electrocardiograph; and

(F) automated external defibrillator.

(2) If pediatric patients are treated, the facility shall have the appropriate type and size emergency equipment and supplies listed in paragraph (1) of this subsection for this special population.

(3) A facility shall establish, implement, and enforce a policy for the periodic testing and maintenance of the emergency equipment. Staff shall properly maintain and test the emergency equipment and supplies and document the testing and maintenance.

§117.33. Water Treatment, Dialysate Concentrates and Reuse.

(a) Compliance required. A facility shall meet the requirements of this section. A facility may follow more stringent requirements than the minimum standards required by this section.

(1) The facility owner and medical director shall each demonstrate responsibility for the water treatment and dialysate supply systems to protect hemodialysis patients from adverse effects arising from known chemical and microbial contaminates that may be found in improperly prepared dialysate, to ensure that the dialysate is correctly formulated and meets the requirements of all applicable quality standards.

(2) The facility owner and medical director must each assure that policies and procedures related to water treatment, dialysate and reuse are understandable and accessible to the operator(s) and that the training program includes quality testing, risks and hazards of improperly prepared concentrate and bacterial issues.

(3) The facility owner and medical director must be informed prior to any alteration of, or any device being added to, the water system.

(b) Water treatment. These requirements apply to water intended for use in the delivery of hemodialysis, including the preparation of concentrates from powder at a dialysis facility and dialysate, and for reprocessing dialyzers for multiple use.

(1) The design for the water treatment system in a facility shall be based on considerations of the source water for the facility and designed by a water quality professional with education, training, or experience in dialysis system design.

(2) When a public water system supply is not used by a facility, the source water shall be tested by the facility at monthly intervals in the same manner as a public water system as described in 30 Texas Administrative Code, §290.104 (Control Tests), §290.105 (Maximum Contaminant Levels (MCLs) for Microbiological Contaminants), and §290.106 (Bacteriological Monitoring) as adopted by the Texas Commission on Environmental Quality.

(3) The physical space in which the water treatment system is located must be adequate to allow for maintenance, testing, and repair of equipment. If mixing of dialysate is performed in the same area, the physical space must also be adequate to house and allow for the maintenance, testing, and repair of the mixing equipment and for performing the mixing procedure.

(4) The water treatment system components shall be arranged and maintained so that bacterial and chemical contaminant levels in the product water do not exceed the standards for hemodialysis water quality described in §4.2.1 (concerning Water Bacteriology) and §4.2.2 (concerning Maximum Level of Chemical Contaminants) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition, published by the Association for the Advancement of Medical Instrumentation (AAMI). All documents published by the AAMI as referenced in this section may be obtained by writing the following address: 1110 North Glebe Road, Suite 220, Arlington, Virginia 22201.

(5) Written policies and procedures for the operation of the water treatment system must be developed and implemented. Parameters for the operation of each component of the water treatment system must be developed in writing and known to the operator. Each major water system component shall be labeled in a manner that identifies the device; describes its function, how performance is verified and actions to take in the event performance is not within an acceptable range.

(6) The materials of any components of water treatment systems (including piping, storage, filters and distribution systems) that contact the purified water shall not interact chemically or physically so as to affect the purity or quality of the product water adversely. Such components shall be fabricated from unreactive materials (e.g. plastics) or appropriate stainless steel. The use of materials that are known to cause toxicity in hemodialysis, such as copper, brass, galvanized material, or aluminum, is prohibited.

(7) Chemicals infused into the water such as iodine, acid, flocculants, and complexing agents shall be shown to be nondialyzable or shall be adequately removed from product water. Monitors or specific test procedures to verify removal of additives shall be provided and documented.

(8) Each water treatment system shall include reverse osmosis membranes or deionization tanks and a minimum of two carbon tanks in series. If the source water is from a private supply which does not use chlorine/chloramine, the water treatment system shall include reverse osmosis membranes or deionization tanks and a minimum of one carbon tank.

(A) Reverse osmosis membranes, if used, shall meet the standards in §4.3.7 (concerning Reverse Osmosis) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition, published by the AAMI.

(B) Deionization systems.

(i) Deionization systems, if used, shall be monitored continuously to produce water of one megohm-cm or greater specific resistivity (or conductivity of one microsiemen/cm or less) at 25 degrees Celsius. An audible and visual alarm shall be activated when the product water resistivity falls below this level and the product water stream shall be prevented from reaching any point of use.

(ii) Patients shall not be dialyzed on deionized water with a resistivity less than 1.0 megohm-cm measured at the output of the deionizer.

(iii) A minimum of two deionization (DI) tanks in series shall be used with resistivity monitors including audible and visual alarms placed pre and post the final DI tank in the system. The alarms must be audible in the patient care area.

(iv) Feed water for deionization systems shall be pretreated with activated carbon adsorption, or a comparable alternative, to prevent nitrosamine formation.

(v) If a deionization system is the last process in a water treatment system, it shall be followed by an ultrafilter or other bacteria and endotoxin reducing device.

(C) Carbon tanks.

(i) The carbon tanks must contain acid washed carbon, 30-mesh or smaller with a minimum iodine number of 900.

(ii) A minimum of two carbon adsorption beds shall be installed in a series configuration.

(iii) The total empty bed contact time (EBCT) shall be at least ten minutes, with the final tank providing at least five minutes EBCT. Carbon adsorption systems used to prepare water for home dialysis or for portable dialysis systems are exempt from the requirement for the second carbon and a ten minute EBCT if removal of chloramines to below 0.1 mg/1 is verified before each treatment.

(iv) A means shall be provided to sample the product water immediately prior to the final bed(s). Water from this port(s) must be tested for chlorine/chloramine levels immediately prior to each patient shift.

(v) All samples for chlorine/chloramine testing must be drawn when the water treatment system has been operating for at least 15 minutes.

(vi) Tests for total chlorine, which include both free and combined forms of chlorine, may be used as a single analysis with the maximum allowable concentration of 0.1 mg/L. Test results of greater than 0.5 parts per million (ppm) for chlorine or 0.1 ppm for chloramine from the port between the initial tank(s) and final tank(s) shall require testing to be performed at the final exit and replacement of the initial tank(s).

(vii) In a system without a holding tank, if test results at the exit of the final tank(s) are greater than the parameters for chlorine or chloramine described in this subparagraph, dialysis treatment shall be immediately terminated to protect patients from exposure to chlorine/chloramine and the medical director shall be notified. In systems with holding tanks, if the holding tank tests <0.1 mg/L for total chlorine, the reverse osmosis (RO) may be turned off and the product water in the holding tank may be used to finish treatments in process. The medical director shall be notified.

(viii) If means other than granulated carbon are used to remove chlorine/chloramine, the facility's governing body must approve such use in writing after review of the safety of the intended method for use in hemodialysis applications. If such methods include the use of additives, there must be evidence the product water does not contain unsafe levels of these additives.

(9) Water softeners, if used, shall be tested at the end of the treatment day to verify their capacity to treat a sufficient volume of water to supply the facility for the entire treatment day and shall be fitted with a mechanism to prevent water containing the high concentrations of sodium chloride used during regeneration from entering the product water line during regeneration.

(10) Timers. If used, the face(s) of timer(s) used to control any component of the water treatment or dialysate delivery system shall be visible to the operator at all times. Written evidence that timers are checked for operation and accuracy each day of operation must be maintained.

(11) Filter housings, if used during disinfectant procedures, shall include a means to clear the lower portion of the housing of the disinfecting agents. Filter housings shall be opaque.

(12) Ultrafilters, or other bacterial reducing filters, if used, shall be fitted with pressure gauges on the inlet and outlet water lines to monitor the pressure drop across the membrane. Ultrafilters shall be included in routine disinfection procedures.

(13) Storage tanks. If used, storage tanks shall have a conical or bowl-shaped base and shall drain from the lowest point of the base. Storage tanks shall have a tight fitting lid and be vented through a hydrophobic 0.2 micron air filter. Means shall be provided to effectively disinfect any storage tank installed in a water distribution system.

(14) Ultraviolet (UV) lights, if used, shall be monitored at the frequency recommended by the manufacturer. A log sheet shall be used to record monitoring.

(15) Water treatment system piping shall be labeled to indicate the contents of the pipe and direction of flow.

(16) The water treatment system must be continuously monitored during patient treatment and be guarded by audible and visual alarms which can be seen and heard in the dialysis treatment area should water quality drop below specific parameters. Quality monitor sensing cells shall be located as the last component of the water treatment system and at the beginning of the distribution system. No water treatment components that could affect the quality of the product water as measured by this device shall be located after the sensing cell.

(17) When deionization tanks do not follow a reverse osmosis system, parameters for the rejection rate of the membranes must assure that the lowest rate accepted would provide product water in compliance with §4.2.2 (concerning Maximum Level of Chemical Contaminants) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition published by the AAMI.

(18) A facility shall maintain written logs of the operation of the water treatment system for each treatment day. The log book shall include each component's operating parameter and the action taken when a component is not within the facility's set parameters.

(19) Microbiological testing of product water.

(A) Frequency. Microbiological testing shall be conducted monthly and following any repair or change to the water treatment system. For a newly installed water distribution system, or when a change has been made to an existing system, weekly testing shall be conducted for one month to verify that bacteria and endotoxin levels are consistently within the allowed limits.

(B) Sample sites. At a minimum, sample sites chosen for the testing shall include the beginning of the distribution piping, the product water in the reuse room, at any site of dialysate mixing, and the end of the distribution piping.

(C) Technique. Samples shall be collected immediately before sanitization/disinfection of the water treatment system and dialysis machines. Water testing results shall be routinely trended and reviewed by the Medical Director in order to determine if results seem questionable or if there is an opportunity for improvement. The Medical Director or the CQI Committee shall determine if there is a need for retesting. Repeated results of "no growth" shall be validated via an outside laboratory. A calibrated loop may not be used in microbiological testing of water samples. Colonies shall be counted using a magnifying device.

(D) Expected results. Product water used to prepare dialysate, concentrates from powder, or to reprocess dialyzers for multiple use, shall contain a total viable microbial count less than 200 CFU/ml and an endotoxin concentration less than 2 EU/ml. The action level for the total viable microbial count in the product water shall be 50 CFU/ml and the action level for the endotoxin concentration shall be 1 EU/ml.

(E) Required action for unacceptable results. If the action levels described at paragraph (D) are observed in the product water, corrective measures shall be taken promptly to reduce the levels into an acceptable range.

(F) Records. All bacteria and endotoxin results shall be recorded on a log sheet in order to identify trends that may indicate the need for corrective action.

(20) Ozone generators. If ozone generators are used to disinfect any portion of the water or dialysate delivery system, testing based on the manufacturer's direction shall be used to measure the ozone concentration each time disinfection is performed, to include testing for safe levels of residual ozone at the end of the disinfection cycle. Testing for ozone in the ambient air shall be conducted on a periodic basis as recommended by the manufacturer. Records of all testing must be maintained in a log.

(21) Hot Water Disinfection Systems. If used, hot water disinfection systems shall be monitored for temperature and time of exposure to hot water as specified by the manufacturer. Temperature of the water shall be recorded at a point furthest from the water heater, where the lowest water temperature is likely to occur. The water temperature shall be measured each time a disinfection cycle is performed. A record that verifies successful completion of the heat disinfection shall be maintained.

(22) After chemical disinfection, means shall be provided to restore the equipment and the system in which it is installed to a safe condition relative to residual disinfectant prior to the product water being used for dialysis applications.

(23) Water Analysis. Samples of product water must be submitted for chemical analysis every six months and must demonstrate that the quality of the product water used to prepare dialysate, concentrates from powder, or to reprocess dialyzers for multiple use, meets §4.2.2 (concerning Maximum Level of Chemical Contaminants) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition, published by the AAMI.

(A) Samples for chemical analysis shall be collected at the end of the water treatment components and at the most distal point in each water distribution loop. All other outlets from the distribution loops shall be inspected to ensure that the outlets are fabricated from compatible materials. Appropriate containers and pH adjustments shall be used to ensure accurate determinations. New facilities or facilities that add or change the configuration of the water distribution system must draw samples at the most distal point for each water distribution loop on a one time basis.

(B) Additional chemical analysis shall be submitted if substantial changes are made to the water treatment system or if the percent rejection of a reverse osmosis system decreased 5.0% or more from the percent rejection measured at the time the water sample for the preceding chemical analysis was taken.

(24) Facility records must include all test results and evidence that the medical director has reviewed the results of the water quality testing and directed corrective action when indicated.

(25) Only persons qualified by the education or experience described in §117.44(f) of this title (relating to Qualifications of Staff) may operate, repair, or replace components of the water treatment system.

(c) Dialysate.

(1) Quality control and quality assurance procedures shall be established to ensure ongoing conformance to policies and procedures regarding dialysate quality.

(2) Each facility shall set all hemodialysis machines to use only one family of concentrates. When new machines are put into service, or the concentrate family or concentrate manufacturer is changed, samples shall be sent to a laboratory for verification.

(3) Prior to each patient treatment, staff shall verify the dialysate conductivity and pH of each machine with an independent device.

(4) Bacteriological testing.

(A) Frequency. Responsible facility staff shall develop a schedule to ensure each hemodialysis machine is tested quarterly for bacterial growth and the presence of endotoxins. Hemodialysis machines of home patients shall be cultured monthly until results not exceeding 200 colony forming units per milliliter are obtained for three consecutive months, then quarterly samples shall be cultured.

(B) Acceptable limits. Dialysate shall contain less than 200 CFU/ml and an endotoxin concentration of less than 2 EU/ml. The action level for total viable microbial count shall be 50 CFU/ml and the action level for endotoxin concentration shall be 1 EU/ml.

(C) Action to be taken. Disinfection and retesting shall be done when bacterial or endotoxin counts exceed the action levels. Additional samples shall be collected when there is a clinical indication of a pyrogenic reaction and/or septicemia.

(5) Only a licensed nurse may use an additive to increase concentrations of specific electrolytes in the acid concentrate. Mixing procedures shall be followed as specified by the additive manufacturer. When additives are prescribed for a specific patient, the container holding the prescribed acid concentrate shall be labeled with the name of the patient, the final concentration of the added electrolyte, the date the prescribed concentrate was made, and the name of the person who mixed the additive.

(6) Materials compatibility. All components used in concentrate preparation systems (including mixing and storage tanks, pumps, valves and piping) shall be fabricated from materials (e.g., plastics or appropriate stainless steel) that do not interact chemically or physically with the concentrate so as to affect its purity, or with the germicides used to disinfect the equipment. The use of materials that are known to cause toxicity in hemodialysis such as copper, brass, galvanized material and aluminum is prohibited.

(7) Storage of acid concentrates. Facility policies shall address means to protect stored acid concentrates from tampering or from degeneration due to exposure to extreme heat or cold.

(8) Bulk storage tanks. Procedures to control the transfer of acid concentrates from the delivery container to the storage tank and prevent the inadvertent mixing of different concentrate formulations shall be developed, implemented and enforced. The storage tanks shall be clearly labeled.

(9) Concentrate mixing systems.

(A) Concentrate mixing systems shall include a purified water source, a suitable drain, and a ground fault protected electrical outlet.

(B) Operators of mixing systems shall use personal protective equipment as specified by the manufacturer during all mixing processes.

(C) The manufacturer's instructions for use of a concentrate mixing system shall be followed, including instructions for mixing the powder with the correct amount of water. The number of bags or weight of powder added shall be determined and recorded.

(D) The mixing tank shall be clearly labeled to indicate the fill and final volumes required to correctly dilute the powder.

(E) Systems for preparing either bicarbonate or acid concentrate from powder shall be monitored according to the manufacturer's instructions.

(F) Concentrates shall not be used, or transferred to holding tanks or distribution systems, until all tests are completed.

(G) If a facility designs its own system for mixing concentrates, procedures shall be developed and validated using an independent laboratory to ensure proper mixing.

(10) Acid concentrate mixing systems.

(A) Acid concentrate mixing tanks shall be designed to allow the inside of the tank to be rinsed when changing concentrate formulas.

(B) Acid mixing systems shall be designed and maintained to prevent rust and corrosion.

(C) Acid concentrate mixing tanks shall be emptied completely and rinsed with product water before mixing another batch of concentrate to prevent cross contamination between different batches.

(D) Acid concentrate mixing equipment shall be disinfected as specified by the equipment manufacturer or in the case where no specifications are given, as defined by facility policy.

(E) Records of disinfection and rinsing of disinfectants to safe residual levels shall be maintained.

(11) Bicarbonate concentrate mixing systems.

(A) Bicarbonate concentrate mixing tanks shall have conical or bowl-shaped bottoms and shall drain from the lowest point of the base. The tank design shall allow all internal surfaces to be disinfected and rinsed.

(B) Bicarbonate concentrate mixing tanks shall not be pre-filled the night before use.

(C) If disinfectant remains in the mixing tank overnight, this solution must be completely drained, the tank rinsed and tested for residual disinfectant prior to preparing the first batch of that day of bicarbonate concentrate.

(D) Unused portions of bicarbonate concentrate shall not be mixed with fresh concentrate.

(E) At a minimum, bicarbonate distribution systems shall be disinfected weekly. More frequent disinfection shall be done if required by the manufacturer, or if dialysate culture results are above the action level.

(F) If jugs are reused to deliver bicarbonate concentrate to individual hemodialysis machines:

(i) jugs shall be emptied of concentrate, rinsed and inverted to drain at the end of each treatment day;

(ii) at a minimum, jugs shall be disinfected weekly, more frequent disinfection shall be considered by the facility quality management committee if dialysate culture results are above the action level; and

(iii) following disinfection, jugs shall be drained, rinsed free of residual disinfectant, and inverted to dry. Testing for residual disinfectant should be done and documented.

(12) Labeling of concentrate containers. All mixing tanks, bulk storage tanks, dispensing tanks and containers for single hemodialysis treatments shall be labeled as to the contents.

(A) Mixing tanks. Prior to batch preparation, a label shall be affixed to the mixing tank that includes the date of preparation and the chemical composition or formulation of the concentrate being prepared. This labeling shall remain on the mixing tank until the tank has been emptied.

(B) Bulk storage/dispensing tanks. These tanks shall be permanently labeled to identify the chemical composition or formulation of their contents.

(C) Single-machine containers. At a minimum, single-machine containers shall be labeled with sufficient information to differentiate the contents from other concentrate formulations used in the facility and permit positive identification by users of container contents.

(13) Records of concentrate mixing. Permanent records of batches produced shall be maintained to include the concentrate formula produced, the volume of the batch, lot number(s) of powdered concentrate packages, the manufacturer of the powdered concentrate, date and time of mixing, test results, person performing mixing, test results, and expiration date (if applicable).

(14) Maintenance of dialysate mixing systems. If dialysate concentrates are prepared in the facility, the manufacturers' recommendations shall be followed regarding any preventive maintenance. Records shall be maintained indicating the date, time, person performing the procedure, and the results (if applicable).

(d) Reuse of hemodialyzers and related devices.

(1) Reuse practice in a facility must comply with the American National Standard, Reuse of Hemodialyzers, 1993 Edition published by the AAMI.

(2) Dialyzer manufacturer's labeling shall be reviewed to determine if a specific dialyzer requires special considerations.

(3) A transducer protector shall be replaced when wetted during a dialysis treatment and shall be used for one treatment only.

(4) Arterial lines may be reused only when the arterial lines are labeled to allow for reuse by the manufacturer and the manufacturer-established protocols for the specific line have been approved by the United States Food and Drug Administration.

(5) The water supply in the reuse room shall incorporate a check valve to prevent chemical agents used from inadvertently back flowing into the water distribution system.

(6) Ventilation systems in the reuse room shall be connected to an exhaust system to the outside which is separate from the building exhaust system, have an exhaust fan located at the discharge end of the system, and have an exhaust duct system of noncombustible corrosion-resistant material as needed to meet the planned usage of the system. Exhaust outlets shall be above the roof level and arranged to minimize recirculation of exhaust air into the building.

(7) A facility shall establish, implement, and enforce a policy for dialyzer reuse criteria (including any facility-set number of reuses allowed) which is included in patient education materials and posted in the waiting room and patient treatment areas. A dialyzer may be reused only if that dialyzer's original volume is measured and recorded prior to its first use and the volume of that dialyzer is used as the basis for discard for that dialyzer.

(8) A facility shall consider and address the health and safety of patients sensitive to disinfectant solution residuals.

(9) A facility shall provide each patient with information regarding the reuse practices at the facility, the opportunity to tour the reuse area, and the opportunity to have questions answered.

(10) A facility shall restrict the reprocessing room to authorized personnel.

(11) A facility shall obtain written informed consent of the patient or legal representative.

(e) Centralized dialyzer reprocessing. If a facility participates in centralized reprocessing in which dialyzers from multiple facilities are reprocessed at one site, the facility shall:

(1) appoint a medical director for the centralized reprocessing facility;

(2) require the use of automated reprocessing facility;

(3) maintain responsibility and accountability for the entire reuse process;

(4) adopt, implement, and enforce policies to ensure that the transfer and transport of used and reprocessed dialyzers to and from the off-site location does not increase contamination of the dialyzers, staff, or the environment;

(5) assure that each dialyzer is returned to the appropriate facility or patient home and in the case of home patients who participate in a dialyzer reprocessing program, a system shall be established to verify that the correct dialyzers are being returned to each patient's home; and

(6) provide department staff access to the off-site reprocessing site as part of a facility inspection.

§117.34. Sanitary Conditions and Hygienic Practices.

(a) General infection control measures.

(1) Universal precautions.

(A) Universal precautions shall be followed in the facility for all patient care activities in accordance with 29 Code of Federal Regulations, §1910.1030(d)(1)-(3) (concerning Bloodborne Pathogens) and the Health and Safety Code, Chapter 85, Subchapter I (concerning Prevention of HIV and Hepatitis B Virus by Health Care Workers).

(B) Facility staff shall wash their hands before and after each patient contact in which there is a potential exposure to blood or body fluids. Location and arrangement of hand washing facilities shall permit ease of access and proper use.

(i) Hand washing sinks shall be readily accessible in each patient care area.

(ii) All fixtures and lavatories shall be trimmed with valves which can be operated without the use of hands. There shall be sufficient clearance for the operation of blade-type handles, if they are used.

(iii) Provisions for hand drying shall be included at all hand washing facilities.

(C) Facility staff shall explain the potential risks associated with blood and blood products to patients and family members and provide the indicated personal protective equipment to a patient or family member if the patient or family member assists in procedures which could result in contact with blood or body fluids.

(2) Documentation and coordination of infection control activities.

(A) The facility must designate a person to monitor and coordinate infection control activities.

(B) A facility shall develop and maintain a system to identify and track infections to allow identification of trends or patterns. This activity shall be reviewed as a part of the facility's quality assurance program described in §117.41 of this title (relating to Quality Assurance for Patient Care). The record shall include trends, corrective actions, and improvement actions taken.

(3) Smoking policy. The facility shall establish, implement, and enforce a smoking policy.

(b) Environmental infection control.

(1) General procedures.

(A) A facility shall provide and actively monitor a sanitary environment which minimizes or prevents transmission of infectious diseases.

(i) The facility shall provide a janitor's closet with space for cleaning supplies and equipment.

(ii) Wall bases in patient treatment and other areas which are frequently subject to wet cleaning methods shall be tightly sealed to the floor and the wall, impervious to water and constructed without voids that can harbor insects.

(iii) Floor materials shall be easily cleanable and have wear resistance appropriate for the location involved. In all areas subject to wet cleaning methods, floor materials shall not be physically affected by germicidal and cleaning solutions.

(iv) Wall finishes shall be washable and, in the immediate areas of plumbing fixtures, smooth and moisture resistant.

(v) Floor and wall penetrations by pipes, ducts, and conduits shall be tightly sealed to minimize entry of rodents and insects. Joints of structural elements shall be similarly sealed.

(vi) All exposed ceilings and ceiling structures in areas normally occupied by patients, staff, and visitors shall be finished so as to be cleanable with equipment used in daily housekeeping activities. Ceiling tiles stained with blood shall be cleaned or replaced.

(vii) Ceiling fans shall not be utilized in patient treatment areas.

(B) Blood spills shall be cleaned immediately or as soon as is practical with a disposable cloth and an appropriate chemical disinfectant.

(i) The surface should be subjected to intermediate level disinfection in accordance with the manufacturer's instructions, if a commercial liquid chemical disinfectant is used.

(ii) If a solution of chlorine bleach (sodium hypochlorite) is used, the solution shall be at least 1:100 sodium hypochlorite and the surface to be treated must be compatible with this type of chemical treatment.

(2) Specific procedures for equipment and dialysis machines.

(A) Routine disinfection of active and backup dialysis machines shall be performed according to facility defined protocol, accomplishing at least intermediate level disinfection and the disinfectant removed.

(B) Between patient shifts, facility staff shall clean machine exteriors, treatment chairs, tourniquets, and hemostats. Blood pressure cuffs which become contaminated with blood shall be removed from service, disinfected, and allowed to dry prior to being returned to use.

(c) Medical waste and liquid/sewage waste management.

(1) The facility shall comply with the requirements set forth by the department in §§1.131-1.137 of this title (relating to Definition, Treatment and Disposition of Special Waste from Health Care Related Facilities) and the Texas Commission on Environmental Quality's requirements in Title 30, Texas Administrative Code, §330.1004 (Generators of Medical Waste).

(2) All sewage and liquid wastes shall be disposed of in a municipal sewerage system or a septic tank system permitted by the Texas Commission on Environmental Quality in accordance with Title 30, Texas Administrative Code, Chapter 285 (On-site Sewage Facilities).

(d) Hepatitis B prevention.

(1) Prevention requirements concerning staff. The facility shall offer hepatitis B vaccination to previously unvaccinated, susceptible new staff members in accordance with 29 Code of Federal Regulations, §1910.1030(f)(1)-(2) (concerning Bloodborne Pathogens). Staff vaccination records shall be maintained in each staff member's health record.

(2) Prevention requirements concerning patients.

(A) Hepatitis B vaccination.

(i) With the advice and consent of a patient's attending nephrologist, facility staff shall make the hepatitis B vaccine available to a patient who is susceptible to hepatitis B, provided that the patient has coverage or is willing to pay for vaccination.

(ii) The facility shall make available to patients literature describing the risks and benefits of the hepatitis B vaccination.

(B) Serologic screening of patients.

(i) A patient new to dialysis or returning to a facility after extended hospitalization or absence of 30 calendar days or longer shall have been screened for HBsAg within one month before or at the time of admission to the facility or have a known anti-HBs status of at least 10 milli-international units per milliliter no more than 12 months prior to admission. The facility shall document how this screening requirement is met.

(ii) Repeated serologic screening shall be based on the antigen or antibody status of the patient.

(I) Monthly screening for HBsAg is required for patients whose previous test results are negative for HBsAg.

(II) Screening of HBsAg-positive or anti-HBs-positive patients may be performed on a less frequent basis, provided that the facility's policy on this subject remains congruent with Appendices i and ii of the National Surveillance of Dialysis Associated Disease in the United States, 1993, published by the United States Department of Health and Human Services.

(C) Isolation procedures for the HBsAg-positive patient.

(i) The facility shall treat patients positive for HBsAg in a segregated treatment area which includes a handwashing sink, a work area, patient care supplies and equipment, and sufficient space to prevent cross-contamination to other patients.

(ii) A patient who tests positive for HBsAg shall be dialyzed on equipment reserved and maintained for the HBsAg-positive patient's use only.

(iii) When a caregiver is assigned to both HBsAg-negative and HBsAg-positive patients, the HBsAg-negative patients assigned to this grouping must be Hepatitis B antibody positive. Hepatitis B antibody positive patients are to be seated at the treatment stations nearest the isolation station and be assigned to the same staff member who is caring for the HBsAg+ patient.

(iv) If an HBsAg-positive patient is discharged, the equipment which had been reserved for that patient shall be given intermediate level disinfection prior to use for a patient testing negative for HBsAg.

(v) In the case of patients new to dialysis or a patient returning to a facility after extended hospitalization or absence of 30 calendar days or longer, if these patients are admitted for treatment before results of HBsAg or anti-HBs testing are known, these patients shall undergo treatment as if the HBsAg test results were potentially positive, except that they shall not be treated in the HBsAg isolation room, area, or machine.

(I) The facility shall treat potentially HBsAg-positive patients in a location in the treatment area which is outside of traffic patterns and may not reuse the dialyzer until the HBsAg test results are known.

(II) The dialysis machine used by this patient shall be given intermediate level disinfection prior to its use by another patient.

(III) The facility shall obtain HBsAg status results of the patient no later than three days from admission.

(e) Tuberculosis prevention.

(1) Prevention requirements concerning staff.

(A) Facility staff shall be screened for tuberculosis upon employment or receiving privileges as a member of the medical staff and prior to patient contact.

(B) Subsequent screening of facility staff shall be performed after any potential exposure to laryngeal or pulmonary tuberculosis.

(C) Respiratory isolation procedures and precautions developed by the facility shall be employed by facility staff providing treatment to patients with pulmonary tuberculosis.

(2) Prevention requirements concerning patients.

(A) If the facility treats active pulmonary tuberculosis patients, a separate room with an isolated air handling system shall be utilized for these patients.

(B) The facility shall screen patients for tuberculosis when indicated by the presence of risk factors for, or the signs and symptoms of tuberculosis. Screening shall be performed after potential exposure to active laryngeal or pulmonary tuberculosis.

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 August 18, 2003.

TRD-200305328
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: September 7, 2003
Proposal publication date: March 14, 2003
For further information, please call: (512) 458-7236

♦ ♦ ♦

SUBCHAPTER D. MINIMUM STANDARDS FOR PATIENT CARE AND TREATMENT

25 TAC §§117.41 - 117.46

The amendments are adopted under Health and Safety Code (HSC), Chapter 251, Texas End Stage Renal Disease (ESRD) Facility Licensing Act, which provides the Board of Health (board) with the authority to adopt rules governing the licensing and regulation of ESRDs; and HSC §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 commissioner of health. The review of these rules implements Government Code, §2001.039.

§117.43. Provision and Coordination of Treatment and Services.

(a) Patient rights. Each facility shall adopt, implement, and enforce policies and procedures appropriate to the patient population served which ensure each patient is:

(1) treated with respect, dignity, and full recognition of the patient's individuality and personal needs;

(2) provided privacy and confidentiality, for the patient and the clinical record;

(3) provided a safe and comfortable treatment environment;

(4) provided information in a manner to facilitate understanding by the patient and the patient's legal representative, family or significant other. Written patient information materials shall be available, with materials in languages other than English if the census of the facility includes more than four patients who read that primary language. In lieu of written materials in the patient's primary language, an interpreter may be provided if documentation and patient interview support that information sufficient to allow the patient to participate in the treatment has been communicated;

(5) informed by a physician of the patient's medical status;

(6) informed of all treatment modalities and settings for the treatment of end stage renal disease;

(7) informed about and participates in, if desired, all aspects of care, including the right to refuse treatment, and informed of the medical consequences of such refusal;

(8) aware of all services available in the facility and the charges for services provided;

(9) informed about the facility's reuse of dialysis supplies, including hemodialyzers. If printed materials such as brochures are used to describe a facility and its services, the brochures shall contain a statement with respect to reuse;

(10) assured of a reasonable response by the facility to the patient's requests and needs for treatment or service, within the facility's capacity, the facility's stated mission, and applicable law and regulation;

(11) provided hours of dialysis that are scheduled for patient convenience whenever feasible or possible. Consideration shall be given to a patient's work or school schedule;

(12) transferred or discharged only for medical reasons, for the patient's welfare or that of other patients or staff members, or for nonpayment of fees. A patient shall be given 30 calendar days advance notice to ensure orderly transfer or discharge, except in cases where the patient presents an immediate risk to others;

(13) a facility shall establish, implement and enforce a policy whereby a disruptive patient or family member or non-compliant patient is given an opportunity and assistance to improve the problematic behavior prior to dismissal from the facility. The policy will include requirements at §117.43(b)(7);

(14) provided protection from abuse, neglect, or exploitation as those terms are defined in §1.204 of this title (relating to Abuse, Neglect, and Exploitation Defined);

(15) provided information regarding advance directives and allowed to formulate such directives to the extent permitted by law. This includes documents executed under the Natural Death Act, Health and Safety Code, Chapter 672; Civil Practice and Remedies Code, Chapter 135 concerning durable power of attorney for health care; and Health and Safety Code, Chapter 674 concerning out-of-hospital do-not-resuscitate;

(16) aware of the mechanisms and agencies to express a complaint against the facility without fear of reprisal or denial of services. A facility shall provide to each individual who is admitted to the facility a written statement that informs the individual that a complaint against the facility may be directed to the department. The statement shall be provided at the time of admission and shall advise the patient that registration of complaints may be filed with the director, Health Facility Licensing and Compliance Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199, 1-888-973-0022. Correctional institutions shall not be required to include the

1-888 number in information provided to patients in these facilities; and

(17) fully informed of the rights listed in this subsection, the responsibilities established by the facility, and all rules and regulations governing patient conduct and responsibilities. A written copy of the patient's rights and responsibilities shall be provided to each patient or the patient's legal representative upon admission and a copy shall be posted with the facility license certificate.

(b) Patient care plan.

(1) A facility shall establish, implement, and enforce a policy whereby patient services are coordinated using an interdisciplinary team approach. The interdisciplinary team shall consist of the patient's primary dialysis physician, registered nurse, social worker, and dietitian.

(2) The interdisciplinary team shall engage in an interactive conference in order to develop a written, individualized, comprehensive patient care plan that specifies the services necessary to address the patient's medical, psychological, social, and functional needs, and includes treatment goals.

(3) The patient care plan shall include evidence of coordination with other service providers (e.g. hospitals, long term care facilities, home and community support services agencies, or transportation providers) as needed to assure the provision of safe care.

(4) The patient care plan shall include evidence of the patient's (or patient's legal representative's) input and participation, unless they refuse to participate. At a minimum, the patient care plan shall demonstrate that the content was discussed with the patient or the patient's legal representative by a member of the interdisciplinary team.

(5) The patient care plan shall be developed within 30 days from the patient's admission to the facility and updated as indicated by any change in the patient's medical, nutritional, or psychosocial condition, or at least every six months. Evidence of the review of the patient care plan with the patient and the interdisciplinary team to evaluate the patient's progress or lack of progress toward the goals of the care plan, and interventions taken when the goals are not achieved, shall be documented and included in the patient's clinical record.

(6) A team conference may be conducted via phone conferencing. A phone care plan conference conducted with the interdisciplinary team and the patient (or their legal representative) must be documented as a phone conference.

(7) In the case of disruptive patients or family members or patients who do not conform to the treatment plan, the facility will establish, implement and enforce a process for more intensive team intervention with this patient to include assessment of needs and planned interventions to assist the patient in adjusting to the requirements for safe care.

(c) Emergency preparedness.

(1) A facility shall implement written procedures which describe staff and patient actions to manage potential medical and non-medical emergencies, including but not limited to, fire, equipment failure, power outages, medical emergencies, and natural or other disasters which are likely to threaten the health or safety of facility patients, the staff, or the public.

(2) A facility shall have a functional plan to access the community emergency medical services.

(3) A facility shall have personnel qualified to operate emergency equipment and to provide emergency care to patients on-site and available during all treatment times. A charge nurse qualified to provide basic cardiopulmonary life support (BCLS) shall be on site and available to the treatment area whenever patients are present. All clinical staff members shall maintain current certification and competency in BCLS.

(4) A facility shall have a transfer agreement with one or more hospitals which provide acute dialysis service for the provision of inpatient care and other hospital services to the facility's patients. The facility shall have documentation from the hospital to the effect that patients from the facility will be accepted and treated in emergencies. There shall be reasonable assurances that:

(A) the transfer or referral of patients will be effected between the hospital and the facility whenever such transfer or referral is determined as medically appropriate by the attending physician, with timely acceptance and admission;

(B) the interchange of medical and other information necessary or useful in the care and treatment of the patient transferred will occur within one working day; and

(C) security and accountability will be assured for the transferred patient's personal effects.

(5) A facility shall establish, implement and enforce a written plan for the protection of patients in the event of a fire.

(A) An evacuation plan shall be developed and diagrams posted in conspicuous places.

(B) The facility shall provide approved fire extinguishing equipment adequate for the conditions involved. Every portable fire extinguisher maintained in the facility shall be installed and maintained in accordance with National Fire Protection Association 10, Standard for Portable Fire Extinguishers, 1994 Edition, and the National Fire Protection Association 101, Code for Safety to Life from Fire in Buildings and Structures, 1994 Edition, §26-3.5, published by the National Fire Protection Association, Post Office Box 9101, Batterymarch Park, Quincy, Massachussetts 02169, 1-800-344-3555. Fire extinguishers shall be refilled when necessary, kept in condition for instant use, and tagged or labeled to indicate the name, address, and telephone number of the person recharging the unit and the date of the last inspection. The hose, nozzle, gaskets, and all other parts shall be maintained in good repair at all times.

(C) The facility shall conduct fire drills at least every six months for each patient shift to include the use of alarms and equipment, and discussion with patients, visitors, employees and staff about the evacuation plan. Written reports shall be maintained to include evidence of staff and patient participation.

(D) All staff shall be familiar with the locations of fire-fighting equipment. Fire-fighting equipment shall be located so that a person shall not have to travel more than 75 feet from any point to reach the equipment.

(6) A written disaster preparedness plan for natural and other disasters specific to each facility shall be developed and in place. The plan shall be based on an assessment of the probability and type of disaster in each region and the local resources available to the facility. The plan shall be reviewed by the governing body at least annually. Contact shall be made annually with a local disaster management representative to assess the need to revise the plan and to ensure that local agencies are aware of the dialysis facility, its provision of life-saving treatment, and the patient population served. The plan shall include procedures designed to minimize harm to patients and staff along with ensuring safe facility operations. The plan and in-service programs for patients and staff shall include provisions or procedures for responsibility of direction and control, communications, alerting

and warning systems, evacuation, and closure. Each staff member employed by or under contract with the facility shall be able to demonstrate their role or responsibility to implement the facility's disaster preparedness plan.

(7) A facility shall have an emergency lighting system capable of providing sufficient illumination to allow safe discontinuation of treatments and safe evacuation from the building. Battery pack systems shall be maintained and tested quarterly. If a facility maintains a back-up generator, the generator must be installed, tested and maintained in accordance with the National Fire Protection Association 110, Standard for Emergency and Standby Power Systems, 1993 Edition (NFPA 110), published by the National Fire Protection Association.

(8) A facility shall develop and post a telephone number listing specific to the facility equipment and locale to assist staff in contacting mechanical and technical support in the event of an emergency.

(d) Medication storage and administration.

(1) Pharmaceutical services shall be provided in accordance with accepted professional principles and federal and state laws and regulations.

(2) Medications shall be administered only if such medication is ordered by the patient's physician.

(3) All verbal or telephone orders shall be received by a licensed nurse or physician assistant. Orders relating to a specific service (e.g. dietary services), may be received by the licensed professional responsible for providing the service (e.g. dietitian) and countersigned by the physician within 15 calendar days.

(4) Medications maintained in the facility shall be properly stored and safeguarded in enclosures of sufficient size which are not accessible to unauthorized persons. Refrigerators used for storage of medications shall maintain appropriate temperatures for such storage.

(5) A facility shall maintain an emergency stock of medications, as specified by the medical director, to treat the emergency needs of patients.

(6) Medications shall not be prepared for administration in the patient's immediate treatment area. The medication preparation area shall be located in such a manner as to prevent contamination of medicines being prepared for administration and shall include a work counter and a sink.

(7) Multi-dose vials shall not be taken to a patient station. Protocols approved by the Centers for Disease Control must be used in those cases where single-use vials are entered more than once.

(8) Medications not given immediately shall be labeled with the patient's name, the name of the medication, the dosage prepared, and the initials of the person preparing the medication. All medications shall be administered by the individual who prepares them.

(9) All medications shall be administered by licensed nurses, physician assistants, or physicians except that intravenous normal saline, intravenous heparin, subcutaneous lidocaine, and oxygen may be administered as part of a routine hemodialysis treatment by dialysis technicians qualified according to §117.62(b) and (f) of this title (relating to Training Curricula and Instructors) and §117.63(b), (c) and (e) of this title (relating to Competency Evaluation). Such administration by dialysis technicians shall be in compliance with Chapter 157 of the Texas Occupations Code concerning the delegation of medical acts by a licensed physician in the State of Texas.

(e) Nursing services.

(1) Nursing services to prevent or reduce complications and to maximize the patient's functional status shall be provided to a patient and the patient's family or significant other.

(2) A full-time supervising nurse shall be employed to manage the provision of patient care.

(3) A registered nurse shall be responsible for:

(A) conducting admission nursing assessments;

(B) conducting assessments of a patient when indicated by a question relating to a change in the patient's status or at the patient's request;

(C) participating in team review of a patient's progress;

(D) recommending changes in treatment based on the patient's current needs;

(E) facilitating communication between the patient, patient's family or significant other, and other team members to ensure needed care is delivered;

(F) providing oversight and direction to dialysis technicians and licensed vocational nurses; and

(G) participating in continuous quality improvement activities.

(4) A nurse or nurses functioning in the charge role shall be on site and available to the treatment area to provide patient care during all dialysis treatments.

(5) At least one licensed nurse shall be available on-site to provide patient care for every twelve patients or portion thereof. This may include the nurse(s) functioning in the charge role required by paragraph (4) of this subsection.

(6) If pediatric dialysis is provided, a registered nurse with experience or training in pediatric dialysis shall be available to provide care for pediatric dialysis patients smaller than 35 kilograms in weight.

(7) Sufficient direct care staff shall be on-site to meet the needs of the patients.

(A) The staffing level for a facility shall not exceed four patients per licensed nurse or patient care technician per patient shift. During treatment of eight or more patients, one of the licensed nurses qualified to function in the charge role shall not be included in this ratio.

(B) For pediatric dialysis patients, one licensed nurse shall be provided on-site for each patient weighing less than ten kilograms and one licensed nurse provided on- site for every two patients weighing from ten to 20 kilograms.

(8) A facility shall provide a nursing station(s) to allow adequate visual monitoring of patients by nursing staff during treatment.

(9) A licensed nurse or dialysis technician shall collect and document objective and subjective data for each patient before and after treatment according to facility policy and the staff member's level of training. Written protocols may identify parameters which would require a patient be referred to a nurse for evaluation. A registered nurse shall conduct a patient assessment when indicated by a question relating to a change in the patient's status or at the patient's request.

(10) The initial patient evaluation shall be initiated by a licensed nurse qualified to function in the charge role or a registered nurse at the time of the first treatment in the facility and completed by a registered nurse within the first three treatments.

(f) Licensed vocational nurses. This chapter does not preclude a licensed vocational nurse (LVN) from practicing in accordance with

the rules adopted by the Texas Board of Vocational Nurse Examiners. If the LVN is acting in the capacity of a dialysis technician, the facility shall determine that the LVN has passed a training and competency evaluation curriculum which meets the requirements in §117.62 of this title (relating to Training Curricula) and §117.63 of this title (relating to Competency Evaluation).

(g) Dialysis technicians. A dialysis technician providing direct patient care shall demonstrate knowledge and competency for the responsibilities specified in §117.62 of this title and §117.63 of this title.

(h) Nutrition services.

(1) Nutrition services shall be provided to a patient and the patient's caregiver(s) in order to maximize the patient's nutritional status.

(2) The dietitian shall be responsible for:

(A) conducting a nutrition assessment of a patient;

(B) participating in a team review of a patient's progress;

(C) recommending therapeutic diets in consideration of cultural preferences and changes in treatment based on the patient's nutritional needs in consultation with the patient's physician;

(D) counseling a patient, a patient's family, and a patient's significant other on prescribed diets and monitoring adherence and response to diet therapy. Correctional institutions shall not be required to provide counseling to family members or significant others;

(E) referring a patient for assistance with nutrition resources such as financial assistance, community resources or in-home assistance;

(F) participating in continuous quality improvement activities; and

(G) providing ongoing monitoring of subjective and objective data to determine the need for timely intervention and follow-up. Measurement criteria include but are not limited to weight changes, blood chemistries, adequacy of dialysis, and medication changes which affect nutrition status and potentially cause adverse nutrient interactions.

(3) The collection of objective and subjective data to assess nutrition status shall occur within two weeks or seven treatments from admission to the facility, whichever occurs later. A comprehensive nutrition assessment with an educational component shall be completed within 30 days or 13 treatments from admission to the facility, whichever occurs later.

(4) A nutrition reassessment shall be conducted annually or more often if indicated.

(5) Each facility shall employ or contract with a dietitian(s) to provide clinical nutrition services for each patient. One full-time equivalent of dietitian time shall be available for up to 100 patients with the maximum patient load per full-time equivalent of dietitian time being 125 patients.

(6) Nutrition services shall be available at the facility during scheduled treatment times. Access to services may require an appointment.

(i) Social services.

(1) Social services shall be provided to patients and their families and shall be directed at supporting and maximizing the adjustment, social functioning, and rehabilitation of the patient.

(2) The social worker shall be responsible for:

(A) conducting psychosocial evaluations;

(B) participating in team review of patient progress;

(C) recommending changes in treatment based on the patient's current psychosocial needs;

(D) providing case work and group work services to patients and their families in dealing with the special problems associated with end stage renal disease;

(E) except in the case of social workers providing service in correctional institutions, identifying community social agencies and other resources and assisting patients and families to utilize them; and

(F) participating in continuous quality improvement activities.

(3) Initial contact between the social worker and the patient shall occur and be documented within two weeks or seven treatments from the patient's admission, whichever occurs later. A comprehensive psychosocial assessment shall be completed within 30 days or 13 treatments from the patient's admission, whichever occurs later.

(4) A psychosocial reassessment shall be conducted annually or more often if indicated.

(5) Each facility shall employ or contract with a social worker(s) to meet the psychosocial needs of the patients. One full-time equivalent of qualified social worker time shall be available for each 100 patients. If the facility provides additional staff who perform supportive services (e.g. assistance with financial services/ transportation), the maximum patient load per full-time equivalent of qualified social worker time may be 125 patients.

(6) Social services shall be available at the facility during the times of patient treatment. Access to social services may require an appointment.

(j) Medical services.

(1) Medical director. The medical director is responsible for:

(A) developing facility treatment goals which are based on review of aggregate data assessed through quality management activities;

(B) assuring adequate training of licensed nurses and dialysis technicians;

(C) adequate monitoring of patients and the dialysis process; and

(D) developing and implementing all policies required by this chapter.

(2) Medical staff.

(A) Each patient shall be under the care of a physician on the medical staff.

(B) The care of a pediatric dialysis patient shall be in accordance with this subparagraph. If a pediatric nephrologist is not available as the primary physician, an adult nephrologist may serve as the primary physician with direct patient evaluation by a pediatric nephrologist according to the following schedule:

(i) for patients two years of age or younger - monthly (two of three evaluations may be by phone);

(ii) for patients three to 12 years of age - quarterly; and

(iii) for patients 13 to 18 years of age--semiannually.

(C) At a minimum, each patient receiving dialysis in the facility shall be seen by a physician on the medical staff once every two weeks during the patient's treatment time. Home patients shall be seen by a physician at least every three months. The record of these contacts shall include evidence of assessment for new and recurrent problems and review of dialysis adequacy, monthly for in-facility patients and quarterly for home patients.

(D) A physician on the medical staff shall be on call and available 24 hours a day (in person or by telecommunication) to patients and staff.

(E) Orders for treatment shall be in writing and signed by the prescribing physician. Routine orders for treatment shall be updated at least annually.

(i) Orders for hemodialysis treatment shall include length of treatment, dialyzer, blood flow rate, dialysate composition, target weight, medications including heparin, and, as needed, specific infection control measures.

(ii) Orders for peritoneal dialysis treatment shall include fill volume(s), number of exchanges, dialysate concentrations, catheter care, medications, and, as needed, specific infection control measures.

(F) If advanced practice nurses or physician assistants are utilized:

(i) there shall be evidence of communication with the treating physician whenever the advanced practice nurse or physician assistant changes treatment orders;

(ii) the advanced practice nurse or physician assistant may not replace the physician in participating in patient care planning or in quality management activities; and

(iii) the treating physician shall be notified and direct the care of patient medical emergencies.

(k) Home dialysis (self dialysis).

(1) If a facility provides self dialysis training, a registered nurse with at least 12 months clinical experience and six months experience in home dialysis shall be responsible for training the patient or family. When other personnel assist in the training, supervision by the registered nurse shall be demonstrated.

(2) For a patient who performs self dialysis at home, the following services shall be provided:

(A) a yearly physical examination;

(B) monthly contact from facility staff by telephone calls or clinic visits;

(C) a clinic visit at least every three months;

(D) communication with the appropriate interdisciplinary team member(s);

(E) routine laboratory work according to facility policy;

(F) a mechanism to contact staff at any time in the event of an emergent need; and

(G) surveillance of the patient's home adaptation, including provisions for visits to the home.

(3) The facility shall provide directly or under arrangement the following services.

(A) For hemodialysis, the required services are:

(i) consultation for the patient with a registered nurse, social worker and a dietitian;

(ii) a record keeping system which assures continuity of care;

(iii) installation and maintenance of equipment;

(iv) testing and appropriate treating of the water used for dialysis; and

(v) ordering of supplies on an ongoing basis.

(B) For continuous ambulatory peritoneal dialysis, the required services are:

(i) consultation for the patient with a registered nurse, a social worker and a dietitian;

(ii) a record keeping system which assures continuity of care; and

(iii) ordering of supplies on an ongoing basis.

(C) For continuous cycling peritoneal dialysis, the required services are:

(i) consultation for the patient with a registered nurse, a social worker and a dietitian;

(ii) a record keeping system which assures continuity of care;

(iii) installation and maintenance of equipment; and

(iv) ordering of supplies on an ongoing basis.

(l) Temporary and transient admissions.

(1) Temporary admissions. If a facility dialyzes a patient who is normally dialyzed in another local facility, the referring and receiving facilities shall meet the requirements in this paragraph.

(A) The individual to be treated by the receiving facility must be a patient of a physician who is a member of the medical staffs of the referring and receiving facilities.

(B) The referring and receiving facilities shall establish, implement, and enforce written policies and procedures for communication of medical information and transfer of clinical records between facilities.

(C) The receiving facility shall continuously evaluate staffing levels and utilize this information in determining whether to accept a temporary admission for treatment.

(D) The receiving facility shall obtain the information described in §117.45(e) of this title (relating to Clinical Records) prior to providing dialysis. However, if the referring facility is closed when the patient's need for dialysis treatment is identified, the receiving facility may provide dialysis with, at a minimum, the following information:

(i) orders for treatment;

(ii) hepatitis B status;

(iii) medical justification by the physician ordering treatment that the patient's need for dialysis outweighs the need for the additional clinical information set out in §117.45(e) of this title.

(E) In the event a temporary patient's hepatitis status is unknown, the patient may undergo treatment as if the HBsAg test results were potentially positive, except that such a patient shall not be treated in the HBsAg isolation room, area, or machine.

(2) Transient admissions. If a facility dialyzes a patient who is normally dialyzed in a distant facility, the facility shall meet the requirements in this paragraph.

(A) The facility shall continuously evaluate staffing levels and utilize this information in determining whether to accept a transient patient for treatment.

(B) The facility shall obtain the information described in §117.45(e) of this title (relating to Clinical Records) prior to providing dialysis. However, if the transient patient arrives unannounced, the facility may provide dialysis with, at a minimum, the following information:

(i) evidence of evaluation of the patient by a physician on the staff of the facility;

(ii) orders for treatment;

(iii) hepatitis B status;

(iv) medical justification by the physician ordering treatment that the patient's need for dialysis outweighs the need for the additional clinical information set out in §117.45(e) of this title.

(C) In the event a transient patient's hepatitis status is unknown, the patient may undergo treatment as if the HBsAg test results were potentially positive, except that such a patient shall not be treated in the HBsAg isolation room, area, or machine.

(m) Laboratory services. A facility that provides laboratory services shall comply with the requirements of Federal Public Law 100-578, Clinical Laboratory Improvement Amendments of 1988 (CLIA 1988). CLIA 1988 applies to all facilities that examine human specimens for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings.

(n) Illegal remuneration prohibited. A facility shall not violate the Health and Safety Code, §161.191, et seq. concerning the prohibition on illegal remuneration for the purpose of securing or soliciting patients or patronage.

(o) Do-not-resuscitate orders. The facility shall comply with the Health and Safety Code, Chapter 674 concerning out-of-hospital do-not-resuscitate orders.

(p) Audits of billing. A facility shall develop, implement, and enforce a compliance policy for monitoring its receipt and expenditure of state or federal funds.

(q) Student health care professionals. If the facility has a contract or agreement with an accredited school of health care to use their facility for a portion of the students' clinical experience, those students may provide care under the following conditions.

(1) Students may be used in facilities, provided the instructor gives class supervision and assumes responsibility for all student activities occurring within the facility. If the student is licensed (e.g., a licensed vocational nurse attending a registered nurse program for licensure as a registered nurse) the facility shall ensure that the administration of any medication(s) is within the student's licensed scope of practice.

(2) A student may administer medications only if:

(A) on assignment as a student of his or her school of health care; and

(B) the instructor is on the premises and immediately supervises the administration of medication by an unlicensed student and the administration of such medication is within the instructor's licensed scope of practice.

(3) Students shall not be used to fulfill the requirement for administration of medications by licensed personnel.

(4) Students shall not be considered when determining staffing levels required by the facility.

(r) Complaint resolution. A facility shall adopt, implement, and enforce procedures for the resolution of complaints relevant to quality of care or services rendered by licensed health care professionals and other members of the facility staff, including contract services or staff. The facility shall document the receipt and the disposition of the complaint. The investigation and documentation must be completed within 30 calendar days after the facility receives the complaint, unless the facility has and documents reasonable cause for a delay.

§117.46. Reports to the Director.

(a) A facility shall report the following occurrence(s) to the department within ten working days of the occurrence(s):

(1) an accident or incident resulting in the death of a patient; or

(2) conversion of staff or a patient to HbsAg positive.

(b) An occurrence listed in subsection (a) of this section shall be reported to the Director, Health Facility Licensing and Compliance Division, 1100 West 49th Street, Austin, Texas, 78756-3199, telephone number 512-834-6646, fax number 512-834-4514. The report to the director shall be on a form provided by the department and include the information requested on the form. The facility may reproduce the form as needed to maintain an adequate supply.

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 August 18, 2003.

TRD-200305329
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: September 7, 2003
Proposal publication date: March 14, 2003
For further information, please call: (512) 458-7236

♦ ♦ ♦

SUBCHAPTER E. DIALYSIS TECHNICIANS

25 TAC §§117.61 - 117.65

The amendments are adopted under Health and Safety Code (HSC), Chapter 251, Texas End Stage Renal Disease (ESRD) Facility Licensing Act, which provides the Board of Health (board) with the authority to adopt rules governing the licensing and regulation of ESRDs; and HSC §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 commissioner of health. The review of these rules implements Government Code, §2001.039.

§117.62. Training Curricula and Instructors.

(a) Specific objectives for training curricula. Each training program for dialysis technicians shall develop a written curriculum with objectives specified for each section.

(b) Components of training curricula. The training curricula for dialysis technicians shall include the following minimum components:

(1) introduction to dialytic therapies to include history and major issues as follows:

(A) history of dialysis;

(B) definitions and terminology;

(C) communication skills;

(D) ethics and confidentiality;

(E) multidisciplinary process;

(F) roles of other team members; and

(G) information about renal organizations and resources;

(2) principles of hemodialysis to include:

(A) principles of dialysis;

(B) access to the circulatory system; and

(C) anticoagulation, local anesthetics, and normal saline;

(3) understanding the individual with kidney failure to include:

(A) basic renal anatomy, physiology, and pathophysiology;

(B) the effect of renal failure on other body systems;

(C) symptoms and findings related to the uremic state;

(D) modes of renal replacement therapy, including transplantation;

(E) basic renal nutrition;

(F) basic psychosocial aspects of end stage renal disease (ESRD);

(G) medications commonly administered to patients with ESRD;

(H) confidentiality of patient personal and clinical records;

(I) professional conduct;

(J) patient rights and responsibilities; and

(K) rehabilitation;

(4) dialysis procedures to include:

(A) using aseptic technique;

(B) technical aspects of dialysis, operation and monitoring of equipment, initiation and termination of dialysis;

(C) delivering an adequate dialysis treatment and factors which may result in inadequate treatment;

(D) observing and reporting patient reactions to treatment;

(E) glucose monitoring and hemoglobin/hematocrit monitoring;

(F) emergency procedures and responses such as cardiopulmonary resuscitation, air embolism management, and response to line separation and hemolysis;

(G) external and internal disasters, fire, natural disasters, and emergency preparedness; and

(H) safety, quality control, and continuous quality improvement;

(5) hemodialysis devices to include:

(A) theory and practice of conventional, high efficiency, and high flux dialysis;

(B) dialysate composition, options, indications, complications, and safety;

(C) monitoring and safety; and

(D) disinfection of equipment;

(6) water treatment to include:

(A) standards for water treatment used for dialysis as described in the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition, published by the American Association for the Advancement of Medical Instrumentation (AAMI), 1110 North Glebe Road, Suite 220, Arlington, Virginia 22201;

(B) systems and devices;

(C) monitoring; and

(D) risks to patients of unsafe water;

(7) reprocessing, if the facility practices reuse, to include:

(A) principles of reuse;

(B) safety, quality control, universal precautions, and water treatment; and

(C) standards for reuse as described in the American National Standard, Reuse of Hemodialyzers, 1993 Edition, published by the AAMI;

(8) patient teaching to include:

(A) the role of the technician in supporting patient education goals; and

(B) adult education principles;

(9) infection control and safety to include:

(A) risks to patients of nosocomial infections, accidents, and errors in treatment;

(B) universal precautions, aseptic technique, sterile technique, and specimen handling;

(C) basic bacteriology and epidemiology;

(D) risks to employees of blood and chemical exposure; and

(E) electrical, fire, disaster, environmental safety, and hazardous substances; and

(10) quality assurance and continuous quality improvement (QA/CQI) to include:

(A) role of the technician in quality assurance activities;

(B) principles of QA/CQI; and

(C) the importance of ongoing quality control activities in assuring safe dialysis treatments are provided to patients.

(c) Additional responsibilities.

(1) If a dialysis technician is to assist with training or treatment of peritoneal dialysis patients, the following content must also be included:

(A) principles of peritoneal dialysis;

(B) sterile technique;

(C) peritoneal dialysis delivery systems;

(D) symptoms of peritonitis; and

(E) other complications of peritoneal dialysis.

(2) If a dialysis technician, other than a licensed vocational nurse (LVN), is to cannulate access or administer normal saline, heparin, or lidocaine, the following content must be included:

(A) access to the circulation to include:

(i) fistula: creation, development, needle placement, and prevention of complications;

(ii) grafts: materials used, creation, needle placement, and prevention of complications; and

(iii) symptoms to report;

(B) safe administration of medications to include:

(i) identifying the right patient;

(ii) assuring the right medication;

(iii) measuring the right dose;

(iv) ascertaining the right route; and

(v) checking the right time for administration;

(C) administration of normal saline to include:

(i) reasons for administration;

(ii) potential complications;

(iii) administration limits; and

(iv) information to report and record;

(D) administration of heparin to include:

(i) reasons for administration;

(ii) methods of administration;

(iii) preparation of ordered dose;

(iv) potential complications; and

(v) information to report and record; and

(E) administration of lidocaine to include:

(i) reasons for administration;

(ii) method of administration;

(iii) preparation of ordered dose;

(iv) potential complications and risks; and

(v) information to report and record.

(F) administration of oxygen to include:

(i) reasons for administration;

(ii) method of administration;

(iii) delivery of the ordered flow rate;

(iv) potential complications and risks; and

(v) information to report and record.

(d) Roster. A roster of attendance for each training class shall be maintained by the instructor.

(e) Trainee evaluation. Each trainee shall be evaluated on a weekly basis during the training program to ascertain the trainee's progress.

(f) Written examination. The dialysis technician trainee shall complete a written examination. The examination shall encompass the content required in subsection (b) of this section. If the dialysis technician trainee will cannulate access and administer medications, the examination shall encompass the content described in subsection (c) of this section. A score of 80% is required on the written examination(s) covering the required content prior to the dialysis technician trainee's release from orientation. Other than the first examination for a specific responsibility in a facility, current certification as a dialysis technician by a nationally recognized testing organization may be substituted for the written examination.

(g) Instructors. An instructor for the course to train an individual as a dialysis technician shall be:

(1) a physician who qualifies as a medical director;

(2) a registered nurse with at least 12 months of experience in hemodialysis obtained within the last 24 months and a current competency skills checklist on file in the facility or a registered nurse instructor of a dialysis technician training course of an accredited college or university;

(3) a qualified dietitian or social worker providing training only within the person's area of expertise; or

(4) a technician with at least 12 months experience, qualified by training and experience in water treatment, dialysate preparation, reprocessing or other technical aspects of dialysis providing training within their area of expertise.

(h) Preceptors. Licensed nurses and patient care technicians who have at least one year of experience in hemodialysis and a current competency skills checklist on file in the facility may assist in didactic sessions and serve as preceptors.

(i) Length of training. For persons with no previous experience in direct patient care, a minimum of 80 clock hours of classroom education and 200 clock hours of directly supervised clinical training shall be required. Training programs for dialysis technician trainees who have previous direct patient care experience may be shortened if competency with the required knowledge and skills is demonstrated, but may not be less than a total of 80 clock hours of combined classroom education and clinical training.

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 August 18, 2003.

TRD-200305330

Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: September 7, 2003
Proposal publication date: March 14, 2003
For further information, please call: (512) 458-7236

♦ ♦ ♦

SUBCHAPTER F. CORRECTIVE ACTION PLAN AND ENFORCEMENT

25 TAC §§117.81 - 117.86

The amendments are adopted under Health and Safety Code (HSC), Chapter 251, Texas End Stage Renal Disease (ESRD) Facility Licensing Act, which provides the Board of Health (board) with the authority to adopt rules governing the licensing and regulation of ESRDs; and HSC §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 commissioner of health. The review of these rules 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 August 18, 2003.

TRD-200305331
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: September 7, 2003
Proposal publication date: March 14, 2003
For further information, please call: (512) 458-7236

♦ ♦ ♦

PART 2. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

CHAPTER 411. STATE AUTHORITY RESPONSIBILITIES

SUBCHAPTER N. STANDARDS FOR SERVICES TO INDIVIDUALS WITH CO-OCCURRING PSYCHIATRIC AND SUBSTANCE USE DISORDERS (COPSD)

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts new §§411.651-411.662 of Chapter 411, Subchapter N, concerning standards for services to individuals with co-occurring psychiatric and substance use disorders (COPSD). Sections §§411.653, 411.654, 411.658, and 411.660, are adopted with changes to the proposed text as published in the May 23, 2003, issue of the *Texas Register* (28 TexReg 4059-4061). Sections 411.651-411.652, 411.655-411.657, 411.659, and 411.661-411.662 are adopted without changes.

In §411.653, the definition of "access" has been revised to delete the reference to outcomes described in §411.659 because outcomes are not described in §411.659. In the same section, the definition of "co-occurring psychiatric and substance use disorders (COPSD)" has been revised to use the term "psychiatric disorder" rather than "mental illness." The definition of "psychiatric disorder" in §411.653 has been revised on adoption to reference the definition of "mental illness" in the TDMHMR strategic plan. Language is clarified in §411.654 to reflect responsibilities of staff with respect to provision of services to individuals with COPSD. Section 411.658 is revised on adoption to delete subsection (a) and to revise subsection (b) to address the intent of subsection (a). In the same section, subsection (c) is redesignated (b) and language is added that requires entities to ensure that the required competencies described in subsection (a) are demonstrated by staff providing services to individuals with COPSD within 90 days of the effective date of the subchapter. Section 411.660(b)(1) has been revised to add the words "attempt to" with reference to the provider's efforts to involve a family member in treatment planning at request of an individual. Section 411.660(c)(1) has been revised to delete specific timeframes for treatment plan review and to instead indicate that treatment plan review should occur according to TDMHMR-established timeframes.

Public comments on the proposal were received from Sandy Skelton, Executive Director, Texas Council of Community MHMR Centers, Inc., Austin; Arturo Hernandez, Austin-Travis County MHMR, Austin; Pam Gionfriddo, Mental Health Association, Austin; Monica Thyssen, Advocacy, Inc., Austin; and Sam Miller, Lubbock Regional MHMR, Lubbock.

A commenter requested information about arrangements between TDMHMR and the Texas Commission on Alcoholism and Drug Abuse (TCADA) to integrate funding streams to provide for screening, assessments, and treatment services at the local mental health authorities (LMHAs). The department responds that TDMHMR and TCADA have blended funds for specialized services for persons with COPSD since 1996. These funds have been awarded to successful applicants through a request for proposal (RFP) process to purchase specialized adjunct services that address both psychiatric and substance use disorders through intense case management and specific engagement strategies to assist eligible consumers in benefiting from treatment. Non-awarded LMHAs have also served individuals with COPSD (approximately 25% of the TDMHMR adult consumers served in FY02) without the attention to co-occurring disorders that awarded applicants provided. The subchapter seeks to improve outcomes for this population by establishing minimum competencies for staff and standards for assessing and providing services.

A commenter requested information about the funding methodology for services. Another commenter suggested that additional funding would be needed. The department responds that there is not a unique funding methodology for serving members of the TDMHMR priority population who have COPSD. The new subchapter does not impose requirements that are more difficult or more expensive to meet than existing standards. Rather, the subchapter clarifies minimum standards for serving members of the TDMHMR priority population who have COPSD, and it utilizes existing resources and the existing funding methodology.

Commenters asked several questions about training and staff competencies. One commenter requested that the Texas Council of Community MHMR Centers, Inc., through its Quality Management Consortium, Behavioral Health Consortium, and Children's Services Consortium, be provided the opportunity to review and comment on the training curriculum and mode of delivery prior to implementation. The department responds that interested parties are welcome to participate at any time during the development and revision of the curriculum for COPSD. The curriculum is regularly updated to reflect current research and practice. Interested parties may contact Dr. A. J. Ernst at TDMHMR.

A commenter asked if training would be available prior to implementation of the subchapter. The department responds that training opportunities on the competencies identified in the rules will be available prior to and during implementation of the new subchapter.

A commenter asked if LMHAs are expected to budget for staff training to comply with §411.658. The department responds that LMHAs already budget training for staff in areas that are determined by the LMHAs. Although this is an additional training expectation, the LMHAs and other entities identified in the rules will be given train-the-trainer opportunities by the department prior to and during implementation of the new subchapter.

A commenter asked if the interpersonal competencies are measurable. The department responds that interpersonal competencies are measurable and that the curriculum includes a post-test that measures the attendee's mastery of each competency.

A commenter requested that the department distinguish between the competencies needed by persons who screen, assess, and coordinate the development of plans of care, and the competencies needed by substance disorders providers. The department responds that the competencies listed in the new subchapter are minimum competencies for all staff designated to address COPSD with eligible consumers. The competencies do not address substance use disorders for persons with a single diagnosis of a substance use disorder. The required competencies may be met by compliance with the current licensure requirements of the governing or supervisory boards for the respective disciplines involved in serving individuals with COPSD (e.g., LPC, LMSW, LMFT) or by documentation regarding the attainment of the competencies described in the new subchapter.

A commenter noted that there is confusion about the use of the term "COPSD" as it relates to TCADA, Projects for Assistance in Transition from Homelessness (PATH), and TDMHMR. The department responds that "COPSD" is an acronym for "co-occurring psychiatric and substance use disorders." It refers to diagnoses, not specific services. Services to populations with COPSD diagnoses are determined by the funding source. The services currently purchased to serve individuals who have COPSD through TCADA contracts provide individual sessions from cross-trained staff with specific interventions to individuals who are non-responsive to substance abuse or mental health services. PATH purchases specialized outreach services to the homeless, mentally ill population. The new subchapter establishes minimum competencies and standards for assessing and providing services to individuals who have COPSD in a systems approach through mainstream services.

A commenter asked that the department's Office of Medicaid Administration be required to provide documentation assuring local mental health authorities (LMHAs) that Medicaid does not prohibit persons with COPSD from receiving Medicaid rehabilitation services. The department responds that the Office of Medicaid Administration has indicated that Medicaid does not prohibit persons with COPSD from receiving Medicaid rehabilitation services. The Texas Medicaid State Plan stipulates that mental health rehabilitative services are "medically necessary to reduce an individual's disability resulting from mental illness." Therefore, to be reimbursed through Medicaid rehabilitative services, documentation must indicate that the skills training addresses the mental illness. Services that address the substance abuse issues without relating those issues back to the mental illness are not reimbursable under Medicaid rehabilitative services.

A commenter suggested that department staff discuss with members of its Performance Contract Committee whether the department will include substance disorder treatments as part of the performance contract. The department responds that substance disorder treatments are not part of the performance contract. Persons who present for services with a single diagnosis of a substance use disorder do not meet eligibility for services as defined for an "individual" in the new subchapter and must be referred to an appropriate provider for substance abuse services. The services for persons with mental illness that are described in the performance contract, however, do not exclude persons with co-occurring substance use disorders.

With reference to §411.654, a commenter asked if all staff providing services to individuals with COPSD must have the competencies identified in the subchapter. The department responds that individuals with COPSD have access to staff who meet the specialty competencies in order to address COPSD and meet the service requirements that are defined in the subchapter. The new subchapter seeks to improve outcomes for individuals with COPSD by defining minimum staff competencies and identifying minimum standards for assessing and providing services to this population. The subchapter does not restrict services to only those that address COPSD; rather, it requires that COPSD be addressed by appropriate staff.

Concerning §411.657(a), a commenter suggested rewording the subsection to reflect changes in the priority population. The department responds that in response to the commenter's concern, the definition of "psychiatric disorder" for adults has been changed: "In an adult, a diagnosis of mental illness as defined in the TDMHMR strategic plan."

Concerning §411.657, a commenter suggested the addition of the following language: "Entities will work with the criminal justice system to ensure that an individual has access to services while incarcerated." The department responds that it has no authority for provision of services to persons while they are incarcerated. Following release, access to services is addressed in TDMHMR proposed rules governing mental health services admissions, continuity, and discharge.

A commenter suggested that §411.658(a) be deleted and replaced with §411.658(b), because the subsections are redundant. The department concurs and has deleted §411.658(a) and modified §411.658(b) to address age-appropriateness.

With respect to §411.660(a)(1), a commenter noted that the items listed are associated with treatment planning, not screening and assessment. The department responds that the items represent information collected during screening and assessment for purposes that include treatment planning.

Concerning §411.660(b)(1), a commenter asked if the provider will be out of compliance if a family member refuses to participate. The department responds that it has modified §411.660(b)(1) as follows: "If the individual has requested the involvement of a family member, then the provider must *attempt to* involve the family member in all aspects of planning the individual's treatment."

Regarding §411.660(c), a commenter stated that the treatment plan review should coincide with TDMHMR utilization review guidelines. The department responds that the treatment plan review is a provider activity and may occur at more frequent intervals than utilization review for authorization purposes. The current requirement for provider treatment plan review in Chapter 412, Subchapter G (governing mental health community services standards) states that the treatment plan review should occur as clinically indicated or at least every 90 days. The language in subsection (c) has been revised to reference the timeframes established by the TDMHMR.

DIVISION 1. GENERAL PROVISIONS

25 TAC §§411.651 - 411.656

The new rules are adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority; §533.047 (Managed Care Organizations: Medicaid Program), §534.052 (Rules and Standards), and §534.058 (Standards of Care).

§411.653. Definitions.

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

(1) Access--An individual's ability to obtain the psychiatric and substance use disorder services needed.

(2) Adolescent--A person who is 13 through 17 years of age.

(3) Adult- A person who is 18 years of age or older.

(4) Child--A person who is 0 through 12 years of age.

(5) Contract--A legally enforceable written agreement for the purchase of services.

(6) Co-occurring psychiatric and substance use disorders (COPSD)--The co-occurring diagnoses of psychiatric disorders and substance use disorders.

(7) *Diagnostic and Statistical Manual of Mental Disorders* (DSM)--The most recent edition of the American Psychiatric Association's official classification of mental disorders.

(8) Entity or entities--The terms used to refer to the following:

(A) local mental health authorities (LMHAs);

(B) Medicaid managed care organizations (MMCOs);

(C) state mental health facilities (SMHF); and

(D) Medicaid providers who are required to comply with Chapter 419, Subchapter L of this title, governing Medicaid Rehabilitative Services, or Chapter 412, Subchapter J of this title, governing Service Coordination.

(9) Family member--Anyone an individual identifies as being involved in the individual's life (e.g., the individual's parent, spouse, child, sibling, significant other, or friend).

(10) Individual--

(A) For an LMHA--An adult with COPSD, adolescent with COPSD, or child with COPSD seeking or receiving services from or through the LMHA or its provider.

(B) For an MMCO--An enrolled adult with COPSD, adolescent with COPSD, or child with COPSD seeking or receiving services from or through the MMCO or its provider.

(C) For an SMHF--An adult with COPSD, adolescent with COPSD, or child with COPSD seeking or receiving services from or through the SMHF or its provider.

(D) For a provider of rehabilitative services or a provider of service coordination reimbursed by Medicaid--An adult with COPSD, adolescent with COPSD, or child with COPSD seeking or receiving rehabilitative services or service coordination reimbursed by Medicaid.

(11) Integrated assessment--An assessment of an individual to gather both substance use and psychiatric information.

(12) Legally authorized representative (LAR)--A person authorized by law to act on behalf of an individual with regard to a matter (e.g., a parent, guardian, or managing conservator of a child or adolescent, a guardian of an adult, or a personal representative of a deceased individual).

(13) Local mental health authority (LMHA)--A governmental entity to which the Texas MHMR Board delegates its authority and responsibility for any, all, or portions of planning, policy development, coordination, resource development and allocation, and oversight of the delivery of mental health services in a local service area.

(14) Medicaid managed care organization (MMCO)--An entity that has a current Texas Department of Insurance certificate of authority to operate as a health maintenance organization (HMO) under Article 20A of the Texas Insurance Code or as an approved nonprofit health corporation under Article 21.52F of the Texas Insurance Code and that provides mental health services to Medicaid recipients.

(15) Psychiatric disorder--A mental illness in a child, adolescent, or adult who is a member of the mental health priority population as defined in the current TDMHMR strategic plan.

(16) Readiness to change--An individual's emotional and cognitive awareness of the need to change, coupled with a commitment to change.

(17) Services--Services provided to treat a psychiatric or substance use disorder.

(18) Staff--Full- or part-time employees, contractors, and students of an entity.

(19) Substance use disorder--The use of one or more drugs, including alcohol, which significantly and negatively impacts one or more major areas of life functioning and which meets criteria described in the current *Diagnostic and Statistical Manual of Mental Disorders* for substance abuse or substance dependence.

(20) Support services--Services delivered to an individual, legally authorized representative (LAR) or family member(s) to assist the individual in functioning in the living, learning, working, and socializing environments.

(21) Treatment plan--A written document developed by the provider, in consultation with the individual (and LAR on the individual's behalf), that is based on assessments of the individual and which

addresses the individual's strengths, needs, goals, and preferences regarding service delivery as referenced in §412.315 (relating to Assessment and Treatment Planning) of Chapter 412, Subchapter G of this title, governing Mental Health Community Services Standards.

§411.654. Services to Individuals.

(a) Staff providing services to an individual with COPSD must ensure that services provided:

(1) address both psychiatric and substance use disorders;

(2) be provided within established practice guidelines for this population; and

(3) facilitate individuals or LARs in accessing available services they need and choose, including self-help groups.

(b) The services provided to an individual with COPSD must be provided:

(1) by staff who are competent in the areas identified in §411.658 of this title (relating to Specialty Competencies of Staff Providing Services to Individuals with COPSD);

(2) in an individual or small group setting;

(3) in an age, gender, and culturally appropriate manner; and

(4) in accordance with the individual's treatment plan.

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 August 18, 2003.

TRD-200305279
Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: September 7, 2003
Proposal publication date: May 23, 2003
For further information, please call: (512) 206-4516

♦ ♦ ♦

DIVISION 2. ORGANIZATIONAL STANDARDS

25 TAC §§411.657 - 411.659

The new rules are adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority; §533.047 (Managed Care Organizations: Medicaid Program), §534.052 (Rules and Standards), and §534.058 (Standards of Care).

§411.658. Specialty Competencies of Staff Providing Services to Individuals with COPSD.

(a) Entities must ensure that services to individuals are age-appropriate and are provided by staff within their scope of practice who have the following minimum knowledge, technical, and interpersonal competencies prior to providing services:

(1) Knowledge competencies:

(A) knowledge of the fact that psychiatric and substance use disorders are potentially recurrent relapsing disorders, and that although abstinence is the goal, relapses can be opportunities for learning and growth;

(B) knowledge of the impact of substance use disorders on developmental, social, and physical growth and development of children and adolescents;

(C) knowledge of interpersonal and family dynamics and their impact on individuals;

(D) knowledge of the current *Diagnostic and Statistical Manual of Mental Disorders* diagnostic criteria for psychiatric disorders and substance use disorders and the relationship between psychiatric disorders and substance use disorders;

(E) knowledge regarding the increased risks of self-harm, suicide, and violence in individuals;

(F) knowledge of the elements of an integrated treatment plan and community support plan for individuals;

(G) basic knowledge of pharmacology as it relates to individuals;

(H) basic understanding of the neurophysiology of addiction;

(I) knowledge of the phases of recovery for individuals;

(J) knowledge of the relationship between COPSD and Axis III disorders; and

(K) basic knowledge of self-help in recovery.

(2) Technical competencies:

(A) ability to perform age-appropriate assessments of individuals; and

(B) ability to formulate an individualized treatment plan and community support plan for individuals.

(3) Interpersonal competencies:

(A) ability to tailor interventions to the process of recovery for individuals;

(B) ability to tailor interventions with readiness to change; and

(C) ability to support individuals who choose to participate in 12-step recovery programs.

(b) Within 90 days of the effective date of this subchapter, entities must ensure that staff who provide services to individuals with COPSD have demonstrated the competencies described in subsection (a) of this section. These competencies may be evidenced by compliance with current licensure requirements of the governing or supervisory boards for the respective disciplines involved in serving individuals with COPSD or by documentation regarding the attainment of the competencies described in subsection (a) of this section. For unlicensed staff delivering these services, these competencies are evidenced by documentation regarding their attainment as required in subsection (a) of this 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 August 18, 2003.

TRD-200305280

Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: September 7, 2003
Proposal publication date: May 23, 2003
For further information, please call: (512) 206-4516

♦ ♦ ♦

DIVISION 3. STANDARDS OF CARE

25 TAC §411.660

The new rule 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; §533.047 (Managed Care Organizations: Medicaid Program), §534.052 (Rules and Standards), and §534.058 (Standards of Care).

§411.660. Screening, Assessment, and Treatment Planning.

(a) Screening and assessment. When a screening determines an assessment is necessary, an integrated assessment must be conducted to consider relevant past and current medical, psychiatric, and substance use information, including:

(1) information from the individual (and LAR on the individual's behalf) regarding the individual's strengths, needs, natural supports, responsiveness to previous treatment, as well as preferences for and objections to specific treatments;

(2) the needs and desire of the individual for family member involvement in treatment and services if the individual is an adult without an LAR; and

(3) recommendations and conclusions regarding treatment needs and eligibility for services for individuals.

(b) Treatment plan development.

(1) The individual (and LAR on the individual's behalf, if applicable) must be involved in all aspects of planning the individual's treatment. If the individual has requested the involvement of a family member, then the provider must attempt to involve the family member in all aspects of planning the individual's treatment.

(2) The treatment plan must identify services to be provided and must include measurable outcomes that address COPSD.

(3) The treatment plan must identify the LAR's or family members' need for education and support services related to the individual's mental illness and substance abuse and a method to facilitate the LAR's or family members' receipt of the needed education and support services.

(4) The individual, LAR, and, if requested, family member, must be given a copy of the treatment plan.

(c) Treatment plan review. Each individual's treatment plan must be reviewed in accordance with TDMHMR-defined timeframes and the review must be documented.

(d) Progress notes. The medical record notes must contain a description of the individual's progress towards goals identified in the treatment plan, as well as other clinically significant activities or events.

(e) Episode of care summary. Upon discharge or transfer of an individual from one entity to another, the individual's medical record must identify the services provided according to this subchapter and the items referenced in §412.315 (relating to Assessment and Treatment Planning) of Chapter 412, Subchapter G of this title, governing Mental Health Community Services Standards.

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 August 18, 2003.

TRD-200305281
Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: September 7, 2003
Proposal publication date: May 23, 2003
For further information, please call: (512) 206-4516

♦ ♦ ♦

DIVISION 4. REFERENCES AND DISTRIBUTION

25 TAC §411.661, §411.662

The new rules are adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority; §533.047 (Managed Care Organizations: Medicaid Program), §534.052 (Rules and Standards), and §534.058 (Standards of Care).

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 August 18, 2003.

TRD-200305282
Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: September 7, 2003
Proposal publication date: May 23, 2003
For further information, please call: (512) 206-4516

♦ ♦ ♦

PART 11. TEXAS CANCER COUNCIL

CHAPTER 704. TEXANS CONQUER CANCER PROGRAM

25 TAC §704.7

The Texas Cancer Council adopts amendments to §704.7, concerning the implementation of the Texans Conquer Cancer Program (TCCP) without changes to the proposed text as published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4522).

Section 704.7 is being amended to adopt by reference the application form that must be used for the submission of grant proposals and to add guidelines for awarding funds in the Texans Conquer Cancer Account and expense reimbursement. The Council has determined that these guidelines are necessary to assist potential applicants in understanding and correctly submitting their requests for funds from this account. The Guidelines explain how

applications will be reviewed, which support services and organizations are eligible for funding, how funding availability will be announced, where applications should be sent, how funding reimbursement will be managed, and reporting requirements for successful applicants. This information is vital to give all applicants every opportunity to effectively present their applications. Adoption of this rule amendment will assure greater consistency and objectivity in proposal review, and a fair, objective process for awarding funds.

No public comments were received.

The amendments are proposed under the Texas Health and Safety Code Annotated, §102.010 which directs the Council to adopt rules governing the submission and approval of grant requests and the cancellation of grants, and §102.017(c) which directs the Council to establish guidelines for spending the money in the Texans Conquer Cancer Account.

These proposed amendments implement Texas Health and Safety Code, §102.017 and §102.018, which create and govern the Texans Conquer Cancer program, account, and advisory committee.

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 August 11, 2003.

TRD-200305014
Mickey L. Jacobs, M.S.H.P.
Executive Director
Texas Cancer Council
Effective date: August 31, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 463-3190

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 11. OFFICE OF THE FIRE FIGHTERS' PENSION COMMISSIONER

CHAPTER 301. RULES OF THE TEXAS STATEWIDE EMERGENCY SERVICES RETIREMENT FUND

34 TAC §301.5, §301.6

The Office of the Fire Fighters' Pension Commissioner (FFPC) adopts amendments to §301.5 and §301.6, concerning the Rules of the Texas Statewide Emergency Services Personnel Retirement Fund, without changes to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4830) and will not be republished.

The amendment to §301.5 is made to subsection (b)(5). The amendment is adopted to simplify the assessment of administrative penalties for late reports and to reduce future database programming costs. The amendment to §301.6 adds a new subsection (f). The amendment is necessary to clarify that local boards of trustees are to elect board officers each year.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Revised Civil Statutes, Article 6243e.3, §21 that provides the Board of Trustees with the authority to establish rules necessary for the administration of the Fund.

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 August 18, 2003.

TRD-200305278
Morris E. Sandefer
Commissioner
Office of the Fire Fighters' Pension Commissioner
Effective date: September 7, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 936-3372

♦ ♦ ♦

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 423. FIRE SUPPRESSION

The Texas Commission on Fire Protection (TCFP) adopts amendments to §423.3, concerning minimum standards for basic structure fire protection personnel certification, and §423.203, concerning minimum standards for basic aircraft rescue fire fighting personnel certification, in Chapter 423, entitled Fire Suppression. The amendments are adopted without changes to the proposed text published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4524) and will not be republished.

The amendments to §423.3 and §423.203 offer an additional method for meeting requirements for basic levels of certification. That additional method is to provide documentation of accreditation by the International Fire Service Accreditation Congress (an IFSAC seal). The amendment to §423.3 also adds an option to the training requirements of the rule that would make a current medical certification with the National Registry a valid way to meet those training requirements.

No comments were received regarding the proposed amendments.

SUBCHAPTER A. MINIMUM STANDARDS FOR STRUCTURE FIRE PROTECTION PERSONNEL CERTIFICATION

37 TAC §423.3

The amendments are adopted under Texas Government Code, §419.008, which provides the TCFP with the authority to adopt rules for the administration of its powers and duties, and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum standards for admission to employment as fire protection personnel.

Texas Government Code, §419.022 is affected by the adopted amendments.

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 August 13, 2003.

TRD-200305191
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Effective date: September 2, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 239-4921

♦ ♦ ♦

SUBCHAPTER B. MINIMUM STANDARDS FOR AIRCRAFT RESCUE FIRE FIGHTING PERSONNEL

37 TAC §423.203

The amendments are adopted under Texas Government Code, §419.008, which provides the TCFP with the authority to adopt rules for the administration of its powers and duties, and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum standards for admission to employment as fire protection personnel.

Texas Government Code, §419.022 is affected by the adopted amendments.

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 August 13, 2003.

TRD-200305192
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Effective date: September 2, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 239-4921

♦ ♦ ♦

CHAPTER 431. FIRE INVESTIGATION

The Texas Commission on Fire Protection (TCFP) adopts amendments to §431.3, concerning minimum standards for Basic Arson Investigator certification, and §431.203, concerning minimum standards for Fire Investigator certification, in Chapter 431, entitled Fire Investigation. The amendments are adopted without changes to the proposed text published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4526) and will not be republished.

The amendment to §431.3 offers an additional method for meeting certification requirements for basic levels of certification. That additional method is to provide documentation of accreditation by the International Fire Service Accreditation Congress (an IFSAC seal).

The amendment to §431.203 consists of the rewording of subsection (b) for clarity and to account for the concurrent amendments to §431.3.

No comments were received regarding the proposed amendments.

SUBCHAPTER A. MINIMUM STANDARDS FOR ARSON INVESTIGATOR CERTIFICATION

37 TAC §431.3

The amendments are adopted under Texas Government Code, §419.008, which provides the TCFP with the authority to adopt rules for the administration of its powers and duties, and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum standards for admission to employment as fire protection personnel.

Texas Government Code, §419.022 is affected by the adopted amendments.

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 August 13, 2003.

TRD-200305193
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Effective date: September 2, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 239-4921

♦ ♦ ♦

SUBCHAPTER B. MINIMUM STANDARDS FOR FIRE INVESTIGATOR CERTIFICATION

37 TAC §431.203

The amendments are adopted under Texas Government Code, §419.008, which provides the TCFP with the authority to adopt rules for the administration of its powers and duties, and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum standards for admission to employment as fire protection personnel.

Texas Government Code, §419.022 is affected by the adopted amendments.

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 August 13, 2003.

TRD-200305194
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Effective date: September 2, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 239-4921

♦ ♦ ♦

CHAPTER 433. MINIMUM STANDARDS FOR DRIVER/OPERATOR-PUMPER

37 TAC §433.3

The Texas Commission on Fire Protection (TCFP) adopts an amendment to §433.3, concerning minimum standards for Driver/Operator - Pumper certification in Chapter 433, entitled Minimum Standards for Driver/Operator - Pumper. The amendment is adopted without changes to the proposed text published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4528) and will not be republished.

The amendment offers an additional method for meeting requirements for certification. That additional method is to provide documentation of accreditation by the International Fire Service Accreditation Congress (an IFSAC seal). The amendment also rewords some subsections for clarity, and deletes obsolete language.

No comments were received regarding the proposed amendment.

The amendment is adopted under Texas Government Code, §419.008, which provides the TCFP with the authority to adopt rules for the administration of its powers and duties, and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum standards for admission to employment as fire protection personnel.

Texas Government Code, §419.022 is affected by the adopted amendment.

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 August 13, 2003.

TRD-200305195
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Effective date: September 2, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 239-4921

♦ ♦ ♦

CHAPTER 439. EXAMINATIONS FOR CERTIFICATION

SUBCHAPTER A. EXAMINATIONS FOR ON-SITE DELIVERY TRAINING

37 TAC §439.1, §439.5

The Texas Commission on Fire Protection (TCFP) adopts amendments to §439.1, concerning general requirements, and §439.5, concerning procedures, in Chapter 439, entitled Examinations for Certification. The amendments are adopted without changes to the proposed text published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4528) and will not be republished.

The amendment to §439.1 adds an additional method to requirements for basic levels of certification. That additional method is to provide documentation of accreditation by the International Fire Service Accreditation Congress (an IFSAC seal).

The amendment to §439.5 changes the time period in which the commission staff must notify the training officer or coordinator of preliminary test results from three (3) business days to seven (7) business days, and removes the requirement that official test results must be provided in writing within 30 days after the date of the examination. The amendment also deletes obsolete language.

No comments were received regarding the proposed amendments.

The amendments are adopted under Texas Government Code, §419.008, which provides the TCFP with the authority to adopt rules for the administration of its powers and duties, Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum standards for admission to employment as fire protection personnel, and Texas Government Code, §419.035(a), which sets out the time frame under which notice of the results of a certification examination must be provided.

Texas Government Code, §419.022(a)(5) and §419.035(a) are affected by the adopted amendments.

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 August 13, 2003.

TRD-200305196
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Effective date: September 2, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 239-4921

♦ ♦ ♦

CHAPTER 451. FIRE OFFICER

The Texas Commission on Fire Protection (TCFP) adopts amendments to §451.3, concerning minimum standards for Fire Officer I certification, and §451.203, concerning minimum standards for Fire Officer II certification, in Chapter 451, entitled Fire Officer. The amendments are adopted without changes to the proposed text published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4529) and will not be republished.

The amendments offer an additional method for meeting requirements for certification. That additional method is to provide documentation of accreditation by the International Fire Service Accreditation Congress (an IFSAC seal). The amendments also reword some subsections for clarity, and delete obsolete language.

No comments were received regarding the proposed amendments.

SUBCHAPTER A. MINIMUM STANDARDS FOR FIRE OFFICER I

37 TAC §451.3

The amendments are adopted under Texas Government Code, §419.008, which provides the TCFP with the authority to adopt rules for the administration of its powers and duties, and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum standards for admission to employment as fire protection personnel.

Texas Government Code, §419.022 is affected by the adopted amendments.

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 August 13, 2003.

TRD-200305197
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Effective date: September 2, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 239-4921

♦ ♦ ♦

SUBCHAPTER B. MINIMUM STANDARDS FOR FIRE OFFICER II

37 TAC §451.203

The amendments are adopted under Texas Government Code, §419.008, which provides the TCFP with the authority to adopt rules for the administration of its powers and duties, and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum standards for admission to employment as fire protection personnel.

Texas Government Code, §419.022 is affected by the adopted amendments.

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 August 13, 2003.

TRD-200305198
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Effective date: September 2, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 239-4921

♦ ♦ ♦

CHAPTER 453. MINIMUM STANDARDS FOR HAZARDOUS MATERIALS TECHNICIAN

37 TAC §453.3

The Texas Commission on Fire Protection (TCFP) adopts an amendment to §453.3, concerning minimum standards for Hazardous Materials Technician certification, in Chapter 453, entitled Minimum Standards for Hazardous Materials Technician. The amendment is adopted without changes to the proposed text published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4531) and will not be republished.

The amendment offers an additional method for meeting requirements for certification. That additional method is to provide documentation of accreditation by the International Fire Service Accreditation Congress (an IFSAC seal). The amendment also rewords some subsections for clarity, and deletes obsolete language.

No comments were received regarding the proposed amendment.

The amendment is adopted under Texas Government Code, §419.008, which provides the TCFP with the authority to adopt rules for the administration of its powers and duties, and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum standards for admission to employment as fire protection personnel.

Texas Government Code, §419.022 is affected by the adopted amendment.

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 August 13, 2003.

TRD-200305199
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Effective date: September 2, 2003
Proposal publication date: June 13, 2003
For further information, please call: (512) 239-4921

♦ ♦ ♦

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 2. MEDICALLY NEEDY AND CHILDREN AND PREGNANT WOMEN PROGRAMS

The Texas Department of Human Services (DHS) adopts the repeal of §§2.1002, 2.1004, 2.1006, 2.1008, 2.1010, 2.1012, 2.1014, and 2.1016, and adopts new §§2.1, 2.11- 2.18, and 2.32-2.38 in its Medically Needy and Children and Pregnant Women Programs chapter. New §§2.1, 2.32, and 2.37 are adopted with changes to the proposed text published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4831). The repeals of §§2.1002, 2.1004, 2.1006, 2.1008, 2.1010, 2.1012, 2.1014, and 2.1016 and new §§2.11-2.18, 2.33-2.36, and 2.38 are adopted without changes to the proposed text.

The repeals and new sections were undertaken as part of a DHS project to rewrite agency rules in plain language format to make them easier to use and understand. Because the Medically Needy (MN) and Children and Pregnant Women (CPW) programs have similar rules and are both Medicaid programs, the rules governing these programs are incorporated into the same chapter, making them easier for providers and the public to access. The repeal of rules in DHS's Chapter 4, concerning the

CPW Program, is adopted elsewhere in this issue of the *Texas Register*.

Justification for new §§2.11(1)(A), 2.14(2), and 2.34(2)(C) is to distinguish resource limits for the MN and CPW programs from those of the Temporary Assistance for Needy Families (TANF) Program. The three programs no longer have the same resource limits, since House Bill (HB) 2292 and Senate Bill (SB) 1862, 78th Texas Legislature, amended the Human Resources Code, §31.032, to reduce the TANF asset limit to $1,000.

Justification for new §2.32 is to comply with the new provisions of the Human Resources Code, §32.025 and §32.026, amended by SB 1522, SB 1862, and HB 2292, 78th Texas Legislature, which permit DHS to require personal interviews for applications and recertifications of children's Medicaid when necessary to obtain information needed for eligibility verification.

DHS received two written comments from the Center for Public Policy Priorities and the Coalition for Nurses in Advanced Practice. Additional oral comments were received at the Medical Care Advisory Committee meeting on July 9, 2003, and at a public hearing on July 11, 2003. A summary of the comments and DHS's responses follow.

Comment: Concerning §2.1(12), one commenter noted that the definition of a provider does not include important categories of Medicaid providers. DHS should use language proposed by the Health and Human Services Commission in an amendment to Title 1, Texas Administrative Code, §355.201(4) published in the June 27, 2003 issue of the *Texas Register*, that incorporates all categories of providers.

Response: DHS agrees, and has changed the definition of provider to include all categories of providers.

Comment: Concerning §2.14(6)(C) and §2.34(6)(C), one commenter suggested that DHS needs to carefully monitor its application of the policy to request Social Security Numbers (SSNs) from non-benefit recipients. Making non-applicant budget group members think they need to provide an SSN to DHS may unwittingly lead persons not authorized to obtain an SSN to apply for one.

Response: DHS agrees, and will be clear in instructions to staff and on written materials, such as the application for the Medicaid Program, that it is voluntary for people not applying for benefits to provide SSNs. DHS will handle this through internal procedures and does not believe this requires the adoption of a specific rule. DHS adopts these subparagraphs without change.

Comment: Concerning §2.32(a)(1)(B) and (C), one commenter expressed concern that the proposal may lead to unnecessary face-to-face interviews.

Response: DHS will continue to provide guidance to staff regarding the circumstances in which a face-to-face interview may be necessary and expects local DHS staff to exercise prudent discretion in this matter. DHS will handle this through internal procedures and does not believe this requires any change in the proposed rule. DHS adopts these subparagraphs without change.

Comment: Regarding §2.32(a)(1)(B) and (C), one commenter expressed concern that a private company contracted in the future to perform eligibility functions may not be as reliable as DHS in minimizing unnecessary face-to-face interviews.

Response: DHS notes this concern.

Comment: Concerning §2.32(b)(1), one commenter suggested that the reference to DHS be removed as DHS does not deliver the health care orientation.

Response: DHS agrees, and has changed the rule to remove the reference to DHS.

Comment: Concerning §2.37(b)(2), one commenter noted that the language in this paragraph conflicts with that in 2.35(4) and should be changed to clarify what changes children under age 19 must report.

Response: DHS agrees, and has changed the paragraph to clarify that a change in address and a child leaving or joining the household must be reported.

DHS has initiated a minor editorial change to the text of §2.32(a)(1)(B) to clarify and improve the accuracy of the section.

Additional comments were received that did not pertain to the rule proposal.

SUBCHAPTER A. DEFINITIONS

40 TAC §2.1

The new section 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 the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new section affects the Human Resources Code, §§22.0001-22.038 and §§32.001-32.053.

§2.1. Definitions.

The words and terms used in this chapter have the following meanings, unless the context clearly indicates otherwise. The definitions apply to the Medically Needy (MN) and Children and Pregnant Women (CPW) programs.

(1) Applied income--A portion of a legal parent's income applied or counted to meet the needs of a minor applicant.

(2) Budget group--People living as a group at one address with needs, income, resources, and/or medical expenses in common. The Texas Department of Human Services (DHS) includes each group member in the Medicaid budget when determining eligibility, whether or not each group member is individually Medicaid eligible.

(3) CPW--The Children and Pregnant Women Program. A program DHS administers that provides Medicaid benefits to pregnant women and children.

(4) Caretaker--A person who supervises and cares for a dependent child. A caretaker must be related to the child, as required by Temporary Assistance for Needy Families (TANF) rules (detailed in Chapter 3 of this title (relating to Texas Works)).

(5) Clearinghouse--A site with staff that process medical bills submitted by MN applicants who must spend down income to qualify for Medicaid. Clearinghouse staff determine if the bills are acceptable and when spend down is met.

(6) Client--A person who is either an applicant for or a recipient of Medicaid.

(7) DHS--The Texas Department of Human Services.

(8) FPIL--Federal Poverty Income Limit. FPILs are income amounts, by family size, that represent the dividing line between

families who live above or below the poverty level. The Office of Management and Budget, a federal agency, periodically calculates, updates, and publishes the FPIL.

(9) Good cause--An acceptable reason that exempts an applicant or recipient from a Medicaid requirement. For the purposes of this chapter, good cause refers to a reason for an applicant or recipient not to cooperate to obtain medical support from an absent parent or not to comply with third party resource requirements.

(10) Health and human services office--An agency other than DHS that is authorized to accept Medicaid applications.

(11) MN--The Medically Needy Program. A program DHS administers that provides Medicaid benefits to pregnant women, children, and parents or caretakers of children whose income is too high to qualify for other Medicaid programs and who have high medical expenses.

(12) Provider--A health care practitioner, institution, or other entity that is enrolled in the medical assistance program and is authorized to submit claims for payment or reimbursement of medical assistance.

(13) Spend down--The amount of income that an MN applicant must apply toward incurred medical bills before he can be certified for Medicaid.

(14) TANF--The Temporary Assistance for Needy Families Program.

(15) Third-party--A person or organization, other than DHS or a person living with the applicant, who may be liable as a source of payment of the applicant's medical expenses (for example, a health insurance company).

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 August 11, 2003.

TRD-200305021
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER B. MEDICALLY NEEDY PROGRAM REQUIREMENTS

40 TAC §§2.11 - 2.18

The new sections 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 the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections affect 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 August 11, 2003.

TRD-200305022
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER C. CHILDREN AND PREGNANT WOMEN PROGRAM REQUIREMENTS

40 TAC §§2.32 - 2.38

The new sections 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 the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections affect the Human Resources Code, §§22.0001-22.038 and §§32.001-32.053.

§2.32. Application Procedures.

(a) The Texas Department of Human Services (DHS) processes Children and Pregnant Women Program applications using the application rules of the Temporary Assistance for Needy Families (TANF) Program, as detailed in Chapter 3 of this title (relating to Texas Works), with the following exceptions:

(1) For applicants under the age of 19, DHS:

(A) processes applications and reviews active cases by mail, telephone, or face-to-face interview;

(B) may conduct a personal interview with an initial applicant if DHS has received conflicting information related to household membership, income, or assets that affects eligibility and the information cannot be verified through other means;

(C) conducts a personal interview for recertification of Medicaid eligibility when there is no associated case record for TANF or food stamps or adult Medicaid coverage, and DHS has received conflicting information related to household membership, income, or assets that affects eligibility and the information cannot be verified through other means;

(D) allows any office of a state health and human services agency to accept an initial application; and

(E) contracts with third parties to accept applications from hospital districts (including state- owned teaching hospitals), federally qualified health centers, and county health departments.

(2) For pregnant applicants who are potentially eligible but unable to provide proof of eligibility, DHS:

(A) postpones verifications and provides Medicaid coverage to ensure access to medical care within 30 days of application;

(B) continues the coverage of women who provide postponed verifications by the 30th day after the application date; and

(C) denies the coverage of those who fail to meet the 30-day deadline.

(3) There are no conditions limiting the designation of an authorized representative.

(b) Parents or guardians of Medicaid children under the age of 19 must:

(1) attend a health care orientation;

(2) accompany the child on a visit to a health care provider; or

(3) meet with a DHS representative to discuss the child's eligibility and, as appropriate, receive counseling on the child's need for comprehensive health care.

(c) Parents or guardians of Medicaid children under the age of 19 who are eligible for the Texas Health Steps Program must:

(1) comply with the Texas Health Steps regimen of health care requirements, as required by the Texas Department of Health in 25 TAC Chapter 33, Subchapter J (relating to Texas Health Steps Medical Case Management); or

(2) meet with a DHS representative to discuss the child's eligibility and, as appropriate, receive counseling on the child's need for comprehensive health care.

(d) The services and policies in subsection (b) of this section and §2.35(3) and (4) of this chapter (relating to Medicaid Eligibility Dates) are administered according to the procedures in DHS's Medicaid simplification operating guidelines. The guidelines are published, available to the public, and are updated regularly to reflect procedural changes.

§2.37. Requirement to Report Changes.

(a) Children and Pregnant Women Program (CPW) recipients must report changes as required by Temporary Assistance for Needy Families (TANF) Program rules, and within the time frames specified by TANF rules as outlined in Chapter 3 of this title (relating to Texas Works).

(b) In addition to the reporting required by TANF Program rules, a recipient of the CPW Medicaid Program who is:

(1) pregnant must report the termination of pregnancy; and

(2) under age 19 must report a change in address, and a child leaving or joining the household. The child is continuously eligible, regardless of reported income and resource changes, until Medicaid eligibility is reviewed.

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 August 11, 2003.

TRD-200305020
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

CHAPTER 2. MEDICALLY NEEDY PROGRAM
SUBCHAPTER A. PROGRAM REQUIREMENTS

40 TAC §§2.1002, 2.1004, 2.1006, 2.1008, 2.1010, 2.1012, 2.1014, 2.1016

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 the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeals affect 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 August 11, 2003.

TRD-200305017
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

CHAPTER 2. MEDICALLY NEEDY AND CHILDREN AND PREGNANT WOMEN PROGRAMS
SUBCHAPTER B. MEDICALLY NEEDY PROGRAM REQUIREMENTS

40 TAC §2.19

The Texas Department of Human Services (DHS) adopts new §2.19 without changes to the proposed text published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4837).

Justification for the new section is to comply with House Bill 2292 and Senate Bill 1862, 78th Texas Legislature, which amended the Human Resources Code, §32.024(i), to state that operation of the Medically Needy (MN) Program is contingent on the availability of appropriated state funds. New §2.19 makes it clear that operation of the MN Program depends on funds being appropriated for the program and allows DHS to administer the MN Program if appropriated funds become available.

DHS received four written comments from the Center for Public Policy Priorities, the Seton Healthcare Network, the Texas Hospital Association, and the University Health System. Additional oral comments were received at the Medical Care Advisory Committee meeting on July 9, 2003, and at a public hearing on July 11, 2003. A summary of the comments and DHS's responses follow.

Comment: Several commenters were concerned that persons who would have been eligible for the MN program will have reduced access to healthcare as a result of the program being discontinued. They also commented on the negative impact of the rule proposal on hospitals and other healthcare providers and the resulting loss of federal Medicare and Medicaid funds. The proposal will strain the resources of hospitals and local governments.

Response: DHS notes the concern that the loss of Medicaid eligibility may result in reduced access to healthcare for some people. The discontinuation of the MN program is required to stay within the funding levels allocated to DHS in the 2004-2005 General Appropriations Act. The proposal allows DHS to continue operation of the MN program when funds become available. At this time, the MN program will continue to cover eligible children. DHS adopts this section without change.

Comment: Several commenters said that despite DHS's assertion to the contrary in the preamble of the proposed rule, published in the June 27, 2003 issue of the *Texas Register*, there will be a fiscal effect on state government as a result of discontinuation of the MN Program. Please clarify this fiscal note.

Response: DHS did not originally cite cost to the state or expected cost savings for the MN Program in the proposal because the proposal simply conditions the delivery of this program to be contingent upon available funds. The rule, therefore, does not put in place a reduction in funding. In reflecting upon the impact of the 2004-2005 General Appropriation Act, DHS has estimated that the effect on state government for the first five-year period the sections are in effect is an estimated additional cost in general revenue funds of $65,367 in fiscal year (FY) 2004; and an estimated reduction in cost in general revenue funds of $28,814,458 in FY 2004; $35,100,486 in FY 2005; $40,995,830 in FY 2006; $45,883,339 in FY 2007 and $51,450,766 in FY 2008.

Comment: Several commenters disagreed with the assertion in the preamble of the proposal that there are no fiscal implications for local governments as a result of enforcing the section. With the resulting loss of federal Medicare and Medicaid funds, the proposal will strain the resources of hospitals and local governments, resulting in local tax increases for public hospitals. Shifting the costs to local authorities is not a responsible and effective way of solving state government Medicaid shortfalls.

Response: DHS agrees that the proposal may result in additional costs to local governments, but is unable to quantify the amount because there are so many variables involved, such as, for example, the number of persons who may receive uncompensated care, the kind and level of care that persons would be seeking, nongovernmental resources, and other resources available to local governments in different parts of the state.

Additional comments were received that did not pertain to the rule proposal.

The new section 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 the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new section affects 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 August 11, 2003.

TRD-200305018

Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER C. CHILDREN AND PREGNANT WOMEN PROGRAM REQUIREMENTS

40 TAC §2.31, §2.39

The Texas Department of Human Services (DHS) adopts new §2.31 and §2.39 without changes to the proposed text published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4838).

New §2.31 was undertaken as part of a DHS project to rewrite agency rules in plain language format to make them easier to use and understand. Justification for new §2.31(1) and §2.39 is to stay within funding levels for the Children and Pregnant Women Program allocated to DHS in the 2004-2005 General Appropriations Act. Funding levels for fiscal years 2004 and 2005 are based on lowering the income limit for pregnant women ages 19 and over to 158% of the Federal Poverty Income Limit; therefore, DHS needed to adopt rules that reflect the budget assumption.

DHS received four written comments from the Center for Public Policy Priorities, the Seton Healthcare Network, the Texas Hospital Association, the University Health System. Additional oral comments were received at the Medical Care Advisory Committee meeting on July 9, 2003, and at a public hearing on July 11, 2003. A summary of the comments and DHS's responses follow.

Comment: Concerning §2.31(1) and §2.39, several commenters were concerned that pregnant women who would have been eligible for Medicaid under the higher income limit will have reduced access to healthcare as a result of the new lower income limit. They also commented on the negative impact of the rule proposal on hospitals and other healthcare providers and the resulting loss of federal Medicare and Medicaid funds. The proposal will strain the resources of hospitals and local governments.

Response: DHS notes the concern that the loss of Medicaid eligibility may result in reduced access to healthcare for some people. The lower income limit for pregnant women ages 19 and over is required to stay within the funding levels allocated to DHS in the 2004-2005 General Appropriations Act. The proposal allows DHS to raise the income limit when funds become available.

Comment: Concerning §2.31(1) and §2.39, several commenters said that the fiscal impact in the preamble of the proposed rules, published in the June 27, 2003 issue of the *Texas Register*, is incorrect. DHS did not take into account potential clients from the Emergency Services Program (TP30).

Response: DHS acknowledges that the original cost savings estimated for the CPW Program did not take into account clients from the Emergency Services Program (TP30). The revised cost savings, taking these clients into account, is $27,543,012 in fiscal year (FY) 2004; $31,972,163 in FY 2005; $35,464,465 in FY 2006; $39,575,989 in FY 2007; and $44,485,623 in FY 2008.

Comment: Several commenters disagreed with the assertion in the preamble of the proposal that there are no fiscal implications

for local governments as a result of enforcing the section. With the resulting loss of federal Medicare and Medicaid funds, the proposal will strain the resources of hospitals and local governments, resulting in local tax increases for public hospitals. Shifting the costs to local authorities is not a responsible and effective way of solving state government Medicaid shortfalls.

Response: DHS agrees that the proposal may result in additional costs to local governments, but is unable to quantify the amount because there are so many variables involved, such as, for example, the number of persons who may receive uncompensated care, the kind and level of care that persons would be seeking, nongovernmental resources, and other resources available to local governments in different parts of the state.

Additional comments were received that did not pertain to the rule proposal.

The new sections 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 the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections affect 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 August 11, 2003.

TRD-200305019
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

CHAPTER 3. TEXAS WORKS

The Texas Department of Human Services (DHS) adopts amendments to §§3.301, 3.1104, 3.1105, 3.1801, and 3.7609. DHS adopts §3.301 and §3.1105 with changes to the proposed text published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4839). DHS adopts §§3.1104, 3.1801, and 3.7609 without changes to the proposed text.

Justification for the amendments is to implement the changes in law made by sections 2.86- 2.88 of House Bill (HB) 2292, 78th Texas Legislature, which amended the Human Resources Code, §§31.0031-31.0034. Justification for the amendment to §3.301(d) is to implement the provisions of the Human Resources Code, §31.0031, as amended by HB 2292, section 2.86, which defines a payee and requires a TANF payee to sign a responsibility agreement that defines the responsibilities of the state and the payee. The amendment also implements the provisions of the Human Resources Code, §31.0031(c), as amended by HB 2292, section 2.87, which require DHS to adopt rules governing sanctions and penalties against a person and the family of a person who fails to cooperate with the responsibility agreement. In addition, DHS is amending the language of §3.301(d)(2)(C)(i) as proposed, in response to a request for clarification from the Texas Workforce Commission, to clarify when a recipient is considered to be out of compliance with work requirements. As amended, §3.301(d) implements the provisions of the Human Resources Code, §§31.0032-31.0034, as amended by HB 2292, section 2.88, which require DHS to apply an immediate sanction to terminate the total amount of financial assistance provided to or for the person and person's family for failure to cooperate with a requirement contained in the responsibility agreement. Justification for the amendments to §§3.1104, 3.1105, 3.1801, and 3.7609 is to implement provisions of the legislation in associated rules in DHS's rule base that refer to §3.301(d).

DHS received one written comment from the Texas Workforce Commission and an additional oral comment from the Center for Public Policy Priorities at a public hearing on July 11, 2003. A summary of the comments and DHS's responses follow.

Comment: A commenter noted that the proposed language in §3.301(d)(4)(A) conflicts with language in HB 2292 that requires TANF families to be sanctioned or penalized, rather than lose eligibility, after one month of noncooperation with each requirement of the responsibility agreement.

Response: DHS agrees and has clarified the rule.

Comment: A commenter suggested that clarification is needed in §3.1105(b) regarding requirements for TANF families who are denied due to noncooperation. The commenter suggests that the family may reapply for financial assistance but must cooperate with each requirement of the responsibility agreement for a one-month period before receiving an assistance payment for that month.

Response: DHS agrees and has clarified the rule.

Comment: A commenter suggested DHS clarify definitions regarding a "household denied for continuous failure to cooperate" and a "household denied for noncooperation." The commenter suggests DHS use consistent terms.

Response: Since there is no intended difference between the two phrases, consistent terminology should be used. DHS has modified the rules.

Comment: A commenter indicated that the terms "compliance" and "cooperation" are used interchangeably throughout the proposed rules. The commenter suggests using "cooperation" and "noncooperation" to align with HB 2292.

Response: DHS agrees and has modified the rules.

Comment: A commenter proposed that DHS make a reasonable attempt to contact the TANF recipient before imposition of a full family sanction to ensure the recipient has received notification and that there is no obvious good cause.

Response: DHS agrees that clients should be adequately informed and potential good cause explored before imposition of the full family sanction but does not believe a specific rule is required. To the extent possible, this suggestion will be included in DHS policies and procedures.

SUBCHAPTER C. THE APPLICATION PROCESS

40 TAC §3.301

The amendment is adopted under the Human Resources Code, Chapter 31, which authorizes DHS to administer financial assistance programs.

The amendment implements the Human Resources Code, §§31.001-31.081.

§3.301. Responsibilities of Clients and the Texas Department of Human Services (DHS).

(a) To apply, the client must complete the application process. Clients must:

(1) fill out and sign an application. Clients must answer the questions on the application before DHS can certify them.

(2) give the application to DHS. Except for households with all SSI recipients, clients must file their applications at the office DHS designates. Applications may be filed in person, by mail, or through an authorized representative. Clients may file an application anytime during office hours and on the same day they get the form.

(3) participate in an interview. DHS does not require clients to be interviewed before they file their application.

(4) sign a responsibility agreement as specified in subsection (d) of this section.

(5) provide proof of any eligibility factor specified in Chapter 3 of this title (relating to Texas Works). Clients have the primary responsibility for providing proof needed by DHS to determine their eligibility and benefits. DHS allows clients 10 calendar days to provide requested proof.

(6) comply with the requirements of the finger imaging process unless exempt as specified in §3.7002 of this title (relating to Individuals Exempt from Finger Imaging Requirements).

(7) comply with the requirement to attend a workforce orientation unless the individual meets the exception criteria as specified in §3.7302 of this title (relating to Exceptions to the Workforce Orientation Requirements--Temporary Assistance for Needy Families (TANF)).

(b) DHS mails or gives applications for Temporary Assistance for Needy Families (TANF) and food stamps to clients on the same day they are requested. DHS must take the application when the client gives it if it contains the information specified in §3.303 of this title (relating to Receipt of Application-Acceptability Factors).

(c) If required proof is incomplete, DHS offers, or attempts to offer, reasonable help.

(d) Additional state and client responsibilities are explained by eligibility staff to households as a condition of TANF eligibility in Texas as specified in paragraphs (1)-(5) of this subsection.

(1) Requirements.

(A) State requirements. The state will:

(i) provide recipients with help in finding employment and necessary support services within available resources;

(ii) provide support services to strengthen the family such as life skills and parenting skills training;

(iii) ensure that programs administered are efficient, fraud-free and easily accessible;

(iv) gather accurate client information;

(v) promote the development of community resources;

(vi) promote clear and tangible goals for recipients;

(vii) enable parents to provide for their children's basic necessities in a time-limited benefits program;

(viii) promote education, job training and workforce development; and

(ix) give communities the opportunity to develop alternative programs that meet the unique needs of local recipients.

(B) Client requirements. DHS requires each adult TANF recipient, each minor parent applying as a caretaker or second parent, and each payee, as a condition of eligibility, to sign a responsibility agreement as specified in Human Resources Code, §31.0031. DHS requires household members to comply with any applicable requirements contained in the agreement and listed in Human Resources Code, §31.0031(d), after the agreement has been signed or the household is subject to a penalty as described in paragraph (4) of this subsection. For the parenting skills training specified in Human Resources Code, §31.0031(d)(8), DHS requires participation by certified caretakers and second parents of a certified child under age five and teen parents. Others may voluntarily participate.

(2) Establishing cooperation. Cooperation with a responsibility agreement that contains any one or more of the requirements listed in Human Resources Code, §31.0031(d), is established in the following manner:

(A) Recipients and payees must provide proof of cooperation with provisions in Human Resources Code, §31.0031(d)(2), (6), and (7), at each periodic review. DHS accepts the following as proof of cooperation:

(i) Human Resources Code, §31.0031(d)(2). For Texas Health Steps medical screens, DHS uses information from National Heritage Insurance Company's (NHIC's) paid claims system, or secondary verification provided by staff of the Texas Department of Health (TDH). For the immunization requirement, DHS accepts immunization records completed by a doctor or other medical professional licensed to perform immunization services indicating that a child's immunizations are current or, if not current, that the medical provider has established an alternate schedule for the child. DHS also accepts verification of school attendance at a public school in Texas or proof that a child is current for Texas Health Steps as proof for purposes of meeting the immunization requirement.

(ii) Human Resources Code, §31.0031(d)(6) and (7). DHS accepts written or verbal proof from the school that each household member, unless exempted under Human Resource Code, §31.0031(d)(6), is attending school regularly (as determined by the school).

(B) Human Resources Code, §31.0031(d)(8). DHS accepts written or verbal proof of training completion from the person or organization that provided training.

(C) Recipients are considered to be in cooperation related to the sections of the Human Resource Code described in clauses (i)-(ii) of this subparagraph, unless noncooperation is determined.

(i) DHS considers a recipient to be cooperating with Human Resources Code, §31.0031(d)(4), unless DHS is notified by the Texas Workforce Commission that the recipient is not cooperating or DHS determines that the recipient has failed to cooperate with another requirement that is considered a work requirement of the Choices employment plan; or

(ii) Human Resources Code, §31.0031(d)(3), unless DHS verifies the recipient voluntarily quit a job.

(D) Recipients and payees are considered to be in cooperation related to the sections of the Human Resource Code described in clauses (i)-(ii) of this subparagraph, unless noncooperation is determined.

(i) Human Resources Code, §31.0031(d)(5), unless DHS determines the recipient or payee, as applicable, has, since signing the responsibility agreement, committed and either been convicted of or received a deferred adjudication for:

(I) using, selling, or possessing marijuana or any other controlled substance in violation of Health and Safety Code, Chapter 481; or

(II) the abuse of alcohol; or

(ii) Human Resources Code, §31.0031(d)(1), unless noncooperation is determined pursuant to §3.1801 of this title (relating to Temporary Assistance for Needy Families (TANF) Child Support Requirements).

(3) Failure to sign the responsibility agreement. If a member of the household who is required to sign the responsibility agreement fails or refuses to sign, the application or case for the entire TANF household is denied.

(4) Penalties for noncooperation with requirements of a responsibility agreement. Failure to cooperate results in the penalties specified in subparagraphs (A)-(D) of this paragraph.

(A) A recipient or payee who fails to cooperate is penalized from receiving TANF cash assistance for the recipient or payee and their family for one month or until the person demonstrates cooperation with the requirement of the responsibility agreement for which the penalty was imposed, whichever is longer.

(B) A recipient or payee who fails to cooperate for two consecutive months becomes ineligible for TANF cash assistance for the recipient or payee and family.

(C) A family denied for noncooperation may reapply for TANF cash assistance but must cooperate with any applicable requirements of a responsibility agreement for one month before receiving cash assistance. This month of cooperation does not count toward the 45-day time frame DHS allows for processing applications.

(D) Penalty periods. DHS starts penalty periods beginning with the earliest month benefits can be adjusted. DHS considers noncooperation with these requirements to have ended as specified in:

(i) Human Resources Code, §31.0031(d)(1). DHS is notified by the Title IV-D agency of the parent's compliance with child support requirements.

(ii) Human Resources Code, §31.0031(d)(2). Medical screening for the child is completed, treatments are completed, or the recipient or payee, as applicable, has shown good faith effort because treatments are initiated by the medical provider. Immunizations are current or the recipient has shown good faith effort because an immunization schedule is established by the medical provider.

(iii) Human Resources Code, §31.0031(d)(6) and (7). The recipient or payee, as applicable, has shown a good faith effort because he or she provides verification from the school that the required student has attended school without an unexcused absence (as determined by the school) for one calendar month.

(iv) Human Resources Code, §31.0031(d)(8). For recipients participating in the Choices program, the case manager monitors and ensures the client participates and completes the parenting skills program. The case manager determines cooperation. The DHS eligibility worker monitors participation and completion of parenting skills for non-Choices clients.

(5) Good cause. Good cause for noncooperation as specified in Human Resources Code, §31.0033, is established for the requirements listed in Human Resources Code, §31.0031(d), as explained in the following subparagraphs.

(A) Human Resources Code, §31.0031(d)(1). Good cause is established as specified in §3.1801 of this title (relating to Temporary Assistance for Needy Families (TANF) Child Support Requirements).

(B) Human Resources Code, §31.0031(d)(2). Good cause regarding immunizations is established if the child is exempt under the provisions in Health and Safety Code, §161.004(d).

(C) Human Resources Code, §31.0031(d)(3). Good cause is established according to the regulations applicable to the Food Stamp Program as specified in 7 CFR §273.7(n)(3), regarding voluntary quit.

(D) Human Resources Code, §31.0031(d)(4). Good cause is established as specified in 45 CFR §250.35 and Human Resources Code, §31.0031(f), regarding employment education and training activities.

(E) Human Resources Code, §31.0031(d)(5). Good cause cannot be established for this requirement.

(F) Human Resources Code, §31.0031(d)(6) and (7). Good cause is established as specified in Human Resources Code, §31.0031(f), regarding lack of funding for support services. Regarding child care or day care, good cause is established if child care for a child under the age of 12 years (or day care for any incapacitated individual) living in the same home as the recipient is necessary for an individual to attend school, and such care is not available and outside funding is not available to provide such care. If there is another responsible household member in the home who is willing and able to provide such care, good cause does not apply. Good cause is also established if a student is expelled from school and the school system verifies it does not offer an alternative educational program.

(G) Human Resources Code, §31.0031(d)(8). Good cause is established if:

(i) no classes are available in the area or verification from known providers is received indicating that all classes were full when offered;

(ii) the provider verifies the client is currently attending classes;

(iii) the client provides a physician's statement or medical evidence that verifies that illness or injury prevented training completion when classes were available; or

(iv) the client provides verification that other circumstances beyond his control prevented training completion, such as a household disaster.

(H) Good cause noncompliance hearings. As required by the Human Resources Code, §31.0033, if the recipient claims good cause during the 13-day period after notice of adverse action concerning the noncompliance penalty is sent, DHS either makes a determination on the claim before the 13-day period expires or files the claim as a fair hearing pursuant to DHS's rules. The recipient retains the right to request a fair hearing within 90 days of agency action pursuant to Chapter 79 of this title (relating to Legal Services).

(I) Good cause related to parenting skills noncompliance. A client may request a determination that his noncompliance was due to good cause after a penalty is imposed. The client receives a determination regarding good cause for parenting skills noncompliance by the eligibility worker or case manager.

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 August 12, 2003.

TRD-200305050
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER K. EMPLOYMENT SERVICES

40 TAC §3.1104, §3.1105

The amendments are adopted under the Human Resources Code, Chapter 31, which authorizes DHS to administer financial assistance programs.

The amendments implement the Human Resources Code, §§31.001-31.081.

§3.1105. Reestablishing Eligibility.

(a) A household denied for noncooperation and who remains subject to the Temporary Assistance for Needy Families (TANF) work participation requirement can reestablish eligibility as explained in §3.301(d) of this title (relating to Responsibilities of Clients and the Texas Department of Human Services (DHS)).

(b) A household denied for noncooperation and who does not remain subject to the TANF work participation requirement may reestablish eligibility by making application, signing the responsibility agreement, meeting other eligibility requirements, and demonstrating cooperation with all applicable personal responsibility requirements for one month.

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 August 12, 2003.

TRD-200305049
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER R. CHILD SUPPORT

40 TAC §3.1801

The amendment is adopted under the Human Resources Code, Chapter 31, which authorizes DHS to administer financial assistance programs.

The amendment implements the Human Resources Code, §§31.001-31.081.

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 August 12, 2003.

TRD-200305048
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER WW. TEMPORARY ASSISTANCE FOR NEEDY FAMILIES--STATE PROGRAM

40 TAC §3.7609

The amendment is adopted under the Human Resources Code, Chapter 31, which authorizes DHS to administer financial assistance programs.

The amendment implements the Human Resources Code, §§31.001-31.081.

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 August 12, 2003.

TRD-200305047
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

CHAPTER 3. TEXAS WORKS

SUBCHAPTER V. MEDICAID ELIGIBILITY

40 TAC §§3.2201 - 3.2207

The Texas Department of Human Services (DHS) adopts the repeal of §§3.2201- 3.2207 without changes to the proposed text published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4844).

DHS undertook the repeals in order to remove the rules in Chapter 3 regarding Medicaid eligibility for households that are eligible for Temporary Assistance for Needy Families so that they could be rewritten in plain language format and placed into their own chapter.

DHS received no comments regarding adoption of the repeals.

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 the Texas Health and Human Services

Commission with the authority to administer federal medical assistance funds.

The repeals affect the Human Resources Code, §§22.001-22.038 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 August 11, 2003.

TRD-200305041
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

CHAPTER 4. TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF)-LEVEL MEDICAL ASSISTANCE

The Texas Department of Human Services (DHS) adopts the repeal of §§4.1002, 4.1004, 4.1006, 4.1008, 4.1010, 4.1012, 4.1014, and 4.1016; and adopts new §4.1-4.11 without changes to the proposed text published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4844).

DHS undertook the repeals and new sections as part of its initiative to reorganize its rules and write them in plain language format and in response to legislation passed by the 78th Texas Legislature. Rules concerning Medicaid programs for children and pregnant women were repealed from Chapter 4 so that they could be relocated to DHS's new Chapter 2 with the rules for the Medically Needy Program, since the two programs have similar criteria. Rules concerning Medicaid eligibility for households that are eligible for Temporary Assistance for Needy Families (TANF) were repealed from Chapter 3, Subchapter V, so they could be placed into their own chapter. DHS placed the TANF-level Medicaid rules in a separate chapter because federal welfare reform legislation delinked Medicaid eligibility from cash assistance eligibility. The new eligibility automation system (Texas Integrated Eligibility Re-design System, or TIERS) processes eligibility separately for TANF and Medicaid, as required by federal law. The new chapter reflects the eligibility requirements for a TANF-level family applying for Medicaid.

The new sections were written in plain language format to make them easier for the public to understand. New §4.2 was necessary to distinguish the resource limits applicable to Medicaid eligibility from those applicable to TANF, since the latter were changed during recent legislative amendments to the Human Resources Code, §31.032(d)(1). New §4.8 and §4.9 were included to clarify the current requirement that medical support and compliance with the medical support requirement are applicable to recipients of TANF-level medical assistance. New §4.10 and §4.11, concerning compliance with work requirements and denying medical assistance to a person who is eligible for TANF but for whom TANF is denied because of the person's failure to comply with the work requirement, were necessary in order to stay within the levels of funding allocated to DHS in the 2004-2005 General Appropriations Act.

DHS received one written comment from the Center for Public Policy Priorities (CPPP) and similar oral comments from representatives of CPPP at the Medical Care Advisory Committee meeting on July 9, 2003, and a public hearing on July 11, 2003. A summary of the comments and DHS's responses follow.

Comment: DHS should not adopt the rule to deny medical assistance as part of the new full-family sanction policy, because although the legislation allows the agency to do so, DHS is not required to do so.

Response: In consideration of the amount funded by appropriations to DHS in the 2004- 2005 General Appropriations Act, DHS has determined that the rule (§4.11) is necessary to stay within its appropriated limits.

Comment: DHS should clarify that the Medicaid sanction applies only to non-pregnant, adult caretakers over the age of 18.

Response: DHS notes that the Children and Pregnant Women Program is available to TANF non-compliers who qualify.

Comment: DHS should clarify that the sanction provision will be applied strictly to the work and child support requirements of the PRA.

Response: DHS believes that the rules as written limit the denial of Medicaid for TANF non- compliance to adults who fail to cooperate with child support and work requirements. The Office of the Attorney General defines what constitutes cooperation with child support, and the Texas Workforce Commission defines what constitutes work requirements.

Comment: DHS should develop clear and understandable notices for clients about this change and share information with community-based organizations who work with low-income families.

Response: DHS worked diligently to produce easy-to-understand client notices regarding this change. DHS has regular interaction with client advocacy organizations and will continue this communication on these important issues.

Comment: The cost savings estimated for the Medicaid penalty for non-cooperating TANF adults and the position stated by others that this sanction will produce a high level of cooperation need to be reconciled.

Response: DHS believes that the Medicaid sanction for non-cooperating TANF adults will eventually result in a higher level of cooperation with the TANF work requirement. However, in the early stages of implementation of this change in program policy, there will continue to be noncooperation that will produce cost savings. Further, once the level of cooperation has been increased, additional savings will occur due to more TANF adults leaving the TANF Program for employment as a result of the services the clients receive in the Choices Program.

SUBCHAPTER A. PROGRAM REQUIREMENTS

40 TAC §§4.1 - 4.11

The new sections 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 the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections affect the Human Resources Code, §§22.001-22.038 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 August 11, 2003.

TRD-200305042
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

CHAPTER 4. MEDICAID PROGRAMS--CHILDREN AND PREGNANT WOMEN SUBCHAPTER A. ELIGIBILITY REQUIREMENTS

40 TAC §§4.1002, 4.1004, 4.1006, 4.1008, 4.1010, 40.1012, 4.1014, 4.1016

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 the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeals affect the Human Resources Code, §§22.001-22.038 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 August 11, 2003.

TRD-200305043
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

CHAPTER 47. PRIMARY HOME CARE

The Texas Department of Human Services (DHS) adopts the repeal of §47.2909; adopts amendments to §§47.1901, 47.1903, 47.2901-47.2904, 47.2911-47.2914, 47.3906, 47.4902, and 47.5902; and adopts new §47.2909 and §47.3908 in its Primary Home Care chapter. The amendments to §§47.1901, 47.2904, and 47.5902, and new §47.2909 are adopted with changes to the proposed text published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4870). The repeal of §47.2909, amendments to §§47.1903, 47.2901-47.2903, 47.2911-47.2914, 47.3906, and 47.4902; and new §47.3908 are adopted without changes to the proposed text.

DHS removed the provider agency nurse from Primary Home Care (PHC) Program requirements to require only a non-nurse supervisor because the Centers for Medicare and Medicaid Services no longer requires nurse involvement in the state's personal care option and because the PHC Program is a non-medical program. The adopted rules reflect efforts to incorporate these intentions as part of a larger effort to streamline the PHC Program and to allow DHS to continue the program within reduced funding levels. Provider agency licensing requirements were changed to support the streamlining efforts. New §47.3908 was needed to make the retroactive payment procedures clearer to ensure more accurate claims of this type. Finally, DHS changed references to "1929(b) (Frail Elderly) services" to "community attendant services" to comply with new language for the program as provided in the Human Resources Code, §32.061.

DHS initiated a minor editorial change to the text of §47.1901(23) to clarify and improve the accuracy of the section.

DHS received written comments from ADAPT and an individual, and oral comments from the Texas Association for Home Care and Advocacy, Incorporated, during the Medical Care Advisory Committee meeting on July 9, 2003; at the DHS public hearing on July 11, 2003; and at the Aged and Disabled Advisory Committee on August 1, 2003. A summary of the comments and DHS's responses follow.

Comment: Several commenters expressed concerns about provider agencies' liability in service provision and that they may not be able to meet all of a client's needs.

Response: DHS is adding a statement to the assessment and the orientation/supervisory visit forms that the client and the provider agency sign, which indicates they are aware the program only provides certain services and the provider agency is not responsible for services outside of the program.

Comment: A comment was expressed about provider agency implementation of the reduction in hours for PHC clients.

Response: The comment does not directly address a proposed rule so there is no change to a rule. However, DHS will provide guidance on this issue.

Comment: Regarding §47.1901, Definitions, a comment was made about the different service names under the Primary Home Care Program being confusing. Specific reference was made to the new name of the services provided under Title XIX of the federal Social Security Act, 1929(b), called "Community Attendant Services." Another commenter proposed changing the name of the Primary Home Care Program.

Response: DHS did not revise this rule. The service names cannot be changed at this time. A change to the program and service names would require a change to automation programs and systems. DHS cannot currently make any automation changes due to the pending implementation of a new automation system.

Comment: Regarding §47.1901, Definitions, comments were received about the definition of "Practitioner" in these proposed rules, which limits orders or statements to a Texas physician. Licensure rules allow acceptance of orders or statements from physicians who are licensed in states that are contiguous to Texas.

Response: DHS revised the definition of "Practitioner" in §47.1901(20) to allow a statement from physicians currently licensed in contiguous states.

Comment: Regarding §47.1903, Staffing Requirements, and §47.2911, Orientation of Attendants, a commenter requested that language about attendant qualifications, orientation, and supervision of those attendants be removed and deferred to personal assistance service (PAS) licensure requirements.

Response: DHS did not revise these rules. PHC Program requirements are patterned after PAS licensure standards wherever possible. However, some additional contract requirements are necessary for program quality.

Comment: Regarding §47.2909, Medical Need Determination, and §47.2904, Critical Omissions/Errors for Primary Home Care or Community Attendant Services, there were comments about the provider agencies no longer having nurses on staff, but still being responsible for documenting medical diagnosis(es).

Response: DHS is developing a new form the provider agencies will use to obtain a statement from the practitioner documenting the client's medical need for personal care services. The provider agency will only be obtaining the form. DHS revised §47.2904 and §47.2909 to indicate that provider agencies are not responsible for ensuring a client's functional impairment related to a medical diagnosis.

Comment: Regarding §47.5902, a commenter noted that subsection (d) was inadvertently deleted. This section needs to be added back into the rules

Response: DHS revised §47.5902 as requested.

SUBCHAPTER A. GENERAL PROVISIONS AND SERVICES

40 TAC §47.1901, §47.1903

The amendments 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 the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendments affect the Human Resources Code, §§22.0001-22.038 and §§32.001-32.053.

§47.1901. Definitions.

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

(1) Abuse--Willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish; or willful deprivation by a caretaker or oneself of goods or services that are necessary to avoid physical harm, mental anguish, or mental illness.

(2) Adult--A person 18 or older, or an emancipated minor.

(3) Aged or elderly person--A person 65 or older.

(4) Assignee--A legal entity that assumes the responsibilities and duties of a current primary home care contract through a legal assignment of contract from another legal entity.

(5) Assignor--A legal entity that assigns its primary home care contract to another legal entity through an assignment of contract.

(6) Attendant--A provider agency employee who provides the authorized tasks to the client.

(7) Client--A person who is determined by the department to be eligible for services.

(8) Community attendant (CA) services--A service under the Primary Home Care program providing in-home attendant services to eligible clients. Clients receiving CA services must have a medical need for specific tasks. CA services are provided under Title XIX of the federal Social Security Act (relating to Grants to States for Medical Assistance Programs), at 42 U.S.C. §1396t (relating to Home and community care for functionally disabled elderly individuals).

(9) Controlling interest--an owner who is a sole proprietor, a partner owning 5.0% or more of the partnership, or a corporate stockholder owning 5.0% or more of the outstanding stock of the contracted provider, or a member of the board of directors.

(10) Days--Any reference to days means calendar days, unless otherwise specified in the text. Calendar days include weekends and holidays.

(11) Department--The Texas Department of Human Services.

(12) Emancipated minor--A person under 18 years of age who has the power and capacity of an adult. This includes a minor who has had the disabilities of minority removed by a court of law or a minor who, with or without parental consent, has been married.

(13) Exploitation--The illegal or improper act or process of a caretaker or others using an adult's resources for monetary or personal benefit, profit, or gain.

(14) Family care (FC) services--A service under the Primary Home Care Program providing in- home attendant services to eligible adults. FC services are provided under Title XX of the federal Social Security Act (relating to Block Grants to States for Social Services), at 42 U.S.C. §1397 et seq.

(15) Income eligible--An adult who is neither a Supplemental Security Income (SSI) or Temporary Assistance for Needy Families (TANF) client, but who has income that is equal to or less than the eligibility level established by the department.

(16) Institution--A nursing home, personal care home, intermediate care facility for the mentally retarded (ICF-MR), or state hospital.

(17) Medicaid eligible--An individual who is eligible for Medicaid as an SSI or TANF client, or who is eligible for medical assistance only while living in the community.

(18) Neglect--Failure to provide for oneself the goods or services that are necessary to avoid physical harm, mental anguish, or mental illness; or the failure of a caretaker to provide these goods or services.

(19) Person with a disability--A person who, because of physical, mental, or developmental impairment, is limited in his capacity to adequately perform one or more essential activities of daily living. Activities of daily living include but are not limited to:

(A) personal and health care;

(B) mobility;

(C) communication; and

(D) money management.

(20) Practitioner--A physician currently licensed in Texas, Louisiana, Arkansas, Oklahoma, or New Mexico; a physician assistant currently licensed in Texas; or a registered nurse approved by the Texas State Board of Nurse Examiners to practice as an advanced practice nurse.

(21) Practitioner's statement--A document signed by a practitioner that includes a client's diagnosis, current medications, and a statement that the client has a current medical need for assistance with personal care tasks and other activities of daily living.

(22) Primary Home Care Program--A Texas Department of Human Services attendant care services program. Community attendant (CA), primary home care (PHC), and family care (FC) are the three types of services available under the Primary Home Care Program.

(23) Primary home care (PHC) services--A service under the Primary Home Care Program providing in-home attendant services to eligible clients. Clients receiving PHC services must have a medical need for specific tasks. PHC services are provided under Title XIX of the federal Social Security Act, at 42 U.S.C. §1396a et seq. (relating to State plans for medical assistance).

(24) Prior approval--A decision made by the department regional nurse/caseworker, before services begin and before payment can be made, that the applicant or client meets the department criteria for the requested service.

(25) Provider agency--A home and community support services agency that has a contract with the department to provide services under the Primary Home Care Program.

(26) Provisional contract--A time-limited contract.

(27) Special attendant--A provider agency employee who can substitute for another attendant.

(28) Supervisor--A provider agency employee who:

(A) coordinates the delivery of services in the client's service plan;

(B) supervises attendants; and

(C) complies with §97.404 of this title (relating to Standards Specific to Agencies Licensed to Provide Personal Assistance Services).

(29) Unit of service--One hour of authorized service delivered to a prior-approved client.

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 August 11, 2003.

TRD-200305006
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER B. SERVICE REQUIREMENTS

40 TAC §§47.2901 - 47.2904, 47.2909, 47.2911 - 47.2914

The amendments and new section 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 the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendments and new section affect the Human Resources Code, §§22.0001- 22.038 and §§32.001-32.053.

§47.2904. Critical Omissions/Errors for Primary Home Care or Community Attendant Services.

(a) If the client assessment/service plan form or the practitioner's statement is missing, or if any of the following critical omissions or errors has occurred in the required documentation, the provider agency cannot obtain prior approval.

(1) The supervisor fails to sign or date the client assessment/service plan.

(2) The practitioner's statement does not include the credential of the practitioner who signed the order.

(3) Service plan tasks are not identified on the service plan form.

(4) The total number of service hours per week is not specified on the service plan form.

(5) The practitioner's statement does not include the license number of the practitioner who signed it.

(6) The practitioner who signed the order is excluded from participation in Medicare or Medicaid.

(7) The practitioner's signature is not on the practitioner's statement.

(8) The practitioner's signature date is missing or illegible and the provider agency's stamped date is missing from the practitioner's statement.

(9) The provider agency's stamped date used instead of the practitioner's date on the practitioner's statement does not include the provider agency's name, abbreviated name, or initials.

(b) Corrections of critical omissions or errors in provider agency documentation must be postmarked or date stamped as received by the department within 14 days after the regional nurse mails notification of the omission or error to the provider agency. If the provider agency fails to meet this time frame, the date of prior approval can be no earlier than the postmark or department-stamped date on the corrected documentation, or the department may refer the client to another provider agency of the client's choice.

§47.2909. Medical Need Determination.

(a) Applicability. This section does not apply to family care.

(b) Obtaining medical need. The provider agency must obtain the statement of medical need from the practitioner and submit the statement to the regional nurse within the time frame described in §47.2902 of this chapter (relating to Assessment, Service Plan, and Requesting Prior Approval) for:

(1) applicants who are referred to the provider agency (unless the applicant requests and is to receive family care only);

(2) clients who are receiving family care only and who are referred to the provider agency for primary home care or community attendant services; and

(3) clients who are referred to the provider agency to have medical need re-assessed, as requested by the case manager, such as when the initial medical need was established for a limited time.

(c) Negotiated referrals. In the case of negotiated referrals, the provider agency:

(1) must initially determine medical need by obtaining an oral statement of medical need from the practitioner before initiating

services as described in §47.2905 of this chapter (relating to Initiation of Service); and

(2) must then complete and submit a practitioner's statement as described in §47.2903 of this chapter (relating to Provider Agency Requirements after Verbal Referral for Primary Home Care or Community Attendant Services).

(d) Mental illness and mental retardation. Persons diagnosed with mental illness or mental retardation or both are not considered to have established medical need based solely on such diagnoses, but may establish medical need through a related diagnosis.

(e) Documentation of medical need determination. The provider agency must maintain the practitioner's statement in the client file.

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 August 11, 2003.

TRD-200305007
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

40 TAC §47.2909

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 the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeal affects 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 August 11, 2003.

TRD-200305008
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER C. CLAIMS PAYMENT

40 TAC §47.3906, §47.3908

The amendment and new section 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 the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment and new section 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 August 11, 2003.

TRD-200305009
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER D. PROVIDER CONTRACTS

40 TAC §47.4902

The amendment 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 the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment affects 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 August 11, 2003.

TRD-200305010
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER E. SUPPORT DOCUMENTS

40 TAC §47.5902

The amendment 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 the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment affects the Human Resources Code, §§22.0001-22.038 and §§32.001-32.053.

§47.5902. Reimbursement Methodology for Primary Home Care.

(a) General requirements. The Texas Department of Human Services (DHS) or its designee applies the general principles of cost

determination as specified in §20.101 of this title (relating to Introduction).

(b) Cost reporting. Providers must follow the cost-reporting guidelines as specified in §20.105 of this title (relating to General Reporting and Documentation Requirements, Methods and Procedures).

(1) All contracted providers must submit a cost report unless the number of days between the date the first DHS client received services and the provider's fiscal year end is 30 days or fewer. The provider may be excused from submitting a cost report if circumstances beyond the control of the provider make cost report completion impossible, such as the loss of records due to natural disasters or removal of records from the provider's custody by any governmental entity. Requests to be excused from submitting a cost report must be received at the address specified in the letter mailed with the cost report before the due date of the cost report.

(2) Providers are responsible for reporting only allowable costs on the cost report, except where cost report instructions indicate that other costs are to be reported in specific lines or sections. Only allowable cost information is used to determine recommended reimbursement. DHS or its designee excludes from reimbursement determination unallowable expenses included in the cost report and makes the appropriate adjustments to expenses and other information reported by providers. The purpose is to ensure that the database reflects costs and other information which are necessary for the provision of services and are consistent with federal and state regulations.

(A) Individual cost reports may not be included in the database used for reimbursement determination if:

(i) there is reasonable doubt as to the accuracy or allowability of a significant part of the information reported; or

(ii) an auditor determines that reported costs are not verifiable.

(B) When material pertinent to proposed reimbursements is made available to the public, the material will include the number of cost reports eliminated from reimbursement determination for the reason stated in subparagraph (A)(i) of this paragraph.

(c) Reimbursement determination. Reimbursement is determined in the following manner.

(1) Cost determination by cost area. Allowable costs are combined into three cost areas, after allocating payroll taxes to each salary line item on the cost report on a pro rata basis based on the portion of that salary line item to the amount of total salary expense and after applying employee benefits directly to the corresponding salary line item.

(A) Service support cost area. This includes field supervisors' salaries and wages, benefits, and mileage reimbursement expenses. This also includes building, building equipment, and operation and maintenance costs; administration costs; and other service costs. Administration expenses equal to $0.18 per Priority 1 unit of service are allocated to Priority 1. The administration costs remaining after this allocation are summed with the other service support costs.

(B) Nonpriority attendants cost area. This includes nonpriority attendants' salaries and wages, benefits, and mileage reimbursement expenses. This cost area is calculated as specified in §20.112 of this title (relating to Attendant Compensation Rate Enhancement).

(C) Priority 1 attendants cost area. This includes Priority 1 attendants' salaries and wages, benefits, mileage reimbursement, expenses. This cost area is calculated as specified in §20.112 of this title (relating to Attendant Compensation Rate Enhancement).

(2) Recommended reimbursement by cost area. For the service support cost area described in paragraph (1)(A) of this subsection the following is calculated:

(A) Projected costs. Each provider's total allowable costs, excluding depreciation and mortgage interest, per unit of service are projected from each provider agency's reporting period to the next ensuing reimbursement period, as described in §20.108 of this title (relating to Determination of Inflation Indicies) to calculate the projected expenses. Reimbursement may be adjusted where new legislation, regulations, or economic factors affect costs as specified in §20.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs).

(B) Projected cost per unit of service. To determine the projected cost per unit of service for each provider agency, the total projected allowable costs for the service support cost area are divided by total units of service, including nonpriority services, Priority 1 services, and STAR+PLUS services, in order to calculate the projected cost per unit of service.

(C) Projected cost arrays. All provider agencies' projected allowable costs per unit of service are rank ordered from low to high, along with each provider agency's corresponding total units of service.

(D) Recommended reimbursement for the service support cost area. The total units of service for each provider agency are summed until the median hour of service is reached. The corresponding projected expense is the weighted median cost component. The weighted median cost component is multiplied by 1.044 to calculate the recommended reimbursement for the service support cost area. The service support cost area recommended reimbursement is limited, if necessary, to available appropriations.

(3) Total recommended reimbursement.

(A) For nonpriority clients. The recommended reimbursement is determined by summing the recommended reimbursement described in paragraph (2) of this subsection and the cost area component from paragraph (1)(B) of this subsection.

(B) For Priority 1 clients. The recommended reimbursement is determined by summing the recommended reimbursement described in paragraph (2) of this subsection and the cost area component from paragraph (1)(C) of this subsection.

(d) Reimbursement determination authority. The reimbursement determination authority is specified in §20.101 of this title (relating to Introduction).

(e) Desk reviews and field audits of cost reports. Desk reviews or field audits are performed on cost reports for all contracted providers. The frequency and nature of the field audits are determined by DHS or its designee to ensure the fiscal integrity of the program. Desk reviews and field audits will be conducted in accordance with §20.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), and providers will be notified of the results of a desk review or an audit in accordance with §20.107 of this title (relating to Notification of Exclusions and Adjustments). Providers may request an informal review and, if necessary, an administrative hearing to dispute an action taken under §20.110 of this title (relating to Informal Reviews and Formal Appeals).

(f) Factors affecting allowable costs. Providers must follow the guidelines in determining whether a cost is allowable or unallowable as specified in §20.102 this title (relating to General Principles of

Allowable and Unallowable Costs) and §20.103 of this title (relating to Specifications for Allowable and Unallowable Costs).

(g) Reporting revenues. Revenues must be reported on the cost report in accordance with §20.104 of this title (relating to Revenues).

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 August 11, 2003.

TRD-200305011
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

PART 4. TEXAS COMMISSION FOR THE BLIND

CHAPTER 167. BUSINESS ENTERPRISES OF TEXAS

40 TAC §§167.2 - 167.4, 167.6 - 167.15, 167.17

The Texas Commission for the Blind adopts amendments to §§167.2-167.4 and §§167.6-167.15 pertaining to the administration of the agency's Business Enterprises of Texas. The Commission also adopts new §167.17. §§167.2, 167.3, 167.4, 167.6, 167.8-167.15, and §167.17 are adopted without changes to the text proposed in the May 23, 2003, issue of the *Texas Register* (28 TexReg 4083) and will not be republished. §167.7 is adopted with changes.

The Commission received comments on the proposed rules from the Elected Committee of Managers. The changes to §167.7 reflect the results of a meeting in which representatives of the Elected Committee of Managers (ECM) participated in additional discussions about the agency's procedures for making initial and career advancement assignments. The discussions were held in compliance with §107b-1 of the Randolph-Sheppard Act (20 U. S. C., Chapter 6A, §107 et seq.). During the course of the meeting, representatives of the Elected Committee of Managers (ECM) recommended several changes, summarized as follows:

The ECM chairman recommended changes to paragraph 9 of §167.7 to require the same selection and assignment procedures for level one and level two facilities. He suggested eliminating the establishment of a pool of impartial and qualified individuals from which to draw a third panel member to facilitate promotional selection panels for level two facilities. The board disagrees with the recommendation and did not eliminate the selection method for career advancement selections. The random selection of an impartial person connected neither to the Commission nor managers to facilitate the panel interview and selection process for promotion assignments better ensures a fair and unbiased decision. With regard to (9)(H) pertaining to duties of selection panels, the ECM representatives recommended that changes be made to ensure that panels give greater weight to the interview portion of the selection process than the business plan score and performance evaluation score. The recommended weighted ratio was 60/20/20 for all career advancement panels. The board agrees and has made the changes.

The ECM chairman also recommended the total elimination of subsections (i) and (j) pertaining to improper contacts, stating that the rules are unnecessarily harsh. Another ECM representative suggested the insertion of "alleged" before improper contact in the subsections. The board disagrees with the elimination of the subsections because of the need to protect the integrity of the selection process, but agrees with the suggestion to modify the subsections with the words "alleged" and "improperly" where appropriate. In addition, the board is modifying the subsection to ensure that the ECM chairman receives notices of alleged improper contacts when they are reported. The board is also changing subsection (j) to have reports of improper contact be made to the BET director in lieu of the executive director for administrative purposes.

The amendments and new section are adopted under Human Resources Code §94.012, which authorizes the Commission to promulgate rules for the administration of the vending facility program, and §94.016, which authorizes the Commission to administer the program in accordance with the provisions of the Randolph-Sheppard Act (20 U.S.C. Section 107 et seq.).

The adoption affects no other statutes.

§167.7. Initial and Career Advancement Assignment Procedures.

(a) Purpose. This section defines the process for the initial and career advancement assignments of managers. It is the goal of the process to provide a fair, unbiased, and impartial process for selection, transfer, and promotion.

(b) Initial assignment. Upon successful completion of BET training, the initial assignment for a newly-licensed licensee shall be made by the BET director. The initial assignment shall be for a minimum of 12 months. The BET director shall make the assignment based on the following:

(1) availability of a Level 1 facility;

(2) recommendations from the BET training specialist and the ECM chairperson;

(3) licensee's training records;

(4) licensee's geographical concerns; and

(5) any other circumstances on a case-by-case basis.

(c) Career advancement assignments.

(1) Availability. All career advancement opportunities are dependent upon the availability of BET facilities. No facility with a projected annual income equal to the annual median income level of all managers or $30,000, whichever is the greater after set-aside fees, shall be used for an initial assignment unless it has first been advertised and made available to all licensees in the BET Program and no one has been assigned to such facility as a result of the advertising process.

(2) Notice. As BET facilities become available and ready for permanent assignment, written notice of such availability shall be given to all licensees within 30 business days .

(3) On-site visits. An advertised facility shall be available for onsite visits upon reasonable notice by applicants.

(4) Eligibility. To apply for an available facility, a licensee must meet the following requirements:

(A) The licensee must have successfully managed a BET facility for a minimum of one year.

(B) The licensee must have been current on all accounts payable for the preceding 12 months prior to the date of the facility announcement.

(C) The licensee must not be on probation under the section of these rules relating to administrative actions.

(D) The licensee must meet eligibility requirements of the facility's host organization.

(E) The licensee must not have submitted two or more insufficient fund checks to the Commission within the 12 months prior to the date of the facility announcement.

(F) The licensee must not have submitted two or more late reports within the 12 months prior to the date of the facility announcement.

(G) If unassigned, the licensee must have fulfilled all resignation requirements in the licensee's last facility or be displaced and eligible to apply for a facility.

(H) The manager must have an inventory of merchandise and expendables in the manager's current facility as the Commission has determined sufficient for its satisfactory operation.

(I) The licensee must satisfy the Commission that he can acquire the merchandise and expendables required for the available facility.

(J) A licensee who has been placed on probation is not eligible for promotion and transfer for 30 days following release from probation.

(K) A licensee who has been placed on probation twice within a twelve-month period is not eligible for promotion or transfer for six months following release from probation.

(L) A licensee who has been placed on probation three times within a two-year period is not eligible for promotion or transfer for one year following release from probation.

(5) BET application deadline. A licensee may apply for an available facility by submitting an application not later than the 12th business day (exclusive of date of mailing) after the date the facility notice was mailed. The submission date shall be:

(A) the date the application is delivered to the Commission; or

(B) 3 days after deposit of the application in the United States mail, whichever is earlier; or

(C) the date the application is delivered to an overnight courier.

(6) BET application contents. A copy of the current form of the application shall be included in the BET manual. The substance of the application form shall not be modified except by action of the Commission's board. Modifications shall be provided to all licensees prior to their effective date. Upon request by the manager and prior to the submission deadline, assistance is available from the local BET staff and ECM representative in completing the BET Application Form.

(7) Preliminary review of applications. Commission staff and the ECM representative in each geographic area in which the applying licensees are currently located shall review all applications from their areas and shall verify the applicant's eligibility. In the event an ECM representative is an applicant for an available BET facility, the ECM chairperson shall appoint another ECM member for the review. Completed applications shall then be forwarded to the BET director who shall provide copies to the ECM and Commission staff in the area in which the available facility is located.

(8) Level 1 assignments. Assignments to Level 1 facilities shall be made by the BET director after reviewing the recommendations and assessments of all applicants conducted by the ECM representative and Commission staff for the regions in which the available facilities are located.

(9) Level 2 assignments. For Level 2 assignments, the following additional procedures shall apply:

(A) Business plan. An applicant must submit a business plan to the BET director no later than the 20th business day after the postmark date on the notice of facility availability. Upon request by an applicant, the Commission staff in the area in which the available facility is located shall provide a standard packet of information to the applicant containing information necessary to prepare the business plan. The Commission staff shall deliver the packet to the applicant no later than the 3rd business day after receiving a request.

(B) Establishment of pool of impartial and qualified individuals. The Commission shall establish and maintain a pool of qualified individuals. The pool members shall be individuals who:

(i) have no personal, professional, or financial interest that would be in conflict with the objectivity of the individual;

(ii) neither have nor have had any association with the Commission or Business Enterprises of Texas prior to being considered as a pool member; and

(iii) have at least 5 years experience in business at a managerial or executive level, including experience in budget preparation and administration, personnel supervision or management; and administration of business plans or equivalents to business plans in the sector of business in which the person has experience.

(C) Evaluation of business plans. All business plans shall be reviewed and evaluated by an individual chosen at random from the pool of impartial and qualified individuals. Business plans shall be evaluated and scored based on a scoring system of 100 points. The evaluations and scores shall then be forwarded to the BET director for consideration by the selection panel in the selection process.

(D) Selection panel. A selection panel consisting of one representative from the ECM, one Commission staff member, and one individual from the pool of impartial and qualified individuals shall be chosen by means of a computer program that selects randomly from a database. The selection of each panel member shall be from among all persons within their respective categories, except that the impartial member may not be the individual who evaluated the business plans. If the member of a category of panel members who is selected is unable or refuses to serve, the BET director shall use the same method of random selection until three members are chosen.

(E) Presiding officer. The impartial panel member shall serve as the presiding officer of the selection panel.

(F) Interview notices. Applicants shall be notified by first class U. S. Mail of the date, place and time of the selection panel interview no fewer than 10 business days prior to the convening of the selection panel.

(G) Selection panel materials. Completed applications, business plans, and each applicant's most recent performance evaluation shall be provided to the selection panel members no fewer than 5 business days prior to the date the selection panel is to convene.

(H) Duties of selection panel. The selection panel shall review the documents provided and interview the applicants. The panel shall prepare a tabulation sheet for each manager on which the member will enter the business plan score and performance evaluation score previously received by the applicant. A third score shall be awarded by each panel member for the interview performance of the applicant. Each interview shall be rated on a maximum score of 100 based on such areas as the quality of the applicant's presentation, knowledge of the submitted business plan, and preparation for the assignment. Each applicant shall be interviewed on the same areas and given a similar amount of time to present their case. While questions must necessarily be tailored to each individual's business plan, presentation, and knowledge, the panel should strive to conduct the interviews as similarly as possible. The selection panel shall then rank the top three applicants. An applicant's ranking shall be determined after weighting each applicant's business plan score by 20%, weighting each applicant's most recent performance evaluation by 20%, and weighting the average interview score received by panel members by 60%. In the event of a tie in scores, the panel will award one point to whichever applicant has the greater length of accumulated service as an assigned manager in a BET facility according to BET records, thereby breaking the tie. The selections shall be transmitted to the BET director, who shall in turn notify the highest ranked applicant of the decision of the selection panel. The available facility shall be offered to the applicants in order of ranking.

(I) Reports of improper contact. Members of the selection panel must report alleged improper contacts to the BET director or the executive director. Improper contact is defined as any communication with a member of the selection panel for the purpose of improperly influencing or manipulating, directly or indirectly, the selection of an applicant for the facility being considered for assignment. Nothing contained in this section, however, shall be deemed to prohibit any licensee from endorsing or supporting any candidate for selection by furnishing a letter or other document to that effect to be included with the applying licensee's application. At the conclusion of the selection panel's responsibilities, each panel member shall be required to sign a statement certifying whether the member had, or had knowledge of, an improper contact during the selection proceedings.

(J) Process for investigating reports of improper contact. When alleged improper contact is reported, each applicant for the facility under consideration and the ECM Chairman shall be informed as to the occurrence of an alleged improper contact. The information provided to the applicants shall describe the nature of the alleged improper contact but shall not divulge the identities of any persons allegedly participating in such improper contact. Each applicant may make objection to continuation by the existing panel and request that a new panel be formed to select the manager for the available facility. The BET Director, upon the request of any applicant for the facility, shall determine if the improper contact is such as to require that the panel be disbanded and a new panel formed. In making that decision, the BET Director shall consider all relevant factors, including the objections, if any, of the applicants, to determine if the improper contact is likely to influence the decision of the selection panel. If the BET Director determines that the improper contact is likely to influence the selection process, the BET Director shall direct that the panel be disbanded and that a new panel be formed to consider the selection for the facility being considered. The BET Director shall inform all applicants of his decision to continue the selection process with the existing panel or to form a new panel and shall state the basis of the decision. The actions prescribed as a consequence of improper contact set forth in policies pertaining to administrative actions shall apply whether or not any improper contact results in the panel being disbanded.

(K) Exceptions to assignment and selection procedures. Unusual circumstances may require exceptions to assignment and selection procedures. Exceptions to these procedures shall be made only if the circumstance is not covered by assignment procedures and failure to react to the circumstance would be detrimental to BET or a licensee. Notwithstanding anything in this section, no exceptional procedure shall result in the removal of a manager from a facility except for reasons contained in policies pertaining to administrative actions. Assignment and selection decisions that are exceptions to these procedures shall be made by the BET director after discussing relevant information with the ECM chairperson and receiving the chairperson's recommendation. Should a decision contrary to the ECM chairperson's recommendation be made, the BET director shall provide a written explanation of the decision to the ECM chairperson.

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 August 11, 2003.

TRD-200305023
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: October 1, 2003
Proposal publication date: May 23, 2003
For further information, please call: (512) 377-0611

♦ ♦ ♦

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 Department of Banking

Title 7, Part 2

The Finance Commission of Texas (commission) files this notice of intention to review and consider for readoption, revision, or repeal, Texas Administrative Code, Title 7, Chapter 15 (Corporate Activities), specifically Subchapter C, comprised of §15.41 and §15.42, concerning Bank Offices; Subchapter D, comprised of §15.61 and §15.62, concerning Trust Company Applications; Subchapter E, comprised of §15.81, concerning Change of Control Applications; Subchapter F, comprised of §§15.101-15.117, concerning Applications for Merger, Conversion, and Purchase or Sale of Assets; and Subchapter G, comprised of §15.121 and §15.122, concerning Charter Amendments and Certain Changes in Outstanding Stock.

The commission undertakes its review pursuant to Government Code, §2001.039. The commission will accept comments for 30 days following the publication of this notice in the *Texas Register* as to whether the reasons for adopting the sections under review continue to exist.

Any questions or written comments pertaining to this notice of intention to review should be directed to Shannon Phillips, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705, or by email to shannon.phillips@banking.state.tx.us. Any changes to rules proposed as a result of the review will be published in the Proposed Rules Section of the *Texas Register* and will be open for a separate 30-day comment period prior to final adoption or repeal by the commission.

TRD-200305342
Everette D. Jobe
Certifying Official
Texas Department of Banking
Filed: August 18, 2003

♦ ♦ ♦

The Finance Commission of Texas (commission) files this notice of intention to review and consider for readoption, revision, or repeal, Texas Administrative Code, Title 7, Chapter 29 (Sale of Checks Act).

The commission undertakes its review pursuant to Government Code, §2001.039. The commission will accept comments for 30 days following the publication of this notice in the *Texas Register* as to whether the reasons for adopting the sections under review continue to exist.

Any questions or written comments pertaining to this notice of intention to review should be directed to Sarah Shirley, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705, or by email to sarah.shirley@banking.state.tx.us. Any changes to rules proposed as a result of the review will be published in the Proposed Rules Section of the *Texas Register* and will be open for a separate 30-day comment period prior to final adoption or repeal by the commission.

TRD-200305341
Everette D. Jobe
Certifying Official
Texas Department of Banking
Filed: August 18, 2003

♦ ♦ ♦

Texas Department of Health

Title 25, Part 1

The Texas Department of Health (department) will review and consider for readoption, revision, or repeal Title 25, Texas Administrative Code, Part 1, Texas Department of Health, Chapter 135, Ambulatory Surgical Centers, Subchapter A, Operating Requirements for Ambulatory Surgical Centers, §§135.1 - 135.29; Subchapter B, Safety Requirements for New and Existing Ambulatory Surgical Centers, §§135.41 - 135.42; and Subchapter C, Physical Plant and Construction Requirements for New and Existing Ambulatory Centers, §§135.51 - 135.54.

This review is in accordance with the Texas Government Code, §2001.039 regarding agency review of existing rules.

An assessment will be made by the department as to whether the reasons for adopting or readopting these rules continues to exist. This assessment will be continued during the rule review process. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the department.

Comments on the review may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to Linda Wiegman, Office of General Counsel, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756. Any proposed changes to these rules as a result of the review will be published in the Proposed Rule Section of the *Texas Register* and will be open for an additional 30 day public comment period prior to final adoption or repeal by the department.

TRD-200305384
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 20, 2003

♦ ♦ ♦

The Texas Department of Health (department) will review and consider for readoption, revision, or repeal Title 25, Texas Administrative Code, Part 1, Texas Department of Health, Chapter 313, Athletic Trainers, §§313.1 - 313.17.

This review is in accordance with the Texas Government Code, §2001.039 regarding agency review of existing rules.

An assessment will be made by the department as to whether the reasons for adopting or readopting these rules continues to exist. This assessment will be continued during the rule review process. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the department.

Comments on the review may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to Linda Wiegman, Office of General Counsel, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756. Any proposed changes to these rules as a result of the review will be published in the Proposed Rule Section of the *Texas Register* and will be open for an additional 30 day public comment period prior to final adoption or repeal by the department.

TRD-200305385
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 20, 2003

♦ ♦ ♦

Adopted Rule Reviews

Texas Department of Banking

Title 7, Part 2

The Finance Commission of Texas (commission), on behalf of the Texas Department of Banking (department), has completed the review of Texas Administrative Code, Title 7, Chapter 15 (Corporate Activities), Subchapter A, comprised of §§15.1-15.8, concerning Fees and Other Provisions of General Applicability, and Subchapter B comprised of §§15.23-15.24, concerning Bank Charters.

Notice of the review of Chapter 15, Subchapters A and B, was published in the May 9, 2003 issue of the *Texas Register* (28 TexReg 3849). No comments were received in response to the notice.

The department believes that the reasons for initially adopting these rules continue to exist. However, the department recognizes that the rules require minor amendments to conform statutory references to the 1999 codification of the Finance Code and is proposing conforming changes at the same time as this rule review adoption.

Subject to the proposed amendments to conform statutory references, published in this issue of the *Texas Register*, the commission finds that the reasons for initially adopting these rules continue to exist and readopts these rules without change in accordance with the requirements of Government Code, §2001.039.

TRD-200305223
Everette D. Jobe
Certifying Official
Texas Department of Banking
Filed: August 15, 2003

♦ ♦ ♦

Texas Commission for the Blind

Title 40, Part 4

The Texas Commission for the Blind has completed its review of all rules in Chapter 159 of its rules pertaining to Administrative Rules and Procedures in accordance with the requirements of Texas Government Code, §2001.039, added by Acts 1999, 76th Leg., ch. 1499, §1.11(a).

The Board received no public comments in response to its notice of the proposed rule review filed in the February 14, 2003, issue of the *Texas Register* (28 TexReg 1533). The public was invited to make comments on the rules as they then existed in Title 40 TAC, Part 4, Chapter 159.

During the review period, the Commission adopted an amendment to §159.6 concerning payment rates for medical services provided to consumers. The rule as amended was adopted without changes to the proposed text as published in the February 28, 2003, issue of the *Texas Register* (28 TexReg 1822).

In its August 2003 meeting, the Commission concluded its review of the chapter and found that the reasons for adopting all remaining rules in the chapter continue to exist and they are hereby readopted without changes.

TRD-200305375
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Filed: August 19, 2003

♦ ♦ ♦

Texas State Board of Examiners of Psychologists

Title 22, Part 21

The Texas State Board of Examiners of Psychologists adopts rule review to Board Rules 463.16-463.29 (concerning Licensing), and Chapter 469 (concerning Complaints Enforcement), in accordance with the Appropriations Act, Section 167. As part of this review process, the Board proposes new Rule 463.20, Refunds of Application and Examination Fees, and new Rule 469.15, Disciplinary Action for Persons with Dual Licensure. In addition, the Board proposes to amend the existing Rule 469.1, Timeliness of Complaints, Rule 469.3, Standardized Complaint Form, 469.4, Complaint Investigation, Rule 469.5, Complaint Disposition, Rule 469.6, Temporary Suspension of a License, Rule 469.7, Persons with Criminal Backgrounds, Rule 469.8, Rehabilitation Guidelines, Rule 469.13, Non-Compliance with Continuing Education Requirements, Rule 469.14, Monitoring of Licensees, and Rule 469.15, Disciplinary Action for Persons with Dual Licensure. The adopted amendments may be found in the Proposed Rules section of the Texas Register. The Board is not proposing any changes to existing Board rules 463.16-463.29, 469.2, 469.9, 469.10 and 469.12.

The proposed rule review appeared in the June 13,2003, issue of the *Texas Register* (28 TexReg 4572).

No comments were received regarding adoption of the rule review.

TRD-200305071
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Filed: August 12, 2003

♦ ♦ ♦

Railroad Commission of Texas

Title 16, Part 1

The Railroad Commission of Texas (Commission) files this notice of completion of the review of §3.20, in accordance with Texas Government Code, §2001.039. The proposed review was published in the July 11, 2003, issue of the *Texas Register* (28 TexReg 5549). The Commission previously proposed some amendments to §3.20 which were published in the March 28, 2003, issue of the *Texas Register* (28 TexReg 2677) for a 60-day comment period. The Commission withdrew that proposal (28 TexReg 5519), but may consider amendments to §3.20 in the future. The Commission received no comments on the proposed review of §3.20 and has determined that the reasons for adopting this rule continue to exist.

Issued in Austin, Texas, on August 19, 2003.

TRD-200305373
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Filed: August 19, 2003

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: 7 TAC §1.1308(a)(1)

"(Optional:)DATE _____)
BUYER _____
ADDRESS _____
CITY _____STATE_____ ZIP _____
PHONE _____

SELLER/CREDITOR_____
ADDRESS _____
CITY _____ TX _____
PHONE _____

(Optional Co-Buyer Identification)
CO-BUYER _____
ADDRESS _____
CITY _____ STATE_____ZIP_____
PHONE _____"

Figure: 7 TAC §1.1308(e)

MOTOR VEHICLE IDENTIFICATION

Stock No.	Year	Make	Model	Vehicle Identification Number	License Number (if applicable)	☐ New ☐ Demonstrator ☐ Executive/Official ☐ Used	USE FOR WHICH PURCHASED ☐ PERSONAL, FAMILY OR HOUSEHOLD ☐ BUSINESS OR COMMERCIAL ☐ AGRICULTURAL

Figure: 7 TAC §1.1308(f)

"Trade-in: Year_____ Make_____ Model_____ VIN_____ License No._____"

Figure: 7 TAC §1.1308(g)

ANNUAL PERCENTAGE RATE The cost of my credit as a yearly rate. %	**FINANCE CHARGE** The dollar amount the credit will cost me. $	**AMOUNT FINANCED** The amount of credit provided to me or on my behalf. $	**TOTAL OF PAYMENTS** The amount I will have paid after I have made all payments as scheduled. $	**TOTAL SALE PRICE** The total cost of this credit purchase including my down payment of $_____ _ $

My Payment Schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due

Security: You will have a security interest in the motor vehicle being purchased.
Late Charge: [**True daily earnings:**] (Option A:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge at the rate of _____% per year on the past due amount. The late charge on the past due amount will be earned from the due date to the date that it is paid. (Option B:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge of _____% of the scheduled payment. [**Scheduled Installment Earnings Method or sum of the periodic balances:**] (Option A:) If I do not pay my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge on the past due amount at the contract rate. (Option B:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge at the rate of _____% per year on the late amount. The late charge on the past due amount will be earned from the due date to the date that it is paid. (Option C:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge of _____% of the scheduled payment.
Prepayment: [**True daily earnings method:**] If I pay all that I owe early, I will not have to pay a penalty. [**Sum of the periodic balances method:**] I can pay all that I owe early. If I do so, I can get a refund of part of the Finance Charge.
Additional Information: I will refer to this document for information about nonpayment, default, security interests, any required repayment in full before the scheduled date, and prepayment refunds.

Figure: 7 TAC §1.1308(h)(1)

ITEMIZATION OF AMOUNT FINANCED

1. Cash price [Optional additional description: "(including any accessories, services, and taxes)"] $_____(1)

2. Total downpayment (A + B) =
   A. [*If netting add*: (if negative, enter "0" and see Line 4.A. below)]
   Gross trade-in $_____
   - payoff by seller $_____
   = net trade-in $_____
   B. [*If not netting add*: (if negative enter "0" and see Line 4.A. below)]
   + cash $_____
   + Mfrs. Rebate $_____
   + other (describe) _____ $_____
   $_____(2)

3. Unpaid balance of cash price (1 minus 2) $_____(3)

4. Other charges including amounts paid to others on your behalf (Seller may keep part of these amounts.):
   A. Net trade-in payoff [*Alternative caption*: "prior credit or lease balance"] to _____ $_____
   B. Cost of physical damage insurance paid to insurance company $_____
   C. Cost of optional coverages with physical damage insurance paid to insurance company $_____
   D. Cost of optional credit insurance paid to insurance company or companies $_____
      Life
      Disability
   E. Other insurance paid to the insurance company $_____
   F. Official fees paid to government agencies $_____
   G. Dealer's inventory tax [*Optional addition*: (if not included in cash price)] $_____
   H. Sales tax [*Optional addition*: (if not included in cash price)] $_____
   I. Other taxes [*Optional addition*: (if not included in cash price)] $_____
   J. Government license and/or registration fees $_____
   K. Government certificate of title fee $_____
   L. Government vehicle inspection fees $_____
   M. Deputy service fee paid to dealer $_____
   N. **Documentary fee. A documentary fee is not an official fee. A documentary fee is not required by law, but may be charged to buyers for handling documents and performing services relating to the closing of a sale. A documentary fee may not exceed $50. This notice is required by law.** [***Option to insert Spanish translation of disclosure here.***] $_____
   O. Other charges (Seller must identify who is paid and describe purpose)
      to_____for_____ $_____
      to_____for_____ $_____
      to_____for_____
      $_____
   Total other charges and amounts paid to others on your behalf
   $_____(4)

5. **Amount Financed** (3 + 4) $_____(5)

[*Optional Caption*: Taxes, title fee, license fee, and any state inspection fee (*except for $5.00 of each such inspection fee that will be retained by Seller*) will be paid by Seller to government agencies. Documentary fee and deputy service fee will be retained by Seller.]

[***Note: A creditor may delete portions of the figure applicable to any insurance premiums that are not financed in the contract and may also delete other inapplicable portions.***]

Figure: 7 TAC §1.1308(h)(2)

ITEMIZATION OF AMOUNT FINANCED

1. Cash price [Optional additional description: "(including any accessories, services, and taxes)"] $_____(1)

2. Total downpayment (A + B) =
   A. [*If netting add*: (if negative, enter "0" and see Line 4.A. below)]
   Gross trade-in $_____
   - payoff by seller $_____
   = net trade-in $_____
   B. [*If not netting add*: (if negative enter "0" and see Line 4.A. below)]
   + cash $_____
   + Mfrs. Rebate $_____
   + other (describe) _____ $_____
   $_____(2)

3. Unpaid balance of cash price (1 minus 2) $_____(3)

4. Other charges including amounts paid to others on your behalf (Seller may keep part of these amounts.):
   A. Net trade-in payoff [*Alternative caption*: "prior credit or lease balance"] to _____ $_____
   B. Cost of physical damage insurance paid to insurance company $_____
   C. Cost of optional coverages with physical damage insurance paid to insurance company $_____
   D. Cost of optional credit insurance paid to insurance company or companies $_____
      Life
      Disability
   E. Other insurance paid to the insurance company $_____
   F. Official fees paid to government agencies $_____
   G. Dealer's inventory tax [*Optional addition*: (if not included in cash price)] $_____
   H. Other taxes [*Optional addition*: (if not included in cash price)] $_____
   I. Government license and/or registration fees $_____
   J. Government certificate of title fee $_____
   K. Government vehicle inspection fees $_____
   L. Deputy service fee paid to dealer $_____
   M. **Documentary fee. A documentary fee is not an official fee. A documentary fee is not required by law, but may be charged to buyers for handling documents and performing services relating to the closing of a sale. A documentary fee may not exceed $50. This notice is required by law.** [***Option to insert Spanish translation of disclosure here.***] $_____
   N. Other charges (Seller must identify who is paid and describe purpose)
      to_____for_____ $_____
      to_____for_____ $_____
      to_____for_____ $_____
   Total Itemized Charges upon which the Finance Charge is assessed $_____(4)

5. Total Unpaid Balance Plus Itemized Charges Upon which the Finance Charge is assessed $_____(5)
6. Total Sales Tax (Upon Which No Finance Charge is Assessed) $_____(6)
7. **Amount Financed** (3+4+5+6) $_____(7)

Finance Charge (Not Assessed Upon Sales Tax) $_____

[*Optional Caption*: Taxes, title fee, license fee, and any state inspection fee (*except for $5.00 of each such inspection fee that will be retained by Seller*) will be paid by Seller to government agencies. Documentary fee and deputy service fee will be retained by Seller.]

[***Note: A creditor may delete portions of the figure applicable to any insurance premiums that are not financed in the contract and may also delete other inapplicable portions.***]

Figure: 7 TAC §1.1308(j)

DEFERRED DOWNPAYMENT(S)	
AMOUNT	**DATE DUE**

Figure: 7 TAC §1.1308(k)

MODEL CLAUSE FOR REQUIRED PHYSICAL DAMAGE INSURANCE

PROPERTY INSURANCE: I must keep the collateral insured against damage or loss in the amount I owe. I must keep this insurance until I have paid all that I owe under this contract. I may obtain property insurance from anyone I want or provide proof of insurance I already have. The insurer must be authorized to do business in Texas. I agree to give you proof of property insurance. I must name you as the person to be paid under the policy in the event of damage or loss.

[Note: The following optional provisions are included for Creditors who finance physical damage insurance. Creditors who do not routinely finance Physical Damage coverage, or who are not financing it in a particular transaction, may delete the remaining disclosures in this Figure. A creditor may also delete those portions below that pertain to coverages it does not routinely finance, or that pertain to coverages that it is not financing in a particular transaction.]

If any insurance is included below, policies or certificates from the insurance company will describe the terms, conditions and deductibles.

A. Physical damage insurance. If you obtain physical damage insurance, the coverages, terms and premiums for these terms are set forth below.

Coverage	Term in Months	Premium
Collision	___	☐$_____
Comprehensive	___	☐$_____
Fire, Theft, and Combined Additional Coverage	___	☐$_____
Other	___	☐$_____

If I obtain the insurance through you, I will pay the premium shown in this contract; however, I have 10 days from the date of this contract to furnish like (equivalent) coverage from another source.

B. Optional coverages with physical damage insurance. If I have chosen this insurance, the premiums for the initial _____ month term are itemized below. ***[Note: alternatively, these optional coverages may be disclosed as part of Figure 1: 7 TAC 1.1308(l).]***

☐$_____ Towing and Labor Costs Reimbursement ☐$_____ Rental

☐$_____ Other:_____

If the box next to a premium for an insurance coverage included above is marked, that premium is not fixed or approved by the Texas Insurance Commissioner. ***[At Creditor's Option, the following may be added:]*** If the premium is for a required coverage, I have the option, for a period of 10 days from the date I receive a copy of this contract, of furnishing that coverage through existing policies of insurance or by obtaining like coverage from any insurance company authorized to do business in Texas.

I choose the above checked optional coverages.

Buyer's Signature: _____ Date: _____

Figure: 7 TAC §1.1308(l)

MODEL CLAUSE FOR OPTIONAL INSURANCE COVERAGES

Optional insurance coverages. The insurance described below is not required to obtain credit. It will not be provided unless I sign and agree to pay the extra cost. [***At Creditor's Option, the following may be added:***] My decision to buy or not buy these insurance coverages will not be a factor in the credit approval process.

Coverage		Term in Months	Premium
GAP*		_____	☐ $_____
Invol. Unemployment		_____	☐ $_____
_____		_____	☐ $_____
Liability Insurance	$_____ per person $_____ per accident	$_____ property damage	☐ $_____

*If the motor vehicle is determined to be a total loss, GAP Insurance will pay you the difference between the proceeds of my basic collision policy and the amount I owe on the motor vehicle, minus my deductible. I can cancel that insurance without charge for 10 days from the date of this contract.

If the box next to a premium for an insurance coverage included above is marked, that premium is not fixed or approved by the Texas Insurance Commissioner.

I want the optional coverages for which premiums are included above

Buyer's Signature: _____ Date: _____

[***Note: A creditor who does not routinely finance optional coverages, or does not finance them in a particular transaction, may omit this figure. A creditor may also delete those portions of the Figure that pertain to coverages it does not routinely finance, or that pertain to coverages that it is not financing in a particular transaction.***]

Figure: 7 TAC §1.1308(m)

MODEL CLAUSE FOR OPTIONAL CREDIT LIFE AND ACCIDENT AND HEALTH (DISABILITY) INSURANCE

Optional credit life and credit disability insurance. Credit life insurance and credit disability insurance are not required to obtain credit. They will not be provided unless I sign and agree to pay the extra cost. [***At Creditor's Option, the following may be added:***] My decision to buy or not buy these insurance coverages will not be a factor in the credit approval process.

☐Credit Life, one buyer	$_____	☐Credit Life, both buyers	$_____	Term _____
☐Credit Disability, one buyer	$_____	☐Credit Disability, both buyers	$_____	Term _____

[***Optional additional sentence for balloon payment contracts:***] Credit Life Insurance is for the scheduled term of this contract. Credit Disability Insurance covers the first ____ payments and does not cover the last scheduled payment. [***Optional additional language for true daily earnings method contracts:***] Credit life insurance pays only the amount I would owe if I paid all my payments on time. Credit disability insurance does not cover any increase in my payment or in the number of payments.
If the term of the insurance is 121 months or longer, the premium is not fixed or approved by the Texas Insurance Commissioner.

I want the insurance indicated above.
Buyer's Signature: _____ Date: _____
Co-Buyer's Signature: _____ Date: _____

[***Note: A creditor who does not routinely finance these coverages, or does not finance them in a particular transaction, may omit this figure. A creditor may also delete those portions of the Figure that pertain to coverages it does not routinely finance, or that pertain to coverages that it is not financing in a particular transaction.***]

Figure: 7 TAC §1.1308(o)

"Any changes to this contract must be in writing. Both you and I must sign it. No oral changes to this contract are enforceable.

_____Buyer _____Co-Buyer"

Figure 7 TAC §1.308(r)(2)

"THIS CONTRACT IS NOT VALID UNTIL YOU AND I SIGN IT.

Buyer	Date	Seller	Date
Co-Buyer	Date"		

Figure: 7 TAC §1.1308(u)

"You will apply my payments in the following order:

1. earned but unpaid finance charge; and
2. to anything else I owe under this agreement."

Figure: 7 TAC §1.1308(ee)

"To secure all I owe on this contract and all my promises in it, I give you a security interest in

- the motor vehicle including all accessories and parts now or later attached (Optional: and any other goods financed in this contract);
- all insurance proceeds and other proceeds received for the motor vehicle
- any insurance policy, service contract or other contract financed by you and any proceeds of those contracts;
- any refunds of charges included in this contract for insurance, or service contracts.

This security interest also secures any extension or modification of this contract. The certificate of title must show your security interest in the motor vehicle."

Figure: 7 TAC §1.1308(hh)(1)

"I will be in default if:

- I do not pay any amount when it is due;
- I break any of my promises in this agreement;
- I allow a judgment to be entered against me or the collateral; or
- I file bankruptcy, bankruptcy is filed against me, or the motor vehicle becomes involved in a bankruptcy.

If I default, you can exercise your rights under this contract and your other rights under the law."

Figure: 7 TAC §1.1309(10)

MOTOR VEHICLE RETAIL INSTALLMENT SALES CONTRACT

(Optional: DATE _____)

BUYER _____ SELLER/CREDITOR _____

ADDRESS _____ ADDRESS _____

CITY _____ STATE____ZIP_____ CITY _____ TX _____

PHONE _____ PHONE _____

The Buyer is referred to as "I" or "me." The Seller is referred to as "you" or "your." This contract may be transferred by the Seller.

PROMISE TO PAY

The credit price is shown below as the "Total Sales Price." The "Cash Price" is also shown below. By signing this contract, I choose to purchase the motor vehicle on credit according to the terms of this contract. I agree to pay you the Amount Financed, Finance Charge, and any other charges in this contract. I agree to make payments according to the Payment Schedule in this contract. If more than one person signs as a buyer, I agree to keep all the promises in this agreement even if the others do not.

I have thoroughly inspected, accepted, and approved the motor vehicle in all respects.

MOTOR VEHICLE IDENTIFICATION

Stock No.	Year	Make	Model	Vehicle Identification Number	License Number (if applicable)	☐ New ☐ Demonstrator ☐ Executive/Official ☐ Used	USE FOR WHICH PURCHASED ☐ PERSONAL, FAMILY OR HOUSEHOLD ☐ BUSINESS OR COMMERCIAL ☐ AGRICULTURAL

Trade-in: Year_____ Make_____ Model_____ VIN_____ License No._____

ANNUAL PERCENTAGE RATE The cost of my credit as a yearly rate. %	**FINANCE CHARGE** The dollar amount the credit will cost me. $	**AMOUNT FINANCED** The amount of credit provided to me or on my behalf. $	**TOTAL OF PAYMENTS** The amount I will have paid after I have made all payments as scheduled. $	**TOTAL SALE PRICE** The total cost of this credit purchase including my down payment of $_____ $

My Payment Schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due

Security: You will have a security interest in the motor vehicle being purchased.

Late Charge: [True daily earnings:] (Option A:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge at the rate of _____% per year on the past due amount. The late charge on the past due amount will be earned from the due date to the date that it is paid. (Option B:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge of _____% of the scheduled payment. [Scheduled Installment Earnings Method or sum of the periodic balances:] (Option A:) If I do not pay my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge on the past due amount at the contract rate. (Option B:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge at the rate of _____% per year on the late amount. The late charge on the past due amount will be earned from the due date to the date that it is paid. (Option C:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge of _____% of the scheduled payment.

Prepayment: [True daily earnings method:] If I pay all that I owe early, I will not have to pay a penalty. [Sum of the periodic balances method:] I can pay all that I owe early. If I do so, I can get a refund of part of the Finance Charge.

Additional Information: I will refer to this document for information about nonpayment, default, security interests, any required repayment in full before the scheduled date, and prepayment refunds.

ITEMIZATION OF AMOUNT FINANCED

1. Cash price [Optional additional description: "(including any accessories, services, and taxes)"] $_____(1)

2. Total downpayment (A + B) =
   A. [*If netting add*: (if negative, enter "0" and see Line 4.A. below)]
   Gross trade-in $_____
   - payoff by seller $_____
   = net trade-in $_____
   B. [*If not netting add*: (if negative enter "0" and see Line 4.A. below)]
   + cash $_____
   + Mfrs. Rebate $_____
   + other (describe) _____ $_____
   $_____(2)

3. Unpaid balance of cash price (1 minus 2) $_____(3)

4. Other charges including amounts paid to others on your behalf (Seller may keep part of these amounts.):
   A. Net trade-in payoff [*Alternative caption*: "prior credit or lease balance"] to _____ $_____
   B. Cost of physical damage insurance paid to insurance company $_____
   C. Cost of optional coverages with physical damage insurance paid to insurance company $_____
   D. Cost of optional credit insurance paid to insurance company or companies $_____
      Life
      Disability
   E. Other insurance paid to the insurance company $_____
   F. Official fees paid to government agencies $_____
   G. Dealer's inventory tax [*Optional addition*: (if not included in cash price)] $_____
   H. Sales tax [*Optional addition*: (if not included in cash price)] $_____
   I. Other taxes [*Optional addition*: (if not included in cash price)] $_____
   J. Government license and/or registration fees $_____
   K. Government certificate of title fee $_____
   L. Government vehicle inspection fees $_____
   M. Deputy service fee paid to dealer $_____
   N. **Documentary fee. A documentary fee is not an official fee. A documentary fee is not required by law, but may be charged to buyers for handling documents and performing services relating to the closing of a sale. A documentary fee may not exceed $50. This notice is required by law.** [***Option to insert Spanish translation of disclosure here.***] $_____
   O. Other charges (Seller must identify who is paid and describe purpose)
   to_____for_____ $_____
   to_____for_____ $_____
   to_____for_____
   $_____
   Total other charges and amounts paid to others on your behalf
   $_____(4)

5. **Amount Financed** (3 + 4) $_____(5)

[*Optional Caption*: Taxes, title fee, license fee, and any state inspection fee (*except for $5.00 of each such inspection fee that will be retained by Seller*) will be paid by Seller to government agencies. Documentary fee and deputy service fee will be retained by Seller.]

[***Note: A creditor may delete portions of the figure applicable to any insurance premiums that are not financed in the contract and may also delete other inapplicable portions.***]

DEFERRED DOWNPAYMENT(S)	
AMOUNT	**DATE DUE**

MODEL CLAUSE FOR REQUIRED PHYSICAL DAMAGE INSURANCE

PROPERTY INSURANCE: I must keep the collateral insured against damage or loss in the amount I owe. I must keep this insurance until I have paid all that I owe under this contract. I may obtain property insurance from anyone I want or provide proof of insurance I already have. The insurer must be authorized to do business in Texas. I agree to give you proof of property insurance. I must name you as the person to be paid under the policy in the event of damage or loss.

[Note: The following optional provisions are included for Creditors who finance physical damage insurance. Creditors who do not routinely finance Physical Damage coverage, or who are not financing it in a particular transaction, may delete the remaining disclosures in this Figure. A creditor may also delete those portions below that pertain to coverages it does not routinely finance, or that pertain to coverages that it is not financing in a particular transaction.]

If any insurance is included below, policies or certificates from the insurance company will describe the terms, conditions and deductibles.

A. Physical damage insurance. If you obtain physical damage insurance, the coverages, terms and premiums for these terms are set forth below.

Coverage	Term in Months	Premium
Collision	___	☐$_____
Comprehensive	___	☐$_____
Fire, Theft, and Combined Additional Coverage	___	☐$_____
Other	___	☐$_____

If I obtain the insurance through you, I will pay the premium shown in this contract; however, I have 10 days from the date of this contract to furnish like (equivalent) coverage from another source.

B. Optional coverages with physical damage insurance. If I have chosen this insurance, the premiums for the initial _____ month term are itemized below. ***[Note: alternatively, these optional coverages may be disclosed as part of Figure 1: 7 TAC 1.1308(l).]***

☐$_____ Towing and Labor Costs Reimbursement ☐$_____ Rental

☐$_____ Other:_____

If the box next to a premium for an insurance coverage included above is marked, that premium is not fixed or approved by the Texas Insurance Commissioner. ***[At Creditor's Option, the following may be added:]*** If the premium is for a required coverage, I have the option, for a period of 10 days from the date I receive a copy of this contract, of furnishing that coverage through existing policies of insurance or by obtaining like coverage from any insurance company authorized to do business in Texas.

I choose the above checked optional coverages.

Buyer's Signature: _____ Date: _____

MODEL CLAUSE FOR OPTIONAL INSURANCE COVERAGES

Optional insurance coverages. The insurance described below is not required to obtain credit. It will not be provided unless I sign and agree to pay the extra cost. ***[At Creditor's Option, the following may be added:]*** My decision to buy or not buy these insurance coverages will not be a factor in the credit approval process.

Coverage		Term in Months	Premium
GAP*		_____	☐ $_____
Invol. Unemployment		_____	☐ $_____
_____		_____	☐ $_____
Liability Insurance	$_____ per person $_____ per accident	$_____ property damage	☐ $_____

*If the motor vehicle is determined to be a total loss, GAP Insurance will pay you the difference between the proceeds of my basic collision policy and the amount I owe on the motor vehicle, minus my deductible. I can cancel that insurance without charge for 10 days from the date of this contract.

If the box next to a premium for an insurance coverage included above is marked, that premium is not fixed or approved by the Texas Insurance Commissioner.

I want the optional coverages for which premiums are included above

Buyer's Signature: _____ Date: _____

[Note: A creditor who does not routinely finance optional coverages, or does not finance them in a particular transaction, may omit this figure. A creditor may also delete those portions of the Figure that pertain to coverages it does not routinely finance, or that pertain to coverages that it is not financing in a particular transaction.]

MODEL CLAUSE FOR OPTIONAL CREDIT LIFE AND ACCIDENT AND HEALTH (DISABILITY) INSURANCE

Optional credit life and credit disability insurance. Credit life insurance and credit disability insurance are not required to obtain credit. They will not be provided unless I sign and agree to pay the extra cost. ***[At Creditor's Option, the following may be added:]*** My decision to buy or not buy these insurance coverages will not be a factor in the credit approval process.

☐Credit Life, one buyer $_____ ☐Credit Life, both buyers $_____ Term _____
☐Credit Disability, one buyer $_____ ☐Credit Disability, both buyers $_____ Term _____

[Optional additional sentence for balloon payment contracts:] Credit Life Insurance is for the scheduled term of this contract. Credit Disability Insurance covers the first ____ payments and does not cover the last scheduled payment. ***[Optional additional language for true daily earnings method contracts:]*** Credit life insurance pays only the amount I would owe if I paid all my payments on time. Credit disability insurance does not cover any increase in my payment or in the number of payments.
If the term of the insurance is 121 months or longer, the premium is not fixed or approved by the Texas Insurance Commissioner.

I want the insurance indicated above.
Buyer's Signature: _____ Date: _____
Co-Buyer's Signature: _____ Date: _____

[Note: A creditor who does not routinely finance these coverages, or does not finance them in a particular transaction, may omit this figure. A creditor may also delete those portions of the Figure that pertain to coverages it does not routinely finance, or that pertain to coverages that it is not financing in a particular transaction.]

LIABILITY INSURANCE

(OPTION A) THIS CONTRACT DOES NOT INCLUDE INSURANCE COVERAGE FOR PERSONAL LIABILITY AND PROPERTY DAMAGE CAUSED TO OTHERS.

(OPTION B) UNLESS A CHARGE FOR LIABILITY INSURANCE IS INCLUDED IN THE ITEMIZATION OF AMOUNT FINANCED, LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED IN THIS CONTRACT.

(OPTION C) UNLESS A CHARGE FOR LIABILITY INSURANCE IS INCLUDED IN THE ITEMIZATION OF AMOUNT FINANCED, ANY INSURANCE REFERRED TO IN THIS CONTRACT DOES NOT INCLUDE COVERAGE FOR PERSONAL LIABILITY AND PROPERTY DAMAGE CAUSED TO OTHERS.

Any changes to this contract must be in writing. Both you and I must sign it. No oral changes to this contract are enforceable.

_____ Buyer _____ Co-Buyer

HOW YOU FIGURE THE FINANCE CHARGE

[Regular Transaction using sum of the periodic balances method:] (Option A_1: Sales Tax Advance) You figure the Finance Charge using the add-on method as defined by the Texas Finance Commission Rule. Add-on Finance Charge is calculated on the full amount of the unpaid principal balance and added as a lump sum to the unpaid principal balance for the full term of the contract. (Option A_2: Sales Tax Advance) The Finance Charge will be calculated by using the add-on method. Add-on Finance Charge is calculated on the full amount of the unpaid principal balance and added as a lump sum to the unpaid principal balance for the full term of the contract. The add-on Finance Charge is calculated at a rate of $____ per $100.00. (Option B: Deferred Sales Tax) The Finance Charge will be calculated by using the add-on method. Add-on Finance Charge is calculated on the full amount of the unpaid principal balance subject to a finance charge and added as a lump sum to the unpaid principal balance subject to a Finance Charge for the full term of the contract. The add-on finance charge is calculated at a rate of $____ per $100.00.

[True Daily Earnings Method:] (Option A_1: Sales Tax Advance) You figure the Finance Charge using the true daily earnings method as defined by the Texas Finance Code. Under the true daily earnings method, the Finance Charge will be figured by applying the daily rate to the unpaid portion of the Amount Financed for the number of days the unpaid portion of the Amount Financed is outstanding. The daily rate is 1/365th of the Annual Percentage Rate. The unpaid portion of the Amount Financed does not include late charges or return check charges. (Option A_2: Sales Tax Advance) The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You will figure the Finance Charge by applying the true daily earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance. The daily rate is 1/365th of the contract rate. The unpaid principal balance does not include the late charges or returned check charges. (Option B: Deferred Sales Tax) The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You will figure the Finance Charge by applying the true daily earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance subject to a Finance Charge. The daily rate is 1/365th of the contract rate. The unpaid principal balance subject to a finance charge does not include the late charges, sales tax, or returned check charges.

[Scheduled Installment Earnings Method:] (Option A_1: Sales Tax Advance) You figure the Finance Charge using the scheduled installment earnings method as defined by the Texas Finance Code. Under the scheduled installment earnings method, the Finance Charge is figured by applying the daily rate to the unpaid portion of the Amount Financed as if each payment will be made on its scheduled payment date. The daily rate is 1/365th of the Annual Percentage Rate. The unpaid portion of the Amount Financed does not include late charges or return check charges. (Option A_2: Sales Tax Advance) The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You will figure the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance. You based the Finance Charge,

Total of Payments, and Total Sale Price as if all payments were made as scheduled. The unpaid principal balance does not include the late charges or returned check charges. (Option B: Deferred Sales Tax) The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You figured the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance subject to a Finance Charge. You based the Finance Charge, Total of Payments, and Total Sale Price as if all payments were made as scheduled. The unpaid principal balance subject to a Finance Charge does not include the late charges, sales tax, or returned check charges.

CONSUMER WARNING

[Scheduled Installment Earnings Method:] Notice to the buyer - I will not sign this contract before I read it or if it contains any blank spaces. I am entitled to a copy of the contract I sign. Under the law, I have the right to pay off in advance all that I owe and under certain conditions may obtain a partial refund of the finance charge. I will keep this contract to protect my legal rights.

[True Daily Earnings Method:] Notice to the buyer - I will not sign this contract before I read it or if it contains any blank spaces. I am entitled to a copy of the contract I sign. Under the law, I have the right to pay off in advance all that I owe and under certain conditions may save a portion of the finance charge. I will keep this contract to protect my legal rights.

BUYER'S ACKNOWLEDGEMENT OF CONTRACT RECEIPT

(OPTION A: **If buyer's signature is dated)** I AGREE TO THE TERMS OF THIS CONTRACT. WHEN I SIGN THE CONTRACT, I WILL RECEIVE THE COMPLETED CONTRACT. IF NOT, I UNDERSTAND THAT A COPY WILL BE MAILED TO ME WITHIN A REASONABLE TIME.

(OPTION B: **If the buyer's signature is not dated)** I AGREE TO THE TERMS OF THIS CONTRACT. I CONFIRM THAT BEFORE I SIGNED THIS CONTRACT, YOU GAVE IT TO ME, AND I WAS FREE TO TAKE IT AND REVIEW IT. I RECEIVED THE COMPLETED CONTRACT ON _____ (MO.) (DAY) (YR.)

(OPTION C: **If the buyer's signature is not dated)** I SIGNED THIS CONTRACT ON _____ AND A COPY WILL BE MAILED TO ME WITHIN A REASONABLE TIME.

(OPTION D: **If the buyer's signature is dated or not dated)** I AGREE TO THE TERMS OF THIS CONTRACT AND ACKNOWLEDGE RECEIPT OF A COMPLETED COPY OF IT. I CONFIRM THAT BEFORE I SIGNED THIS CONTRACT, YOU GAVE IT TO ME, AND I WAS FREE TO TAKE IT AND REVIEW IT.

THIS CONTRACT IS NOT VALID UNTIL YOU AND I SIGN IT.

_____	_____	_____	_____
Buyer	Date	Seller	Date
_____	_____		
Co-Buyer	Date		

CONSUMER CREDIT COMMISSIONER NOTICE. To contact (insert authorized business name of retail seller, creditor or holder as appropriate) about this account, call (insert telephone number of retail seller, creditor, or holder as appropriate). This contract is subject in whole or in part to Texas law which is enforced by the Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207. Phone 800-538-1579; 512-936-7600, and can be contacted relative to any inquiries or complaints.

OTHER TERMS AND CONDITIONS

[Sum of the periodic balances method and Scheduled Installment Earnings Method:] **HOW YOU CALCULATE MY FINANCE CHARGE REFUND IF I PREPAY** If I prepay in full, I may be entitled to a refund of part of the Finance Charge. [Sum of the periodic balances method:] You will figure the Finance Charge refund by using the sum of the periodic balances method as defined by the Texas Finance Commission rule. (Optional: You will figure the Finance Charge refund using the sum of the periodic balances method as defined by the Texas Finance Commission rule. The Finance Charge Refund will be computed upon the entire Finance Charge minus the Acquisition Cost. I will not get a refund if it is less than $1.00.) (Additional Option for heavy commercial vehicle: You will figure the Finance Charge refund using the sum of the periodic balances method as defined by the Texas Finance Commission rule. The Finance Charge refund will be computed based upon the entire Finance Charge calculated using the sum of the periodic balances method. Then you will subtract the Acquisition Cost from that amount. I will not get a refund if it is less than $1.00.) [Scheduled Installment Earnings Method:] You will figure the Finance Charge refund by the scheduled installment earnings method as defined by the Texas Finance Commission rule. (Optional: You will figure my refund by deducting earned finance charges from the Finance Charge. You will figure earned finance charges by applying a daily rate to the unpaid principal balance as if I paid all my payments on the date due. If I prepay between payment due dates, you will figure earned finance charges for the partial payment period. You do this by counting the number of days from the due date of the prior payment through the date I prepay. You then multiply that number of days times the daily rate. The daily rate is 1/365th of the Annual Percentage Rate. You will also add the acquisition cost of $25 (or $150 for a heavy commercial vehicle) to the earned finance charge. I will not get a refund if it is less than $1.00.) [Flexible contract forms designed to accommodate alternative methods:] You will figure the Finance Charge refund using the sum of the periodic balances method as defined by the Texas Finance Commission rule if 1) this contract is a Regular Payment Contract as defined by the Texas Finance Commission rule, and 2) this contract does not have a term

greater than 61 months. If this contract is not a Regular Payment Contract or if it has a term greater than 61 months, you will figure the Finance Charge refund using the scheduled installment earnings method as defined by the Texas Finance Commission rule. I will not get a refund if it is less than $1.00.

HOW YOU WILL APPLY MY PAYMENTS [True daily earnings method:] You will apply my payments in the following order:

1. earned but unpaid finance charge; and
2. to anything else I owe under this agreement.

HOW LATE OR EARLY PAYMENTS CHANGE WHAT I MUST PAY [True daily earnings method:] You based the Finance Charge, Total of Payments, and Total Sale Price as if all payments were made as scheduled. If I do not timely make all my payments in at least the correct amount, I will have to pay more Finance Charge and my last payment will be more than my final scheduled payment. If I make scheduled payments early, my Finance Charge will be reduced (less). If I make my scheduled payments late, my Finance Charge will increase.

INTEREST AFTER MATURITY If I don't pay all I owe when the final payment becomes due, or I do not pay all I owe if you demand payment in full under this contract, I will pay an interest charge on the amount that is still unpaid. That interest charge will be the higher rate of 18% per year or the maximum rate allowed by law, if that rate is higher. The interest charge for this amount will begin the day after the final payment becomes due.

SPECIAL PROVISIONS FOR BALLOON PAYMENTS CONTRACTS A balloon payment is a scheduled payment more than twice the amount of the average of my scheduled payments, other than the downpayment, that are due before the balloon payment.

(Paying the balloon payment under Texas Finance Code §348.123(a)) I can pay all I owe when the balloon payment is due and keep my motor vehicle.

(Option A: Refinancing the balloon payment) If I buy the motor vehicle primarily for personal, family, or household use, I can enter into a new written agreement to refinance the balloon payment when due without a refinancing fee. If I refinance the balloon payment, my periodic payments will not be larger or more often than the payments in this contract. The annual percentage rate in the new agreement will not be more than the Annual Percentage Rate in this contract. This provision does not apply if my Payment Schedule has been adjusted to my seasonal or irregular income.

(Option B: Special right to refinance balloon payment under Texas Finance Code §348.123(b)(5)(b)(iii)) I can refinance my last installment if I am not in default. I can refinance at an annual percentage rate up to 5 points greater than the Annual Percentage Rate shown in this contract. The rate will not be more than applicable law allows. I can refinance the last installment for at least 24 months with equal monthly payments. You and I can refinance the last installment over another time period or on a different payment schedule.

AGREEMENT TO KEEP MOTOR VEHICLE INSURED I agree to have physical damage insurance covering loss or damage to the vehicle for the term of this contract. The insurance must cover your interest in the vehicle. (Optional Language Provision: The insurance must include collision coverage and either comprehensive or fire, theft, and combined additional coverage.)

AGREEMENT TO ALLOW CREDITOR TO PURCHASE REQUIRED INSURANCE IF BUYER FAILS TO KEEP THE MOTOR VEHICLE INSURED If I fail to give you proof that I have insurance, you may buy physical damage insurance. You may buy insurance that covers my interest and your interest in the motor vehicle, or you may buy insurance that covers your interest only. I will pay the premium for the insurance and a finance charge at the contract rate. If you obtain collateral protection insurance, you will mail notice to my last known address shown in your file.

PHYSICAL DAMAGE INSURANCE PROCEEDS I must use physical damage insurance proceeds to repair the motor vehicle, unless you agree otherwise in writing. However, if the motor vehicle is a total loss, I must use the insurance proceeds to pay what I owe you. I agree that you can use any proceeds from insurance to repair the motor vehicle, or you may reduce what I owe under this contract. If you apply insurance proceeds to the amount I owe, they will be applied to my payments in the reverse order of when they are due. If my insurance on the motor vehicle or credit insurance doesn't pay all I owe, I must pay what is still owed. Once all amounts owed under this contract are paid, any remaining proceeds will be paid to me.

RETURNED INSURANCE PREMIUMS AND SERVICE CONTRACT CHARGES [True daily earnings method:] If you get a refund on insurance, service contracts, or other contracts included in the cash price, you will subtract it from what I owe. Once all amounts owed under this contract are paid, any remaining refunds will be paid to me. [Scheduled installment earnings method or sum of the periodic balances:] If you get a refund of insurance or service contract charges, you will apply it and the unearned finance charges on it in the reverse order of the payments to as many of my payments as it will cover. Once all amounts owed under this contract are paid, any remaining refunds will be paid to me.

APPLICATION OF CREDITS Any credit that reduces my debt will apply to my payments in the reverse order of when they are due, unless you decide to apply it to another part of my debt. The amount of the credit and all finance charge or interest charged on the credit will be applied to my payments in the reverse order of my payments.

TRANSFER OF RIGHTS You may transfer this contract to another person. That person will then have all your rights, privileges, and remedies.

SECURITY INTEREST To secure all I owe on this contract and all my promises in it, I give you a security interest in

- the motor vehicle including all accessories and parts now or later attached (Optional: and any other goods financed in this contract);
- all insurance proceeds and other proceeds received for the motor vehicle
- any insurance policy, service contract or other contract financed by you and any proceeds of those contracts;

- any refunds of charges included in this contract for insurance, or service contracts.

This security interest also secures any extension or modification of this contract. The certificate of title must show your security interest in the motor vehicle.

USE AND TRANSFER OF THE MOTOR VEHICLE I will not sell or transfer the motor vehicle without your written permission. If I do sell or transfer the motor vehicle, this will not release me from my obligations under this contract, and you may charge me a transfer of equity fee of $25.00 ($50 for a heavy commercial vehicle). I will promptly tell you in writing if I change my address or the address where I keep the motor vehicle. I will not remove the motor vehicle (Optional: motor vehicle or other collateral) from Texas for more than 30 days unless I first get your written permission.

CARE OF THE MOTOR VEHICLE I agree to keep the motor vehicle free from all liens, and claims except those that secure this contract. I will timely pay all taxes, fines, or charges pertaining to the motor vehicle. I will keep the motor vehicle in good repair. I will not allow the motor vehicle to be seized or placed in jeopardy or use it illegally. I must pay all I owe even if the motor vehicle is lost, damaged or destroyed. If a third party takes a lien or claim against or possession of the motor vehicle, you may pay the third party any cost required to free the motor vehicle from all liens or claims. You may immediately demand that I pay you the amount paid to the third party for the motor vehicle. If I do not pay this amount, you may repossess the motor vehicle and add that amount to the amount I owe. If you do not repossess the motor vehicle, you may still demand that I pay you, but you cannot add the amount to my account.

DEFAULT I will be in default if:

- I do not pay any amount when it is due;
- I break any of my promises in this agreement;
- I allow a judgment to be entered against me or the collateral; or
- I file bankruptcy, bankruptcy is filed against me, or the motor vehicle becomes involved in a bankruptcy.

If I default, you can exercise your rights under this contract and your other rights under the law.

LATE CHARGE I will pay you a late charge as agreed to in this contract when it accrues.

REPOSSESSION If I default, you may repossess the motor vehicle from me if you do so peacefully. If any personal items are in the motor vehicle, you can store them for me and give me written notice at my last address shown on your records within 15 days of discovering that you have my personal items. If I do not ask for these items back within 31 days from the day you mail or deliver the notice to me, you may dispose of them as applicable law allows. Any accessory, equipment, or replacement part stays with the motor vehicle.

MY RIGHT TO REDEEM If you take my motor vehicle, you will tell me how much I have to pay to get it back. If I do not pay you to get the motor vehicle back, you can sell it or take other action allowed by law. My right to redeem ends when the motor vehicle is sold.

DISPOSITION OF THE MOTOR VEHICLE If I don't pay you to get the motor vehicle back, you can sell it or take other action allowed by law. You will send me notice at least 10 days before you sell it. You can use the money you get from selling it to pay allowed expenses and to reduce the amount I owe. Allowed expenses are expenses you pay as a direct result of taking the motor vehicle, holding it, preparing it for sale, and selling it. If any money is left, you will pay it to me unless you must pay it to someone else. If the money from the sale is not enough to pay all I owe, I must pay the rest of what I owe you plus interest. If you take or sell the motor vehicle, I will give you the certificate of title and any other document required by state law to record transfer of title.

COLLECTION COSTS If you hire an attorney who is not your employee to enforce this contract, I will pay reasonable attorney's fees and court costs as the applicable law allows.

CANCELLATION OF OPTIONAL INSURANCE AND SERVICE CONTRACTS This contract may contain charges for insurance or service contracts or for services included in the cash price. If I default, I agree that you can claim benefits under these contracts to the extent allowable, and terminate them to obtain refunds of unearned charges to reduce what I owe or repair the motor vehicle.

YOUR RIGHT TO DEMAND PAYMENT IN FULL If I default, or you believe in good faith that I am not going to keep any of my promises, you can demand that I immediately pay all that I owe. You don't have to give me notice that you are demanding or intend to demand immediate payment of all that I owe.

IF YOU DEMAND I PAY ALL I OWE **[Sum of the periodic balances method or scheduled installment earnings method:]** If you demand that I pay you all that I owe, you will give me a credit of part of the Finance Charge as if I had prepaid in full.

INTEGRATION AND SEVERABILITY CLAUSE This contract contains the entire agreement between you and me relating to the sale and financing of the motor vehicle. If any part of this contract is not valid, all other parts stay valid.

LEGAL LIMITATIONS ON YOUR RIGHTS If you don't enforce your rights every time, you can still enforce them later. You will exercise all of your rights in a lawful way. This provision prevails over all other parts of this contract and over all your other acts. I don't have to pay finance charge or other amounts that are more than the law allows.

APPLICABLE LAW Federal and Texas law apply to this contract.

SELLER'S DISCLAIMER OF WARRANTIES **Unless the seller makes a written warranty, or enters into a service contract within 90 days from the date of this contract, the seller makes no warranties, express or implied, on the motor vehicle, and**

there will be no implied warranties of merchantability or of fitness for a particular purpose. This provision does not affect any warranties covering the motor vehicle that the motor vehicle manufacturer may provide.

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS AND SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

In this box only, the word "you" refers to the Buyer

Used Car Buyers Guide. The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale.
Spanish Translation:
Guía para compradors de vehículos usados. La información que ve en el formulario de la ventanilla para este vehículo forma parte del presente contrato. La información del formulario de la ventanilla deja sin efecto toda disposición en contrario contenida en el contrato de venta.

Figure 1: 10 TAC §33.6(b)

Private Activity Bond Program Scoring Criteria

Construction Cost Per Unit (includes: site work, contractor profit, overhead, general requirements and contingency. Calculation will be hard costs per square foot of net rentable area. ≤$60 per sq ft) (Acquisition / Rehab will automatically receive 1 point)	1pt
Size of Units (average size of all units combined in the development ≥950 sq ft/family and ≥750 sq ft/elderly) (Acquisition / Rehab developments will automatically receive 5 points)	5pts
Quality and Amenities (maximum 34 points) (Acquisition / Rehab developments will receive double points not to exceed 34 points)	
• Washer/Dryer Connections	1pt
• Microwave Ovens (in each unit)	1pt
• Storage Room (outside the unit)	1pt
• Covered Parking (at least one per unit)	3pts
• Garages (equal to at least 35% of units)	5pts
• Ceiling Fans (living room and bedrooms)	1pt
• Ceramic Tile Flooring (entry way and bathroom)	2pts
• 75% or Greater Masonry (includes rock, stone, brick, stucco and cementious board product; excludes efis)	5pts
• Playground and Equipment or Covered Community Porch	3pts
• BBQ Grills and Tables (one each per 50 units) or Walking Trail (minimum length of ¼ mile) or Gazebo with Seating for Twelve	3pts
• Full Perimeter Fencing and Gated	3pts
• Computers with internet access / Business Facilities (8 hour availability)	2pts
• Game Room or TV Lounge	2pts
• Workout Facilities or Library (with comparable square footage as workout facilities)	2pts
Tenant Services (per unit / above line on expenses)	
$10.00 / unit /monthly	10pts
$7.00 / unit /monthly	5pts
$4.00 / unit / monthly	3pts
Zoning appropriate for the proposed use or a statement of no zoning required (appropriate zoning for the intended use must be in place at the time of application submission date, September 2, 2003, in order to receive points)	5pts

Proper Site Control (fully executed and escrow receipted control through 12/01/03 with option to extend through 03/01/04 and all information correct at the time of application submission date, September 2, 2003, in order to receive points) — 5pts

Development Support / Opposition (maximum net points of +12 to -12. Each letter will receive a maximum of +1.5 to -1.5. All letters received by October 24, 2003 will be used in scoring) — **Max**

- Texas State Senator and Texas State Representative — +3 to -3 pts
- Presiding officer of the governing body of any municipality containing the Development and the elected district member of the governing body of the municipality containing the Development — +3 to -3 pts
- Presiding officer of the governing body of the county containing the Development and the elected district member of the governing body of the county containing the Development (if the site is not in a municipality, these points will be doubled) — +3 to -3 pts
- Local School District Superintendent and Presiding Officer of the Board of Trustees for the school district containing the Development — +3 to -3 pts

Penalties for Missed Deadlines in the Previous Year's Bond and/or Tax Credit program year. This includes approved and used extensions. (maximum 3 point deduction) — -1 per program application

Local Development Funding Commitment (CDBG, HOME or other funds through local political subdivisions) (Must be $\geq$2% of the bond amount requested) — 2pts

Proximity to Community Services / Amenities (Community services / amenities within three (3) miles of the site. Map must be included with the Application showing a three (3) mile radius notating where the services / amenities are located. Maximum 12 points)

- Grocery Store — 1pt
- Pharmacy — 1pt
- Convenience store — 1pt
- Retail Facilities (Target, Wal-mart, Home Depot, etc...) — 1pt
- Bank / Financial Institution — 1pt
- Restaurant — 1pt
- Public Recreation Facilities (park, civic center, YMCA) — 1pt
- Fire / Police Station — 1pt
- Medical Facilities (hospitals, minor emergency, etc...) — 1pt

- Public Library 1pt
- Public Transportation (1/2 mile from site) 1pt
- Public School (only one school required for point) 1pt

Proximity to Negative Features (Within 300 feet of any part of the Development site boundaries. Map must be included with the application showing where feature is located. Developer must provide a letter stating there are none of the negative features listed below within the stated area if that is correct. Maximum --20 points)

- Junkyards 5pts
- Active Railways (excluding light rail) 5pts
- Interstate Highways / Service Roads 5pts
- Solid Waste / Sanitary Landfills 5pts
- High Voltage Transmission Towers 5pts

Figure 2: 10 TAC §33.6(b)

Private Activity Bond Program Threshold Requirements

1. Prequalification Assumptions

a. Development Feasibility

Debt Coverage	≥1.10
Annual Expenses	$3800 per unit or $3.75 per sq ft
Deferred Developer Fees	≤80%
Contractor Fee	≤6%
Overhead	≤2%
General Requirements	≤6%
Developer Fees	≤15%

b. Construction Costs Per Unit Assumption Acceptable range $47 – $61 per unit
(Acquisition / Rehab developments are exempt from this requirement)

c. Interest Rate Assumption

6.00%	30 year
6.75%	40 year

d. Size of Units
(Acquisition / Rehab developments are exempt from this requirement)

1 Bed	≥650 Family	≥550 Senior
2 Bed	≥900 Family	≥750 Senior
3 Bed	≥1000 Family	

2. **Appropriate Zoning** - Evidence of appropriate zoning for the proposed use or evidence of application made and pending decision.

3. **Executed Site Control**
Properly executed and escrow receipted site control through 12/1/03 with option to extend through 3/1/04

4. **Previous Participation and Authorization to Release Credit Information**
(forms in Uniform Application)

5. **Current Market Information** (Must support affordable rents)

6. **Completed** TDHCA Uniform Application and application exhibits

7. **Completed** Multifamily Rental Worksheets

8. **Public Notification Information** (see application package)

9. **Relevant Developer Information** (see application package)

10. **Completed** 2004 Bond Review Board Residential Rental Attachment

11. **Signed Letter of Responsibility for All Costs Incurred**

12. **Signed MRB Program Certification Letter**

13. **Evidence of paid Application Fees** ($1000 TDHCA, $1500 Vinson and Elkins, $5000 Bond Review Board)

14. **Boundary Survey or Plat**

15. **Local Area map showing the location of the Property and Community Services/Amenities within a three (3) mile radius**

16. **Utility Allowance from Appropriate Local Housing Authority**

17. **Organization Chart with evidence of Entity Registration or Reservation with Secretary of State**

18. **Required Notification. Evidence of notifications shall include a copy of the exact letter and other materials that were sent to the individual or entity and proof of delivery in the form of a signed certified mail receipt, signed overnight mail receipt, or confirmation letter from each official. Each notice must include the information required for "Community Notification" within the Application Package. Notification must be sent to all the following individuals and entities:**

    i. State Senator and Representative that represents the community containing the development;
    ii. Presiding Officer of the governing body of any municipality containing the development and **all** elected members of that body (Mayor, City Council members)
    iii. Presiding Officer of the governing body of the county containing the development and **all** elected members of that body (County Judge and/or Commissioners)
    iv. School District Superintendent of the school district containing the development
    v. Presiding Officer of the School Board of Trustees of the school district containing the development
    vi. City and County Clerks (Evidence must be provided that a letter, meeting the requirements of the "Clerk Notification" letter in the application materials, was sent to the city clerk and county clerk. A copy of the return letter from the city and county clerks must be provided)
    vii. Neighborhood Organizations on record with the state or county whose boundaries contain the development (All entities identified in the letters from the city and county clerks must be provided with written notification and evidence of that notification must be provided. If the Applicant can

provide evidence that the proposed Development is not located within the boundaries of an entity on a list from the clerk(s), then such evidence in lieu of notification may be acceptable. If no letter is received from the city or county clerk by seven (7) days prior to the date of Application submission, the Applicant must submit a statement attesting to the fact that no return letter was received. If the Applicant has knowledge of neighborhood organizations on record with the state or county within whose boundaries the development is located, written notification must be provided to them. If the Applicant has no knowledge of such neighborhood organizations within whose boundaries the Development is located, they must submit a statement to that effect with the Application).

Figure: 10 TAC §33.6(d)(1)

NOTICE TO PUBLIC

(5 inch lettering above)

PROPOSED MULTIFAMILY RESIDENTIAL RENTAL COMMUNITY

(4 inch lettering above)

(2 inch lettering below)

[Applicant Name] has made application to the Texas Department of Housing and Community Affairs for the issuance of Private Activity Tax-Exempt Bonds and Tax Credits for the development of a proposed multifamily residential rental community [Development Name] to be located at [Street Address], [City], [County], [State] [Zip]. This development community will be comprised of [Total # of] units on [# acres].

There will be a public hearing to receive public comments on the proposed development.

Date: _____, Time: _____

Location: _____

_____

[Applicant Contact Name] with [Developer Name] located at [Address], [City], [State] [Zip] and telephone number is [Telephone Number]

For additional information contact Robbye Meyer with the Texas Department of Housing and Community Affairs, 507 Sabine, Suite #700, Austin, Texas 78701 or by telephone at (512) 475-2213 or by email at rmeyer@tdhca.state.tx.us

Sign must be at least 4 feet by 8 feet in size and located within twenty feet of the main roadway.

(These are MINIMUM requirements)

The Applicant/Developer may choose to provide more information.

Figure: 10 TAC §50.9(g)(12)(C)

% of AMGI	# of Rent Restricted Units (a)	Percentage of Rent Restricted Units (a/b)		Weight A	OR	Weight B	Points
50%	(a)		X	10		15	
40%	(a)		X	20		30	
						TOTAL POINTS=	
TOTAL LI TARGETED UNITS*	(b)					ROUNDED TOTAL POINTS =	

*Includes all Low Income Units

Figure: 10 TAC §80.54(g)

SITE PREPARATION NOTICE

FAILURE TO PREPARE THE SITE PROPERLY BEFORE INSTALLING YOUR MANUFACTURED HOME MAY INVALIDATE YOUR WARRANTY AND MAY CAUSE PROBLEMS WITH YOUR HOME.

IF YOU ARE ACQUIRING LAND FOR A MANUFACTURED HOME AND WILL NOT HAVE THE ABILITY TO OVERSEE SITE PREPARATION YOURSELF, BE SURE THAT YOUR AGREEMENT WITH THE PARTY PROVIDING THE LAND COVERS THEIR RESPONSIBILITIES FOR SITE PREPARATION.

If you are acquiring a manufactured home you need to be sure that the site is properly prepared **BEFORE the home is installed**. If you will be having your home installed in a rental community, you should first be sure that the community has prepared the site properly and assumed that responsibility. If you are acquiring a manufactured home that is already installed, you should satisfy yourself that the site was properly prepared first.

Site Preparation includes AT LEAST the following: (1) selecting a site where the home will not be affected by rising or running water, as in the case of heavy rains, (2) grading the site, as needed, so that the land slopes away from the home, (3) making sure that the site will not create puddles or moisture build-up under the home by filling any depressions and, as needed, providing for drainage, (4) clearing away any plants, stumps, or debris on the site where the home will be placed, and (5) installing any required vapor retarder barrier (and, if such a barrier is to be installed, trimming any grasses or other organic materials to a suitable height, not greater than 8").

If your retailer is providing skirting, the retailer must also provide and install any required vapor retarder barrier and insure that there is adequate ventilation under the home. If the retailer is not providing these things, you should be sure that you have provided for any required vapor retarder barrier and that you have provided adequately for ventilation under the home.

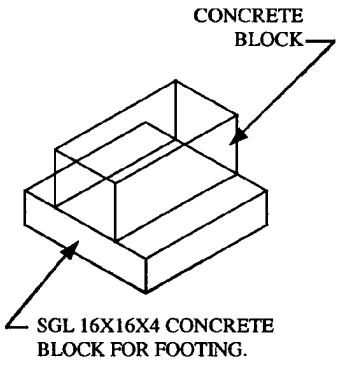
FAILURE TO PREPARE THE SITE PROPERLY AND/OR FAILURE TO TAKE APPROPRIATE MEASURES TO GUARD AGAINST MOISTURE BUILD-UP MAY CAUSE SERIOUS PROBLEMS WITH YOUR MANUFACTURED HOME INCLUDING, BUT NOT LIMITED TO, MOISTURE IN THE HOME, DE-LAMINATION OF FLOOR DECKING, BUCKLING OF WALLS AND FLOORS, WARPAGE THAT WILL MAKE DOORS AND WINDOWS NOT OPERATE PROPERLY, FAILURE OF ANCHORS TO HOLD THE HOME AS INTENDED, AND EVEN SERIOUS STRUCTURAL DAMAGE.

_____	_____
purchaser/homeowner signature	purchaser/homeowner signature
_____	_____
type or print name	type or print name
_____	_____
date	date

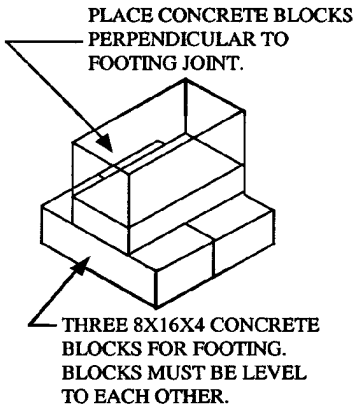
Figure: 10 TAC §80.54(h)(3)

FOOTER CONFIGURATIONS

SINGLE 16x16x4



DOUBLE 8x16x4



DOUBLE 16x16x4

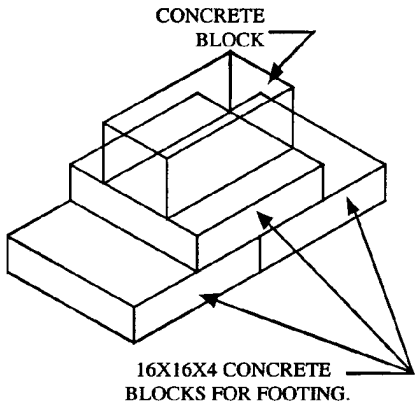


Figure: 10 TAC §80.54(h)(4)

TABLE 3A: FOOTER CAPACITIES (LBS)

	Soil Bearing Capacity						
Footer size	**1000psf**	**1500psf**	**2000psf**	**2500psf**	**3000psf**	**3500psf**	**4000psf**
16x16x4	1700	2700	3500	4400	5300	6100	7000
20x20x4	2700	4100	5500	6900	8300	9400	11000
16x32x4	3500	5200	6800	8600	10400	12000	14000
24x24x4	4000	6000	8000	10000	12000	14000	16000

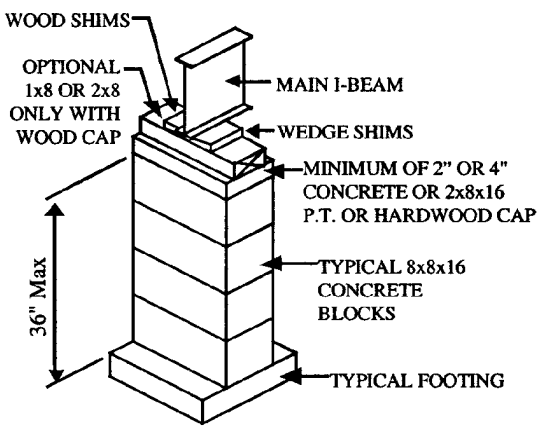
Notes:

1) 8x16x4 footers may be used for perimeter and/or exterior door supports. Capacity is half that of the tabulated values for a 16x16x4 footer. For double 8x16x4 footers use the 16x16x4 row.
2) Footers of material other than concrete may be used if approved by the department and the listed capacity and area is equal to or greater than the footer it replaces. Concrete footers of sizes not listed may be used as long as their size is equal to or greater than the size listed.
3) Footers with loads greater than 10,000 lbs. require a double stacked pier.
4) All poured concrete is minimum 2500 psi at 28 days.
5) Actual footer dimensions may be 3/8 inch less than the nominal dimensions for solid concrete footers conforming to the specifications in ASTM C90-99a, Standard Specification for Loadbearing Concrete Masonry Units.

Figure: 10 TAC §80.54(h)(6)

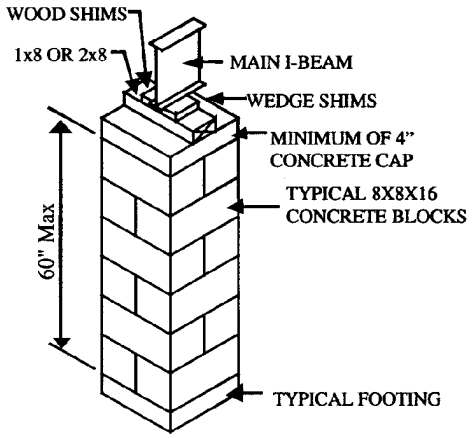
PIER DESIGN (SINGLE & MULTI-SECTION STACK)

PIER A



Pier A: Single stack of open cell, 8x8x16 concrete blocks. Maximum height is 36 inches as measured from the top of the footer to the top of the last concrete block. Concrete blocks are installed with their lengths perpendicular to the main I-Beam. Open cells must be vertical and in alignment.

PIER B



Pier B: Interlocked double stack of open cell 8x8x16 concrete blocks. The maximum height is 60 inches as measured from the top of the footer to the top of the last concrete block. The pier is capped with a minimum 16x16x4 concrete cap. Open cells must be vertical and in alignment. Each course of open cell blocks must be perpendicular to the previous course.

Note:

1) Open cell and solid concrete blocks shall meet ASTM-C90-99a, Standard Specification for Loadbearing Concrete Masonry Units.
2) Support system components are to be undamaged and installed in a manner to accomplish the purpose intended.
3) Either wood caps or shims must be used between I-Beam and concrete.

Figure: 10 TAC §80.54(h)(6)(B)

TABLE 3B: PIER LOADS (LBS) AT TABULATED SPACINGS (WITHOUT PERIMETER SUPPORTS)

---------- maximum pier spacing ----------

Unit Width(ft)	4 ft o.c.	5 ft o.c.	6 ft o.c.	7 ft o.c.	8 ft o.c.
12 Wide	1725	2150	2600	3000	3400
14 wide	2000	2500	3000	3500	4000
16 Wide	2350	2900	3500	4100	4700

Note: 18 ft. wides require perimeter blocking per table 3C.

Example: Determine maximum pier spacing for a 16 ft. wide x 76 ft. long single section with a soil bearing capacity of 1500 psf. Footer size to be used is a single 16x16x4 precast concrete footer.

Step 1: In table 3A look up the maximum load for a single 16x16x4 pad set on 1500 psf soil.
Answer = 2700 psf

Step 2: In table 3B in the column for 16 ft. wide, find the on-center spacing (o.c.) load equal to or less than the footer capacity of 2700 lbs found in table 3A.
The 4ft column shows minimum capacity of 2350 lbs.

Answer: Therefore, for a 16 ft. wide and a soil bearing capacity of 1500 psf using 16x16x4 footers the maximum pier spacing is 4 ft. o.c.

Figure: 10 TAC §80.54(h)(6)(C)

TABLE 3C: PIER LOADS (LBS) AT TABULATED SPACINGS (WITH PERIMETER SUPPORTS)

---------- maximum I-Beam pier spacing ----------

Unit width (ft)	4 ft o.c.	6 ft o.c.	8 ft o.c.	10 ft o.c.	12 ft o.c.
12 Wide	750	1150	1500	1900	2300
14 Wide	1050	1600	2100	2600	3100
16 Wide	1200	1800	2400	3000	3600
18 Wide	1450	2150	2850	3600	4300

Note: Maximum I-Beam pier spacing is 8 ft. o.c. for 8" I-Beam, 10 ft. o.c. for 10" I-Beam and 12 ft. o.c. for 12" I-Beam or the resultant maximum spacing based on soil bearing and footer size per Table 3A, whichever is less.

---------- maximum perimeter pier spacing ----------

Unit width (ft)	4 ft o.c.	5 ft o.c.	6 ft o.c.	7 ft o.c.	8 ft o.c.
12 Wide	1000	1200	1500	1700	1900
14 Wide	1100	1400	1650	1900	2200
16 Wide	1300	1600	1900	2250	2500
18 Wide	1600	2000	2300	2700	3000

Example: Determine maximum I-Beam pier spacing for a 16 ft. wide with 12" I-Beam, perimeter blocking and 1500 psf soil bearing capacity.

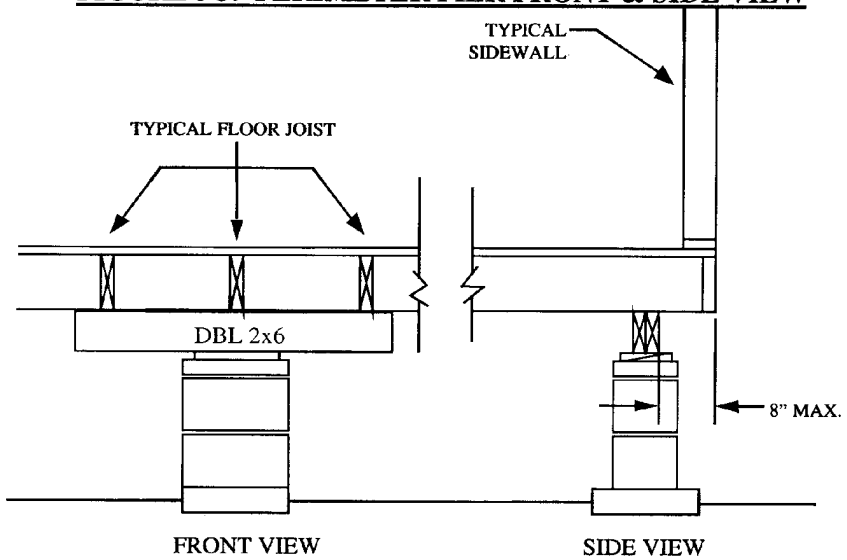
Step 1: From Table 3A, the maximum load for a 16x16x4 at 1500 psf soil is 2700 lbs.

Step 2: From Table 3C, the I-Beam pier load @ 10 ft. o.c. is 3000 lbs ==> no good
the I-Beam pier load @ 8 ft. o.c. is 2400 lbs ===> ok

I-Beam pier spacing is at 8 ft. o.c.

Step 3: The perimeter pier load @ 8ft. o.c. is 2500 lbs =====> ok
Perimeter pier spacing is at 8 ft. o.c.

FIGURE 3C: PERIMETER PIER FRONT & SIDE VIEW



Notes:

1) Perimeter pier may be inset from edge of floor up to 8". The 2x6 brace may be omitted if the front face of a perimeter pier is flush with the perimeter joist and the perimeter pier supports the intersection of an interior joist and perimeter joist.
2) Dbl 2x6 are min. #3 Yellow Pine or pressure treated Spruce-Pine, nailed together with min. 16d nails 2-rows at maximum 8" o.c.
3) 2x6 brace must span at least two (2) but not more than three (3) floor joists.

Figure: 10 TAC §80.54(h)(7)

TYPICAL MULTI-SECTION PIER LAYOUT

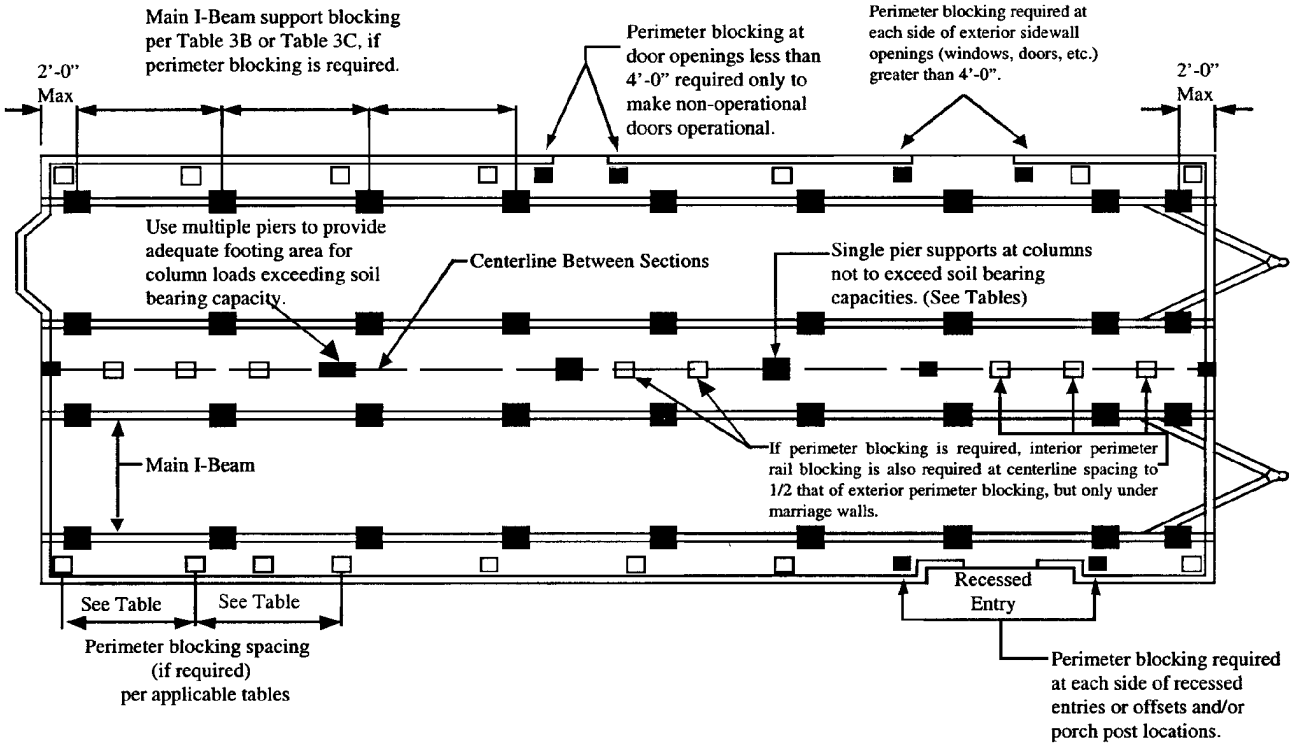


Figure: 10 TAC §80.54(h)(8)

TYPICAL SINGLE SECTION PIER LAYOUT

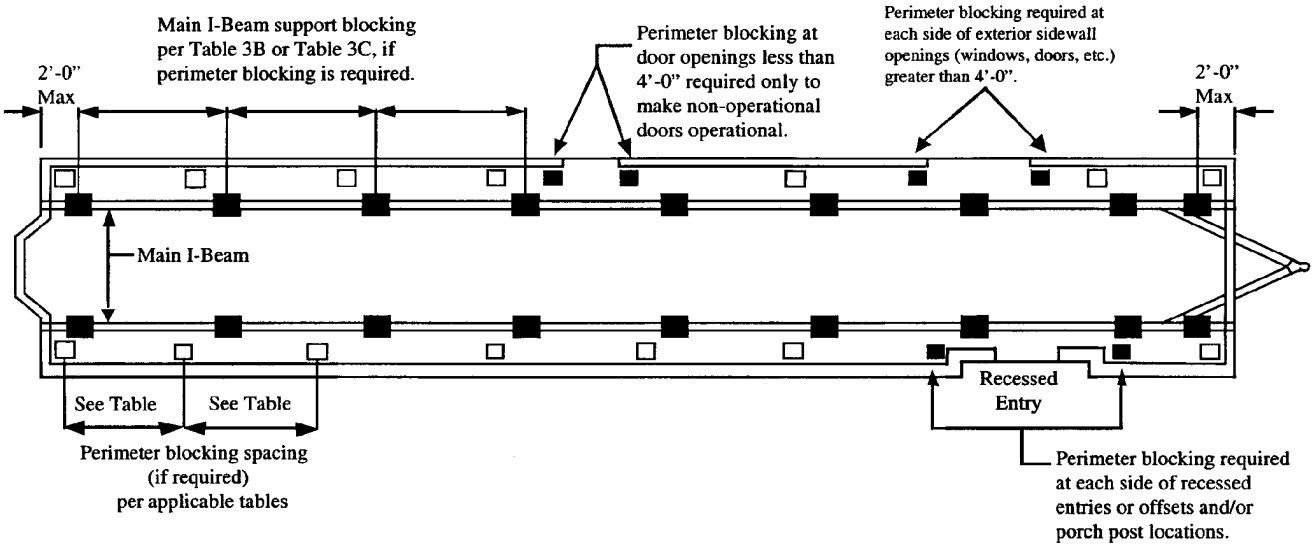


Figure: 10 TAC §80.54(h)(9)(A)

DETERMINING COLUMN LOAD

To determine the column load for Column #1 at the endwall look up Span "A" in Table 3D. To determine the column load for Column #2, look up the combined distance of both Span "A" and Span "B".

To determine the column load for Column #3 look up Span "B" in the table.
(NOTE: Mating line walls not supporting the beam must be included in the span distance.)

To determine the loads for Columns #4 and #5 look up Span "C". For Columns #6 and #7 look up load for span "D".

MARRIAGE LINE ELEVATION

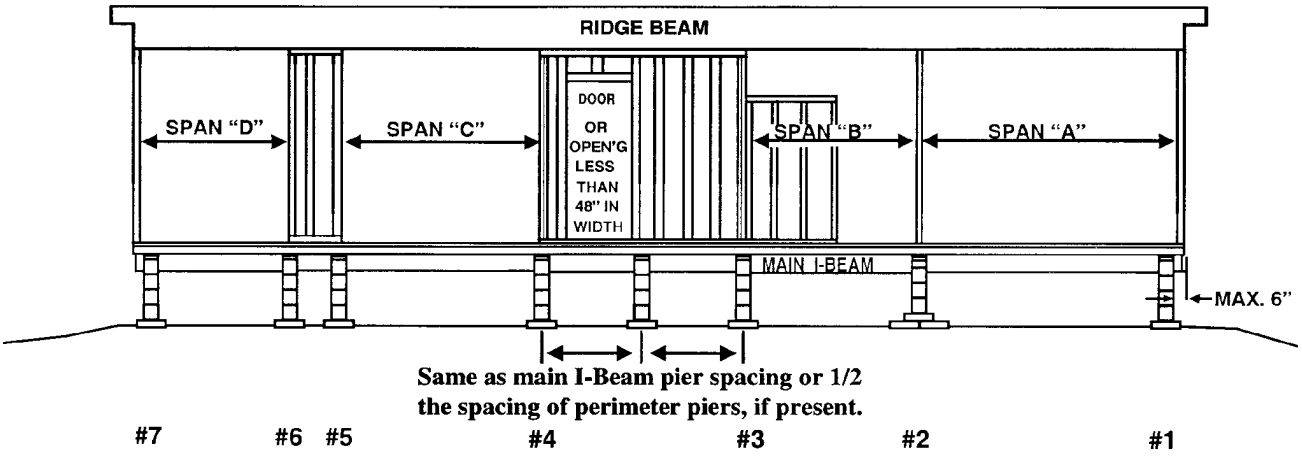


Figure: 10 TAC §80.54(h)(9)(D)

TABLE 3D: MATING LINE COLUMN LOADS (LBS)

----------Unit width in feet (nominal)----------

Span in feet	12 Wide	14 Wide	16 Wide
4	720	840	960
6	1080	1260	1440
8	1440	1680	1920
10	1800	2100	2400
12	2160	2520	2880
14	2520	2940	3360
16	2880	3360	3840
18	3240	3780	4320
20	3600	4200	4800
22	3960	4620	5280
24	4320	5040	5760
26	4680	5460	6240
28	5040	5880	6720
30	5400	6300	7200
32	5760	6720	7680
34	6120	7140	8160
36	6480	7560	8640
Note: If actual span is not shown use next higher tabulated span.			

Figure: 10 TAC §80.129(g)

Enforcement Matrix

Nature of violation	Range of recommended actions
1st time – no dangerous conditions or loss to consumers – addressed promptly	1st time violator letter
1st time – no dangerous conditions or loss to consumers – not addressed promptly	Up to $250 fine
1st time – danger to consumer and/or significant loss to consumer – addressed promptly	Up to $500 fine
1st time – danger to consumer and/or significant loss to consumer – not addressed promptly	$500-1000 fine
recurring – no dangerous conditions or loss to consumers – addressed promptly	Up to $250 fine for 1st recurrence; up to $500 for 2nd, up to $1000 PLUS a written plan to prevent additional violations for 3rd
recurring – no dangerous conditions or loss to consumers – not addressed promptly	Up to $500 fine for 1st recurrence; up to $1000 for 2nd, up to $1000 and/or seek suspension
recurring – danger to consumer and/or significant loss to consumer – addressed promptly	$500 -1000 for first recurrence; seek suspension (may be probated) for 2nd recurrence; revocation for 3rd recurrence
recurring – danger to consumer and/or significant loss to consumer – not addressed promptly	Up to maximum allowed by law for 1st recurrence; seek suspension (may be probated) for 2nd recurrence; revocation for 3rd recurrence

Figure: 10 TAC §80.137(a)(1) Texas Department of Housing and Community Affairs

DIVISION OF MANUFACTURED HOUSING ("DMH")

P. O. BOX 12489 Austin, Texas 78711-2489

(800) 500-7074, (512) 475-2200 FAX (512) 475-1109, Internet Address: www.tdhca.state.tx.us

Pursuant to the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201

NOTICE OF INSTALLATION (FORM T)

HUD Label or Texas Seal # (s):_____ Serial # (s):_____

New: ( ) Used: ( ) Manufacturer Name:_____ License No._____

Manufacturer Address, City & State:_____

Home Size - Width / Length: _____ X _____ Weight _____ Date of Manufacture: ____/____/_____ Model / Name: _____

Legal Description (use additional page if necessary):

Lot _____ Block _____ Survey _____ City _____ County _____ Vol _____ Pg _____

Name of property owner IF OTHER THAN THE CONSUMER:_____

Draw A Map To Provide Directions To Home On The Other Side Of This Page

Consumer: _____ Actual Installation Date: ____/____/____Wind Zone on Data Plate: I ( ) II ( ) III ( )

Does the Data Plate state, "As designed and constructed, this home is suitable for installation only in humid and fringe climates as shown on the Humid and Fringe Climate Map provided with this data plate?" Yes _____ No _____

Mailing Address: _____ ZIP: _____

Site Address: _____ Within City Limits of _____ ZIP: _____

Phone Numbers: Home (____)_____ Work: (____)_____

	Name	Address	License #	Expiration Date	Phone #
Retailer					
Installer					

Is installation part of sales contract of used home?
Yes ( ) No ( ) Not Applicable ( )

Does retailer or installer provide skirting?
Yes ( ) No ( )

The home has been installed in accordance with:

( ) **1. Manufacturer's Home Installation Instructions (Provide page number or option _____)**
( ) **2. State Generic Standards**
( ) **3. DMH Pre-approved Foundation System** *(Provide Reference to DMH Approval Letter)*_____
( ) **4. Custom Designed Foundation System** ***(Attach a copy of the drawing for this system and provide a reference,*** *if applicable,to any drawing previously submitted.)*_____

IF NO METHOD IS CHECKED, IT WILL BE PRESUMED THAT OPTION 2 (STATE GENERIC STANDARDS) WAS USED.

THE RETAILER OR INSTALLER MUST FILE THIS FORM T, PLUS THE REQUIRED INSPECTION REPORTING FEE, WITH THE DEPARTMENT WITHIN 30 DAYS OF THE INSTALLATION. THIS REQUIRED FEE MAY BE COMBINED WITH THE APPLICATION FEE FOR THE STATEMENT OF OWNERSHIP AND LOCATION, IF THIS FORM T IS FILED WITH THE APPLICATION FOR THE STATEMENT OF OWNERSHIP AND LOCATION.

I verify that I am a licensed retailer or installer, that I am responsible for the installation described, and that the information supplied is true and correct.

_____ _____

Signature (Retailer/Installer) **Printed Name and Title**

DRAW MAP BELOW

Figure: 10 TAC §80.137(a)(2) Texas Department of Housing and Community Affairs

DIVISION OF MANUFACTURED HOUSING

P. O. BOX 12489 Austin, Texas 78711-2489

(800) 500-7074, (512) 475-2200 FAX (512) 475-1109

Pursuant to the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201

Internet Address: www.tdhca.state.tx.us

DOWN PAYMENT VERIFICATION AFFIDAVIT (Required)

BLOCK 1: Home Information (Must be completed.)			
Manufacturer Name:		License #:	
Manufacturer's Address/City/State/Zip			
Model:	Total Sq. Ft.:	Date of Manufacture:	
Label/Seal Number	*Complete Serial Number*	*Weight*	*Size*
Section One:			
Section Two:			
Section Three:			
Wind Zone:	Thermal Zone:	Roof Load Zone:	

BLOCK 2: Retailer and Consumer Information	
Retailer Name:	License #:
Retailer's Address/City/State/Zip	
Salesperson's Name:	License #:
Consumer(s) Name	
Deposit Amount: $	

BLOCK 3: SWORN STATEMENT *(Notarization Required)*

The Retailer, the Salesperson, and the Consumer(s), under being first duly sworn, do hereby state as follows:

The Manufactured Home is to be sold to the Consumer(s) by the Retailer in a transaction that is being handled by the Salesperson and will be subject to financing. Any creditor that will be providing such financing requires that the source of any Down Payment being provided by the Consumer(s) be verified.

1. The Retailer, the Salesperson, and the Consumer(s) have verified that the Down Payment has been actually received by the Retailer and the consumer states that it came from (check one below):

( ) money on deposit in an account owned by the Consumer(s)

( ) a *bona fide* gift to the Consumer(s) from _____, with no obligation for the Consumer(s) to repay all or part thereof.

( ) a loan to the Consumer(s) from_____

( ) Other (describe):

2. The Retailer, the Salesperson, and the Consumer(s) each verify and confirm that no portion of the Down Payment was provided or will be provided by the Retailer or the Manufacturer or by a rebate from either of them.

3. The **Consumer** hereby verifies that the amount of the down payment is the true amount noted on my retail installment contract.

I (We) certify that the statements set forth herein above are true and correct.

_____ _____

Consumer *Consumer*

_____ _____

Retailer's Authorized Representative *Salesperson*

Sworn and subscribed before me this _____ day of _____

(month) (year)

_____

Signature of Notary *SEAL*

_____

Printed Name of Notary

Figure: 10 TAC §80.137(a)(3)

Estimate for Reassigned Warranty Work

Part I – Labor and Materials

1) Number of item on inspection report and description of proposed correction:

Estimated time:

Hourly rate:

Itemized cost of materials:

2) Number of item on inspection report and proposed correction:

Estimated time:

Hourly rate:

Itemized cost of materials:

3) Number of item on inspection report and proposed correction:

Estimated time:

Hourly rate:

Itemized cost of materials:

The undersigned represents that:

(1) the actual costs for labor charged to the Texas Department of Housing and Community Affairs, Division of Manufactured Housing and/or the Manufactured Homeowner's Recovery Trust Fund will not exceed the actual number of hours expended, rounded to the nearest quarter of an hour increment, times the hourly rate specified above;

(2) the actual costs for materials charged to Texas Department of Housing and Community Affairs, Division of Manufactured Housing and/or the Manufactured Homeowner's Recovery Trust Fund will not exceed the costs actually charged to the undersigned and such costs do not exceed the costs at which the undersigned is able to obtain such materials for its own account; and

(3) the hourly rate being charged by the undersigned does not exceed the normal hourly rate at which the specified individuals customarily provide their services.

(4) If the work to be performed involves any repair or alteration that would require DAPIA approval, such approval has been obtained and a copy of such approval, together with all DAPIA-approved drawings relating thereto, is attached.

Part II – Other Costs and Expenses

Travel

Starting location (must be the closer of the nearest office to the site of the re-assigned warranty work or the in-state service center for the licensee)

Estimated round-trip mileage:

Mileage is reimbursable at the greater of the rate of $0.35 per mile, not to exceed $75.00 per day, or the State of Texas approved rates from time to time in effect for reimbursement of state employees' travel expenses.

Itemized list of any other travel costs:

Lodging

Name, location, and rate (actual cost not to exceed the rate approved for reimbursement of State of Texas employees)

Reimbursement for overnight lodging is to include the actual room rate and any applicable taxes but does not include any long distance telephone calls, entertainment, food, or beverages. Reimbursement may not exceed the State of Texas approved rates for reimbursement of state employees' lodging.

Meals

Reimbursement for meals shall not exceed the greater of $30.00 per day or the State of Texas approved rate for reimbursement of state employees' meals while traveling. Alcoholic beverages are not subject to reimbursement.

Administrative and oversight costs

Provide an explanation of the necessary administrative services, including the number of hours required and the hourly rate of each person providing such services. Administrative services may not exceed 20% of the total estimate.

This estimate submitted this ____ day of _____, _____.

Name of Licensee:_____

License number:_____

_____
Signature of licensee or duly authorized
Officer or Representative

_____
Printed Name of licensee or duly authorized
Officer or Representative

Figure: 28 TAC §21.2820(c)

Figure: 40 TAC §12.192(d)

MINIMUM TIME BETWEEN THE START OF MEALS							
AM and PM Snacks Served		**AM Snack Served**		**PM Snack Served**		**No Snack Served**	
Breakfast	Two hours	Breakfast	Two hours	Breakfast	Three hours	Breakfast	Three hours
Snack	Two hours	Snack	Two hours	Lunch	Two hours	Lunch	Four hours
Lunch	Two hours	Lunch	Four hours	Snack	Two hours		
Snack	Two hours			Supper(1)		Supper(1)	
Supper(1)		Supper(1)					

(1) Supper must be served between 5:00 p.m. and 7:00 p.m.

APPENDIX

A

Figure: 40 TAC §148.1506(j)

MEMORANDUM OF UNDERSTANDING

The purpose of this MOU is to implement certain requirements enacted by Acts 1993, 73rd Legislature, Regular Session, Chapter 573 (Senate Bill 210), which amends Chapter 161 of the Health and Safety Code by adding Subchapter K, relating to, "abuse, neglect, and unprofessional or unethical conduct in health care facilities." Section 161.133 requires the Texas Board of Mental Health and Mental Retardation (TXMHMR), the Texas Board of Health (TDH) and the Texas Commission on Alcohol and Drug Abuse (TCADA) to adopt by rule a joint MOU, as set out below, detailing the health facility inservice training requirement for identifying patient abuse or neglect and illegal, unprofessional, or unethical conduct by or in the health care facility.

In accordance with the above-referenced legislation, each health care facility is required to annually provide, as a condition of continued licensure, a minimum of eight hours of inservice training designed to assist employees and health care professionals associated with the facility in identifying patient abuse or neglect and illegal, unprofessional, or unethical conduct by or in the facility, as such terms are defined in Chapter 161, Health and Safety Code, Subchapter K.

Accordingly, TXMHMR, TDH, and TCADA agree as follows:

Section I
APPLICATION

If a health care facility provides inpatient mental health, chemical dependency, or comprehensive medical rehabilitation services in a separate and distinct unit of the hospital, the requirements of this MOU shall apply to all employees and associated health care professionals who are assigned to, or who provide services on such units.

Section II
DEFINITIONS

Health care facility — An inpatient mental health facility, inpatient treatment facility, or hospital that provides comprehensive medical rehabilitation services.

Hospital that provides comprehensive medical rehabilitation services — Includes a general hospital and a special hospital.

Illegal conduct — Conduct prohibited by law.

Inpatient mental health facility — As defined in §571.003 of the Texas Health and Safety Code, a mental health facility that can provide 24-hour residential and psychiatric services and that is:

(A) a facility operated by the TXMHMR;

(B) a private mental hospital licensed by the TDH;

(C) a community center;

(D) a facility operated by a community center or other entity designated by the TXMHMR to provide mental health services;

(E) an identifiable part of a general hospital in which diagnosis, treatment, and care for persons with mental illness is provided and that is licensed by the TDH; or

(F) a hospital operated by a federal agency.

Inpatient treatment facility — A treatment facility that can provide 24-hour residential and chemical dependency services and that is:

(A) a public or private hospital;

(B) a detoxification facility;

(C) a primary care facility;

(D) an intensive care facility;

(E) a long-term care facility;

(F) a community mental health center;

(G) a recovery center;

(H) a halfway house;

(I) an ambulatory care facility; or

(J) any other facility that offers or purports to offer chemical dependency treatment.

Unethical conduct — Conduct prohibited by the ethical standards adopted by state or national professional organizations for their respective professions or by rules established by the state licensing agency for the respective profession.

Unprofessional conduct — Conduct prohibited under rules adopted by the state licensing agency for the respective profession.

Section III
MINIMUM STANDARDS OF TRAINING PROGRAM

A. The inservice training program shall address, at a minimum, the following elements:

1. Applicable laws and regulations governing patient abuse and neglect, as well as policies and procedures adopted by the governing board of the facility with regard to patient abuse and neglect.

2. Applicable laws and regulations governing illegal, unprofessional, and unethical conduct, as well as policies and procedures adopted by the governing board of the facility with regard to illegal, unprofessional, and unethical conduct.

3. Applicable laws and regulations governing patient rights, as well as policies and procedures adopted by the governing board of the facility with respect to patient rights.

4. Specific types of patient abuse and neglect and how to identify when abuse or neglect is occurring or has occurred.

5. Specific types of illegal, unprofessional, and unethical conduct and how to identify when illegal, unprofessional, or unethical conduct is occurring or has occurred.

6. Requirements and procedures for reporting an incident of patient abuse and neglect, together with the applicable penalties for non-reporting.

6. Requirements and procedures for reporting an incident of patient abuse and neglect, together with the applicable penalties for non-reporting.

7. Requirements and procedures for reporting illegal, unprofessional, and unethical conduct, together with the applicable penalties for non-reporting.

8. The legal protection afforded to employees and associated health care professionals who report patient abuse and neglect and illegal, unprofessional, and unethical conduct.

B. In addition, the training program may include training designed to improve patient care or to prevent abuse or neglect and illegal, unprofessional, or unethical conduct from occurring. This additional training may be customized according to the type of tasks performed by the various employees and health care professionals, their amount of direct patient contact, and the likelihood of their being exposed to patient abuse or neglect and illegal, unprofessional, or unethical conduct. Courses related to improving patient care may include things such as the "Prevention and Management of Aggressive Behavior" (PMAB) or other programs designed to deal with aggressive behavior and crisis intervention, some aspects of existing employee orientation courses, and continuing education courses (CME, CNE, CEU) related to improving patient care.

C. Each full-time employee or associated health care professional shall receive a minimum of eight hours inservice training on identifying patient abuse or neglect and illegal, unprofessional, or unethical conduct. The inservice training program shall include the topics outlined in paragraph (A) of this section; in addition, the training may include other topics as outlined in paragraph (B) of this section.

D. Although each part-time employee or associated health care professional must receive training as outlined in paragraphs (A) and (B) above, the amount and type of training provided to each part-time employee or associated health care professional may be determined based on a number of factors, including, but not limited to:

(1) the amount of direct contact the employee or associated health care professional has with patients;

(2) the amount of time the employee or associated health care professional spends at the health care facility (e.g., a consultant who is at the hospital 20 hours a week versus a consultant who works at the health care facility once a month).

E. An interim training program that does not meet the minimum requirements set forth in Section I, Paragraph A, above, is acceptable until June 1, 1994, to allow for development of a training program that meets the minimum standards of this MOU.

Section IV
MEANS OF REPORTING COMPLIANCE WITH REQUIREMENTS

A. Each facility subject to the inservice training requirement shall keep a record of the exact content of training provided.

B. Each facility subject to the inservice training requirement shall furnish documentation to show that each employee has completed the required training.

Documentation shall include:

1. course title
2. instructor's name
3. date(s) of course(s)
4. employee or associate health professional's social security number
5. signature block for employee or associated health care professional to verify that training was received and that he/she is aware of the training objectives
6. length of program presented

C. The health care facility shall keep the records required in Paragraphs A and B above for five (5) years.

D. A health care facility that utilized an independent contracting agency that supplies health care professionals and/or contract personnel to serve on a full or part time basis in a health care facility may rely on written representations by the independent contracting agency that such health care professionals and/or contract personnel have received inservice training on identifying patient abuse or neglect and illegal, unprofessional or unethical conduct. An independent contracting agency shall meet all other requirements of this MOU and shall supply evidence documenting each healthcare professional's and/or contract personnel's compliance with such requirements.

E. Employees and associated health care professionals may fulfill all or some of the training requirement by attending a continuing education program on patient abuse or neglect or illegal, unprofessional, or unethical conduct, provided such program meets the minimum requirements set forth in Section I, Paragraph A, above. In addition, briefings regarding the Code of Ethics for the appropriate discipline provided by the discipline head or other individual may be used to fulfill a portion of the requirement.

F. Each health care facility shall be in compliance with the annual requirement if it can demonstrate that each employee or associated health care professional received the required training over a twelve month period, and that the health care facility provided the required eight hours of inservice training over the twelve month period.

Section V
MISCELLANEOUS PROVISIONS

A. This memorandum of understanding shall be jointly adopted as a rule by the Texas Board of Mental Health and Mental Retardation, the Texas Board of Health, and the Texas Commission on Alcohol and Drug Abuse and shall be effective upon final joint adoption of the rules by the signatory agencies.

B. This memorandum may be amended at any time upon the mutual agreement of the agencies and such amendments shall also be made to the jointly adopted rules.

C. Each agency shall review and modify the memorandum as necessary not later than the last month of each state fiscal year.

EXECUTION OF MEMORANDUM OF UNDERSTANDING

For faithful performance of the terms of this Memorandum of Understanding (MOU) concerning training to identify client abuse or neglect and illegal, unprofessional, and unethical conduct, it is hereby executed by the undersigned persons in their capacities as stated below.

David R. Smith, M.D., Commissioner
Texas Department of Health

J. Ben Bynum, Executive Director
Texas Commission on Alcohol
and Drug Abuse

Dennis Jones, Commissioner
Texas Department of Mental Health
and Mental Retardation

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.

Comptroller of Public Accounts

Notice of Request for Proposals

Notice of Request for Proposals: Pursuant to Chapter 2254, Subchapter B, and Sections 403.011 and 403.020, Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces the issuance of a Request for Proposals (RFP #165a) from qualified, independent firms to provide consulting services to Comptroller. The successful respondent will assist Comptroller in conducting a management and performance review of the Victoria Independent School District (Victoria ISD). Comptroller reserves the right, in its sole discretion, to award one or more contracts for this review. The successful respondent(s) will be expected to begin performance of the contract or contracts, if any, on or about September 29, 2003, or as soon thereafter as practical.

Contact: Parties interested in submitting a proposal should contact Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 E. 17th St., ROOM G-24, Austin, Texas, 78774, telephone number: (512) 305-8673, to obtain a copy of the RFP. Comptroller will mail copies of the RFP only to those specifically requesting a copy. The RFP was made available for pick-up at the above-referenced address on Friday, August 29, 2003, between 10 a.m. and 5 p.m., Central Zone Time (CZT), and during normal business hours thereafter. Comptroller also made the complete RFP available electronically on the Texas Marketplace at: http://esbd.tbpc.state.tx.us after 10 a.m. (CZT) on Friday, August 29, 2003.

Mandatory Letters of Intent and Questions: All Mandatory Letters of Intent and questions regarding the RFP must be sent via facsimile to Mr. Harris at: (512) 475-0973, not later than 2:00 p.m. (CZT), on Monday, September 15, 2003. Official responses to questions received by the foregoing deadline will be posted electronically on the Texas Marketplace no later than September 16, 2003, or as soon thereafter as practical. Mandatory Letters of Intent received after the 2:00 p.m., September 15, 2003 deadline will not be considered. Respondents shall be solely responsible for confirming the timely receipt of Mandatory Letters of Intent to propose.

Closing Date: Proposals must be received in Assistant General Counsel's Office at the address specified above (ROOM G-24) no later than 2 p.m. (CZT), on Monday, September 22, 2003. Proposals received after this time and date will not be considered. Proposals will not be accepted from respondents that do not submit mandatory letters of intent by the September 15, 2003, deadline. Respondents shall be solely responsible for confirming the timely receipt of proposals.

Evaluation and Award Procedure: All proposals will be subject to evaluation by a committee based on the evaluation criteria and procedures set forth in the RFP. Comptroller will make the final decision regarding the award of a contract or contracts. Comptroller reserves the right to award one or more contracts under this RFP.

Comptroller reserves the right to accept or reject any or all proposals submitted. Comptroller is under no legal or other obligation to execute any contracts on the basis of this notice or the distribution of any RFP. Comptroller shall not pay for any costs incurred by any entity in responding to this Notice or the RFP.

The anticipated schedule of events is as follows: Issuance of RFP - August 29, 2003, 10 a.m. CZT; All Mandatory Letters of Intent and Questions Due - September 15, 2003, 2 p.m. CZT; Official Responses to Questions Posted - September 16, 2003, or as soon thereafter as practical; Proposals Due - September 22, 2003, 2 p.m. CZT; Contract Execution - September 29, 2003, or as soon thereafter as practical; Commencement of Project Activities - September 29, 2003, or as soon thereafter as practical.

TRD-200305379
William Clay Harris
Assistant General Counsel Contracts
Comptroller of Public Accounts
Filed: August 20, 2003

♦ ♦ ♦

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, 303.009, and 304.003, Tex. Fin. Code.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 08/25/03 - 08/31/03 is 18% for Consumer [1]/Agricultural/Commercial [2]/credit thru $250,000.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 08/25/03 - 08/31/03 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 09/01/03 - 09/30/03 is 5% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 09/01/03 - 09/30/03 is 5% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200305359
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: August 19, 2003

♦ ♦ ♦

Court Reporters Certification Board

Certification of Court Reporters

Following the examination of applicants on July 25, 2003, the Texas Court Reporters Certification Board certified to the Supreme Court of Texas the following individuals who are qualified in the method indicated to practice shorthand reporting pursuant to Chapter 52 of the Texas Government Code, V.T.C.A.:

MACHINE SHORTHAND: DONNA BLISSETT - CARTHAGE, TX; DENISE MACKAY - HONDO, TX; HEATHER VEZINA - IRVING, TX; JOANNA TAYLOR - AZLE, TX; APRIL BELL - FORT WORTH, TX; JULIE BAILEY - SWENEY, TX; PATRICIA LOPEZ - FORT WORTH, TX; and DEBBIE LEONARD - WESTON, PA.

Following the examination of applicants on July 25, 2003, the Texas Court Reporters Certification Board certified to the Supreme Court of Texas the following individuals who are qualified in the method indicated to practice shorthand reporting pursuant to Chapter 52 of the Texas Government Code, V.T.C.A.:

ORAL STENOGRAPHY: CHRISTAL CAFFEY - DECATUR, TX; and PAMELA BALSAM - GRAPEVINE, TX.

TRD-200305212
Sheryl Jones
Director of Administration
Court Reporters Certification Board
Filed: August 14, 2003

♦ ♦ ♦

Credit Union Department

Application for a Merger or Consolidation

Notice is given that the following application has been filed with the Credit Union Department and is under consideration:

An application was received from J&J Employees Credit Union (Sherman) seeking approval to merge with My Federal Credit Union (Bedford) with the latter being the surviving credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200305367
Harold E. Feeney
Commissioner
Credit Union Department
Filed: August 19, 2003

♦ ♦ ♦

Applications to Expand Field of Membership

Notice is given that the following applications have been filed with the Credit Union Department and are under consideration:

An application was received from OmniAmerican Credit Union, Fort Worth, Texas to expand its field of membership. The proposal would permit persons who live, work, attend school in, are paid from, business and non-business entities, organizations and associations located within Dallas County, Texas, to be eligible for membership in the credit union.

An application was received from OmniAmerican Credit Union, Fort Worth, Texas to expand its field of membership. The proposal would permit persons who live, work, attend school in, are paid from, business and non-business entities, organizations and associations located within Denton County, Texas, to be eligible for membership in the credit union.

An application was received from EECU, Fort Worth, Texas to expand its field of membership. The proposal would remove exclusionary language relating to Undergraduate and graduate students of the university of Texas at Arlington, which protects the field of membership of certain occupation or association based credit unions.

An application was received from EECU, Fort Worth, Texas to expand its field of membership. The proposal would remove exclusionary language relating to individuals that reside or work within the cities of North Richland Hills, Bedford, Hurst or Colleyville, which protects the field of membership of certain occupation or association based credit unions.

An application was received from EECU, Fort Worth, Texas to expand its field of membership. The proposal would remove exclusionary language relating to individuals who live or work in the City of Burleson or within Tarrant County or Parker County, which protects the field of membership of certain occupation or association based credit unions.

An application was received from EECU, Fort Worth, Texas to expand its field of membership. The proposal would remove exclusionary language relating to individuals who live, or work in the cities of Fort Worth, Haslet, or Mansfield, which protects the field of membership of certain occupation or association based credit unions.

An application was received from EECU, Fort Worth, Texas to expand its field of membership. The proposal would remove exclusionary language relating to individuals who live or work in the counties of Hood, Johnson or Palo Pinto, which protects he field of membership of certain occupation or association based credit unions.

An application was received from Pegasus Credit Union, Dallas, Texas to expand its field of membership. The proposal would permit persons who work or reside within Dallas, Denton and Collin County, Texas, to be eligible for membership in the credit union.

An application was received from MemberSource Credit Union, Houston, Texas to expand its field of membership. The proposal would permit employees of South Texas Dental and its affiliate, All Star Dental, who work in or are paid or supervised from Houston, TX, to be eligible for membership in the credit union.

An application was received from BP Employees Credit Union, Alvin, Texas to expand its field of membership. The proposal would permit persons who live, work or attend school in Brazoria County, Texas, to be eligible for membership in the credit union.

An application was received from BP Employees, Alvin, Texas to expand its field of membership. The proposal would remove exclusionary language relating to contractors and their employees who work under contract for any business or organization, including subsidiaries and affiliates, that are included within its field of membership, which protects he field of membership of certain occupational or associational based credit unions.

An application was received from The Education Credit Union, Amarillo, Texas to expand its field of membership. The proposal would permit members of the Canyon ISD Council PTA and the individual members of the PTA organizations at Canyon High School, Randall High School, Canyon Junior High School, Westover Park Intermediate School, Greenways Intermediate School, Arden Road School, Crestview Elementary School, Gene Howe Elementary School, Lakeview Elementary School, Oscar Hinger Elementary School, Rex Reeves Elementary School, and Sundown Lane Elementary School, to be eligible for membership in the credit union.

An application was received from Neighborhood Credit Union, Dallas, Texas to expand its field of membership. The proposal would permit persons who work or reside in the following Texas Counties: Dallas,

Tarrant, Denton, Collin, Rockwall, Kaufman and Ellis, to be eligible for membership in the credit union.

An application was received from South Texas Area Resources Credit Union, Corpus Christi, Texas to expand its field of membership. The proposal would permit persons who live, work, attend school, within a five mile radius of the following South Texas Area Resources branch locations: 10429 Leopard, Corpus Christi, TX 78460-0324; 3022 Buffalo, Corpus Christi, TX 78408; 5262 Staples, Suite 100, Corpus Christi, TX 78412, to be eligible for membership in the credit union.

An application was received from PriorityOne Credit Union, Dallas, Texas to expand its field of membership. The proposal would permit employees of Leasing Services, Inc. Dallas, Texas and its subsidiaries/client companies whose employees are co-employed by Leasing Services, Inc., excluding individuals eligible for primary membership in another occupation or association based credit union;

An application was received from PriorityOne Credit Union, Dallas, Texas to expand its field of membership. The proposal would permit employees of EASI in Dallas, Texas and its subsidiaries/client companies whose employees are co-employed by EASI, excluding individuals eligible for primary membership in another occupation or association based credit union;

An application was received from PriorityOne Credit Union, Dallas, Texas to expand its field of membership. The proposal would permit persons that live, work, or attend school within a ten-mile radius of the PriorityOne Credit Union branch at 4801 Spring Valley, Suite 10, Dallas, TX 75244-3968, to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236 or downloading the form at http://www.tcud.state.tx.us/applications.html. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200305369
Harold E. Feeney
Commissioner
Credit Union Department
Filed: August 19, 2003

♦ ♦ ♦

Notice of Final Action Taken

In accordance with the provisions of 7 TAC Section 91.103, the Credit Union Department provides notice of the final action taken on the following application(s):

Application(s) to Expand Field of Membership - Approved

United Heritage Credit Union, Austin, Texas (Amended) - Persons who live, work, or attend school in and business located in Travis, Bastrop, Caldwell, and Hays County, Texas;

United Heritage Credit Union, Austin, Texas (Amended) - Persons who live, work, or attend school in and business located in Smith, and Wood, County, Texas;

United Heritage Credit Union, Austin, Texas (Amended) - Persons who live, work, or attend school in and business located in Williamson County, Texas;

Members Choice Credit Union, Houston, Texas - See *Texas Register* issue dated June 27, 2003.

Community Credit Union, (2 applications) Richardson, Texas - See *Texas Register* issue dated June 27, 2003.

Cameron Credit Union, Houston, Texas - See *Texas Register* issue dated June 27, 2003.

Star One Credit Union, Sunnyvale, California (2 applications) - See *Texas Register* issue dated June 27, 2003.

TruWest Credit Union, Scottsdale, Arizona - See *Texas Register* issue dated June 27, 2003.

Application(s) for a Merger or Consolidation - Approved

Texas Steel Credit Union, (Fort Worth) and My Federal Credit Union (Bedford) - See *Texas Register* issue dated June 27, 2003.

Application(s) to Articles of Incorporation - Approved

Cameron Credit Union, Houston, Texas - See *Texas Register* issue dated June 27, 2003.

TRD-200305368
Harold E. Feeney
Commissioner
Credit Union Department
Filed: August 19, 2003

♦ ♦ ♦

Texas Department of Criminal Justice

Award Notification

The Texas Department of Criminal Justice publishes this notice of a contract award to D. R. Kidd Company, 1413 Brandi Lane, Round Rock, Texas 78680. Notice of an Invitation for Bid was published in the 28th edition of the *Texas Register* (28 TexReg 4344). This contract was awarded in accordance with the requirements in Chapter 2254, Subchapter B, Texas Government Code.

The contract number is 696-FD-3-4-C0091 and the not-to-exceed contract amount is $774,575.00.

TRD-200305358
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: August 19, 2003

♦ ♦ ♦

Texas Education Agency

Notice of Cancellation of Request for Applications Concerning Adult Education Regional Training Coordination Centers

The Texas Education Agency (TEA) is retracting Request for Applications (RFA) #701-03-028, with a deadline date of September 18, 2003, 5:00 p.m. (Central Time). It will be replaced with a new title, Project GREAT, Getting Results Educating Adults in Texas-Adult Education and Family Literacy Regional Centers of Excellence, a new RFA number, and a new deadline date to be announced. The TEA hereby gives notice of the cancellation of RFA #701-03-028, concerning Adult Education Regional Training Coordination Centers.

Further Information. For further information, contact Joanie Rethlake, Harris County Department of Education, (800) 696-4233.

TRD-200305383
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Filed: August 20, 2003

♦ ♦ ♦

Texas Commission on Environmental Quality

Enforcement Orders

An agreed order was entered regarding A. D. Stenger Dba Ridgewood Village Water System, Docket No. 2001-0138-PWS-E on July 28, 2003 assessing $800 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Darren Ream, Staff Attorney at (817)588-5878, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Walter J. Carroll Water Company, Inc., Docket No. 2001-1379-PWS-E on July 28, 2003 assessing $13,876 in administrative penalties with $8,376 deferred.

Information concerning any aspect of this order may be obtained by contacting Lisa Lemanczyk, Staff Attorney at (512)239-5915, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Basf Corporation, Docket No. 2001-0008-AIR-E on July 28, 2003 assessing $87,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lisa Lemanczyk, Staff Attorney at (512)239-5915, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Calderon Enterprises, Incorporated, Docket No. 2001- 0336-PST-E on July 28, 2003 assessing $4,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shannon Strong, Staff Attorney at (512)239-6201, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An default order was entered regarding Lindon Stewart, Docket No. 2001-0305-AIR-E on July 25, 2003 assessing $5,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shannon Strong, Staff Attorney at (512)239-6201, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Longview, Docket No. 2000-0395-MWD-E on July 28, 2003 assessing $65,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shannon Strong, Staff Attorney at (512)239-6201, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Saba Nassif dba OST Chevron, Docket No. 2001-1010- PST-E on July 28, 2003 assessing $3,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Troy Nelson, Staff Attorney at (903)525-0380, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Brant-Sta, Inc. dba Max-A-Mart, Docket No. 2001-1065- PST-E on July 28, 2003 assessing $6,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lisa Lemanczyk, Staff Attorney at (512)239-5915, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An order granting the Executive Director's Motion to Vacate the Default Order and Substitute the Agreed Order was entered regarding Proton, PRC, Ltd., Docket No. 2002-0557-PST-E on July 28, 2003 assessing $1,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting David Speaker, Staff Attorney at (512)239-2548, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Miracles Never Cease, Inc., Docket No. 2002-0625-AIR- E on July 28, 2003 assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting David Speaker, Staff Attorney at (512)239-2548, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dr Pepper Bottling Company of Texas dba Big Red/Seven Up Bottling Company of South Texas, Docket No. 2001-1156-PST-E on July 28, 2003 assessing $6,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Petty, Staff Attorney at (512)239-3693, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Insignia, Inc., Docket No. 2002-0363-IHW-E on July 28, 2003 assessing $36,300 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Petty, Staff Attorney at (512)239-3693, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Rowntree Cattle Company, L.L.C., Docket No. 2001- 0821-AGR-E on July 28, 2003 assessing $14,700 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Petty, Staff Attorney at (512)239-3693, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Military Highway Water Supply Corporation, Docket No. 2002-1336-MWD-E on July 28, 2003 assessing $4,320 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Steven Lopez, Enforcement Coordinator at (512)239-1896, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lytle Quik-Stop Corp. dba Lytle Fast Stop & Terry Giannas dba Lytle Quik-Stop, Docket No.

2001-1486-PST-E on July 28, 2003 assessing $5,000 in administrative penalties with $1,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Todd Huddleson, Enforcement Coordinator at (512)239-1105, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Courtney & Company, Inc., Docket No. 1999-1594-IHW- E on July 28, 2003 assessing $15,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713)422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Merit Energy Company, Docket No. 2001-0615-AIR-E on July 28, 2003 assessing $5,625 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kelly Mego, Staff Attorney at (713)422-8916, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Pilkington's Big Tex Oil Distributors, Inc., Docket No. 2002-0641-PST-E on July 28, 2003 assessing $2,000 in administrative penalties with $1,400 deferred.

Information concerning any aspect of this order may be obtained by contacting Troy Nelson, Staff Attorney at (903)525-0380, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Joe Ledbetter dba Joe's Auto Body, Docket No. 2002- 0104-AIR-E on July 28, 2003 assessing $13,125 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Benjamin De Leon, Staff Attorney at (512)239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding PM Fuel Service, Incorporated, Docket No. 2002-0709- PST-E on July 28, 2003 assessing $1,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robin Chapman, Staff Attorney at (512)239-0497, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Blue Dolphin Pipe Line Company, Docket No. 2002- 1022-AIR-E on July 28, 2003 assessing $6,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Benjamin De Leon, Staff Attorney at (512)239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Pilkington's Big Tex, Inc., Docket No. 2002-0845-PST-E on July 28, 2003 assessing $8,000 in administrative penalties with $7,400 deferred.

Information concerning any aspect of this order may be obtained by contacting Troy Nelson, Staff Attorney at (903)525-0380, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lyondell-Citgo Refining, L.P., Docket No. 2002-1040- AIR-E on July 28, 2003 assessing $3,350 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Benjamin De Leon, Staff Attorney at (512)239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Nathaniel Energy Corporation, Docket No. 2002-0950- MSW-E on July 28, 2003 assessing $23,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817)588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Darryl Winstead and Marjorie Winstead dba San Gabriel Water Works and Indian Springs Water Works, Docket No. 2000-0920-PWS-E on July 28, 2003 assessing $626 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Brian Lehmkuhle, Enforcement Coordinator at (512)239-4482, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tenaska III Partners, Ltd. dba Tenaska III Texas Partners, Docket No. 2002-1329-AIR-E on July 28, 2003 assessing $2,025 in administrative penalties with $405 deferred.

Information concerning any aspect of this order may be obtained by contacting Thomas Greimel, Enforcement Coordinator at (512)239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Western Gas Resources, Inc., Docket No. 2003-0090- AIR-E on July 28, 2003 assessing $4,950 in administrative penalties with $990 deferred.

Information concerning any aspect of this order may be obtained by contacting Sheila Smith, Enforcement Coordinator at (512)239-1670, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Majid Asadifar dba Westwood Auto Parts, Docket No. 2002-1330-OSS-E on July 28, 2003 assessing $238 in administrative penalties with $48 deferred.

Information concerning any aspect of this order may be obtained by contacting Subhash Jain, Enforcement Coordinator at (512)239-5867, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Expro Engineering Inc, Docket No. 2002-0587-AIR-E on July 28, 2003 assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (713)422-8931, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Flash Mart Stores, Inc. dba Sylvan Texaco, Docket No. 2002-0978-PST-E on July 28, 2003 assessing $950 in administrative penalties with $190 deferred.

Information concerning any aspect of this order may be obtained by contacting James Flemming, Enforcement Coordinator at (512)239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Westphalia Water and Sewer Supply Corporation, Docket No. 2002-1093-MLM-E on July 28, 2003 assessing $43,980 in administrative penalties with $43,380 deferred.

Information concerning any aspect of this order may be obtained by contacting David Van Soest, Enforcement Coordinator at (512)239-0468, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Grady Crawford Construction Company Inc, Docket No. 2002-1010-PST-E on July 28, 2003 assessing $2,000 in administrative penalties with $400 deferred.

Information concerning any aspect of this order may be obtained by contacting Carolyn Lind, Enforcement Coordinator at (903)535-5145, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Harlingen Consolidated Independent School Dis, Docket No. 2002-0401-MLM-E on July 28, 2003 assessing $14,295 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sandra Hernandez-Alaniz, Enforcement Coordinator at (956)430-6044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Huntsman Petrochemical Corporation, Docket No. 2002- 1431-AIR-E on July 28, 2003 assessing $2,430 in administrative penalties with $486 deferred.

Information concerning any aspect of this order may be obtained by contacting Laura Clark, Enforcement Coordinator at (409)898-3838, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Kingsville, Docket No. 2002-0336-MWD-E on July 28, 2003 assessing $8,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Edward Moderow, Enforcement Coordinator at (361)825-3288, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Apache Corporation, Docket No. 2002-1363-AIR-E on July 28, 2003 assessing $11,250 in administrative penalties with $2,250 deferred.

Information concerning any aspect of this order may be obtained by contacting Gloria Stanford, Enforcement Coordinator at (512)239-1871, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Atofina Petrochemicals Inc, Docket No. 2002-1050-AIR- E on July 28, 2003 assessing $5,500 in administrative penalties with $1,100 deferred.

Information concerning any aspect of this order may be obtained by contacting Stacey Young, Enforcement Coordinator at (512)239-1899, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Metro Stores, Inc. dba Antoine Chevron, Docket No. 2002-0760-PST-E on July 28, 2003 assessing $3,750 in administrative penalties with $750 deferred.

Information concerning any aspect of this order may be obtained by contacting Catherine Sherman, Enforcement Coordinator at (713)767-3600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Crockett Gas Processing Company, Docket No. 2002- 1006-AIR-E on July 28, 2003 assessing $15,625 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sheila Smith, Enforcement Coordinator at (512)239-1670, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dionisio Sotelo dba D&D Paint and Body Shop, Docket No. 2002-0910-AIR-E on July 28, 2003 assessing $1,050 in administrative penalties with $450 deferred.

Information concerning any aspect of this order may be obtained by contacting Catherine Sherman, Enforcement Coordinator at (713)767-3600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Advance Petroleum Distributing Company Incorporated, Docket No. 2002-1309-PST-E on July 28, 2003 assessing $500 in administrative penalties with $100 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, P.E., Enforcement Coordinator at (817)588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Craig and Tina Robin dba Lakeview Hardware and Grocery, Docket No. 2003-0072-PST-E on July 28, 2003 assessing $1,800 in administrative penalties with $360 deferred.

Information concerning any aspect of this order may be obtained by contacting John Barry, Enforcement Coordinator at (409)899-3838, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding La Lomita Transport Company, Inc., Docket No. 2002- 1361-PST-E on July 28, 2003 assessing $900 in administrative penalties with $180 deferred.

Information concerning any aspect of this order may be obtained by contacting Sandra Hernandez-Alaniz, Enforcement Coordinator at (956)430-6044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Degussa Corporation, Docket No. 2002-0991-AIR-E on July 28, 2003 assessing $56,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Audra Baumgartner, Enforcement Coordinator at (361)825-3131, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Desert Hills, L.P. dba Desert Hills Carwash & Convenience Store, Docket No. 2002-1195-PST-E on July 28, 2003 assessing $1,800 in administrative penalties with $360 deferred.

Information concerning any aspect of this order may be obtained by contacting Bradley Brock, Enforcement Coordinator at (512)239-1165, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Carlos Flores dba Del Rio Fisherman's Headquarters, Docket No. 2002-0774-PWS-E on July 28, 2003 assessing $3438 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Benjamin De Leon, Staff Attorney at (512)239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200305184
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 13, 2003

♦ ♦ ♦

Notice of Application for Industrial Hazardous Waste Permits/Compliance Plans

For the Period of July 28, 2003.

APPLICATION. Murray Corporation, 260 Schilling Circle, Great Baltimore Industrial Park, Hunt Valley, Maryland 21031, a former manufacturer of rebuilt automobile air conditioning compressors, has applied to the Texas Commission on Environmental Quality (TCEQ) for a permit renewal for post closure care of the former drum burial trench and compliance plan renewal. The facility is located at 2002 Tile Factory Road, Palestine, in Anderson County, Texas. The permit application was submitted to the TCEQ on May 31, 2002 and the compliance plan application was submitted on July 25, 2002.

The TCEQ executive director has completed the technical review of the application and prepared a draft permit/compliance plan. The draft permit/compliance plan, if approved, would establish the conditions under which the facility must operate. The executive director has made a preliminary decision that this permit/compliance plan, if issued, meet all statutory and regulatory requirements. The permit/compliance plan applications, executive director's preliminary decision, and draft permit/compliance plans are available for viewing and copying at the Palestine Public Library, 1101 North Cedar, Palestine, Texas.

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 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 is 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 comment 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/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.

Further information may also be obtained from Murray Corporation at the address stated above or by calling Mr. Fred Dalbey at (512) 347-7588.

TRD-200305182
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 13, 2003

♦ ♦ ♦

Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director (ED) of the commission in accordance with Texas Water Code (TWC), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **September 29, 2003**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate a proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on September 29, 2003**. Comments may also be sent by facsimile machine to the attorney at (512)

239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, comments on the DOs should be submitted to the commission in **writing**.

(1) COMPANY: Alberto De Leon dba De Leon Construction; DOCKET NUMBER: 2002-0960- LII-E; TCEQ ID NUMBER: none; LOCATIONS: 1084 Los Ebanos, 901 Plantation, 900 Plantation, 896 Plantation, and 35 Arien Court, Brownsville, Cameron County, Texas; TYPE OF FACILITY: installation of landscape irrigation systems; RULES VIOLATED: 30 TAC §334.4 and TWC, §34.007, by failing to obtain an irrigator license prior to selling and installing landscape irrigation systems; PENALTY: $3,125; STAFF ATTORNEY: Diana Grawitch, Litigation Division, MC 175, (512) 239-0939; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(2) COMPANY: Ann Beene dba Crossroads Grocery; DOCKET NUMBER: 2001-1558-PWS-E; TCEQ ID NUMBER: 0250043; LOCATION: intersection of Park Road 15 and Farm-to-Market Road 2559, Brownwood, Brown County, Texas; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.109(c)(2) and (g) and §290.122(c) and Texas Health and Safety Code (THSC), §341.033(d), by failing to collect and submit routine monthly bacteriological samples; and §290.51(a)(6), by failing to pay overdue public health service fees; PENALTY: $6,875; STAFF ATTORNEY: Robert Hernandez, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(3) COMPANY: Convenience Corner, Inc.; DOCKET NUMBER: 2001-1223-PST-E; TCEQ ID NUMBER: 0027555; LOCATION: 930 North Tone, Denison, Grayson County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by the accidental releases arising from the operation of petroleum underground storage tanks (UST); and 30 TAC §334.8(c)(4)(B) and TWC, §26.346(a), by failing to ensure that the UST registration and self- certification form was fully and accurately completed and submitted to the agency in a timely manner; PENALTY: $1,500; STAFF ATTORNEY: Robert Hernandez, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: Mary Fielder dba End of the Trail; DOCKET NUMBER: 2000-1254-PWS-E; TCEQ ID NUMBER: 0200425; LOCATION: 17325 Pearland Sites Road, Pearland, Brazoria County, Texas; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.109(c) and THSC, §341.033(d), by failing to collect and submit routine monthly bacteriological samples; and 30 TAC §290.109(g) and §290.109(c), by failing to provide public notice related to the failure to collect routine monthly bacteriological samples; PENALTY: $1,750; STAFF ATTORNEY: Robert Hernandez, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5) COMPANY: Masters Mart Inc. dba Porter Chevron; DOCKET NUMBER: 2002-0776-PST-E; TCEQ ID NUMBER: 70002; LOCATION: 24205 Farm-to-Market Road 1314, Porter, Montgomery County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A), (2)(A)(i)(III) and (ii)(III) and THSC, §26.3475, by failing to monitor the USTs and piping for releases at a frequency of at least once every month and failing to conduct annual testing of the line leak detectors; 30 TAC §37.815(a) and (b), by failing to demonstrate the required financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of the USTs; 30 TAC §334.48(c), by failing to conduct inventory control for the USTs; 30 TAC §334.10(b)(1)(C), by failing to have UST records, including release detection, inventory control, line leak detector testing, and line leak tests available for inspection; and 30 TAC §115.242(3) and THSC, §382.085(b), by failing to have the required component and configuration consistent with the applicable California Air Resources Board Executive Order in that a dry break cap was missing from the Stage II system; PENALTY: $21,875; STAFF ATTORNEY: Robin Chapman, Litigation Division, MC 175, (512) 239- 0497; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(6) COMPANY: Ronald J. Miller dba IMS Property Management; DOCKET NUMBER: 2002- 0430-MWD-E; TCEQ ID NUMBER: none; LOCATION: 550 Hospital Boulevard, Floresville, Wilson County, Texas; TYPE OF FACILITY: apartment complex with a privately owned lift station; RULES VIOLATED: TWC, §26.121, by failing to prevent the unauthorized discharge of raw sewage onto the ground and the area around the apartment complex's malfunctioning facility; PENALTY: $3,125; STAFF ATTORNEY: Robert Hernandez, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

TRD-200305360
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 19, 2003

♦ ♦ ♦

Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **September 29, 2003**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on September 29, 2003**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or

the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO should be submitted to the commission in **writing**.

(1) COMPANY: Danny's Enterprises, Inc. dba Westview Texaco; DOCKET NUMBER: 2001- 0970-PST-E; TCEQ ID NUMBER: 6746; LOCATION: 1330 Antoine, Houston, Harris County, Texas; TYPE OF FACILITY: underground storage tanks (UST); RULES VIOLATED: 30 TAC §334.7(d)(3), by failing to amend the UST registration; PENALTY: $1,000; STAFF ATTORNEY: Diana Grawitch, Litigation Division, MC 175, (512) 239-0939; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Espinoza Stone, Inc.; DOCKET NUMBER: 2003-0684-EAQ-E; TCEQ ID NUMBER: 00000011; LOCATION: County Road 234, approximately 1.6 miles north of Highway 195, Georgetown, Williamson County, Texas; TYPE OF FACILITY: rock quarry; RULES VIOLATED: 30 TAC §213.4(a)(1), by failing to submit and obtain approval of the Edwards Aquifer water pollution abatement plant prior to constructing and commencing operation of a rock quarry located over the Edwards Aquifer recharge zone; PENALTY: $2,500; STAFF ATTORNEY: James Biggins, Litigation Division, MC R-13, (210) 403-4017; REGIONAL OFFICE: Austin Regional Office, 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(3) COMPANY: K. R. Andani Corporation dba GP Mart; DOCKET NUMBER: 2002-0372-PST-E; TCEQ ID NUMBER: 0021876; LOCATION: 917 Southwest 3rd Street, Grand Prairie, Dallas County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(4)(B) and §334.7(d)(3) and TWC, §26.346(a), by failing to submit to the TCEQ a completed UST registration and self-certification form and failing to update the form to reflect new ownership; 30 TAC §115.245(1) and Texas Health and Safety Code (THSC), §382.085(b), by failing to conduct the initial testing of the Stage II vapor recovery system within 30 days of installation, modification, or major system modification; 30 TAC §37.815(a) and (b), by failing to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by an accidental release arising from the operation of the USTs; 30 TAC §334.50(b)(2)(A)(ii)(I) and (i)(III), by failing to provide a method of release detection for the pressurized piping connecting the USTs and failing to test a line leak detector at least once per year for performance and reliability; 30 TAC §334.50(b)(1)(A) and TWC, §26.3475, by failing to ensure that all USTs were monitored for release at a frequency of no less than once every month; and 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by accepting two deliveries of regulated substances into the USTs without having a valid delivery certificate; PENALTY: $10,500; STAFF ATTORNEY: Richard S. O'Connell, Litigation Division, MC 175, (512) 239-5528; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: Platzer Shipyard, Inc. (Amended Agreed Order); DOCKET NUMBER: 96-0071- IHW-E; TCEQ ID NUMBER: 31207; LOCATION: 13601 Industrial Road, Houston, Harris County, Texas; TYPE OF FACILITY: tank barge cleaning and repair; RULES VIOLATED: 30 TAC §335.2(a) and §335.43 and 40 CFR §270.1, by allowing unauthorized on-site storage and treatment of hazardous waste; 30 TAC §335.2(b), by allowing wastes to be transported, stored, and processed at an unauthorized facility; 30 TAC §335.112(a)(9) and 40 CFR §265.192 and §265.193(a)(1), by failing to have tank assessments and adequate secondary containment for hazardous waste tank systems; 30 TAC §335.62 and §335.504 and 40 CFR §262.11, by failing to complete proper hazardous waste determinations on wastes generated on-site; 30 TAC §335.6(c), by failing to notify the commission properly of wastes managed on-site and waste management units; 30 TAC §335.69(a)(1) and 40 CFR §265.173, by storing hazardous waste in uncovered containers; 30 TAC §335.69(a)(2) and (3), and 40 CFR §262.34(a)(2) and (3), by allowing the storage of hazardous waste in improperly labeled containers; 30 TAC §335.69(a)(1) and 40 CFR §262.34(a)(1)(I), by failing to complete weekly inspections at on-site container storage areas; 30 TAC §335.4 and TWC, §26.121, by allowing unauthorized discharges of wastes; 30 TAC §335.9, by failing to comply with recordkeeping requirements; 30 TAC §335.10(a) and 40 CFR §262.20(a) and (b) and §262.40(a), by failing to comply with proper shipping and reporting procedures for hazardous waste; PENALTY: $18,160; STAFF ATTORNEY: Robin Chapman, Litigation Division, MC 175, (512) 239-0497; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-200305361
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 19, 2003

♦ ♦ ♦

Notice of Water Quality Applications

The following notices were issued during the period of August 1, 2003 through August 7, 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.

ETHYL CORPORATION which operates a facility that produces organic chemicals and oil additive blends, has applied for a renewal of TPDES Permit No. 03890, which authorizes the discharge of storm water associated with industrial activity to the Houston Ship Channel on an intermittent and flow variable basis via Outfall 002. The facility is located at 1000 N. South Avenue, approximately two miles north of State Highway 225 at the intersection of N. South Avenue and the Houston Ship Channel (Buffalo Bayou), in the City of Pasadena, Harris County, Texas.

EXXONMOBIL PIPELINE COMPANY located at 3403 Pasadena Freeway in the City of Pasadena, Harris County, Texas, which operates a petroleum products storage and transportation facility, has applied for a renewal of TPDES Permit No. 02058, which authorizes the discharge of storm water on an intermittent and flow variable basis via Outfall 001.

INLINE UTILITIES, LLC has applied for a renewal of TPDES Permit No. 13942-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 250,000 gallons per day. The facility is located between the 9800 and 10700 blocks of Boudreaux Road, approximately 1/2 mile west of the intersection of Boudreaux and Steubner- Airline Road in Harris County, Texas.

THE CITY OF KOSSE has applied for a renewal of TPDES Permit No. 11405-001, 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 150 feet southeast of the intersection of Jackson and Tulip streets in the City of Kosse in Limestone County, Texas.

TXU GENERATION COMPANY LP which operates the North Lake Steam Electric Station, has applied for a renewal of TPDES Permit No. 01249, which authorizes the discharge of once-through cooling water and previously monitored effluents (PME) at a daily average flow not to exceed 594,000,000 gallons per day via Outfall 001, and low volume waste sources and/or storm water on an continuous and flow variable basis via Outfall 002. The facility is located at 14901 North Lake Road on the north shore of North Lake immediately southeast of the Moore Road and Belt Line Road intersection, approximately one mile east of the City of Coppell, Dallas County, Texas.

UPPER TRINITY REGIONAL WATER DISTRICT has applied for a major amendment to TPDES Permit No. 10698-001 to authorize an increase in the discharge of treated domestic wastewater from an annual average flow not to exceed 4,500,000 gallons per day to an annual average flow not to exceed 7,500,000 gallons per day. The applicant is also requesting the removal of effluent limits/monitoring requirements for Lead, Mercury and Hexachlorocyclohexane. The facility is located on Lakeview Airport Road, adjacent to the west side of Lewisville Lake, approximately 1.5 miles east of Interstate Highway 35 in Denton County, Texas.

THE WALDEN WOODS COMPANY has applied for a renewal of TPDES Permit No. 14221-001, 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 approximately 5 miles east-southeast of the intersection of U.S. Highway 287 and Farm-to-Market Road 637 in Eureka, Texas and approximately 5 miles west-northwest of the intersection of U.S. Highway 287 and Farm-to-Market Road 309 and east of Lake Richland Chambers in Navarro County, Texas.

TRD-200305183

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: August 13, 2003

♦ ♦ ♦

Notice of Water Quality Applications

The following notices were issued during the period of July 28, 2003 through August 5, 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.

AEP NORTH TEXAS COMPANY which operates the Rio Pecos Power Station, a steam electric power generating facility, has applied to for a renewal of TPDES Permit No. 00961, which authorizes the discharge of cooling tower blowdown at a daily average flow not to exceed 864,000 gallons per day via Outfall 001; storm water from the diesel fuel storage tank berm on an intermittent and flow variable basis via Outfall 002; storm water from the storage tank (1200 bbl) berm on an intermittent and flow variable basis via Outfall 003; and the disposal of low volume wastes and metal cleaning wastes on an intermittent and flow variable basis via evaporation. The facility is located adjacent to the Upper Pecos River and 0.5 miles north of U.S. Highway 67, and approximately 3.0 miles northeast of the community of Girvin, Crockett County, Texas.

BCD SERVICES, INC. has applied for a renewal of TPDES Permit No. 12344-001, 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 approximately 1500 feet south of U.S. Highway 90, on the eastern bank of Cedar Bayou in Liberty County, Texas.

THE GALVESTON COUNTY MUNICIPAL UTILITY DISTRICT NO. 12 has applied for a renewal of TPDES Permit No. 10435-002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 400,000 gallons per day. The facility is located at Pompano Road and Neptune Road within the Bayou Vista Subdivision, 0.3 miles south and 1.0 mile west of the intersection of Interstate Highway 45 and State Highway 6 in Galveston County, Texas.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 368 has applied for a major amendment to TPDES Permit No. 12044-001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 950,000 gallons per day to a daily average flow not to exceed 1,600,000 gallons per day. The draft permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,600,000 gallons per day. The facility is located approximately one mile east of Farm-to-Market Road 249 and approximately 1,200 feet south of Boudreaux Road in Harris County, Texas.

SYNAGRO OF TEXAS - CDR, INC. has submitted application for a new permit, Proposed Permit No. 04591, to authorize the land application of sewage sludge for beneficial use on 244 acres. This permit will not authorize a discharge of pollutants into waters in the State. The land application site is located approximately 1 3/4 miles southeast of Rock Island, Texas, and approximately 2.5 miles south of the intersection of Alternate Highway 90 West and County Road 118 in Colorado County, Texas.

TEMPLE-INLAND FOREST PRODUCTS CORPORATION which operates a sawmill producing dimensional pine lumber and pine chips, has applied for a renewal of TPDES Permit No. 02924, which authorizes the discharge of wet deck runoff (log sprinkling water), fire protection pond overflow, kiln washdown and condensate, washdown from sawmill/green trimmer operations and truck shop, storm water runoff. on an intermittent and flow variable basis via Outfall 001; and the discharge of storm water runoff on an intermittent and flow variable basis via Outfalls 002, 003, and 004. The facility is located approximately one mile east of U.S. Highway 96 and approximately two miles north of the community of Buna , Jasper County, Texas.

TEXAS GENCO, LP which operates the Energy Development Complex, containing office buildings, warehouses, maintenance shops, a laboratory, and vehicle washing facilities, has applied for a renewal of TPDES Permit No. 01910, which authorizes the discharge of treated domestic wastewater, cooling tower blowdown, vehicle wash water, and laboratory wastewater at a daily average flow not to exceed 50,000 gallons per day via Outfall 001. The facility is located at 12301 Kurland Drive, east of the intersection of Fuqua Street and Interstate Highway 45, in the corporate limits of the City of Houston, Harris County, Texas.

U.S. DEPARTMENT OF THE AIR FORCE which operates the Total Energy Plant, a diesel-fired power plant, has applied for a renewal of TPDES Permit No. 03603, which authorizes the discharge of treated storm water runoff and groundwater seepage on an intermittent and flow variable basis via Outfall 001. The facility is located at 2200 Bergquist Drive, north of Wilford Hall Hospital, on the north end of Lackland Air Force Base, approximately 0.1 mile south of U.S. Highway 90 and 0.5 mile east of Military Drive, in the City of San Antonio, Bexar County, Texas.

TRD-200305185

LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 13, 2003

♦ ♦ ♦

Notice of Water Quality Applications

The following notices were issued during the period of August 1, 2003 through August 19, 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.

BLUE RIDGE WEST MUNICIPAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. 11553-001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,300,000 gallons per day. The facility is located approximately 1.2 miles southeast of Settegast Road and Farm-to-Market Road 2234 in Missouri City in Fort Bend County, Texas.

CAL-TEX LUMBER COMPANY, INC which operates a sawmill, manufacturing lumber and related wood products, has applied for a major amendment to TPDES Permit No. 04198 to authorize the discharge of lumber kiln condensate and boiler blowdown at Outfall 001. The current permit authorizes the discharge of wet deck storage water and storm water on an intermittent and flow variable basis via outfall 001. The facility is located approximately 0.5 miles south on Farm-to- Market Road 1275 from the intersection of Farm-to-Market Road 1275 and State Highway 224, south of the City of Nacogdoches, Nacogdoches County, Texas.

CENTRAL POWER AND LIGHT COMPANY which operates the Laredo Power Station, a steam electric power generation plant, has applied for a renewal of TPDES Permit No. 01200, which authorizes the discharge of cooling tower blowdown commingled with low volume waste, previously monitored chemical metal cleaning waste, and storm water runoff at a daily average flow not to exceed 1,300,000 gallons per day via Outfall 001. The facility is located adjacent to the Rio Grande, west of the intersection of Interstate Highway 35 and Del Mar Boulevard in the City of Laredo, Webb County, Texas.

CHASEWOOD UTILITIES, INC. has applied for a renewal of TPDES Permit No. 12541-001, 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 20131 State Highway 249, immediately northwest of the point where State Highway 249 crosses Cypress Creek in Harris County, Texas.

CITY OF CLEVELAND has applied for a renewal of TPDES Permit No. 10766-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 750,000 gallons per day. The facility is located south of State Highway 105, approximately 0.5 miles west of the intersection of State Highway 105 and U.S. Highway 59 in Liberty County, Texas.

EXPLORER PIPELINE COMPANY which operates the Port Arthur Station, a petroleum products pipeline tank farm, has applied to for a renewal of TPDES Permit No. 02399, which authorizes the discharge of rainfall runoff on an intermittent and flow variable basis via Outfall 001; and the discharge of rainfall runoff, tank water drainage, and washdown water from the launcher/receiver slab on an intermittent and flow variable basis via Outfall 002. The facility is located at 6300 Port Arthur Road, one mile north-northwest of the intersection of State Highway 73 and State Highway 823 in the City of Port Arthur, Jefferson County, Texas.

GREAT LAKES CARBON CORPORATION which operates a petroleum coke calcining facility, has applied for a renewal of TPDES Permit No. 01994, which authorizes the discharge of treated storm water on an intermittent and flow variable basis via Outfall 001 and the discharge of treated domestic wastewater at a daily average flow not to exceed 10,000 gallons per day via Outfall 002. The proposed permit authorizes the discharge of treated wastewaters on an intermittent and flow variable basis via Outfall 001 and the discharge of treated domestic wastewater at a daily average flow not to exceed 10,000 gallon per day via Outfall 002. The facility is located on the West Turning Basin of the Sabine-Neches Ship Channel, approximately two and one half miles southwest of the City of Port Arthur, Jefferson County, Texas.

GULF COAST WASTE DISPOSAL AUTHORITY AND CITY OF FRIENDSWOOD have applied for a renewal of TPDES Permit No. 11571-001, which authorizes the discharge of treated domestoc wastewater at an annual average flow not to exceed 9,250,000 gallons per day. The facility is located at 3902 West Bay Boulevard on the northeast bank of Clear Creek, approximately 3 miles southeast of the City of Friendswood and 3 miles southwest of Interstate Highway 45 at the NASA One Road exit in Harris County, Texas.

HALLIBURTON ENERGY SERVICES, INC. has applied for a renewal of TPDES Permit No. 14113-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 3,500 gallons per day. The facility is located at 1800 Pelican Island, approximately 1.7 miles along the Seawolf Parkway from the bridge, then south 1800 feet in Galveston County, Texas.

CITY OF HAMILTON has applied for a major amendment to TPDES Permit No. 10492-002 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 440,000 gallons per day to a daily average flow not to exceed 888,000 gallons per day. The facility is located approximately 1,900 feet east of U.S. Highway 281 in the City of Hamilton and located immediately south of Pecan Creek at a point 2,800 feet north of State Highway 36 in Hamilton County, Texas.

HANSON AGGREGATES CENTRAL, INC. which operates the Woodlands Plant, a sand and gravel mining plant, has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. 02502, which authorizes the discharge of process wastewater, groundwater and storm water at a daily average flow not to exceed 350,000 gallons per day via Outfall 001 and 002. The facility is located at 12541 Sleepy Hollow Road, three and one-half miles east of Interstate Highway 45, and approximately seven miles south of the City of Conroe, Montgomery County, Texas.

LOWER COLORADO RIVER AUTHORITY has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14427-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 900,000 gallons per day. The facility is located west of Farm-to-Market Road 969, 1.15 miles northwest of the intersection of State Highway 71 and Farm-to-Market Road 969 in Bastrop County, Texas.

THE CITY OF MANVEL has applied for a renewal of TPDES Permit No. 13872-001, 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 approximately 0.8 miles northwest of the intersection of State Highway 6 and Farm-to-Market Road 1128 in Brazoria County, Texas.

MERISOL USA LLC which operates the Greens Bayou Industrial Chemicals Plant, has applied for a majoe amendment to TPDES

Permit No. 00485 to authorize the discharge of process area storm water through all existing permitted outfalls. The current permit authorizes the discharge of storm water and utility wastewater (cooling tower blowdown and boiler blowdown) on an intermittent and flow variable basis via Outfall 001, and storm water on an intermittent and flow variable basis via Outfalls 002,003,004, and 005. The facility is located at 1914 Haden Road on the east side of Greens Bayou, in the City of Houston, Harris County, Texas.

NATIONAL-OILWELL, L.P. has applied for a renewal of TPDES Permit No. 12314-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 7,500 gallons per day. The facility is located in the southwest corner of a company-owned tract in the eastern part of the Jacintoport Industrial District and approximately 7500 feet east of the intersection of Sheldon Road and Jacintoport Boulevard in the City of Channelview in Harris County, Texas.

NORTH TEXAS MUNICIPAL WATER DISTRICT has applied for a renewal of TPDES Permit No. 10221-001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 25,000,000 gallons per day. The facility is located approximately 0.5 mile south of the intersection of Lawson Road and Cartwright Road in the southeast portion of the City of Mesquite in Dallas County, Texas.

CITY OF PORT ARTHUR has applied for a renewal of TPDES Permit No. 10364-002, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,750,000 gallons per day. The facility is located immediately northeast of the intersection of Farm- to-Market Road 365 and Rhodair Gully, approximately 6,000 feet west-southwest of the intersection of Farm-to-Market Road 365 and Port Arthur Road in Jefferson County, Texas.

R & A HARRIS SOUTH LP which operates an automotive dealership, has applied for a renewal of TPDES Permit No. 02550, which authorizes the discharge of domestic wastewater and carwash wastewater at a daily average flow not to exceed 6,000 gallons per day via Outfall 001. The facility is located at 13915 Interstate Highway 45 North, 1/4 mile northwest of the intersection Interstate Highway 45 North and Rankin Road, in the City of Houston, Harris County, Texas.

WALLACE ALLEN RAYNOR has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14438-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day. The facility is located 260 feet west of Farm-to-Market Road 3322 and approximately 5,000 feet north of the intersection of Farm-to-Market Road 3322 and State Highway 31, northwest of Kilgore in Gregg County, Texas.

SAN MIGUEL ELECTRIC COOPERATIVE, INC which operates a lignite-fired steam electric generating power plant, has applied for a renewal of TPDES Permit No. 02601, which authorizes the discharge of coal pile runoff on an intermittent and flow variable basis via Outfall 001. The facility is located at 6200 Farm-to-Market Road 3387, approximately six miles east of State Highway 16, and approximately five miles south of the City of Christine, Atascosa County, Texas.

HOUSHANG SOLHJOU has applied for a renewal of TPDES Permit No. 12261-001, 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 at 415 Carby, approximately 2,400 feet east-northeast of the intersection of Airline Drive and Carby, north of the City of Houston in Harris County, Texas.

THE WONDER COMPANY which operates a bark processing facility that manufactures bark mulches, potting soils, manures, soil conditioners, and planting mixes (SIC 2421), has applied for a renewal of Permit No. 02901, which authorizes the discharge of storm water on an intermittent and flow variable basis via Outfall 001. The facility is located adjacent to the Southern Pacific Railroad, approximately one mile north of the intersection of Loop 116 South and U.S. Highway 59, south of the community of New Willard, Polk County, Texas.

TRD-200305374
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 19, 2003

♦ ♦ ♦

Office of the Governor

Request for Grant Applications (RFA) for Residential Substance Abuse Treatment (RSAT) Program

The Criminal Justice Division (CJD) of the Governor's Office is soliciting applications for projects to provide residential substance abuse treatment to persons incarcerated or confined in detention and/or correctional facilities.

Purpose: The purpose of the project is to develop and implement residential substance abuse treatment programs within state and local correctional facilities where offenders are incarcerated for a period of time sufficient to permit effective treatment. Residential treatment facilities operated by state and local correctional agencies must: (1) ensure that each offender participates in the program for not less than six nor more than 12 months, unless he or she drops out or is terminated; (2) provide treatment in residential facilities that are set apart from the general correctional population or are in a dedicated housing unit for the exclusive use of program participants; (3) focus on the substance abuse problems of the offender; (4) develop the offender's cognitive, behavioral, social, vocational, and other skills to resolve the substance abuse and related problems; and (5) require urinalysis or other reliable methods of drug and alcohol testing. Substance abuse programs provided in jails and local correctional facilities must: (1) last at least three months; (2) make every effort to set apart the treatment population from the general correctional population; (3) focus on the substance abuse problems of the inmate; (4) develop the inmate's cognitive, behavioral, social, vocational, and other skills to solve the substance abuse and related problems; and (5) be science-based.

Available Funding: Federal funding is authorized for these projects under the Omnibus Crime Control and Safe Streets Act of 1968, §1001, as amended, Public Law 90-351, 42 U.S.C. 3796 et seq. Grantees must provide matching funds of at least 25 percent of total project expenditures. This requirement must be met in cash.

Standards: Grantees must comply with the applicable grant management standards adopted under Texas Administrative Code, §3.19.

Prohibitions: Grantees may not use more than ten percent of the total award for treatment of parolees for more than one year after the parolee's release. A written plan for utilization of these funds must be included in the grant application. Grant funds may not be used to pay for indirect costs.

Eligible Applicants: (1) state agencies; (2) counties operating secure correctional facilities; and (3) community supervision and corrections departments (CSCDs), as defined in the Texas Government Code, §509.001. Applicants who receive grants may provide services directly in correctional facilities that they operate or they may contract with

qualified service providers who meet all licensing and certification requirements.

Project Period: Grant-funded projects must begin on or after January 1, 2004 and will expire on or before September 30, 2004.

Application Process: Eligible applicants can download an application kit from the Office of the Governor's web site address at http://www.governor.state.tx.us. For those applicants that do not have internet access, contact the Office of the Governor, Criminal Justice Division, P.O. Box 12428, Austin, TX 78711, telephone (512) 463-1919 for an electronic application kit.

Preferences: Preference will be given to RSAT programs that are currently being funded by CJD. Preference will also be given to applicants who provide aftercare services to program participants. Aftercare services should coordinate service provisions between the correctional treatment program and other human service and rehabilitation programs, such as education and job training, halfway houses, and self-help rehabilitation. Additional programs may be considered if funding is available.

Closing Date for Receipt of Applications: All original applications, plus an additional copy, must be submitted directly to the Governor's Criminal Justice Division, P.O. Box 12428, Austin, Texas 78711 received or postmarked on or before October 31, 2003. Applications may be mailed overnight to 1100 San Jacinto, Austin, Texas 78701.

Contact Person: If additional information is needed, contact Judy Switzer at CJD at (512) 463-1919.

TRD-200305386
David Zimmerman
Assistant General Counsel
Office of the Governor
Filed: August 20, 2003

♦ ♦ ♦

Texas Department of Health

Extension of the Public Comment Period for a Radiation Rule Concerning Hearing and Enforcement Procedures

The Texas Department of Health (department) is extending the public comment period for the proposed amendment to 25 Texas Administrative Code, §289.205, concerning hearing and enforcement procedures that was published in the Proposed Rules Section of the August 22, 2003, issue of the *Texas Register*. The new deadline for submission of comments is extended through September 30, 2003, to accommodate a public hearing scheduled for September 30, 2003.

Comments may be submitted to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, 1100 West 49th Street, Austin, Texas 78756-3189, Telephone (512) 834-6688 or electronic mail at Ruth.McBurney@tdh.state.tx.us.

TRD-200305356
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 18, 2003

♦ ♦ ♦

Licensing Actions for Radioactive Materials

The Texas Department of Health has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
El Paso	Physicians Specialty Hospital of El Paso East	L05676	El Paso	00	8/15/03
Irving	Las Colinas Surgery Center LTD	L05651	Irving	00	8/8/03
Plano	Cardiac Center of Texas PA	L05673	Plano	00	8/8/03

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Amarillo	Amarillo Cardiovascular Center PC	L05577	Amarillo	02	7/31/03
Austin	Austin Heart PA	L04623	Austin	20	8/4/03
Bedford	Columbia North Hills Outpatient Imag Ctr	L03455	Bedford	35	8/11/03
Brownsville	Brownsville Medical Center	L01526	Brownsville	32	8/8/03
Corpus Christi	Radiology Associates LLP	L04169	Corpus Christi	36	8/6/03
Corpus Christi	Radiology & Imaging of South Texas LLP	L05182	Corpus Christi	11	8/14/03
Dallas	Southern Methodist University	L02887	Dallas	17	8/12/03
El Paso	El Paso Heart Clinic	L04828	El Paso	11	8/13/03
Fannin	American Electric Power	L02519	Fannin	15	7/31/03
Houston	The Methodist Hospital	L00457	Houston	115	8/4/03
Houston	Univ of TX MD Anderson Cancer Center	L00466	Houston	84	8/5/03
Houston	Spectracell Laboratories Inc	L04617	Houston	05	8/7/03
Houston	American Diagnostic Tech LLC	L05514	Houston	08	8/8/03
Houston	Diagnostic Clinic of Houston	L03452	Houston	26	8/12/03
Houston	Houston Cyclotron Partners LP	L05585	Houston	02	8/11/03
Lewisville	Columbia Med Ctr of Lewisville Sub LP	L02739	Lewisville	36	8/14/03
Lewisville	Cardiovascular Specialists PA	L05507	Lewisville	01	8/15/03
Longview	Texas Oncology PA	L05489	Longview	10	8/12/03
Lubbock	Covenant Medical Group	L04468	Lubbock	15	8/1/03
Lubbock	ISORX Radiopharmacy	L05284	Lubbock	09	8/7/03
Lubbock	West Texas Positron LLC	L05482	Lubbock	04	8/11/03
Lubbock	University Medical Center	L04719	Lubbock	59	8/13/03
McAllen	Texas Oncology PA	L05485	McAllen	04	8/12/03
Midland	Texas Oncology PA	L04905	Midland	06	8/8/03
Mission	Valley Nuclear Incorporated	L04521	Mission	17	8/15/03
Odessa	West Texas Imaging Center	L04562	Odessa	08	8/6/03
Odessa	Environmental Lab of Texas Inc	L05499	Odessa	01	8/6/03
Plano	Columbia Medical Center of Plano	L02032	Plano	67	8/1/03
Port Arthur	Gulf Coast Cardiology Group PA	L05393	Port Arthur	10	8/8/03
Round Rock	Austin Heart PA	L05456	Round Rock	06	8/12/03
San Antonio	Salvatore A Barbaro III MD PA	L05680	San Antonio	01	8/4/03
San Antonio	Methodist Healthcare System of SA	L00594	San Antonio	179	8/6/03
San Antonio	Baptist Imaging Center	L04506	San Antonio	39	8/12/03

CONTINUED LICENSE AMENDMENTS

Location	Name	License #	City	Amend-ment #	Date of Action
Sherman	Wilson N Jones Memorial Hospital	L02384	Sherman	29	8/5/03
Sherman	Texas Oncology PA	L05502	Sherman	06	8/12/03
Stafford	Burzynski Research Institute Inc	L02948	Stafford	18	8/5/03
Texarkana	Texarkana Pet Imaging Institute LP	L05495	Texarkana	04	8/14/03
Texas City	Valero Refining Company	L02578	Texas City	21	8/1/03
Texas City	BP Products North America Inc	L00254	Texas City	56	8/1/03
The Woodlands	Advisys Inc	L05531	The Woodlands	01	8/11/03
Throughout TX	Lower Colorado River Authority	L02738	Austin	32	8/1/03
Throughout TX	Applied Standards Inspections Inc	L03072	Beaumont	76	8/12/03
Throughout TX	Applied Standards Inspection Inc	L03072	Beaumont	77	8/14/03
Throughout TX	Construction Services	L05625	Christoval	03	8/6/03
Throughout TX	Terracon Inc	L05268	Dallas	10	8/15/03
Throughout TX	City of Ft Worth Housing Department	L05420	Ft Worth	02	8/6/03
Throughout TX	Computalog Wireline Services Inc	L04286	Ft Worth	49	8/12/03
Throughout TX	Texas Oncology PA	L05606	Ft Worth	03	8/13/03
Throughout TX	City of Garland Neighborhood Development	L05458	Garland	01	8/6/03
Throughout TX	Cooperheat-MQS Inc	L00087	Houston	109	7/31/03
Throughout TX	MACTEC Engineering & Consulting Inc	L02453	Houston	30	7/31/03
Throughout TX	Delta Tubular International Inc	L03083	Houston	21	7/31/03
Throughout TX	Tracerco/Synetix Services	L03096	Houston	51	7/31/03
Throughout TX	METCO	L03018	Houston	137	8/11/03
Throughout TX	Mandes Inspection & Testing Services Inc	L05220	Houston	32	8/13/03
Throughout TX	Southern Services Inc	L05270	Lake Jackson	30	8/13/03
Throughout TX	High Plains Underground Water Cons #1	L02598	Lubbock	16	8/1/03
Throughout TX	Anatec Inc	L04865	Nederland	54	8/14/03
Throughout TX	Texas Gamma Ray LLC	L05561	Pasadena	26	8/4/03
Throughout TX	Conam Inspection	L05010	Pasadena	61	8/8/03
Throughout TX	San Antonio River Authority	L02706	San Antonio	10	8/12/03
Throughout TX	Ludlum Measurements Inc	L01963	Sweetwater	62	7/31/03
Throughout TX	C B & I Constructors INC	L01902	The Woodlands	61	8/4/03
Tyler	Nutech Inc	L04274	Tyler	41	8/14/03

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Conroe	CHCA Conroe LP	L01769	Conroe	62	8/5/03
Edinburg	The Univ of TX Pan American	L00656	Edinburg	24	8/6/03
Pasadena	Microtech Services Inc	L04656	Pasadena	09	7/31/03
Throughout TX	Smith Pipe of Abilene	L04992	Abilene	02	8/6/03
Throughout TX	Fugro South Inc/Gulf Coast Testing Lab	L01474	Corpus Christi	27	8/12/03
Throughout TX	Pre-Test Laboratory	L02524	Georgetown	12	7/31/03
Throughout TX	Aviles Engineering Corporation	L03016	Houston	13	8/15/03
Throughout TX	Science Engineering LTD	L04677	Port Arthur	05	8/6/03

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Metracom USA LLC	L05544	Houston	03	8/7/03
Sherman	Wilson N Jones Memorial Hospital Inc	L02372	Sherman	24	8/6/03

LICENSE AMENDMENT DENIED:

Location	Name	License #	City	Amend-ment #	Date of Action
La Porte	Longview Inspection	L01774	La Porte		8/14/03

LICENSE EXEMPTION ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Alvin	Digital Surveys Inc	L01611	Alvin		8/5/03
Aransas Pass	North Bay General Hospital	L03446	Aransas Pass		7/31/03

In issuing new licenses, amending and renewing existing licenses, or approving exemptions to Title 25 Texas Administrative Code (TAC), Chapter 289, the Texas Department of Health (department), Bureau of Radiation Control, has determined that the applicants are qualified by reason of training and experience to use the material in question for the purposes requested in accordance with 25 TAC, Chapter 289 in such a manner as to minimize danger to public health and safety or property and the environment; the applicants' proposed equipment, facilities and procedures are adequate to minimize danger to public health and safety or property and the environment; the issuance of the new, amended, or renewed license (s) or the issuance of the exemption (s) will not be inimical to the health and safety of the public or the environment; and the applicants satisfy any applicable requirements of 25 TAC, Chapter 289. In granting termination of licenses, the department has determined that the licensee has properly decommissioned its facilities according to the applicable requirements of 25 TAC, Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC, Chapter 289.

This notice affords the opportunity for a hearing on written request of a licensee, applicant, or person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A licensee, applicant, or person affected may request a hearing by writing Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200305365
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 19, 2003

♦ ♦ ♦

Licensing Actions for Radioactive Materials

The Texas Department of Health has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	River Oaks Imaging & Diagnostic LP	L05679	Houston	00	07/14/03
Longview	Kings Management & Leasing LLC	L05649	Longview	00	07/01/03
Lufkin	Pickett Heart Clinic	L05681	Lufkin	00	07/09/03

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Abilene	Abilene Diagnostic Clinic PLLC	L05101	Abilene	09	07/09/03
Austin	Heart Hospital IV LP	L05215	Austin	11	07/01/03
Austin	Heart Hospital IV LP	L05215	Austin	12	07/08/03
Austin	Austin Heart PA	L04623	Austin	19	07/09/03
Bedford	Dallas Cardiology Associates PA	L05448	Bedford	07	07/11/03
Borger	ConocoPhillips Company	L02480	Borger	39	07/09/03
Bowie	Bowie Hospital Authority	L02327	Bowie	14	07/10/03
Burnet	Daughters of Charity Health Services of Austin	L03515	Burnet	27	07/09/03
Clarksville	East Texas Medical Center Clarksville	L02978	Clarksville	19	07/11/03
Clifton	CLSW LTD	L02461	Clifton	11	07/01/03
College Station	College Station Hospital LP	L02559	College Station	50	07/01/03
College Station	O I Analytical	L04238	College Station	09	07/03/03
Corpus Christi	Radiology Associates LLP	L04169	Corpus Christi	34	06/30/03
Corpus Christi	Driscoll Childrens Hospital	L04606	Corpus Christi	27	07/09/03
Dallas	The University of Texas Southwestern Medical Center at Dallas	L00384	Dallas	76	06/04/03
Dallas	The University of Texas Southwestern Medical Center at Dallas	L00384	Dallas	77	07/01/03
Dallas	Dallas Cardiology Associates	L05541	Dallas	02	07/14/03
Deer Park	Clean Harbors Deer Park LP	L02870	Deer Park	19	07/10/03
Flower Mound	Imaging Specialists Group LTD	L05407	Flower Mound	07	07/07/03
Houston	Abitibi Consolidated Inc	L01793	Houston	26	07/01/03
Houston	Houston Cardiovascular Associates	L05070	Houston	09	06/30/03
Houston	University of Texas MD Anderson Cancer Center	L00466	Houston	83	07/03/03
Houston	Sisters of Charity of The Incarnate Word	L02279	Houston	51	07/08/03
Houston	GB Biosciences Corporation	L03521	Houston	18	07/08/03
Houston	Tops Specialty Hospital LTD	L05441	Houston	03	07/10/03
Houston	The Methodist Hospital	L00457	Houston	114	07/11/03
Houston	Nitrogen Therapeutics Inc.	L04870	Houston	06	07/14/03
Irving	Baylor Medical Center at Irving	L02444	Irving	48	06/24/03
Laredo	Laredo Regional Medical Center LP	L02192	Laredo	29	07/09/03

CONTINUED AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Longview	Texas Eastman Division Eastman Chemicals Company	L00301	Longview	91	07/14/03
Lubbock	W Chuck Brogan III MD PHD PA	L05488	Lubbock	03	07/10/03
Lubbock	University Medical Center	L04719	Lubbock	58	07/10/03
Paris	Texas Oncology PA	L05489	Paris	08	07/03/03
Paris	Advanced Heart Care PA	L05290	Paris	05	07/03/03
Port Arthur	Gulf Coast Cardiology Group PA	L05393	Port Arthur	09	07/01/03
Richardson	The University of Texas at Dallas	L02114	Richardson	49	07/07/03
San Antonio	VHS San Antonio Partners LP	L00455	San Antonio	121	07/01/03
San Antonio	San Antonio Heart Associates PA	L04860	San Antonio	16	07/02/03
San Antonio	South Texas Radiology Imaging Centers	L00325	San Antonio	126	07/03/03
San Antonio	VHS San Antonio Partners LP	L00455	San Antonio	122	07/03/03
San Antonio	South Texas Radiology Imaging Centers	L03518	San Antonio	41	07/09/03
San Antonio	South Texas Radiology Imaging Centers	L00325	San Antonio	127	07/10/03
San Antonio	Central Cardiovascular	L04892	San Antonio	10	07/11/03
San Antonio	South Texas Radiology Imaging Centers	L03518	San Antonio	42	07/11/03
San Antonio	Methodist Healthcare System of San Antonio	L00594	San Antonio	176	07/11/03
San Benito	Healthmont of Texas I LLC	L04567	San Benito	10	06/27/03
Sherman	North Texas Cardiology	L05395	Sherman	06	07/01/03
Stafford	Burzynski Research Institute Inc	L02948	Stafford	17	07/03/03
The Woodlands	CB&I Constructors Inc	L01902	The Woodlands	59	07/03/03
Throughout Tx	Expro Americas	L05611	Alice	01	07/07/03
Throughout Tx	Global X-Ray & Testing Corp	L03663	Aransas Pass	92	07/10/03
Throughout Tx	Shaw Environmental Inc	L02906	Arlington	25	07/08/03
Throughout Tx	Kleinfelder	L01351	Austin	45	07/01/03
Throughout Tx	Texas A&M University Environmental Health & Safety	L00448	College Station	114	07/01/03
Throughout Tx	City of Granbury	L05326	Granbury	02	07/10/03
Throughout Tx	Wood Group Logging Services Inc	L05262	Houston	12	07/02/03
Throughout Tx	HVJ Associates Inc	L03813	Houston	22	07/03/03
Throughout Tx	Metco	L03018	Houston	135	06/26/03
Throughout Tx	Stork Southwestern Laboratories Inc	L00299	Houston	117	07/07/03
Throughout Tx	Baker Oil Tools	L03272	Houston	25	07/07/03
Throughout Tx	Cooperheat-MQS Inc	L00087	Houston	108	07/09/03
Throughout Tx	Oceaneering International Inc Solus Schall Division	L04463	Houston	33	07/15/03
Throughout Tx	Services and Compliance	L03873	Huntsville	16	07/10/03
Throughout Tx	Longview Inspection Inc	L01774	La Porte	196	07/07/03
Throughout Tx	B & R Inspection & Equipment Co	L02564	Midland	16	07/07/03
Throughout Tx	Hayter Engineering Inc	L05139	Paris	04	07/10/03
Throughout Tx	Thermo Measuretech	L03524	Round Rock	64	06/30/03
Throughout Tx	Zachry Construction Corporation San Antonio	L05230	San Antonio	10	07/11/03
Throughout Tx	Schlumberger Technology Corporation	L00764	Sugarland	86	07/10/03
Throughout Tx	H & H X-Ray Services Inc	L02516	Tyler	41	07/01/03
Throughout Tx	Grimes and Associates Consulting Engineers LP	L04616	Wolfforth	08	07/01/03
Trinity	East Texas Medical Center Trinity	L05392	Trinity	04	07/01/03
Tyler	Tyler Internal Medicine Associates PA	L05597	Tyler	01	07/08/03

CONTINUED AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Tyler	Nutech Cyclotron Technologies LLC	L05598	Tyler	01	07/10/03
Victoria	Citizens Medical Center	L00283	Victoria	67	07/14/03
Webster	American Molecular Imaging LLC	L05664	Webster	01	07/11/03
Wichita Falls	United Regional Health Care System Inc	L00350	Wichita Falls	89	07/10/03

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout Tx	Dyess-Peterson Testing Laboratory Inc	L01123	Amarillo	48	07/10/03

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Brownsville	Ohmite – Texas LP	L05241	Brownsville	03	07/01/03
Irving	North Irving Imaging Center	L04975	Irving	07	07/07/03
Port Neches	Ameripol Synpol Corporation	L00077	Port Neches	31	07/01/03
Throughout Tx	Superior Well Services LTD	L05599	Seguin	01	07/03/03

LICENSE EXEMPTIONS ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Alvin	Solutia Inc	L00219	Alvin		07/10/03
Corpus Christi	Fugro South/Gulf Coast	L01474	Corpus Christi		07/14/03
Friendswood	ISO Tex Diagnostic Inc	L02999	Friendswood		06/30/03
Houston	Nuclear Sources & Services Inc	L02991	Houston		06/30/03
Killeen	City of Killeen	L04668	Killeen		07/01/03
Robstown	Pipe Reclamation Inc	L04684	Robstown		07/09/03

In issuing new licenses, amending and renewing existing licenses, or approving exemptions to Title 25 Texas Administrative Code (TAC), Chapter 289, the Texas Department of Health (department), Bureau of Radiation Control, has determined that the applicants are qualified by reason of training and experience to use the material in question for the purposes requested in accordance with 25 TAC, Chapter 289 in such a manner as to minimize danger to public health and safety or property and the environment; the applicants' proposed equipment, facilities and procedures are adequate to minimize danger to public health and safety or property and the environment; the issuance of the new, amended, or renewed license (s) or the issuance of the exemption (s) will not be inimical to the health and safety of the public or the environment; and the applicants satisfy any applicable requirements of 25 TAC, Chapter 289. In granting termination of licenses, the department has determined that the licensee has properly decommissioned its facilities according to the applicable requirements of 25 TAC, Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC, Chapter 289.

This notice affords the opportunity for a hearing on written request of a licensee, applicant, or person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A licensee, applicant, or person affected may request a hearing by writing Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200305381
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 20, 2003

♦ ♦ ♦

Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation to Hereford Regional Medical Center

Notice is hereby given that the Bureau of Radiation Control (bureau), Texas Department of Health (department), issued a notice of violation and proposal to assess an administrative penalty to Hereford Regional Medical Center (registrant-M00408) of Hereford. A total penalty of $15,000 is proposed to be assessed the registrant for alleged violations of 25 Texas Administrative Code, §289.230.

A copy of all relevant material is available, by appointment, for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200305362
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 19, 2003

♦ ♦ ♦

Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation to Michael Margolies, D.C.

Notice is hereby given that the Bureau of Radiation Control (bureau), Texas Department of Health (department), issued a notice of violation and proposal to assess an administrative penalty to Michael Margolies, D.C. (registrant-R09131) of Richardson. A total penalty of $5,000 is proposed to be assessed the registrant for alleged violations of 25 Texas Administrative Code, §289.227.

A copy of all relevant material is available, by appointment, for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200305364
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 19, 2003

♦ ♦ ♦

Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation to Urology Specialists and Associates, P.A.

Notice is hereby given that the Bureau of Radiation Control (bureau), Texas Department of Health (department), issued a notice of violation and proposal to assess an administrative penalty to Urology Specialists and Associates, P.A. (registrant-R02423) of Dallas. A total penalty of $11,000 is proposed to be assessed the registrant for alleged violations of 25 Texas Administrative Code, §289.227.

A copy of all relevant material is available, by appointment, for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200305363
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 19, 2003

♦ ♦ ♦

Notice of Request for Proposals Number H25 0058.1 for Increasing Participation of Minorities with Human Immunodeficiency Virus (HIV) in the Texas HIV Medication Program in Harris County

INTRODUCTION

The Texas Department of Health (department), HIV/STD Clinical Resources Division, requests proposals to create intensive case management systems to establish and maintain participation by minorities with human immunodeficiency virus (HIV) disease in the Texas HIV Medication Program (THMP), primary medical care, and other related treatment services. The target populations to be served are African Americans, Hispanics, and others with HIV in Harris County, the state's highest morbidity county, who are: (1) incarcerated in federal, state, or local adult and juvenile institutions, or (2) recently released back into Harris County. Project proposals will be reviewed and awarded on a competitive basis.

PROJECT AND BUDGET PERIODS

There will be two 12-month project periods beginning April 1, 2004, through March 31, 2006.

The department's HIV/STD Clinical Resources Division will assign the contract period for the successful applicant. It is expected that the federally funded contract will begin on or about April 1, 2004, and will be made for a 12-month budget period (April 1, 2004 - March 31, 2005). This contract is renewable for one additional 12-month period through the project period ending March 31, 2006. Award of continuation funds for the second project period is dependent upon successful project performance as stipulated in the agency contract.

AVAILABLE FUNDS

The total amount available is approximately $151,613 per 12-month period. The department expects to fund one project. The specific dollar amount to be awarded will depend upon the merit and scope of the proposed project. Award of these funds is contingent upon annual federal grant awards to the department from the Health Resources and Services Administration (HRSA).

Continued funding in future years will be based upon the availability of funds and documented progress in the provision of services to minority populations during the project period. Funding may vary and is subject to change for each budget period.

PURPOSE

The purpose of this special project grant program is to increase participation of minorities with HIV disease in primary medical care, the THMP, and other treatment resources through the creation of an intensive case management system grant to one organization in Harris County which serves minority populations. The target populations to be served are African Americans, Hispanics, and others with HIV in Harris County who are: (1) incarcerated in federal, state, or local

adult and juvenile institutions, or (2) recently released back into Harris County.

The overall goal of the project is to increase minority client-level health outcomes by documenting increased and sustained participation in the THMP, primary medical care, and other resources for prescription medications to treat HIV disease and prevent complications from that disease. Other project goals include:

increasing the number of minority inmates and recently released individuals who apply for the THMP;

increasing access of minority inmates and recently released individuals to Ryan White Title II care programs and services, including new treatments consistent with established clinical and case management standards of care, at an earlier stage in their illness; and

establishing systems for providing or improving continuity of care between community and correctional entities, and establishing memoranda of understanding (MOU) between these entities.

Projects funded under this Request for Proposals (RFP) must collaborate with the THMP, existing Ryan White Title I and II programs, Medicare/Medicaid, and other available resources in order to maximize resources, improve access to care, avoid duplication of effort, and better serve target populations.

The applicant should consult with HIV infected and affected populations, current and potential service providers in their community, community leaders in other fields (e.g., local elected officials, clergy), federal, state, or local adult and juvenile institutions, and others, such as the Ryan White Title II Consortium, Ryan White Title I Planning Council, Ryan White Title III and IV grantees, when planning the special project.

ELIGIBLE APPLICANTS

In compliance with the 2003 Application Guidance from HRSA, only the following types of minority providers in Harris County, Texas are eligible to apply for this grant: not-for-profit community-based organizations; national organizations, colleges, and universities; clinics and hospitals; research institutions; state and local governmental agencies; tribal government or tribal/urban Indian entities and organizations; and faith-based and community-based organizations. For purposes of this grant, an organization/agency must meet the following criteria to be considered a minority provider: have a documented history of providing service to the targeted racial/ethnic minority community to be served; located in or near the targeted racial/ethnic minority community they are intending to serve; have documented linkages to the targeted racial/ethnic minority populations, so that they can help close the gap in access to services for highly impacted communities of color; and provide services in a manner that is culturally and linguistically appropriate. Individuals are not eligible to apply. Applicants must have documented experience and/or expertise in working with the target population(s). Entities that have had state or federal contracts terminated within the last 24 months for deficiencies in fiscal or programmatic performance are not eligible to apply. Applicants must provide historical evidence of fiscal and administrative responsibility as outlined in the administrative information of the grant instructions.

SCHEDULE OF EVENTS

(1) Issuance of RFP (September 3, 2003)

(2) Post to Electronic State Business Daily (September 3, 2003)

(3) Letter of Intent Due - Required (September 24, 2003)

(4) Deadline for Submitting Questions (October 20, 2003)

(5) Posting of Answers to Questions (October 27, 2003)

(6) Application Deadline (November 3, 2003)

(7) Predetermination Site Visits (November 17-21, 2003)

(8) Written Notification to Selected Applicant (December 5, 2003)

(9) Written Notification to All Applicants (December 5, 2003)

(10) Post Awards on ESBD (December 5, 2003)

(11) Expected Contract Start Date (April 1, 2004)

TO OBTAIN A COPY OF THE RFP

For a copy of the RFP, please contact Ms. Janet Childers, Procurement and Contracting Services Division, at (512) 458-7111, extension 6386 or E-mail: janet.childers@tdh.state.tx.us. Copies of the RFP may also be downloaded from the Electronic State Business Daily (ESBD) at http://marketplace.state.tx.us. Copies of the RFP will be available on September 3, 2003.

TRD-200305355
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 18, 2003

♦ ♦ ♦

Texas Health and Human Services Commission

Notice Under Section 2.151, H.B. 2292, 78th Legislature, Regular Session, Regarding Certain Advisory Committees

In accordance with section 2.151(b), HB 2292, 78th Legislature, Regular Session, the Commissioner of Health and Human Services hereby *certifies* that the following advisory committees are exempt from abolition on September 1, 2003:

TEXAS COMMISSION ON ALCOHOL AND DRUG ABUSE

Texas State Incentive Program Advisory Committee

Drug Demand Reduction Advisory Committee

TEXAS COMMISSION FOR THE BLIND

Elected Committee of Managers

TEXAS COMMISSION FOR THE DEAF AND HARD OF HEARING

Board for the Evaluation of Interpreters

TEXAS DEPARTMENT ON AGING

Aging Resource Group

TEXAS DEPARTMENT OF HEALTH

State Preventative Health Advisory Committee

Preparedness Coordinating Council

Bioterrorism Preparedness and Response Committee

Hospital Preparedness Planning Committee

Asbestos Advisory Committee

Youth Camps Advisory Committee

Promotoro(a) Community Health Worker Training and Certification Advisory Committee

Texas Radiation Advisory Board

Texas Oyster Council

State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments

Texas Midwifery Board

Texas Board of Licensure for Professional Medical Physicists

Governor's EMS and Trauma Advisory Council

HIV Medication Advisory Committee

Informational and Educational Subcommittee of the Family Planning Program

Device Distributors and Manufacturers Advisory Committee

Registered Sanitarian Advisory Committee

Code Enforcement Officers - Advisory Committee

Medical Radiologic Technologist Advisory

Texas Traumatic Brain Injury Advisory Council

Health Disparities Task Force

TEXAS DEPARTMENT OF HUMAN SERVICES

Nursing Facilities Administrators Advisory Committee

Aged and Disabled Advisory Committee

Advisory Committee on Assisted Living Facilities

Home and Community Support Services Agencies Advisory Council

Texas Board of Human Services/Board of Nurse Examiners Memorandum of Understanding Advisory Committee

TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

Mental Health Planning and Advisory Council

Interagency Council on Autism and Pervasive Developmental Disorders

Mental Retardation Planning Advisory Council

Advisory Committee on Inpatient Mental Health Services

TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES

Texas Multi-Disciplinary Task Force on Children's Justice

State Advisory on Child-Care Administrators and Facilities

Advisory Committee on Promoting Adoption of Minority Children

HEALTH AND HUMAN SERVICES COMMISSION

Medical Care Advisory Committee

Hospital Payment Advisory Committee

Physician Payment Advisory Committee

Drug Utilization Review Board.

Harris(Houston)Regional Medicaid Managed Care (STAR and STAR+Plus)Committee

Bexar (San Antonio) Regional Medicaid Managed Care and CHIP Regional Advisory Committee

ConsumerDirected Services Workgroup Advisory Committee

Travis (Austin) Regional Medicaid Managed Care and CHIP Regional Advisory Committee

Region 4/5 N CHIP Regional Advisory Committee (Tyler)

Southeast Regional Medicaid Managed Care Advisory Committee (Beaumont/Port Arthur)

El Paso Regional Medicaid Managed Care and CHIP Regional Advisory Committee

Region 11 CHIP Regional Advisory Committee (S. Texas)

Pharmacy and Therapeutics Committee

Lubbock Regional Medicaid Managed Care and CHIP Regional Advisory Committee

Dallas Regional Medicaid Managed Care Advisory Committee

Tarrant Regional Medicaid Managed Care Advisory Committee (Fort Worth)

Interagency Council on Pharmaceuticals Bulk Purchasing

Public Assistance Health Benefit Review and Design Committee

Texas Real Choice Statewide Consumer Task Force

Guardianship Advisory Board

Informal Dispute Resolution Quality Assurance Committee

SB 367 Task Force on Appropriate Care Settings for Persons with Disabilities

Office of Early Childhood Coordination Advisory Committee

Children's Policy Council

Texas Integrated Funding Initiative Consortium (TIFI)

TEXAS INTERAGENCY COUNCIL ON EARLY CHILDHOOD INTERVENTION

Advisory Committee to the Board of the Interagency Council on Early Childhood Intervention

TEXAS REHABILITATION COMMISSION

Rehabilitation Council of Texas.

Statewide Independent Living Council

The following advisory committees are *not certified* as exempt from abolition on September 1, 2003:

TEXAS COMMISSION ON ALCOHOL AND DRUG ABUSE

Statewide Planning Advisory Committee

TEXAS DEPARTMENT ON AGING

Options for Independent Living Advisory Council

Citizens Advisory Council

TEXAS DEPARTMENT OF HEALTH

Animal Friendly Advisory Committee

Kidney Health Care Advisory Committee

Oral Health Services Advisory Committee

Hepatitis and HIV Interagency Coordinating Council

Indigent Health Care Advisory Committee

Children with Special Health Care Needs Advisory Committee

WIC Advisory Committee

School Health Advisory Committee

Family Planning Advisory Committee

TEXAS DEPARTMENT OF HUMAN SERVICES

Alzheimer's Advisory Committee

Special Nutrition Programs Advisory Committee

DHS/MHMR Long-term Care Work Group

Texas Works Advisory Committee

TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

Citizen's Planning Advisory Committee

Local Authority Technical Advisory Committee

Medical Advisory Committee

Dual Diagnosis Coordinating Committee

Mental Health Promoting Independence Advisory Committee

Infant and Early Childhood Mental Health State Planning Team

State Education/Mental Health Oversight Committee

Quality Assurance Improvement System Guidance Team

Quality Services Council

TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES

Child Abuse Program Evaluation Committee

TEXAS HEALTH CARE INFORMATION COUNCIL

Consumer Education Technical Advisory Committee

Quality Methods Technical Advisory Committee

Health Maintenance Organization Technical Advisory Committee

Health Information Systems Technical Advisory Committee

Peer Review and Provider Quality Technical Advisory Committee

HEALTH AND HUMAN SERVICES COMMISSION

Region 6/5S (Houston) CHIP Regional Advisory Committee

Region 2/3 CHIP Regional Advisory Committee (Dallas)

Statewide Managed Care Advisory Committee

Information and Referral System Task Force

State CRCG (for children and youth) Team

State CRCGA (for adult) Team

TEXAS REHABILITATION COMMISSION

Comprehensive Rehabilitation Services Advisory Committee

Community Rehabilitation Program Advisory Committee

Under Section 2.151(c), HB 2292, 78th Legislature, Regular Session, advisory committees created on or after September 1, 2003, or that are exempt from abolition, as indicated above, must make recommendations to the executive director of the agency and the HHSC Commissioner to assist with eliminating or minimizing overlapping functions or required duties between HHS agencies or between the agency it advises and HHSC. Consequently, further changes in advisory committees may occur during the transition to the consolidation of HHS agencies or administrative functions. For information about the above notice, see the HHSC website or contact Adelaide Horn at adelaide.horn@hhsc.state.tx.us.

TRD-200305382

Steve Aragon
General Counsel
Texas Health and Human Services Commission
Filed: August 20, 2003

♦ ♦ ♦

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 03-07, Amendment Number 642.

The amendment adds the Program of All-Inclusive Care for the Elderly as a Medicaid State Plan option. The amendment is effective August 1, 2003.

If additional information is needed, please contact Dena Stoner at (512) 424-6521.

TRD-200305270
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Filed: August 18, 2003

♦ ♦ ♦

Texas Department of Insurance

Company Licensing

Application for admission to the State of Texas by SAGAMORE INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Indianapolis, Indiana.

Application for admission to the State of Texas by AVIATION INSURANCE CORPORATION, a foreign fire and/or casualty company. The home office is in Overland Park, Kansas.

Application for admission to the State of Texas by PROGRESSIVE HOME INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Mayfield Village, Ohio.

Application to change the name of EMPLOYERS MODERN LIFE COMPANY to EMC NATIONAL LIFE COMPANY, a foreign life, accident and/or health company. The home office is in Urbandale, Iowa.

Any objections must be filed with the Texas Department of Insurance, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200305376
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: August 20, 2003

♦ ♦ ♦

Notice of Reconvening of 2002 Texas Title Insurance Biennial Hearing

The Commissioner of Insurance will hold a public hearing under Docket No. 2537 on Wednesday, September 24, 2003, at 10:00 a.m. in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, and continuing thereafter at dates, times, and places designated by the Commissioner until conclusion. This is notice of the reconvening of the continued Rulemaking Phase of the 2002 Texas Title Insurance Biennial Hearing that was originally

set on December 31, 2002, as published in the November 1, 2002, issue of the *Texas Register* (27 TexReg 10482).

The Commissioner of Insurance will hold a public hearing under Docket No. 2538 on Monday, December 15, 2003, at 9:30 a.m. in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, and continuing thereafter at dates, times, and places designated by the Commissioner until conclusion. This is notice of the reconvening of the Ratemaking Phase of the 2002 Texas Title Insurance Biennial Hearing that was originally set on December 31, 2002, as published in the November 1, 2002, issue of the *Texas Register* (27 TexReg 10482).

The Commissioner of Insurance has jurisdiction over the promulgation of rules and premium rates, over amendments to or promulgation of approved forms, and over other matters set out in this notice pursuant to Texas Insurance Code, Section 31.021 and Articles 9.01, 9.02, 9.07, and 9.21, and pursuant to the Texas Administrative Code, Title 28, Chapter 9. The procedure of the hearing will be governed by the Rules of Practice and Procedure before the Department of Insurance (Texas Administrative Code, Title 28, Chapter 1, Subchapter A) and the Administrative Procedure Act (Texas Gov't Code, Ch. 2001).

TRD-200305186
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: August 13, 2003

♦ ♦ ♦

Third Party Administrator Applications

The following third party administrator (TPA) application has been filed with the Texas Department of Insurance and is under consideration.

Application for admission to Texas of Companion Information Management Resources, Inc., a foreign third party administrator. The home office is Columbia, South Carolina.

Any objections must be filed within 20 days after this notice was filed with the Secretary of State, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200305190
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: August 13, 2003

♦ ♦ ♦

Texas Commission on Jail Standards

Request for Proposals

Pursuant to the Texas Government Code, Title 10, Article 2254, Subchapter B, the Commission on Jail Standards invites proposals for consulting services from qualified individuals to advise and assist TCJS in a survey of jails across the state under the terms of the Juvenile Justice and Delinquency Prevention Act, Public Law 93-415, as modified.

The individual selected will conduct analyses of records for county and municipal jails and prepare required documentation and reports to verify compliance information regarding the removal of juveniles from the facilities. The selected consultant shall report directly to Terry Julian at the Texas Commission on Jail Standards.

All work performed under this contract shall be reimbursed on an hourly basis and is expected to be completed by August 31, 2004. Travel expenses shall be reimbursed upon state per diem rates with direct operating expenses provided by TCJS.

Detailed specifications are contained in the Consultant Proposal Request available August 29, 2003 from the Texas Commission on Jail Standards, 300 W. 15th Street, Suite 503, Austin, Texas between the hours of 8:30 a.m. and 4:30 p.m., Monday-Friday. For detailed information, contact Brandon S. Wood at (512) 463-5505.

Responses will be accepted only if actually received in writing in the Texas Commission on Jail Standards office no later than September 12, 2003, no later than 5:00 p.m., Central Daylight Time on this date. The Texas Commission on Jail Standards reserves the right to reject any or all proposals.

All proposals submitted by the deadline will be reviewed by the executive director. The executive director may request interviews with the top rated proposers. Based on proposers response, availability, experience, qualifications and demonstrated ability to work independently, the executive director will select the individual most qualified to provide services.

TRD-200305380
Terry Julian
Executive Director
Texas Commission on Jail Standards
Filed: August 20, 2003

♦ ♦ ♦

North Central Texas Council of Governments

Notice of Consultant Contract Award

Pursuant to the provisions of Government Code, Chapter 2254, the North Central Texas Council of Governments publishes this notice of consultant contract award. The consultant proposal request appeared in the April 26, 2002 issue of the *Texas Register* (27 TexReg 3633). The selected consultant will perform technical and professional work as a rail coordination consultant.

The consultant selected for this project is Lonnie E. Blaydes, Consulting, 8122 San Benito Way, Dallas, Texas 75218. The maximum amount of this contract is $180,000 for a three-year period. Work on this project is scheduled to begin September 16, 2002, and all work will be completed by September 16, 2005.

Issued in Arlington, Texas on August 13, 2003.

TRD-200305377
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: August 20, 2003

♦ ♦ ♦

Public Utility Commission of Texas

Amendment to Published Notice Regarding Low-Income Residential Customer Rate Reduction Programs

On August 15, 2003, the Public Utility Commission of Texas (PUCT or commission) published in the *Texas Register* (28 TexReg 6611), a notice under Project Number 27735 for the issuing of a Request for Proposals (RFP) to select a vendor to administer the low-income residential customer rate reduction programs for electric and telephone services in Texas. The RFP is issued pursuant to the PUCT's authority under Title II, Texas Utilities Code, §§17.007, 39.903, 55.015, and 56.021.

The notice contained a budget amount of $2,500,000, and a sentence in the Selection and Criteria paragraph of that notice which stated, "Proposals for amounts exceeding the budget will be rejected as non-responsive." The commission has reviewed the budget and is hereby amending the notice to delete the above quoted sentence from the original published notice. As a result all proposals otherwise qualified under the terms of the RFP will be considered regardless of the budget amount proposed.

TRD-200305370
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 19, 2003

♦ ♦ ♦

Notice of Application for Relinquishment of a Service Provider Certificate of Operating Authority

On August 11, 2003, Phone Reconnect of America, L.L.C. filed an application with the Public Utility Commission of Texas (commission) to relinquish its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60255. Applicant intends to relinquish its certificate.

The Application: Application of Phone Reconnect of America, L.L.C. to Relinquish its Service Provider Certificate of Operating Authority, Docket Number 28130.

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 no later than September 4, 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 28130.

TRD-200305213
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 15, 2003

♦ ♦ ♦

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 of an application on August 15, 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 Cinergy Communications Company for a Service Provider Certificate of Operating Authority, Docket Number 28359 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, T1-Private Line, Fractional T1, and long distance services.

Applicant's requested SPCOA geographic area includes the area of Texas currently served by SBC Texas and Verizon.

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 September 4, 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 28359.

TRD-200305343
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 18, 2003

♦ ♦ ♦

Public Notice of Interconnection Agreement

On August 11, 2003, Livingston Telephone Company and T-Mobile USA, Incorporated formerly known as Voicestream Wireless Corporation, 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 28321. 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 28321. 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 September 12, 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 28321.

TRD-200305187
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 13, 2003

♦ ♦ ♦

Public Notice of Interconnection Agreement

On August 11, 2003, Peoples Telephone Cooperative, Incorporated and T-Mobile USA, Incorporated formerly known as Voicestream Wireless Corporation, 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 28322. 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 28322. 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 September 12, 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 28322.

TRD-200305188
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 13, 2003

♦ ♦ ♦

Public Notice of Interconnection Agreement

On August 13, 2003, United Telephone Company of Texas, Incorporated doing business as Sprint, Central Telephone Company of Texas doing business as Sprint, and Wes Tex Communications LLC, doing business as WTX Communications, 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 28338. 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 28338. 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 September 12, 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 28338.

TRD-200305345
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 18, 2003

♦ ♦ ♦

Public Notice of Interconnection Agreement

On August 13, 2003, Lipan Telephone Company, Inc. and T-Mobile USA, Incorporated formerly known as Voicestream Wireless Corporation, 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 28339. 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 28339. 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 September 12, 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 28339.

TRD-200305346
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 18, 2003

♦ ♦ ♦

Public Notice of Interconnection Agreement

On August 13, 2003, Tele-One Communications, Inc. and Valor Telecommunications of Texas, LP doing business as Valor Telecom, 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 28340. 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 28340. 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 September 12, 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 28340.

TRD-200305347
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 18, 2003

♦ ♦ ♦

Public Notice of Interconnection Agreement

On August 14, 2003, XIT Telecommunication & Technology, Ltd. and T-Mobile USA, Incorporated formerly known as Voicestream Wireless Corporation, 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 28343. 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 28343. 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 September 15, 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 28343.

TRD-200305348
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 18, 2003

♦ ♦ ♦

Public Notice of Interconnection Agreement

On August 14, 2003, XIT Rural Telephone Cooperative, Inc. and T-Mobile USA, Incorporated formerly known as Voicestream Wireless Corporation, 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 28344. 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 28344. 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 September 15, 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 28344.

TRD-200305349
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 18, 2003

♦ ♦ ♦

Public Notice of Interconnection Agreement

On August 14, 2003, Metropolitan Telecommunications of Texas doing business as MetTel, and GTE Southwest, Inc. doing business as Verizon Southwest, collectively referred to as applicants, filed a joint application for approval to adopt the rates, terms, and conditions of a previously-approved interconnection agreement adopted pursuant to the §252(e) 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). The joint application has been designated Docket Number 28354. 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 28354. 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 September 15, 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 28354.

TRD-200305350
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 18, 2003

♦ ♦ ♦

Public Notice of Interconnection Agreement

On August 14, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and GTE Southwest, Inc. doing business as Verizon Southwest, collectively referred to as applicants, filed a joint application for approval to adopt the rates, terms, and conditions of a previously-approved interconnection agreement adopted pursuant to the §252(e) 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). The joint application has been designated Docket Number 28355. 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 28355. 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 September 15, 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 28355.

TRD-200305351
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 18, 2003

♦ ♦ ♦

Public Notice of Interconnection Agreement

On August 14, 2003, CallNet Communications, Inc. and GTE Southwest, Inc. doing business as 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 28356. 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 28356. 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 September 15, 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 28356.

TRD-200305352
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 18, 2003

♦ ♦ ♦

Public Notice of Interconnection Agreement

On August 14, 2003, Cypress Communications Operating Company, Inc. and GTE Southwest, Inc. doing business as Verizon Southwest, collectively referred to as applicants, filed a joint application for approval to adopt the rates, terms, and conditions of a previously-approved interconnection agreement adopted pursuant to the §252(e) 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). The joint application has been designated Docket Number 28357. 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 28357. 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 September 15, 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 28357.

TRD-200305344
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 18, 2003

♦ ♦ ♦

Public Notice of Workshop on Development of the Filing Package for Fees and Rates of Independent Organizations

The staff of the Public Utility Commission of Texas (commission) will hold a workshop regarding the creation of the filing package for fees and rates of independent organizations on Thursday, September 4, 2003, at 9:00 a.m. in the Hearing Room A, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 28218, *Development of the Filing Package For Fees and Rates of Independent Organizations*, has been established for this proceeding. The workshop will provide an opportunity for interested persons to advise the commission staff of their views on how the filing package should be developed and implemented. **The workshop in this proceeding originally scheduled for Wednesday, September 3, 2003, is cancelled.**

Ten days prior to the workshop the commission will make available in Central Records under Project Number 28218 an agenda for the format of the workshop and a copy of a draft filing package. The commission requests that persons planning on attending the workshop register by phone with Rich Lain, Financial Review Division, (512) 936-7454.

Questions concerning the workshop or this notice should be referred to Rich Lain, Financial Review Division, (512) 936-7454. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200305271
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 18, 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).

Texas Register
Services

The *Texas Register* offers the following services. Please check the appropriate box (or boxes).

Texas Natural Resource Conservation Commission, Title 30

❑ **Chapter 285** $25 ❑ update service $25/year *(On-Site Wastewater Treatment)*
❑ **Chapter 290** $25 ❑ update service $25/year *(Water Hygiene)*
❑ **Chapter 330** $50 ❑ update service $25/year *(Municipal Solid Waste)*
❑ **Chapter 334** $40 ❑ update service $25/year *(Underground/Aboveground Storage Tanks)*
❑ **Chapter 335** $30 ❑ update service $25/year *(Industrial Solid Waste/Municipal Hazardous Waste)*

Update service should be in ❑ printed format ❑ 3 1/2" diskette

Texas Workers Compensation Commission, Title 28

❑ Update service $25/year

Texas Register Phone Numbers	**(800) 226-7199**
Documents	(512) 463-5561
Circulation	(512) 463-5575
Marketing	(512) 305-9623
Texas Administrative Code	(512) 463-5565

Information For Other Divisions of the Secretary of State's Office

Executive Offices	(512) 463-5701
Corporations/	
Copies and Certifications	(512) 463-5578
Direct Access	(512) 475-2755
Information	(512) 463-5555
Legal Staff	(512) 463-5586
Name Availability	(512) 463-5555
Trademarks	(512) 463-5576
Elections	
Information	(512) 463-5650
Statutory Documents	
Legislation	(512) 463-0872
Notary Public	(512) 463-5705
Uniform Commercial Code	
Information	(512) 475-2700
Financing Statements	(512) 475-2703
Financing Statement Changes	(512) 475-2704
UCC Lien Searches/Certificates	(512) 475-2705

Please use this form to order a subscription to the *Texas Register*, to order a back issue, or to indicate a change of address. Please specify the exact dates and quantities of the back issues required. You may use your VISA or Mastercard. All purchases made by credit card will be subject to an additional 2.1% service charge. Return this form to the Texas Register, P.O. Box 13824, Austin, Texas 78711-3824. For more information, please call (800) 226-7199.

☐ **Change of Address**
(Please fill out information below)

☐ **Paper Subscription**
☐ One Year $200 ☐ First Class Mail $300

☐ **Back Issue ($10 per copy)**
_____ Quantity

Volume _____, Issue #_____.
(Prepayment required for back issues)

NAME_____

ORGANIZATION _____

ADDRESS _____

CITY, STATE, ZIP _____

PHONE NUMBER _____

FAX NUMBER _____

Customer ID Number/Subscription Number _____
(Number for change of address only)

Payment Enclosed via ☐ Check ☐ Money Order
Mastercard/VISA Number _____
Expiration Date _____/_____ Signature _____

Please make checks payable to the Secretary of State. Subscription fees are not refundable.
Do not use this form to renew subscriptions.

Visit our home on the internet at http://www.sos.state.tx.us.

_____
_____
Periodical Postage

PAID

Austin, Texas
and additional entry offices

_____
_____