# TEXAS REGISTER

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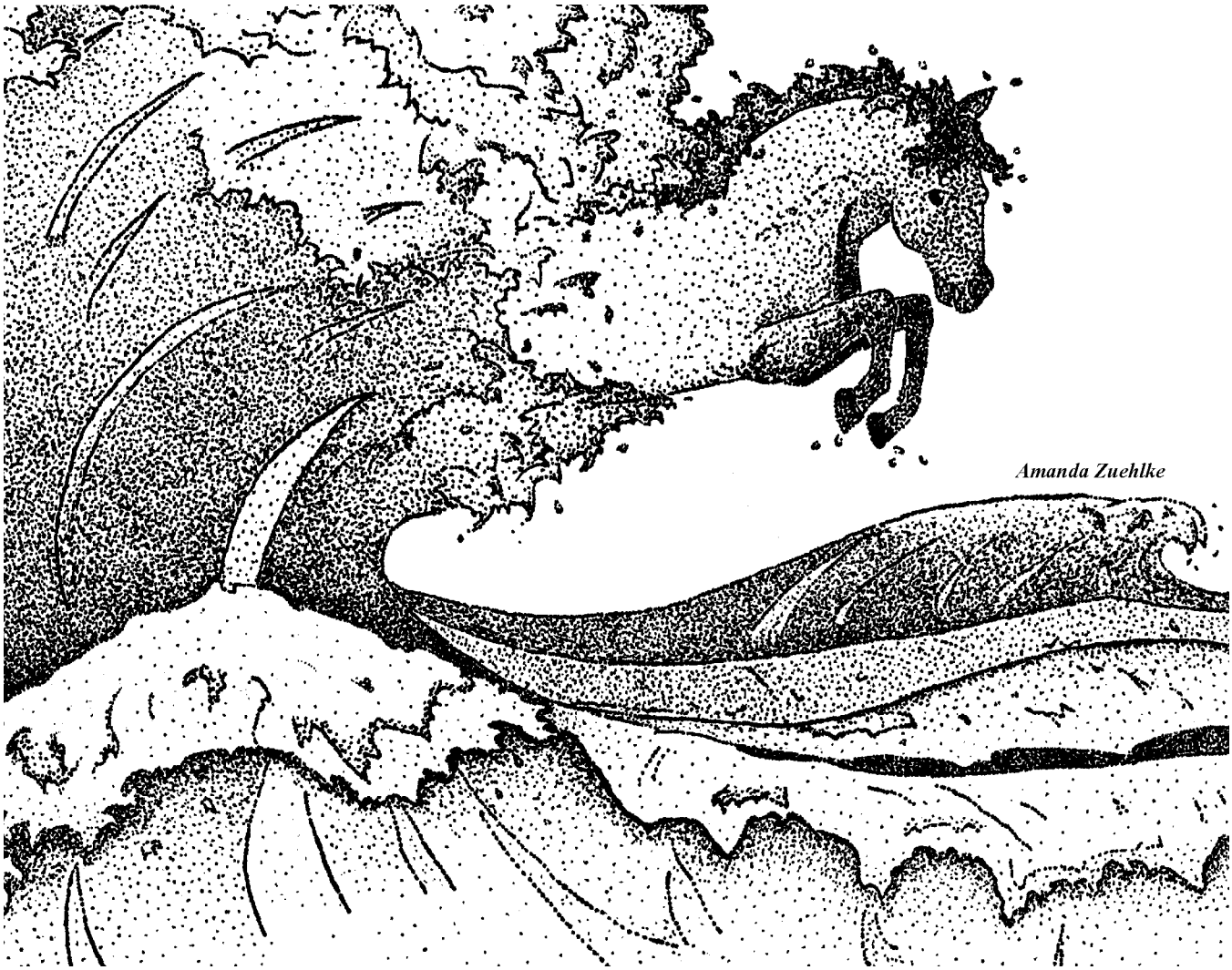

*Amanda Zuehlke*

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*.

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# IN THIS ISSUE

## *WITHDRAWN RULES*



## *ADOPTED RULES*

# 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

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

# THE GOVERNOR

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

## Appointments

**Appointments for November 12, 2003**

Appointed to the Pharmaceutical and Therapeutics Committee, pursuant to HB 2292, 78th Legislature, Regular Session, for a term to expire September 1, 2005, Julie Elaine Lewis of Frisco.

Appointed to the Pharmaceutical and Therapeutics Committee, pursuant to HB 2292, 78th Legislature, Regular Session, for a term to expire September 1, 2005, Donna Burkett Rogers of San Antonio.

Appointed to the Pharmaceutical and Therapeutics Committee, pursuant to HB 2292, 78th Legislature, Regular Session, for a term to expire September 1, 2005, David E. King of Kingwood.

Appointed to the Pharmaceutical and Therapeutics Committee, pursuant to HB 2292, 78th Legislature, Regular Session, for a term to expire September 1, 2005, J. C. Jackson of Seabrook.

Appointed to the Pharmaceutical and Therapeutics Committee, pursuant to HB 2292, 78th Legislature, Regular Session, for a term to expire September 1, 2005, Anthony J. Busti, Pharm.D. of Midlothian.

Appointed to the Pharmaceutical and Therapeutics Committee, pursuant to HB 2292, 78th Legislature, Regular Session, for a term to expire September 1, 2005, Harris M. Hauser, M.D. of Houston.

Appointed to the Pharmaceutical and Therapeutics Committee, pursuant to HB 2292, 78th Legislature, Regular Session, for a term to expire September 1, 2005, Melbert C. Hillert, Jr., M.D. of Dallas.

Appointed to the Pharmaceutical and Therapeutics Committee, pursuant to HB 2292, 78th Legislature, Regular Session, for a term to expire September 1, 2005, Guadalupe Zamora, M.D. of Austin.

Appointed to the Pharmaceutical and Therapeutics Committee, pursuant to HB 2292, 78th Legislature, Regular Session, for a term to expire September 1, 2005, Valerie Robinson, M.D. of Lubbock.

Appointed to the Pharmaceutical and Therapeutics Committee, pursuant to HB 2292, 78th Legislature, Regular Session, for a term to expire September 1, 2005, Tom McCall Zerwas, M.D. of Richmond.

Appointed to the Pharmaceutical and Therapeutics Committee, pursuant to HB 2292, 78th Legislature, Regular Session, for a term to expire September 1, 2005, Richard C. Adams, M.D. of Plano.

**Appointments for November 13, 2003**

Appointed to the Texas Parks and Wildlife Commission for a term to expire February 1, 2009, John D. Parker of Lufkin (replacing Kelly Rising of Beaumont whose term expired).

Appointed to the Texas Parks and Wildlife Commission for a term to expire February 1, 2009, J. Robert Brown of El Paso (replacing Ernest Angelo of Midland whose term expired).

Designating Joseph B. C. Fitzsimons of San Antonio as Presiding Officer of the Texas Parks and Wildlife Commission for a term at the pleasure of the Governor. Mr. Fitzsimons will replace Katherine Idsal Armstrong as Presiding Officer.

Rick Perry, Governor

TRD-200307887

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## Appointments

**Appointments for November 18, 2003**

Appointed to the Texas State University System Board of Regents for a term to expire February 1, 2009, Bernie Francis of Carrollton (replacing John Hageman of Austin whose term expired).

Appointed to the Texas State University System Board of Regents for a term to expire February 1, 2009, John E. Dudley of Comanche (replacing James Sweatt of DeSoto whose term expired).

Appointed to the San Jacinto Historical Advisory Board for a term to expire September 1, 2009, Alfred Davis, IV of Houston (replacing Nina Hendee of Houston whose term expired).

Appointed to the Texas Higher Education Coordinating Board for a term to expire August 31, 2009, Robert W. Shepard of Harlingen (Mr. Shepard is being reappointed).

Designating Robert W. Shepard of Harlingen as Vice-Chair of the Texas Higher Education Coordinating Board for a term at the pleasure of the Governor. Mr. Shepard is replacing Dr. Martin Basaldua as Vice-Chair. Dr. Basaldua no longer services on the board.

Appointed to the Texas Workforce Investment Council for a term to expire September 1, 2009, John W. Sylvester, Jr. of Houston (Mr. Sylvester is being reappointed).

Appointed to the Texas Workforce Investment Council for a term to expire September 1, 2009, Robert Steve Dement of Pasadena (Mr. Dement is being reappointed).

Appointed to the Texas Workforce Investment Council for a term to expire September 1, 2009, Richard Giles Hatfield of Austin (replacing Rowland Funderburg of Irving whose term expired).

Appointed to the Texas Workforce Investment Council for a term to expire September 1, 2009, Larry F. Jeffus of Garland (replacing John Gable of El Paso whose term expired).

Rick Perry, Governor

TRD-200307944

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# THE ATTORNEY GENERAL

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

Opinions

**Opinion No. GA-0119**

The Honorable Jose R. Rodriguez

El Paso County Attorney

500 East San Antonio, Room 503

El Paso, Texas 79901

Re: Whether a school district that does not participate in the state uniform group coverage program is required to provide health coverage to persons who have retired under the Teacher Retirement System and are eligible for coverage under the Texas Public School Retired Employees Group Insurance Program, but who have returned to work for the district (RQ-0062-GA)

**S U M M A R Y**

Section 22.004(b) of the Texas Education Code obliges an independent school district not participating in the Texas School Employees Uniform Group Health Coverage Program (TRS- ActiveCare) to provide group health coverage to all of its employees, including retired persons receiving such coverage under the Texas Public School Retired Employees Group Insurance Program (TRS-Care) who have returned to work. Section 22.004(c) obliges an independent school district to share the costs of participation of such a retiree who has waived coverage under TRS-Care.

**Opinion No. GA-0120**

The Honorable Fred Hill

Chair, Committee on Local Government Ways and Means

Texas House of Representatives

P.O. Box 2910

Austin, Texas 78768-2910

Re: Whether a city council of a home-rule city may delegate to a municipal board the authority to grant a variance under section 109.33 of the Texas Alcoholic Beverage Code (RQ-0067-GA)

**S U M M A R Y**

A home-rule city may not delegate to a municipal board the authority to grant variances in the regulation of alcoholic beverages under section 109.33(e) of the Texas Alcoholic Beverage Code.

**Opinion No. GA-0121**

The Honorable Norman Arnett

Stonewall County Attorney

P.O. Box 367

Aspermont, Texas 79502

Re: Whether the nepotism laws in chapter 573 of the Government Code prohibit the sheriff's office from employing an individual who had been continuously employed in the sheriff's office for more than seven years before marrying the sheriff (RQ-0069-GA)

**S U M M A R Y**

The employment of the sheriff's spouse in the sheriff's office after their marriage does not violate the nepotism laws in chapter 573 of the Government Code when the individual has held that position continuously for five years before the sheriff was reelected and for more than seven years before they married.

**Opinion No. GA-0122**

Mr. Antonio R. Sandoval

Hidalgo County Auditor

P.O. Box 689

Edinburg, Texas 78540-0689

Re: District attorney's obligations as administrator of forfeited real property (RQ-0059-GA)

**S U M M A R Y**

An attorney representing the state must administer property forfeited under chapter 59 of the Code of Criminal Procedure consistent with accepted accounting practices and with the terms of any local agreement with a law enforcement agency. Forfeited property subject to a local agreement must ultimately be disposed of by sale or transfer of the property to a law enforcement agency, but there is no statutory deadline for the disposition. There is no statutory deadline for disposing of forfeited property subject to a local agreement.

An attorney representing the state may lease forfeited property only if the lease is consistent with the local agreement and with the attorney's statutory duties to ultimately dispose of property by transfer or sale and to distribute any proceeds under article 59.06 of the code. Forfeited property subject to administration under article 59.06(a) of the code is state property. The attorney representing the state need not obtain approval from the county commissioners court or the state to execute

a lease within the attorney's authority to administer forfeited property under article 59.06(a). Statutory bidding requirements do not apply to such an attorney's authority to administer forfeited property. To the extent forfeited property is exempt from ad valorem taxation, the attorney representing the state need not apply for an exemption for it to be effective.

**Opinion No. GA-0123**

Mr. Robert Scott

Chief Deputy Commissioner of Education

Texas Education Agency

1701 North Congress Avenue

Austin, Texas 78701-1494

Re: Applying the anti-nepotism laws, Government Code chapter 573, to an independent school district (RQ-0060-GA)

**S U M M A R Y**

A school district that has delegated to the superintendent final authority to select personnel under section 11.163(a)(1), Education Code, may employ and compensate a bus driver related to a trustee within a prohibited degree under chapter 573 of the Government Code, unless the driver is also related within a prohibited degree to the superintendent. *See* TEX.EDUC.CODE ANN. § 11.163(a)(1) (Vernon 1996). The conclusion of *Pena v. Rio Grande City Consolidated Independent School District*, that a school district's superintendent is not a public official for purposes of chapter 573, Government Code, does not apply to a school board that has delegated final authority to select personnel to the district's superintendent. *See Pena v. Rio Grande City Consol. Indep. Sch. Dist.*, 616 S.W.2d 658, 660 (Tex. Civ. App. Eastland 1981, no writ).

Because a superintendent has exclusive statutory authority to assign district personnel under section 11.201(d)(2) of the Education Code, he or she may reassign a trustee's relative to fill a departmental chair position. The board is not authorized to act on the reassignment, and board members are not, therefore, public officials for purposes of chapter 573, Government Code, with respect to the reassignment.

**Opinion No. GA-0124**

The Honorable David Swinford

Chair, Committee on Government Reform

Texas House of Representatives

P. O. Box 2910

Austin, Texas 78768-2910

Re: Whether municipal hotel occupancy tax revenue may be used to fund certain programs at a county senior center (RQ-0065-GA)

**S U M M A R Y**

Under section 351.101 of the Tax Code, a municipality may expend its municipal hotel occupancy tax revenue "only to promote tourism and the convention and hotel industry" and only for the specific uses listed in the statute. TEX.TAX CODE ANN. § 351.101(a) (Vernon Supp. 2004). Whether a particular proposed expenditure of municipal hotel occupancy tax revenue is a permissible use and will "directly enhanc[e] and promot[e] tourism and the convention and hotel industry" is for a municipality's governing body to determine in the first instance.

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

TRD-200307976

Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: November 19, 2003

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## Request for Opinions

**RQ-0123-GA**

**Requestor:**

The Honorable Burt R. Solomons

Chair, Committee on Financial Institutions

Texas House of Representatives

P.O. Box 2910

Austin, Texas 78768-2910

Re: Whether federal law preempts a portion of Chapter 145, Civil Practice and Remedies Code, which relates to the liability of in-home service companies and residential delivery companies for negligent hiring (Request No. 0123-GA)

**Briefs requested by December 14, 2003**

**RQ-0124-GA**

**Requestor:**

Eduardo J. Sanchez, M.D., M.P.H.

Commissioner of Health

Texas Department of Health

1100 West 49th Street

Austin, Texas 78756-3199

Mr. Robert Scott

Chief Deputy Commissioner of Education

Texas Education Agency

1701 North Congress Avenue

Austin, Texas 78701-1494

Re: Whether the Department of Health has exclusive authority to adopt rules relating to the provisional admission of students to Texas primary and secondary schools based on their immunization status (Request No. 0124-GA)

**Briefs requested by December 17, 2003**

**RQ-0125-GA**

**Requestor:**

The Honorable Kenny Marchant

Chair, State Affairs Committee

Texas House of Representatives

P.O. Box 2910

Austin, Texas 78768-2910

Re: Whether it is a penal offense for a city to possess gambling paraphernalia; and whether gambling paraphernalia used by a city is subject to the state sales tax (Request No. 0125-GA)

**Briefs requested by December 17, 2003**

**RQ-0126-GA**

**Requestor:**

The Honorable Carlos I. Uresti

Chair, Human Services Committee

Texas House of Representatives

P.O. Box 2910

Austin, Texas 78768-2910

Re: Circumstances under which an attorney may represent a client before a state agency under §572.52(a)(1), Government Code (Request No. 0126-GA)

**Briefs requested by December 17, 2003**

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

TRD-200307937

Nancy S. Fuller

Assistant Attorney General

Office of the Attorney General

Filed: November 19, 2003

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# EMERGENCY RULES

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

## TITLE 10. COMMUNITY DEVELOPMENT

## PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

### CHAPTER 301. DEFINITIONS

**10 TAC §301.1**

The Texas Residential Construction Commission (the "Commission") adopts on an emergency basis a new rule at Title 10, Part 7, Chapter 301, §301.1, regarding definitions concerning the registration of new homes by builders in the State of Texas.

The new section defines the terms "Home" and "Transaction governed by Title 16, Property Code".

The rule is adopted on an emergency basis to comply with new legislation enacted by the 78th Legislative Session, Regular Session, including House Bill 730. The new section is adopted on an emergency basis under new Chapter 426, Property Code (Act effective Sept. 1, 2003, 78th Leg., R.S., ch. 458, §1.01), which provides in part that builders in the State of Texas register homes and remit a registration fee to be collected beginning January 1, 2004. The adoption of the emergency rule permits the Commission to comply with the timetable prescribed by HB 730 and set out in Chapters 401 through 438, Property Code.

The new rule is simultaneously being proposed for permanent adoption in accordance with Texas Government Code, Chapter 2001, §2001.034. The proposed new rule is published in the Proposed Rules section of this issue of the *Texas Register*.

The statutory provisions affected by the emergency adoption are those set forth in the Property Code, §426.003 and House Bill 730, 78th Legislature, Regular Session.

No other statutes, articles, or codes are affected by the emergency adoption.

*§301.1. Definitions.*

(a) Home--The real property and improvements and appurtenances for a single-family house or duplex. The term includes a unit in a multi-unit residential structure such as a townhome or a condominium, so long as there is a transfer of fee simple title or title is transferred to the owner under a condominium or cooperative system.

(b) Transaction governed by Title 16, Property Code--A transaction involving:

(1) a new home;

(2) a material improvement to a home, other than an improvement solely to replace or repair a roof of an existing home; or

(3) an improvement to the interior of an existing home when the cost of the work exceeds $20,000.

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 November 17, 2003.

TRD-200307875
Stephen D. Thomas
Executive Director
Texas Residential Construction Commission
Effective Date: November 17, 2003
Expiration Date: March 16, 2004
For further information, please call: (512) 463-9524

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### CHAPTER 310. HOME REGISTRATION

**10 TAC §§310.10, 310.20, 310.30, 310.40**

The Texas Residential Construction Commission (the "Commission") adopts on an emergency basis new rules at Title 10, Part 7, Chapter 310, §§310.10, 310.20, 310.30, and 310.40, concerning the registration of new homes by builders in the State of Texas.

The new sections establish home registration provisions related to the statutory mandate that builders register homes with the Commission. The registration of new homes must include an application prescribed by the Commission and a fee. Home registration must be submitted on or before the 15th day of the month following the month in which the transfer of title from the builder to the homeowner occurs. The registration for transactions other than transfers of title of new homes must also include an application prescribed by the Commission and a fee, received by the Commission not later than the 15th day after the earlier of the date of the agreement that describes the transaction between the homeowner and builder, or the commencement of the work on the home.

The rules are adopted on an emergency basis to comply with new legislation enacted by the 78th Legislative Session, Regular Session, including House Bill 730. The new sections are adopted on an emergency basis under new Chapter 426, Property Code (Act effective Sept. 1, 2003, 78th Leg., R.S., ch. 458, §1.01), which provides in part that builders in the State of Texas register homes and remit a registration fee to be collected beginning January 1, 2004. The adoption of the emergency rules permit the Commission to comply with the timetable prescribed by HB 730 and set out in Chapters 401 through 438, Property Code.

The new rules are simultaneously being proposed for permanent adoption in accordance with Texas Government Code, Chapter

2001, §2001.034. The proposed new rules are published in the Proposed Rules section of this issue of the *Texas Register*.

The statutory provisions affected by the emergency adoption are those set forth in the Property Code, §426.003 and House Bill 730, 78th Legislature, Regular Session.

No other statutes, articles, or codes are affected by the emergency adoption.

*§310.10. Registration of Home.*

(a) A builder shall register a new home with the Commission on or before the 15th day of the month following the month in which the transfer of title from the builder to the homeowner occurs.

(b) A builder who enters into a transaction governed by Title 16, Property Code, other than the transfer of title of a new home from the builder to the seller, shall register the home involved in the transaction with the Commission. The registration must be delivered to the Commission via mail, electronic means, or hand-delivery, not later than the 15th day after the earlier of:

(1) the date of the agreement that describes the transaction between the homeowner and the builder; or

(2) the commencement of the work on the home.

(c) If the transfer of the title of the home from the builder to the initial homeowner occurred before January 1, 2004, or if the contract for improvements or additions between the builder and homeowner was entered into before January 1, 2004, the person who submits a request under Chapter 428, Property Code, shall register the home as required by this section.

(d) A registration under this section is not complete unless the commission receives the appropriate fee as established in §302.1.

(e) Fees required under this section are payable to the Texas Residential Construction Commission via check, money order, or other method accepted by the Commission.

(f) The Commission may waive the fee required by subsection (d) of this section upon receiving from the builder an application as established under §310.20 and written documentation from the Internal Revenue Service granting the builder tax-exempt status as a Sec. 501(c)(3) organization.

(g) The Commission may impose a penalty under Chapters 418 and 419, Property Code, for failure to register a home as required by Section 426.003, Property Code.

*§310.20. Required Information.*

(a) The registration required under §310.10 shall be made on a form promulgated by the Commission that includes the following information provided by the builder:

(1) Name and contact information of the builder;

(2) Builder's Commission registration number;

(3) Street address of the home;

(4) Zip code of the home;

(5) City and county in which the home is located;

(6) If, a new home, the year the home was built;

(7) Date of the title transfer, if applicable;

(8) If the transaction does not involve a transfer of title, then the date of the commencement of the improvement of the home, if applicable; and

(9) Other information requested by the Commission.

(b) The Commission may waive the receipt of the information required under subsection (a)(2) of this section until March 1, 2004.

(c) The registration may be made via electronic means established by the Commission.

*§310.30. Late Registration.*

A builder who registers with the Commission less than 60 days after the 15-day period established under §310.10 may register by paying a late payment penalty of two times the fee established in §302.1.

*§310.40. Public Information.*

(a) Within 30 days of the receipt of the information required by §310.20, the Commission shall provide to the owner of the home registered with the Commission named in the registration via mail the required public information defined in subsection (b) of this section.

(b) For the purpose of this section, "public information" is defined as information detailing:

(1) the functions of the Commission;

(2) the provisions of the limited statutory warranty and building and performance standards;

(3) the state-sponsored inspection and dispute resolution process;

(4) the procedures by which complaints or requests are filed with and resolved by the commission; and

(5) any other information designated by the Commission.

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 November 17, 2003.

TRD-200307874
Stephen D. Thomas
Executive Director
Texas Residential Construction Commission
Effective Date: November 17, 2003
Expiration Date: March 16, 2004
For further information, please call: (512) 463-9524

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# 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 75. AUTOMOBILE CLUB SUBCHAPTER B. REGISTRATION OF AGENTS

**1 TAC §75.10**

The Office of the Secretary of State proposes amendments to §75.10, concerning an exemption for individuals who sell automobile club memberships only in connection with an associated consumer transaction. The purpose of the amendments is to clarify that such individuals may receive minor compensation for the sale of the automobile club membership. The amendments also provide guidelines regarding the type of associated consumer transactions that may qualify an individual for the exemption from registration as an automobile club agent.

Guy Joyner, Chief, Legal Support Unit, Statutory Documents Section has determined that for the first five year period that the proposed amendments are in effect there will be no fiscal implications for state or local government or small business as a result of enforcing the amended rule.

Mr. Joyner also has determined that for each year of the first five years that the proposed amendments are in effect the public benefit anticipated as a result of enforcing the amended rule will be the clarification whether compensation for the sale of an automobile club membership may be paid to an individual exempt from registration as an automobile club agent. Businesses selling the automobile club membership will benefit from the amendments by clarifying transactions that qualify as an associated consumer transaction. There will be no other effect on large businesses, small businesses or micro-businesses. There will be no additional economic cost to individuals. There is no anticipated impact on local employment.

Comments on the proposed amendments may be submitted to Guy Joyner, Chief, Legal Support Unit, Statutory Documents Section, P.O. Box 12887, Austin, Texas 78711-2887.

The amendments are proposed under the Texas Government Code, §2001.004(1) which provides the Secretary of State with the authority to prescribe and adopt rules.

The amendments affect the Texas Occupations Code, §722.011.

*§75.10. Exemption from Registration.*

(a) "Agent" does not include an individual who engages in the solicitation or sale of automobile club memberships with respect to the general public only in connection with an associated consumer transaction [~~sells a primary service, such as: cellular telephone service, which has automobile club services offered as an optional feature available to such service purchasers~~], provided:

(1) the automobile club membership is issued [~~services are furnished~~] by an automobile club that has obtained an automobile club certificate of authority from the Office of the Secretary of State;

(2) such [~~the~~] individual is not compensated based primarily on [~~selling the primary service does not receive compensation, either directly or indirectly, for~~] the sale of the automobile club membership; [~~services feature; and~~]

(3) such [~~the~~] individual [~~selling the primary service~~] may not alter the terms or conditions of the automobile club membership; and [~~feature.~~]

(4) the automobile club membership is not required to be purchased in order to complete the associated consumer transaction, and the consideration paid for the associated consumer transaction is not affected by the purchase of the automobile club membership.

(b) In this section, "Associated consumer transaction" means a retail exchange of goods or services, other than the automobile club membership, which is the basis of the relationship between such individual and the consumer. [~~"optional feature" means a feature that is not required to be purchased in order to receive the primary service, and the consideration paid for the primary service is not affected by the purchase of the feature. (There may be a separate additional charge for the feature.)~~]

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 November 13, 2003.

TRD-200307808
Lorna Wassdorf
Director, Business and Public Filings
Office of the Secretary of State
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 475-0775

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## CHAPTER 81. ELECTIONS SUBCHAPTER F. PRIMARY ELECTIONS

**1 TAC §81.135**

The Office of the Secretary of State, Elections Division, proposes new §81.135, concerning primary canvass rules for 2004 elections.

Ann McGeehan, Director of Elections, has determined that, for the first five-year period the new section is in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the section. 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 new section.

Ms. McGeehan has also determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of enforcing the section will be to ensure that (a) sufficient time is provided to permit provisional ballots to be processed timely, and (b) the local county and state canvassing of the primary elections in 2004 will occur in a timely manner.

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 section is proposed pursuant to §31.010 of the Election Code, which requires the Secretary of State to adopt rules as necessary to implement the federal Help America Vote Act of 2002. In the 2003 Legislative Session, the date of the local (county) canvass was modified to allow time for counting provisional ballots; however, the state canvassing date was not similarly modified.

Statutory Authority: Election Code, §31.010.

No other article, statute, or code is affected by this proposed new rule.

*§81.135. Primary Canvass Rules for 2004 Elections.*

(a) Local County Canvass Date in 2004. For purposes of the March 9, 2004 primary and April 13, 2004 primary runoff elections, the Secretary of State shall direct the county chairs of each party conducting a primary to use the earliest available canvass date of Thursday, March 18, 2004, in order to expedite the state canvass.

(b) State Canvass Date in 2004. For purposes of the March 9, 2004 primary, instead of the state canvass occurring on March 17, 2004 (the second Wednesday after the primary election date), in accordance with §171.120 of the Election Code, the state executive committee shall conduct a canvass for all races with potential runoffs (races with 3 or more candidates) not later than Sunday, March 21, 2004.

(c) Local (County) Ballot Drawing. The local (county) ballot drawing for the primary runoff ballot shall be conducted not later than Monday, March 22, 2004.

(d) State Canvass for Remaining Offices. State Executive Committee shall complete the state canvass for the remaining state and district races no later than Monday, March 29, 2004.

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 November 17, 2003.

TRD-200307925

Ann McGeehan
Director of Elections
Office of the Secretary of State
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 463-5650

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# TITLE 4. AGRICULTURE

## PART 1. TEXAS DEPARTMENT OF AGRICULTURE

### CHAPTER 3. BOLL WEEVIL ERADICATION PROGRAM

### SUBCHAPTER E. CREATION OF ERADICATION ZONES

**4 TAC §3.118**

The Texas Department of Agriculture (the department) proposes new §3.118, concerning the creation of a nonstatutory boll weevil eradication zone for the Texas Panhandle. The new section is proposed to designate a new nonstatutory boll weevil eradication zone consisting of the counties in the Texas Panhandle which are not included in another established boll weevil eradication zone, in order to allow cotton producers in the proposed area an opportunity to establish a manageable, efficient eradication program that meets the local needs of producers. New §3.118 establishes the Panhandle Boll Weevil Eradication Zone consisting of all of Carson, Dallam, Hansford, Hartley, Hemphill, Hutchinson, Lipscomb, Moore, Ochiltree, Oldham, Potter, Roberts and Sherman counties. A grower referendum will be conducted to determine whether or not a boll weevil eradication program and assessment will be approved in the area proposed as the Panhandle zone.

Brian Murray, special assistant for producer relations, 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 sections. Costs of administering the section will be borne by the Texas Boll Weevil Eradication Foundation. Should the Panhandle Boll Weevil Eradication Zone become active upon grower referendum, producer, state, and/or federal funds may be utilized to fund active eradication. The amounts of such funding cannot be determined at this time, as no formal budget has been developed.

Mr. Murray also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the sections will be to allow the area to vote on a boll weevil eradication program, thus providing the potential for the entire panhandle will be under active eradication. There will be an economic effect on micro- businesses or small businesses and/or to persons acting as cotton growers who are required to comply with the new sections as proposed. The cost to these entities will be dependent upon the maximum grower assessment approved by cotton growers in the zone.

Comments on the proposal may be submitted to Brian Murray, Special Assistant for Producer Relations, Texas Department of Agriculture, P. O. Box 12847, and Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The new section is proposed under the Texas Agriculture Code, §74.120, which provides the commissioner of agriculture with the authority to adopt rules to carry out the purposes of Chapter 74; §74.1042, which provides the commissioner of agriculture with the authority to designate by rule an area of the state as a proposed boll weevil eradication zone; The code that will be affected by the proposal is the Texas Agriculture Code, Chapter 74, Subchapter D.

*§3.118. Panhandle Boll Weevil Eradication Zone.*

The Panhandle Boll Weevil Eradication Zone shall consist of the following area: all of Carson, Dallam, Hansford, Hartley, Hemphill, Hutchinson, Lipscomb, Moore, Ochiltree, Oldham, Potter, Roberts and Sherman.

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 November 17, 2003.

TRD-200307878
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 463-4075

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# TITLE 10. COMMUNITY DEVELOPMENT

## PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

### CHAPTER 301. DEFINITIONS

**10 TAC §301.1**

The Texas Residential Construction Commission (the "Commission") proposes a new rule at Title 10, Part 7, Chapter 301, §301.1, regarding definitions concerning the registration of new homes by builders in the State of Texas.

The new section defines the terms "Home" and "Transaction governed by Title 16, Property Code".

The rule is proposed to implement new legislation enacted during the 78th Legislative Session, Regular Session, including House Bill 730. The new section is adopted under new Chapter 426, Property Code (Act effective Sept. 1, 2003, 78th Leg., R.S., ch. 458, §1.01), which provides in part that builders in the State of Texas register homes and remit a registration fee to be collected beginning January 1, 2004.

Stephen D. Thomas, Executive Director, has determined that for the first five-year period the new rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the new rule.

Mr. Thomas also has determined that for each year of the first five-year period the new rule is in effect, the public benefit will be clarification of those transactions falling under agency oversight. The rule will further eliminate confusion that may arise within the industries affected.

Mr. Thomas also has determined that there will be no effect on large, small, or micro-businesses as a result of the proposed definitions.

Comments on the proposed rule may be submitted to Kymberley Maddox, Deputy Executive Director, Texas Residential Construction Commission, P.O. Box 13144, Austin, Texas 78711, via facsimile 512/463-9507, or electronically: comments@trcc.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register*.

The new rule is proposed under Property Code, §426.003, which authorizes the Commission to require information for the registration of homes as required by the Texas Residential Construction Commission Act.

The statutory provisions affected by the proposal are those set forth in the Property Code, §426.003 and House Bill 730, 78th Legislature.

No other statutes, articles, or codes are affected by the proposal.

*§301.1. Definitions.*

(a) Home--The real property and improvements and appurtenances for a single-family house or duplex. The term includes a unit in a multi-unit residential structure such as a townhome or a condominium, so long as there is a transfer of fee simple title or title is transferred to the owner under a condominium or cooperative system.

(b) Transaction governed by Title 16, Property Code--A transaction involving:

(1) a new home;

(2) a material improvement to a home, other than an improvement solely to replace or repair a roof of an existing home; or

(3) an improvement to the interior of an existing home when the cost of the work exceeds $20,000.

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 November 17, 2003.

TRD-200307873
Stephen D. Thomas
Executive Director
Texas Residential Construction Commission
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 463-9524

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### CHAPTER 310. HOME REGISTRATION

**10 TAC §§310.10, 310.20, 310.30, 310.40**

The Texas Residential Construction Commission (the "Commission") proposes new rules at Title 10, Part 7, Chapter 310, §§310.10, 310.20, 310.30, and 310.40, concerning the registration of new homes by builders in the State of Texas.

The new sections establish home registration provisions related to the statutory mandates that builders register homes with the Commission. The registration of new homes must include an application prescribed by the Commission and a fee. Home registration must be submitted on or before the 15th day of the month following the month in which the transfer of title from the builder

to the homeowner occurs. The registration for transactions other than transfers of title of new homes must also include an application prescribed by the Commission and a fee, received by the Commission not later than the 15th day after the earlier of the date of the agreement that describes the transaction between the homeowner and builder, or the commencement of the work on the home.

The rules are proposed to implement new legislation enacted during the 78th Legislative Session, Regular Session, including House Bill 730. The new sections are proposed under new Chapter 426, Property Code (Act effective Sept. 1, 2003, 78th Leg., R.S., ch. 458, §1.01), which provides in part that builders in the State of Texas register homes and remit a registration fee to be collected beginning January 1, 2004.

Stephen D. Thomas, Executive Director, has determined that for the first five-year period the new rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the new rules.

Mr. Thomas also has determined that for each year of the first five-year period the new rules are in effect, the public benefit will be the creation of a registration process for homes. The Commission provides a neutral entity for assistance in resolving disputes, which will be less costly than resolving such disputes in a court of law.

Mr. Thomas also has determined that the effect on large, small, or micro-businesses will be minimal due to the requirement that a builder complete a short registration application and pay a small registration fee of $30 per new home or transaction other than a transfer of title to a new home, Property Code, Chapter 426. The anticipated economic costs to persons who are required to comply with the proposed new rules will be the $30 home registration fee.

Comments on the proposed rules may be submitted to Kymberley Maddox, Deputy Executive Director, Texas Residential Construction Commission, P.O. Box 13144, Austin, Texas 78711, via facsimile 512/463-9507, or electronically: comments@trcc.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register*.

The new rules are proposed under Property Code, §426.003, which authorizes the Commission to require information for the registration of homes as required by the Texas Residential Construction Commission Act.

The statutory provisions affected by the proposal are those set forth in the Property Code, §426.003 and House Bill 730, 78th Legislature.

No other statutes, articles, or codes are affected by the proposal.

*§310.10. Registration of Home.*

(a) A builder shall register a new home with the Commission on or before the 15th day of the month following the month in which the transfer of title from the builder to the homeowner occurs.

(b) A builder who enters into a transaction governed by Title 16, Property Code, other than the transfer of title of a new home from the builder to the seller, shall register the home involved in the transaction with the Commission. The registration must be delivered to the Commission via mail, electronic means, or hand delivery, not later than the 15th day after the earlier of:

(1) the date of the agreement that describes the transaction between the homeowner and the builder; or

(2) the commencement of the work on the home.

(c) If the transfer of the title of the home from the builder to the initial homeowner occurred before January 1, 2004, or if the contract for improvements or additions between the builder and homeowner was entered into before January 1, 2004, the person who submits a request under Chapter 428, Property Code, shall register the home as required by this section.

(d) A registration under this section is not complete unless the commission receives the appropriate fee as established in §302.1.

(e) Fees required under this section are payable to the Texas Residential Construction Commission via check, money order, or other method accepted by the Commission.

(f) The Commission may waive the fee required by subsection (d) of this section upon receiving from the builder an application as established under §310.20 and written documentation from the Internal Revenue Service granting the builder tax-exempt status as a Sec. 501(c)(3) organization.

(g) The Commission may impose a penalty under Chapters 418 and 419, Property Code, for failure to register a home as required by Section 426.003, Property Code.

*§310.20. Required Information.*

(a) The registration required under §310.10 shall be made on a form promulgated by the Commission that includes the following information provided by the builder:

(1) Name and contact information of the builder;

(2) Builder's Commission registration number;

(3) Street address of the home;

(4) Zip code of the home;

(5) City and county in which the home is located;

(6) If, a new home, the year the home was built;

(7) Date of the title transfer, if applicable;

(8) If the transaction does not involve a transfer of title, then the date of the commencement of the improvement of the home, if applicable; and

(9) Other information requested by the Commission.

(b) The Commission may waive the receipt of the information required under subsection (a)(2) of this section until March 1, 2004.

(c) The registration may be made via electronic means established by the Commission.

*§310.30. Late Registration.*

A builder who registers with the Commission less than 60 days after the 15-day period established under §310.10 may register by paying a late payment penalty of two times the fee established in §302.1.

*§310.40. Public Information.*

(a) Within 30 days of the receipt of the information required by §310.20, the Commission shall provide to the owner of the home registered with the Commission named in the registration via mail the required public information defined in subsection (b) of this section.

(b) For the purpose of this subsection, "public information" is defined as information detailing:

(1) the functions of the Commission;

(2) the provisions of the limited statutory warranty and building and performance standards;

(3) the state-sponsored inspection and dispute resolution process;

(4) the procedures by which complaints or requests are filed with and resolved by the Commission; and

(5) any other information designated by 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 November 17, 2003.

TRD-200307872
Stephen D. Thomas
Executive Director
Texas Residential Construction Commission
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 463-9524

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# TITLE 16. ECONOMIC REGULATION

## PART 1. RAILROAD COMMISSION OF TEXAS

### CHAPTER 12. COAL MINING REGULATIONS

The Railroad Commission of Texas (Commission) proposes amendments to §§12.3, 12.142, 12.145, 12.187, 12.197, 12.384, 12.385 and 12.552 (relating to Definitions; Operation Plan: Maps and Plans; Reclamation Plan: General Requirements for Surface Mining; Reclamation Plan: General Requirements for Underground Mining; Operation Plan: Maps and Plans; Backfilling and Grading: General Requirements; Backfilling and Grading: General Grading Requirements; and Backfilling and Grading: General Grading Requirements). The Commission proposes the amendments pursuant to its October 21, 2003, vote in open conference to initiate a rulemaking wholly consistent with the petition for rulemaking filed on September 4, 2003, by the Texas Coal Combustion Products Coalition (CCPC). The CCPC comprises representatives from Alcoa, American Electric Power, Texas Genco, LP, San Miguel Electric Cooperative, Inc., Twin Oaks Power, TXU Mining Company LP, and Walnut Creek Mining Company.

The Commission proposes to amend §12.3 to add new paragraphs (33) and (34) defining coal combustion by-products and coal combustion products, respectively. The remaining paragraphs currently designated as paragraphs (33) - (193) will be renumbered (35) - (195).

Coal combustion by-products (CCB) are defined as any material resulting from the combustion of lignite or coal in utility boilers or industrial boilers that is not exempt from the definition of "solid waste" under 30 TAC §335.1(131)(H) (relating to Definitions), or through letter-authorizations related to surface mining and specifically identified in Table 1 in paragraph (33). In the past, the Texas Commission on Environmental Quality (TCEQ) issued letter authorizations for reuse and recycling materials identified as solid waste. When TCEQ amended its definition of solid waste in 30 TAC §335.1(131)(H) to include provisions for reuse and recycling, it discussed letter authorizations in the adoption preamble provided in the May 25, 2001, issue of the *Texas Register* at 26 TexReg 3811-3812. The proposed definition in §12.3(33) goes on to state that coal combustion by-products may be disposed of within the Commission's permitted mining areas so long as the disposal operation complies with applicable TCEQ regulations at 30 TAC §§335.2 - 335.8 (relating to Permit Required; Technical Guidelines; General Prohibitions; Deed Recordation of Waste Disposal; Notification Requirements; Financial Assurance Required; and Closure and Remediation) and 30 TAC Chapter 335, Subchapter R (relating to Waste Classification). The proposed definition provides that where the disposal of coal combustion by-products is proposed to result in approximate original contour before the end of mining operations within the Commission's permitted area, both the disposal operation and all ancillary features (e.g., sediment control structures, roads, and other infrastructure) and activities associated with the operation shall be considered mining-related and the permittee may retain them within the Commission's mining permit for the life of the mining project. The proposed definition further provides that where the disposal of coal combustion by-products is not proposed to result in achieving approximate original contour within the life of the mining project, the disposal area shall be removed from the Commission's mining permit area, but all ancillary features associated with the disposal operations shall be considered mining-related features that the permittee may retain within the Commission's mining permit for the life of the reclamation project until final bond release.

Proposed new §12.3(34) defines coal combustion products (CCP) as fly ash, bottom ash, fluidized bed combustion ash, and flue gas desulfurization solids or sludge resulting from the combustion of lignite or coal in utility boilers or industrial boilers that is exempt from the definition of "solid waste" under 30 TAC §335.1(131)(H) (relating to Definitions) or through letter authorization which TCEQ has issued as referenced at 26 TexReg 3811-3812 and specifically identified in Table 1 in paragraph (33). The proposed definition provides that the utilization of coal combustion products at a Commission-permitted mining area for any of the purposes noted in the definition shall be considered a mining-related activity that the permittee may retain within the Commission's mining permit for the life of the reclamation project until final bond release. The proposed definition further provides that all associated ancillary features and activities (e.g., sediment control structures, roads, and other infrastructure) shall be considered mining-related, and which the permittee may retain within the Commission's mining permit for the life of the reclamation project until final bond release, even if the area of ultimate coal combustion products use is not retained within the mining permit for the same period of time. The proposed definition lists the specific purposes for which coal combustion products may be used, and provides references to other rules in Chapter 12 that pertain to some of the authorized uses for coal combustion products.

The proposed amendments to §12.142(2) add subparagraph (L) to require that each permit application contain maps and plans of the proposed permit and adjacent areas which show the approximate location of any area in which coal combustion by-products have been disposed or will be disposed.

The proposed amendments to §12.145(b) add paragraph (10) to require each reclamation plan for the proposed permit area to include a description of any planned use of coal combustion products designed to achieve approximate original contour, or any proposal to dispose of coal combustion by-products in a manner that achieves approximate original contour. Proposed paragraph (10) states that when additional time to conduct rough backfilling

and grading is requested to allow for the use of coal combustion products or the disposal of coal combustion by-products, the description shall include a planned time frame for those activities, and that the proposed time frame may include extensions of the time frames under §12.384(a) to facilitate the cost-effective utilization of coal combustion products and by-products considering generation rates, transportation issues, market conditions, and other relevant factors. Proposed paragraph (10) also provides that ancillary features such as sediment control structures, roads, and other infrastructure associated with the use of coal combustion products or coal combustion by-products shall be considered mining-related activities which the permittee may retain within the Commission's mining permit for the life of the reclamation project until final bond release. Minor grammatical conforming amendments are also proposed for §12.145(b)(8) and (9).

Proposed amendments to §12.187(b) also add a new paragraph (10) for the same purpose as the proposed amendment to §12.145(b). The only difference is that §12.187(b)(10) includes a reference to §12.551 instead of §12.384.

The proposed amendment to §12.197(2) add new subparagraph (N) to require the inclusion of the approximate location of any area in which coal combustion by-products will be disposed.

The proposed amendments to §12.384(a)(1) - (4) add provisions to reference proposed new §12.145(b)(10) and §12.187(b)(10) as new bases for the Commission to grant additional time and/or distance for rough backfilling and grading.

The proposed amendments to §12.385 and §12.552 add new subsection (f) to each rule to provide that in the case of a reclamation plan in which coal combustion products are designed to achieve approximate original contour or coal combustion by-products are proposed to be disposed of in a manner that achieves approximate original contour, the permittee must submit to the Commission information such as the following as applicable: (1) an affidavit from the generator certifying that any coal combustion products to be used are exempt from the definition of "solid waste" under 30 TAC §335.1(131)(H) (relating to Definitions) or TCEQ letter-authorization as referenced in the table in §12.3(33); (2) an affidavit from the generator certifying that any coal combustion by-product disposal operations are in compliance with 30 TAC §§335.2 - 335.8 (relating to Permit Required; Technical Guidelines; General Prohibitions; Deed Recordation of Waste Disposal; Notification Requirements; Financial Assurance Required; and Closure and Remediation) and 30 TAC Chapter 335, Subchapter R (relating to Waste Classification); (3) documentation (e.g., a signed lease or an affidavit from the landowner) that the landowner has consented to the use of coal combustion products or the disposal of coal combustion by-products on the landowner's property; (4) chemical analyses of a representative sample of any coal combustion products planned to be used or any coal combustion by-products proposed to be disposed; and (5) an estimated time frame for the use of coal combustion products or the disposal of coal combustion by-products as part of the timetable submitted under §12.145(b)(1) or §12.187(b)(1).

Melvin Hodgkiss, Director, Surface Mining and Reclamation Division, has determined that, during each year of the first five years the proposed amendments are in effect, there will be a fiscal impact to state government as a result of their adoption. The additional permit application review requirements applicable to the Commission as a result of these amendments will impose new costs on the Commission. The proposed amendments, particularly in defining both coal combustion waste disposal and reuse to be a surface mining activity, will require additional permit application review requirements estimated to be, on average, 216 person-hours per application. It is estimated that approximately 14 applications will be filed by mining companies during the first five-year period, with as many as six applications filed in the first year. It is estimated that about $50,000 in additional cost will be experienced by the Commission the first year and about $15,000 each additional year thereafter.

Mr. Hodgkiss has determined that during each year of the first five years the proposed amendments are in effect, there will be no increase in revenue to state or local government as a result of administering and enforcing the proposed amendments. Pursuant to the proposed amendments, a potential exists for increased expenses to state government for inspecting, monitoring, and enforcement activities at inactive mine pits which remain open beyond normal reclamation sequences and time tables for the sole purpose of receiving coal combustion products or by-products.

Mr. Hodgkiss has determined that, during each year of the first five years the proposed amendments are in effect, there will be an increase in the cost of regulatory compliance due to additional permit application requirements and monitoring requirements which apply to all mining related activities. Mining permit applicants proposing the placement of coal combustion products in the mine will have to comply with existing regulations that require a determination of the probable hydrologic consequences of the disposal operation. Additional environmental monitoring is also anticipated in some instances.

There will be no fiscal impact to local governments.

Mr. Hodgkiss has concluded that the public benefit from adoption of the proposed amendments may include a potential reduction in power producers' coal combustion waste disposal costs. The CCPC expects the proposed amendments will result in cost savings to mine operators, CCP and CCB generators and, ultimately, Texas electricity consumers.

The Commission has not requested a local employment impact statement pursuant to Texas Government Code, §2002.022.

In accordance with Texas Government Code, §2006.002, Mr. Hodgkiss has determined that there will be no adverse economic effects on small businesses or micro-businesses as a result of the proposed amendment because there are no small businesses or micro-businesses, as those terms are defined in Texas Government Code, §2006.001, holding Commission permits to conduct surface coal mining in Texas.

Comments on the proposed amendments may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at http://www.rrc.state.tx.us/rules/commentform.html; or by electronic mail to rulescoordinator@rrc.state.tx.us and should refer to SMRD Rulemaking Docket No. 2-03. The Commission requests that interested persons file initial comments by December 31, 2003, and initial reply comments by January 15, 2004. The Commission will hold a public comment hearing Tuesday, January 27, 2004, from 1 p.m. to 5 p.m. in Room 1-111 of the William B. Travis Building, 1701 North Congress, Austin, Texas. Oral public comments at the meeting will be recorded. The Commission encourages all interested persons to submit comments

as soon as practicable to foster informed discussion of the proposed amendments. The Commission intends to post all comments on its web site so that interested persons will have access to them. The Commission would like to have as many comments and replies as possible available for discussion at the public hearing. Final reply comments must be filed by February 26, 2004, and should address initial written comments as well as comments offered at the January 27 meeting. The Commission cannot guarantee that comments submitted after this deadline will be considered. For further information, call Melvin Hodgkiss, Director, Surface Mining and Reclamation Division, at (512) 463-6901. The status of Commission rulemakings in progress, and a link to comments on this proposal, will be available at http://www.rrc.state.tx.us/rules/proposed.html.

## SUBCHAPTER A. GENERAL
## DIVISION 1. GENERAL

**16 TAC §12.3**

The Commission proposes the amendments under Texas Natural Resources Code, §134.013, which authorizes the Commission to promulgate rules pertaining to surface coal mining operations.

Statutory authority: Texas Natural Resources Code, §134.013.

Cross-reference to statute: Texas Natural Resources Code, §134.013.

Issued in Austin, Texas, on November 13, 2003.

*§12.3. Definitions.*

The following words and terms, when used in this Chapter (relating to Coal Mining Regulations), shall have the following meanings unless the context clearly indicates otherwise:

(1) - (32) (No change.)

(33) Coal combustion by-products--Any material resulting from the combustion of lignite or coal in utility boilers or industrial boilers that is not exempt from the definition of "solid waste" under 30 TAC §335.1(131)(H) (relating to Definitions), or TCEQ letter-authorization identified in Table 1 of this paragraph. Coal combustion by-products may be disposed of within the Commission's permitted mining areas so long as the disposal operation complies with applicable TCEQ regulations at 30 TAC §§335.2 - 335.8 (relating to Permit Required; Technical Guidelines; General Prohibitions; Deed Recordation of Waste Disposal; Notification Requirements; Financial Assurance Required; and Closure and Remediation) and 30 TAC Chapter 335, Subchapter R (relating to Waste Classification). Where the disposal of coal combustion by-products is proposed to result in approximate original contour before the end of mining operations within the Commission's permitted area, both the disposal operation and all ancillary features and activities associated with the operation shall be considered mining-related and the permittee may retain them within the Commission's mining permit for the life of the mining project. Where the disposal of coal combustion by-products is not proposed to result in achieving approximate original contour within the life of the mining project, the disposal area shall be removed from the Commission's mining permit area, but all ancillary features (e.g. sediment control structures, roads, and other infrastructure) associated with the disposal operations shall be considered mining-related features which the permittee may retain within the Commission's mining permit for the life of the reclamation project until final bond release.
Figure: 16 TAC §12.3(33)

(34) Coal combustion products--Fly ash, bottom ash, fluidized bed combustion ash, and flue gas desulfurization solids or sludge resulting from the combustion of lignite or coal in utility boilers or industrial boilers that is exempt from the definition of "solid waste" under 30 TAC §335.1(131)(H) (relating to Definitions) or TCEQ letter-authorization as referenced in Table 1 of paragraph (33) of this section. The utilization of coal combustion products at a Commission-permitted mining area for any of the purposes noted in this paragraph shall be considered a mining-related activity which the permittee may retain within the Commission's mining permit for the life of the reclamation project until final bond release. All associated ancillary features and activities (e.g. sediment control structures, roads, and other infrastructure) shall be considered a mining-related activity which the permittee may retain within the Commission's mining permit for the life of the reclamation project until final bond release, even if the area of ultimate coal combustion products use is not retained within the mining permit for the same period of time. Coal combustion products may be used for the following purposes:

(A) surfacing material, traction agent, road base material, and structural fill material used to bring roads to necessary grade and for primary or ancillary roads in compliance with §§12.154, 12.198, 12.400, 12.401, 12.569, and 12.570 of this title (relating to Road Systems and Support Facilities; Road Systems and Support Facilities; Roads: General; Primary Roads; Roads: General, and Primary Roads) and any other sections providing requirements relating to road construction and maintenance;

(B) surfacing material, traction agent, road base material, and structural fill material used in the construction of ramps in active pit areas;

(C) fill material to be used to achieve approximate original contour in accordance with §§12.145, 12.187, 12.383 - 12.388, and 12.550 - 12.558 of this title (relating to Reclamation Plan: General Requirements for Surface Mining; Reclamation Plan: General Requirements for Underground Mining; Contemporaneous Reclamation; Backfilling and Grading: General Requirements; Backfilling and Grading: General Grading Requirements; Backfilling and Grading: Covering Coal and Acid- and Toxic-forming Materials; Backfilling and Grading: Thin Overburden; and Backfilling and Grading: Thick Overburden; Contemporaneous Reclamation, Backfilling and Grading: General Requirements; Backfilling and Grading: General Grading Requirements; Backfilling and Grading: Covering Coal and Acid- and Toxic-forming Materials; Stabilization of Surface Areas for Underground Mining; Revegetation: General Requirements; Revegetation: Use of Introduced Species; Revegetation: Timing; and, Revegetation: Mulching and Other Soil Stabilizing Practices), and any other sections providing requirements relating to the use of fill material in achieving approximate original contour;

(D) substitute for aggregate/soil or an ingredient in cement/grout used in on-site construction of such projects as equipment construction pads and repair pads, well pads, and drainage and erosion control structures in compliance with §§12.139, 12.140, 12.148, 12.185, 12.186, and 12.190 of this title (relating to Operation Plan: General Requirements; Operation Plan: Existing Structures; Reclamation Plan: Ponds, Impoundments, Banks, Dams, and Embankments; Operation Plan: General requirements; Operation Plan: Existing Structures; Reclamation Plan: Ponds, Impoundments, Banks, Dams, and Embankments) and any other sections providing requirements relating to on-site construction projects;

(E) soil stabilization additive to reduce the shrink and swell factors as water either evaporates from the soil or infiltrates into the soil in compliance with §§12.145, 12.187, 12.201, 12.338, 12.389 - 12.393, 12.508 and 12.554 - 12.558 of this title (relating to Reclamation Plan: General Requirements for Surface Mining; Reclamation Plan: General Requirements for Underground Mining; Prime

Farmland; Topsoil: Nutrients and Soil Amendments; Stabilization of Surface Areas for Surface Mining; Revegetation: General Requirements; Revegetation: Use of Introduced Species; Revegetation: Timing; Revegetation: Mulching and Other Soil Stabilizing Practices; Topsoil: Nutrients and Soil Amendments; Stabilization of Surface Areas for Underground Mining; Revegetation: General Requirements; Revegetation: Use of Introduced Species; Revegetation: Timing; and, Revegetation: Mulching and Other Soil Stabilizing Practices) and any other sections providing requirements relating to soil stabilization;

(F) ingredient in cement/grout used to seal or manage mine openings, and to plug, case, or manage exploration holes, other bore holes, wells, and other openings within the proposed permit area, in compliance with §§12.331 - 12.333 and §§12.501 - 12.503 of this title (relating to Casing and Sealing of Drilled Holes: General Requirements; Casing and Sealing of Drilled Holes: Temporary; and Casing and Sealing of Drilled Holes: Permanent; Casing and Sealing of Exposed Underground Openings: General Requirements; Casing and Sealing of Underground Openings: Temporary; and Casing and Sealing of Underground Openings: Permanent ) and any other sections providing related requirements;

(G) agricultural soil amendment (including as a substitute for agricultural lime) for a variety of purposes including as additives to soil to adjust the pH balance in compliance with §§12.145, 12.146, 12.187, 12.188, 12.335, 12.338 - 12.341, 12.346, 12.353, 12.505, 12.508 - 12.511, 12.516, and 12.522 of this title (relating to Reclamation Plan: General Requirements for Surface Mining; Reclamation Plan: Protection of Hydrologic Balance; Reclamation Plan: General Requirements for Underground Mining; Reclamation Plan: Protection of Hydrologic Balance; Topsoil: Removal; Topsoil: Nutrients and Soil Amendments; Hydrologic Balance: General Requirements; Hydrologic Balance: Water-Quality Standards and Effluent Limitations; Hydrologic Balance: Diversions; Hydrologic Balance: Acid-Forming and Toxic-Forming Spoil; Hydrologic Balance: Discharge of Water into an Underground Mine; Topsoil: Removal; Topsoil: Nutrients and Soil Amendments; Hydrologic Balance: General requirements; Hydrologic Balance: Water Quality Standards and Effluent Limitations; Hydrologic Balance: Diversions; Hydrologic Balance: Acid-Forming and Toxic-Forming Materials; and Hydrologic Balance: Discharge of Water into an Underground Mine) and any other sections providing requirements relating to the uses of agricultural soil amendments; and

(H) other uses demonstrated to and approved by the Commission.

(35) [~~(33)~~] Coal exploration--The field gathering of:

(A) Surface or subsurface geologic, physical, or chemical data by mapping, trenching, drilling, geophysical, or other techniques necessary to determine the quality and quantity of overburden and coal of an area; or

(B) The gathering of environmental data to establish the conditions of an area before beginning surface coal mining and reclamation operations under the requirements of this chapter.

(36) [~~(34)~~] Coal exploration operation--The substantial disturbance of the surface or subsurface for the purpose of coal exploration.

(37) [~~(35)~~] Coal mine waste--Coal processing waste and underground development waste.

(38) [~~(36)~~] Coal mining operation--The business of developing, producing, preparing or loading bituminous coal, subbituminous coal, anthracite, or lignite, or of reclaiming the areas upon which such activities occur.

(39) [~~(37)~~] Coal preparation--Chemical or physical processing and the cleaning, concentrating, or other processing or preparation of coal.

(40) [~~(38)~~] Coal processing plant or coal preparation plant--A facility where coal is subjected to chemical or physical processing or cleaning, concentrating, or other processing or preparation. It includes facilities associated with coal preparation activities, including, but not limited to, the following: loading facilities; storage and stockpile facilities; sheds, shops and other buildings; water treatment and water storage facilities; settling basins and impoundments; coal processing and other waste disposal areas; and, roads, railroads and other transport facilities. It does not include facilities operated by the final consumer of the coal, such as an electricity generating power plant, when, in the opinion of the Commission, the primary purpose of the facilities is to make the coal ready for conversion into a different energy form and the facilities are located at or near the electricity generating plant or other point of final consumption away from the mine site and outside of the approved mine permit area.

(41) [~~(39)~~] Coal processing waste--Earth materials which are separated and wasted from the product coal during cleaning, concentrating, or other processing or preparation of coal.

(42) [~~(40)~~] Combustible material--Organic material that is capable of burning, either by fire or through oxidation, accompanied by the evolution of heat and a significant temperature rise.

(43) [~~(41)~~] Commission--The Railroad Commission of Texas.

(44) [~~(42)~~] Commission Blaster Certificate--A certificate issued by the Commission to a person determined to be qualified under §§12.700 - 12.710 of this title (relating to Training, Examination, and Certification of Blasters) to be directly responsible for the use of explosives in mining operations regulated by the Commission.

(45) [~~(43)~~] Commissioner--One of the elected or appointed members of the decision making body defined as the Commission.

(46) [~~(44)~~] Community or institutional building--Any structure, other than a public building or an occupied dwelling, which is used primarily for meetings, gatherings or functions of local civic organizations or other community groups; functions as an educational, cultural, historic, religious, scientific, correctional, mental-health or physical health care facility; or is used for public services, including, but not limited to, water supply, power generation or sewage treatment.

(47) [~~(45)~~] Compaction--Increasing the density of a material by reducing the voids between the particles and is generally accomplished by controlled placement and mechanical effort such as from repeated application of wheel, track, or roller loads from heavy equipment.

(48) [~~(46)~~] Complete and accurate application--An application for permit approval or approval for coal exploration where required, which the Commission determines to contain all information required under the Act, this chapter, and the regulatory program that is necessary to make a decision on permit issuance.

(49) [~~(47)~~] Cropland--Land used for the production of adapted crops for harvest, alone or in a rotation with grasses and legumes, and includes row crops, small grain crops, hay crops, nursery crops, orchard crops, and other similar specialty crops, but does not include quick cover crops grown primarily for erosion control.

(50) [~~(48)~~] Cumulative impact area--The area, including the permit area, within which impacts resulting from the proposed operation may interact with the impacts of all anticipated mining on surface-water and ground-water systems. Anticipated mining shall include, at a minimum, the entire projected lives through bond release of:

(A) the proposed operation;

(B) all existing operations;

(C) any operation for which a permit application has been submitted to the Commission; and

(D) all operations required to meet diligent development requirements for leased federal coal for which there is actual mine development information available.

(51) [~~(49)~~] Cumulative measurement period--As used in §§12.25 - 12.33 of this title (relating to Exemption for Coal Extraction Incidental to the Extraction of Other Minerals), the period of time over which both cumulative production and cumulative revenue are measured.

(A) For purposes of determining the beginning of the cumulative measurement period, subject to Commission approval, the operator must select and consistently use one of the following:

*(i)* for mining areas where coal or other minerals were extracted prior to August 3, 1977, the date extraction of coal or other minerals commenced at that mining area or August 3, 1977; or

*(ii)* for mining areas where extraction of coal or other minerals commenced on or after August 3, 1977, the date extraction of coal or other minerals commenced at that mining area, whichever is earlier.

(B) For annual reporting purposes pursuant to §12.33 of this title (relating to Reporting Requirements), the end of the period for which cumulative production and revenue is calculated is either:

*(i)* for mining areas where coal or other minerals were extracted prior to the effective date of §§12.25 - 12.33 of this title, the first anniversary of that date, and each anniversary of that date thereafter; or

*(ii)* for mining areas where extraction of coal or other minerals commenced on or after the effective date of §§12.25 - 12.33 of this title, the last day of the calendar quarter during which coal extraction commenced, and each anniversary of that date thereafter.

(52) [~~(50)~~] Cumulative production--As used in §§12.25 - 12.33 of this title, the total tonnage of coal or other minerals extracted from a mining area during the cumulative measurement period. The inclusion of stockpiled coal and other mineral tonnages in this total is governed by §12.31 of this title (relating to Stockpiling of Minerals).

(53) [~~(51)~~] Cumulative revenue--As used in §§12.25 - 12.33 of this title, the total revenue derived from the sale of coal or other minerals and the fair market value of coal or other minerals transferred or used, but not sold, during the cumulative measurement period.

(54) [~~(52)~~] Department--The U.S. Department of the Interior.

(55) [~~(53)~~] Direct financial interest--Ownership or part ownership by an employee of lands, stocks, bonds, debentures, warrants, partnership shares, or other holdings and also means any other arrangement where the employee may benefit from his or her holding in or salary from coal mining operations. Direct financial interests include employment, pensions, creditor, real property and other financial relationships.

(56) [~~(54)~~] Director--The Director or Acting Director, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, or the Director's representative.

(57) [~~(55)~~] Disturbed area--An area where vegetation, topsoil, or overburden is removed or upon which topsoil, spoil, coal processing waste, underground development waste, or noncoal waste is placed by surface coal mining operations. Those areas are classified as disturbed until reclamation is complete and the performance bond or other assurance of performance required by Subchapter J of this chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations) is released.

(58) [~~(56)~~] Diversion--A channel, embankment, or other manmade structure constructed to divert water from one area to another.

(59) [~~(57)~~] Division--The Surface Mining and Reclamation Division of the Railroad Commission of Texas.

(60) [~~(58)~~] Downslope--The land surface between the projected outcrop of the lowest coal bed being mined along each highwall and a valley floor.

(61) [~~(59)~~] Embankment--An artificial deposit of material that is raised above the natural surface of the land and used to contain, divert, or store water, support roads or railways, or for other similar purposes.

(62) [~~(60)~~] Employee--Shall include:

(A) any person employed by the Commission who performs any function or duty under the Act, including the Commissioners; and

(B) Advisory board or Commission members and consultants who perform any function or duty under the Act, if they perform decision making functions for the Commission under the authority of state law or regulations. However, members of advisory boards or commissions established in accordance with state law or regulations to represent multiple interests are not considered to be employees.

(63) [~~(61)~~] Ephemeral stream--A stream which flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice, and which has a channel bottom that is always above the local water table.

(64) [~~(62)~~] Essential hydrologic functions--The role of an alluvial valley floor in collecting, storing, regulating, and making the natural flow of surface or ground water, or both, usefully available for agricultural activities by reason of the valley floor's topographic position, the landscape and the physical properties of its underlying materials. A combination of these functions provides a water supply during extended periods of low precipitation.

(A) The role of the valley floor in collecting water includes accumulating runoff and discharge from aquifers in sufficient amounts to make the water available at the alluvial valley floor greater than the amount available from direct precipitation.

(B) The role of the alluvial valley floor in storing water involves limiting the rate of discharge of surface water, holding moisture in soils, and holding ground water in porous materials.

(C) The role of the alluvial valley floor in regulating:

*(i)* the natural flow of surface water results from the characteristic configuration of the channel flood plain and adjacent low terraces; and

*(ii)* the natural flow of ground water results from the properties of the aquifers which control inflow and outflow.

(D) The role of the alluvial valley floor in making water usefully available for agricultural activities results from the existence of flood plains and terraces where surface and ground water can be provided in sufficient quantities to support the growth of agriculturally useful plants, from the presence of earth materials suitable for the growth of agriculturally useful plants, from the temporal and physical distribution of water making it accessible to plants throughout the critical phases of the growth cycle either by flood irrigation or by subirrigation, from the natural control of alluvial valley floors in limiting destructive extremes of stream discharge, and from the erosional stability of earth materials suitable for the growth of agriculturally useful plants.

(65) [~~(63)~~] Existing structure--A structure or facility used in connection with or to facilitate surface coal mining and reclamation operations for which construction began prior to approval of the state program.

(66) [~~(64)~~] Experimental practice--The use of alternative surface coal mining and reclamation operation practices for experimental or research purposes.

(67) [~~(65)~~] Explosives--Any chemical compound, mixture, or device by whose decomposition or combustion gas is generated with such rapidity that it can be used for blasting.

(68) [~~(66)~~] Extraction of coal as an incidental part--The extraction of coal which is necessary to enable the construction to be accomplished. For purposes of §§12.21 and 12.22 of this title (relating to Applicability, and to Information to be Maintained On Site), only that coal extracted from within the right-of-way, in the case of a road, railroad, utility line or other such construction, or within the boundaries of the area directly affected by other types of government-financed construction, may be considered incidental to that construction. Extraction of coal outside the right-of-way or boundary of the area directly affected by the construction shall be subject to the requirements of the Act and this chapter.

(69) [~~(67)~~] Federal Act--The "Surface Mining Control and Reclamation Act of 1977" (Pub. L. 95-87).

(70) [~~(68)~~] Federal lands--Any land, including mineral interests, owned by the United States, without regard to how the United States acquired ownership of the lands or which agency manages the lands. It does not include Indian lands.

(71) [~~(69)~~] Federal lands program--A program established by the Secretary, pursuant to Section 523 of the Federal Act, to regulate surface coal mining and reclamation operations on federal lands.

(72) [~~(70)~~] Flood irrigation--With respect to alluvial valley floors, supplying water to plants by natural overflow or the diversion of flows, so that the irrigated surface is largely covered by a sheet of water.

(73) [~~(71)~~] Flyrock--Rock or other blasted material that is propelled from a blast through the air or along the ground.

(74) [~~(72)~~] Fragile lands--Areas containing natural, ecologic, scientific or esthetic resources that could be significantly damaged by surface coal mining operations. Examples of fragile lands include valuable habitats for fish or wildlife, critical habitats for endangered or threatened species of animals or plants, uncommon geologic formations, paleontological sites, National Natural Landmarks, areas where mining may result in flooding, environmental corridors containing a concentration of ecologic and esthetic features, and areas of recreational value due to high environmental quality.

(75) [~~(73)~~] Fugitive dust--That particulate matter not emitted from a duct or stack which becomes airborne due to the forces of wind or surface coal mining and reclamation operations or both. During surface coal mining and reclamation operations, it may include emissions from haul roads; wind erosion of exposed surfaces, storage piles, and spoil piles; reclamation operations; and other activities in which material is either removed, stored, transported, or redistributed.

(76) [~~(74)~~] Fund--The Abandoned Mine Reclamation Fund established pursuant to Section 401 of the Federal Act.

(77) [~~(75)~~] General area--With respect to hydrology, the topographic and ground-water basin surrounding a permit area which is of sufficient size, including areal extent and depth, to include one or more watersheds containing perennial streams and ground-water zones and to allow assessment of the probable cumulative impacts on the quality and quantity of surface- and ground-water systems in the basins.

(78) [~~(76)~~] Government financing agency--A federal, state, county, municipal, or local unit of government, or a department, bureau, agency or office of the unit which, directly or through another unit of government, finances construction.

(79) [~~(77)~~] Government-financed construction--Construction funded 50% or more by funds appropriated from a government financing agency's budget or obtained [~~obtai9.ned~~] from general revenue bonds, but shall not mean government financing agency guarantees, insurance, loans, funds obtained through industrial revenue bonds or their equivalent, or in-kind payments.

(80) [~~(78)~~] Ground cover--The area of ground covered by the combined aerial parts of vegetation and the litter that is produced naturally onsite, expressed as a percentage of the total area of measurement.

(81) [~~(79)~~] Ground water--Subsurface water that fills available openings in rock or soil materials to the extent that they are considered water saturated.

(82) [~~(80)~~] Half-shrub--A perennial plant with a woody base whose annually produced stems die back each year.

(83) [~~(81)~~] Head-of-hollow fill--A fill structure consisting of any material, other than coal processing waste and organic material, placed in the uppermost reaches of a hollow where side slopes of the existing hollow measured at the steepest point are greater than 20 degrees or the average slope of the profile of the hollow from the toe of the fill to the top of the fill is greater than 10 degrees. In fills with less than 250,000 cubic yards of material, associated with contour mining, the top surface of the fill will be at the elevation of the coal seam. In all other head-of-hollow fills, the top surface of the fill, when completed, is at approximately the same elevation as the adjacent ridge line, and no significant area of natural drainage occurs above the fill draining into the fill area.

(84) [~~(82)~~] Highwall--The face of exposed overburden and coal in an open cut of a surface coal mining activity or for entry to underground mining activities.

(85) [~~(83)~~] Historically used for cropland--Refers to:

(A) lands that have been used for cropland for any 5 years or more out of the 10 years immediately preceding the acquisition, including purchase, lease, or option, of the land for the purpose of conducting or allowing through resale, lease or option the conduct of surface coal mining and reclamation operations;

(B) lands that the Commission determines, on the basis of additional cropland history of the surrounding lands and the lands under consideration, that the permit area is clearly cropland but falls

outside the specific 5-years-in-10 criterion, in which case the regulations for prime farmland may be applied to include more years of cropland history only to increase the prime farmland acreage to be preserved; or

(C) lands that would likely have been used as cropland for any 5 out of the last 10 years, immediately preceding such acquisition but for some fact of ownership or control of the land unrelated to the productivity of the land.

(86) [~~(84)~~] Historic lands--Historic, cultural, or scientific resources. Examples of historic lands include archeological sites, National Historic Landmarks, properties listed on or eligible for listing on a state or National Register of Historic Places, properties having religious or cultural significance to Native Americans or religious groups, and properties for which historic designation is pending.

(87) [~~(85)~~] Hydrologic balance--The relationship between the quality and quantity of water inflow to, water outflow from, and water storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the dynamic relationships among precipitation, runoff, evaporation, and changes in ground and surface water storage.

(88) [~~(86)~~] Hydrologic regime--The entire state of water movement in a given area. It is a function of the climate and includes the phenomena by which water first occurs as atmospheric water vapor, passes into a liquid or solid form, falls as precipitation, moves along or into the ground surface, and returns to the atmosphere as vapor by means of evaporation and transpiration.

(89) [~~(87)~~] Imminent danger to the health and safety of the public--The existence of any condition or practice, or any violation of a permit or other requirements of the Act in a surface coal mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same condition or practices giving rise to the peril, would not expose himself to the danger during the time necessary for abatement.

(90) [~~(88)~~] Impoundment--A closed basin, naturally formed or artificially built, which is dammed or excavated for the retention of water, sediment, or waste.

(91) [~~(89)~~] Indian lands--All lands, including mineral interests, within the exterior boundaries of any federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe.

(92) [~~(90)~~] Indian tribe--Any Indian tribe, band, group, or community having a governing body recognized by the Secretary.

(93) [~~(91)~~] Indirect financial interest--The same financial relationships as for direct ownership, but where the employee reaps the benefits of such interests, including interests held by his or her spouse, minor child and other relatives, including in-laws, residing in the employee's home. The employee will not be deemed to have an indirect financial interest if there is no relationship between the employee's functions or duties and the coal mining operation in which the spouse, minor children or other resident relatives hold a financial interest.

(94) [~~(92)~~] In situ processes--Activities conducted on the surface or underground in connection with in-place distillation, retorting, leaching, or other chemical or physical processing of coal. The term includes, but is not limited to, in situ gasification, in situ leaching, slurry mining, solution mining, borehole mining, and fluid recovery mining.

(95) [~~(93)~~] Intermittent stream--A stream or reach of a stream that:

(A) drains a watershed of at least one square mile; or

(B) is below the local water table for at least some part of the year, and obtains its flow from both surface runoff and groundwater discharge.

(96) [~~(94)~~] Irreparable damage to the environment--Any damage to the environment that cannot be or has not been corrected by actions of the applicant.

(97) [~~(95)~~] Knowingly--With respect to §§12.696 - 12.699 of this title (relating to Individual Civil Penalties), that an individual knew or had reason to know in authorizing, ordering, or carrying out an act or omission on the part of a corporate permittee that such act or omission constituted a violation, failure, or refusal.

(98) [~~(96)~~] Land use--Specific uses or management-related activities, rather than the vegetation or cover of the land. Land uses may be identified in combination when joint or seasonal uses occur. Changes of land use or uses from one of the following categories to another shall be considered as a change to an alternative land use which is subject to approval by the Commission.

(A) Cropland. Land used for the production of adapted crops for harvest, alone or in a rotation with grasses and legumes, and includes row crops, small grain crops, hay crops, nursery crops, orchard crops, and other similar specialty crops. Land used for facilities in support of cropland farming operations which is adjacent to or an integral part of these operations is also included for purposes of these land use categories.

(B) Pastureland or land occasionally cut for hay. Land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or occasionally cut and cured for livestock feed. Land used for facilities in support of pastureland or land occasionally cut for hay which is adjacent to or an integral part of these operations is also included.

(C) Grazingland. Includes both grasslands and forest lands where the indigenous vegetation is actively managed for grazing, browsing, or occasional hay production. Land used for facilities in support of ranching operations which are adjacent to or an integral part of these operations is also included.

(D) Forestry. Land used or managed for the long-term production of wood, wood fiber, or wood derived products. Land used for facilities in support of forest harvest and management operations which is adjacent to or an integral part of these operations is also included.

(E) Residential. Includes single- and multiple-family housing, mobile home parks, and other residential lodgings. Land used for facilities in support of residential operations which is adjacent to or an integral part of these operations is also included. Support facilities include, but are not limited to, vehicle parking and open space that directly relate to the residential use.

(F) Industrial/Commercial. Land used for:

*(i)* extraction or transformation of materials for fabrication of products, wholesaling of products, or for long-term storage of products. This includes all heavy and light manufacturing facilities, such as lumber and wood processing, chemical manufacturing, petroleum refining, and fabricated metal products manufacturing. Land used

for facilities in support of these operations which is adjacent to or an integral part of that operation is also included. Support facilities include, but are not limited to, all rail, road, and other transportation facilities; or

*(ii)* retail or trade of goods or services, including hotels, motels, stores, restaurants, and other commercial establishments. Land used for facilities in support of commercial operations which is adjacent to or an integral part of these operations is also included. Support facilities include, but are not limited to, parking, storage or shipping facilities.

(G) Recreation. Land used for public or private leisure-time use, including developed recreation facilities such as parks, camps, and amusement areas, as well as areas for less intensive uses such as hiking, canoeing, and other undeveloped recreational uses.

(H) Fish and wildlife habitat. Land dedicated wholly or partially to the production, protection or management of species of fish or wildlife.

(I) Developed water resources. Includes land used for storing water for beneficial uses, such as stockponds, irrigation, fire protection, flood control, and water supply.

(J) Undeveloped land or no current use or land management. Land that is undeveloped or, if previously developed, land that has been allowed to return naturally to an undeveloped state or has been allowed to return to forest through natural succession.

(99) [~~(97)~~] Materially damage the quantity or quality of water--With respect to alluvial valley floors, changes in the quality or quantity of the water supply to any portion of an alluvial valley floor where such changes are caused by surface coal mining and reclamation operations and result in changes that significantly and adversely affect the composition, diversity, or productivity of vegetation dependent on subirrigation, or which result in changes that would limit the adequacy of the water for flood irrigation of the irrigable land acreage existing prior to mining.

(100) [~~(98)~~] Mining area--As used in §§12.25 - 12.33 of this title, an individual excavation site or pit from which coal, other minerals, and overburden are removed.

(101) [~~(99)~~] Moist bulk density--The weight of soil (oven dry) per unit volume. Volume is measured when the soil is at field moisture capacity (1/3 bar moisture tension). Weight is determined after drying the soil at 105 degrees C.

(102) [~~(100)~~] Monitoring--The collection of environmental data by either continuous or periodic sampling methods.

(103) [~~(101)~~] Mulch--Vegetation residues or other suitable materials that aid in soil stabilization and soil moisture conservation, thus providing micro-climatic conditions suitable for germination and growth.

(104) [~~(102)~~] Natural hazard lands--Geographic areas in which natural conditions exist which pose or, as a result of surface coal mining operations, may pose a threat to the health, safety or welfare of people, property or the environment, including areas subject to landslides, cave-ins, large or encroaching sand dunes, severe wind or soil erosion, frequent flooding, avalanches and areas of unstable geology.

(105) [~~(103)~~] Noxious plants--Species that have been included on official Texas list of noxious plants.

(106) [~~(104)~~] Occupied dwelling--Any building that is currently being used on a regular or temporary basis for human habitation.

(107) [~~(105)~~] Office--The Office of Surface Mining Reclamation and Enforcement, within the U.S. Department of the Interior, established under Title II of the Federal Act.

(108) [~~(106)~~] Operator--Any person engaged in coal mining who removes or intends to remove more than 250 tons of coal from the earth or from coal refuse piles by mining within 12 consecutive calendar months in any one location.

(109) [~~(107)~~] Other minerals--As used in §§12.25 - 12.33 of this title, any commercially valuable substance mined for its mineral value, excluding coal, topsoil, waste, and fill material.

(110) [~~(108)~~] Other treatment facility--Any chemical treatments, such as flocculation or neutralization, or mechanical structures, such as clarifiers or precipitators, that have a point source discharge and are utilized:

(A) to prevent additional contributions of dissolved or suspended solids to streamflow or runoff outside the permit area; or

(B) to comply with all applicable state and federal water-quality laws and regulations.

(111) [~~(109)~~] Outslope--The face of the spoil or embankment sloping downward from the highest elevation to the toe.

(112) [~~(110)~~] Overburden--Material of any nature, consolidated or unconsolidated, that overlies a coal deposit, excluding topsoil.

(113) [~~(111)~~] Owned or controlled and owns or controls--Any one or a combination of the following relationships:

(A) being a permittee of a surface coal mining operation;

(B) based on instrument of ownership or voting securities, owning of record in excess of 50% of an entity;

(C) having any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations; or

(D) the following relationships are presumed to constitute ownership or control unless a person can demonstrate that the person subject to the presumption does not, in fact, have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted:

*(i)* being an officer or director of an entity;

*(ii)* being the operator of a surface coal mining operation;

*(iii)* having the ability to commit the financial or real property assets or working resources of an entity;

*(iv)* being a general partner in a partnership;

*(v)* based on the instruments of ownership or the voting securities of a corporate entity, owning of record 10% through 50% of the entity; or

*(vi)* owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation.

(114) [~~(112)~~] Owner of record or ownership interest of record--The owner and address as shown in the tax records of the Texas Assessor-Collector of taxes for the county where the property is located.

(115) [~~(113)~~] Perennial stream--A stream or part of a stream that flows continuously during all of the calendar year as a result of ground-water discharge or surface runoff. The term does not include intermittent stream or ephemeral stream.

(116) [~~(114)~~] Performance bond--A surety bond, collateral bond or self-bond or a combination thereof, by which a permittee assures faithful performance of all the requirements of the Act, this chapter, and the requirements of the permit and reclamation plan.

(117) [~~(115)~~] Performing any function or duty under this Act--Those decisions or actions, which if performed or not performed by an employee, affect the programs under the Act.

(118) [~~(116)~~] Permanent diversion--A diversion remaining after surface coal mining and reclamation operations are completed which has been approved for retention by the Commission and other appropriate state and federal agencies.

(119) [~~(117)~~] Permanent impoundment--An impoundment which is approved by the Commission and, if required, by other state and federal agencies for retention as part of the postmining land use.

(120) [~~(118)~~] Permit--A permit to conduct surface coal mining and reclamation operations issued by the Commission.

(121) [~~(119)~~] Permit area--The area of land and water indicated on the map submitted by the operator with his application, as approved by the Commission, which area shall be covered by the operator's bond as required by §§134.121 - 134.127 of the Act and shall be readily identifiable by appropriate markers on the site. This area shall include, at a minimum, all areas which are or will be affected by the surface coal mining and reclamation operations during the term of the permit.

(122) [~~(120)~~] Permittee--A person holding or required by the Act or this chapter to hold a permit to conduct surface or underground coal mining and reclamation operations issued by the Commission.

(123) [~~(121)~~] Person--An individual, partnership, society, joint stock company, firm, company, corporation, business organization, governmental agency, or any organization or association of citizens.

(124) [~~(122)~~] Person having an interest which is or may be adversely affected or person with a valid legal interest--Shall include any person:

(A) who uses any resources of economic, recreational, esthetic, or environmental value that may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Commission; or

(B) whose property is or may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Commission.

(125) [~~(123)~~] Precipitation event--A quantity of water resulting from drizzle, rain, snow, sleet, or hail in a limited period of time. It may be expressed in terms of recurrence interval. As used in these regulations, precipitation event also includes that quantity of water emanating from snow cover as snowmelt in a limited period of time.

(126) [~~(124)~~] Previously mined area--Land affected by surface coal mining operations prior to August 3, 1977, that has not been reclaimed to the standards of this Chapter.

(127) [~~(125)~~] Prime farmland--Those lands which are defined by the Secretary of Agriculture in 7 CFR 657 and which have been historically used for cropland.

(128) [~~(126)~~] Principal shareholder--Any person who is the record or beneficial owner of 10% or more of any class of voting stock.

(129) [~~(127)~~] Probable cumulative impacts--The expected total qualitative, and quantitative, direct and indirect effects of mining and reclamation activities on the hydrologic regime.

(130) [~~(128)~~] Probable hydrologic consequences--The projected result of proposed surface coal mining and reclamation operations which may reasonably be expected to change the quantity or quality of the surface- or ground-water flow, timing and pattern; the stream-channel conditions; and the aquatic habitat on the permit area and other affected areas.

(131) [~~(129)~~] Professional specialist--A person whose training, experience, and professional certification or licensing are acceptable to the Commission for the limited purpose of performing certain specified duties under this chapter.

(132) [~~(130)~~] Prohibited financial interest--Any direct or indirect financial interest in any coal mining operation.

(133) [~~(131)~~] Property to be mined--Both the surface estates and mineral estates within the permit area and the area covered by underground workings.

(134) [~~(132)~~] Public building--Any structure that is owned or leased, and principally used by a governmental agency for public business or meetings.

(135) [~~(133)~~] Publicly-owned park--A public park that is owned by a federal, state or local governmental entity.

(136) [~~(134)~~] Public office--A facility under the direction and control of a governmental entity which is open to public access on a regular basis during reasonable business hours.

(137) [~~(135)~~] Public park--An area or portion of an area dedicated or designated by any federal, state, or local agency primarily for public recreational use, whether or not such use is limited to certain times or days, including any land leased, reserved, or held open to the public because of that use.

(138) [~~(136)~~] Public road--Any thoroughfare open to the public for passage of vehicles.

(139) [~~(137)~~] Qualified jurisdiction--A state or federal mining regulatory authority that has a blaster certification program approved by the U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement, in accordance with the Federal Act.

(140) [~~(138)~~] Qualified laboratory--A designated public agency, private firm, institution, or analytical laboratory that can provide the required determination of probable hydrologic consequences or statement of results of test borings or core samplings or other services as specified at §§12.236 and 12.240 of this title (relating to Program Services, and Data Requirements), and that meets the standards of §12.241 of this title (relating to Qualified Laboratories).

(141) [~~(139)~~] Rangeland--Land on which the natural potential (climax) plant cover is principally native grasses, forbs, and shrubs valuable for forage. This land includes natural grass lands and savannahs, such as prairies, and juniper savannahs, such as brushlands. Except for brush control, management is primarily achieved by regulating the intensity of grazing and season of use.

(142) [~~(140)~~] Recharge capacity--The ability of the soils and underlying materials to allow precipitation and runoff to infiltrate and reach the zone of saturation.

(143) [~~(141)~~] Reciprocity--The conditional recognition by the Commission of a blaster certificate issued by another qualified jurisdiction.

(144) [~~(142)~~] Reclamation--Those actions taken to restore mined land as required by this chapter to a postmining land use approved by the Commission.

(145) [~~(143)~~] Recurrence interval--The interval of time in which a precipitation event is expected to occur once, on the average. For example, the 10-year, 24-hour precipitation event would be that 24-hour precipitation event expected to occur on the average once in 10 years.

(146) [~~(144)~~] Reference area--A land unit maintained under appropriate management for the purpose of measuring vegetation ground cover, productivity and plant species diversity that are produced naturally or by crop production methods approved by the Commission. Reference areas must be representative of geology, soil, slope, and vegetation in the permit area.

(147) [~~(145)~~] Regional Director--A Regional Director of the Office or a Regional Director's representative.

(148) [~~(146)~~] Registered professional engineer--A person who is duly licensed by the Texas State Board of Registration for Professional Engineers to engage in the practice of engineering in this state.

(149) [~~(147)~~] Renewable resource lands--Aquifers and areas for the recharge of aquifers and other underground waters, areas for agricultural or silvicultural production of food and fiber, and grazing lands. With respect to Subchapter F of this chapter (relating to Lands Unsuitable for Mining), geographic areas which contribute significantly to the long-range productivity of water supply or of food or fiber products, such lands to include aquifers and aquifer recharge areas.

(150) [~~(148)~~] Replacement of water supply--With respect to protected water supplies contaminated, diminished, or interrupted by coal mining operations, provision of water supply on both a temporary and permanent basis equivalent to premining quantity and quality. Replacement includes provision of an equivalent water-delivery system and payment of operation and maintenance costs in excess of customary and reasonable delivery costs for premining water supplies.

(A) Upon agreement by the permittee and the water-supply owner, the obligation to pay such operation and maintenance costs may be satisfied by a one-time payment in an amount which covers the present worth of the increased annual operation and maintenance costs for a period agreed to by the permittee and the water-supply owner.

(B) If the affected water supply was not needed for the land use in existence at the time of loss, contamination, or diminution, and if the supply is not needed to achieve the postmining land use, replacement requirements may be satisfied by demonstrating that a suitable alternative water source is available and could feasibly be developed. If the latter approach is selected, written concurrence must be obtained from the water-supply owner.

(151) [~~(149)~~] Road--A surface right-of-way for purposes of travel by land vehicles used in surface coal mining and reclamation operations or coal exploration. A road consists of the entire area within the right-of-way, including the roadbed, shoulders, parking and side areas, approaches, structures, ditches, and surface. The term includes access and haulroads constructed, used, reconstructed, improved, or maintained for use in surface coal mining and reclamation operations or coal exploration, including use by coal-hauling vehicles to and from transfer, processing, or storage areas. The term does not include ramps and routes of travel within the immediate mining area or within spoil or coal mine waste disposal areas.

(152) [~~(150)~~] Safety factor--The ratio of the available shear strength to the developed shear stress, or the ratio of the sum of the resisting forces to the sum of the loading or driving forces, as determined by accepted engineering practices.

(153) [~~(151)~~] Secretary--The Secretary of the U.S. Department of the Interior, or the Secretary's representative.

(154) [~~(152)~~] Sedimentation pond--A primary sediment control structure designed, constructed and maintained in accordance with §12.344 or §12.514 of this title (relating to Hydrologic Balance: Siltation Structures) and including but not limited to a barrier, dam, or excavated depression which slows down water runoff to allow sediment to settle out. A sedimentation pond shall not include secondary sedimentation control structures, such as straw dikes, riprap, check dams, mulches, dugouts and other measures that reduce overland flow velocity, reduce runoff volume or trap sediment to the extent that such secondary sedimentation structures drain to a sedimentation pond.

(155) [~~(153)~~] Significant forest cover--An existing plant community consisting predominantly of trees and other woody vegetation.

(156) [~~(154)~~] Significant, imminent environmental harm to land, air or water resources--Determined in the following context:

(A) An environmental harm is an adverse impact on land, air, or water resources, which resources include, but are not limited to, plant and animal life.

(B) An environmental harm is imminent, if a condition, practice, or violation exists which:

*(i)* is causing such harm; or

*(ii)* may reasonably be expected to cause such harm at any time before the end of the reasonable abatement time that would be set under §134.162 of the Act.

(C) An environmental harm is significant if that harm is appreciable and not immediately reparable.

(157) [~~(155)~~] Significant recreational, timber, economic, or other values incompatible with surface coal mining operations--Those significant values which could be damaged by, and are not capable of existing together with, surface coal mining operations because of the undesirable effects mining would have on those values, either on the area included in the permit application or on other affected areas. Those values to be evaluated for their significance include:

(A) recreation, including hiking, boating, camping, skiing or other related outdoor activities;

(B) timber management and silviculture;

(C) agriculture, aquaculture or production of other natural, processed or manufactured products which enter commerce; and

(D) scenic, historic, archaeologic, esthetic, fish, wildlife, plants or cultural interests.

(158) [~~(156)~~] Siltation structure--A sedimentation pond, a series of sedimentation ponds, or other treatment facility.

(159) [~~(157)~~] Slope--Average inclination of a surface, measured from the horizontal, generally expressed as the ratio of a unit of horizontal distance to a given number of units of vertical distance (e.g., 5h:1v). It may also be expressed as a percent or in degrees.

(160) [~~(158)~~] Soil horizons--Contrasting layers of soil parallel or nearly parallel to the land surface. Soil horizons are differentiated on the basis of field characteristics and laboratory data. The four master soil horizons are:

(A) A horizon. The uppermost mineral layer, often called the surface soil. It is the part of the soil in which organic matter is most abundant, and leaching of soluble or suspended particles is typically the greatest;

(B) E horizon. The layer commonly near the surface below an A horizon and above a B horizon. An E horizon is most commonly differentiated from an overlying A horizon by lighter color and generally has measurably less organic matter than the A horizon. An E horizon is most commonly differentiated from an underlying B horizon in the same sequum by color of higher value or lower chroma, by coarser texture, or by a combination of these properties;

(C) B horizon. The layer that typically is immediately beneath the E horizon and often called the subsoil. This middle layer commonly contains more clay, iron, or aluminum than the A, E, or C horizons; and

(D) C horizon. The deepest layer of soil profile. It consists of loose material or weathered rock that is relatively unaffected by biologic activity.

(161) [~~(159)~~] Soil survey--A field and other investigation, resulting in a map showing the geographic distribution of different kinds of soils and an accompanying report that describes, classifies, and interprets such soils for use. Soil surveys must meet the standards of the National Cooperative Soil Survey.

(162) [~~(160)~~] Spoil--Overburden that has been removed during surface coal mining operations.

(163) [~~(161)~~] Stabilize--To control movement of soil, spoil piles, or areas of disturbed earth by modifying the geometry of the mass, or by otherwise modifying physical or chemical properties, such as by providing a protective surface coating.

(164) [~~(162)~~] Steep slope--Any slope of more than 20 degrees or such lesser slope as may be designated by the Commission after consideration of soil, climate, and other characteristics of a region or state.

(165) [~~(163)~~] Subirrigation--With respect to alluvial valley floors, the supplying of water to plants from underneath or from a semisaturated or saturated subsurface zone where water is available for use by vegetation. Subirrigation may be identified by:

(A) diurnal fluctuation of the water table, due to the differences in nighttime and daytime evapotranspiration rates;

(B) increasing soil moisture from a portion of the root zone down to the saturated zone, due to capillary action;

(C) mottling of the soils in the root zones;

(D) existence of an important part of the root zone within the capillary fringe or water table of an alluvial aquifer; or

(E) an increase in streamflow or a rise in ground-water levels, shortly after the first killing frost on the valley floor.

(166) [~~(164)~~] Substantial legal and financial commitments in a surface coal mining operation--Significant investments that have been made on the basis of a long-term coal contract in power plants, railroads, coal-handling, preparation, extraction or storage facilities and other capital-intensive activities. An example would be an existing mine, not actually producing coal, but in a substantial stage of development prior to production. Costs of acquiring the coal in place or the right to mine it without an existing mine, as described in the above example, alone are not sufficient to constitute substantial legal and financial commitments.

(167) [~~(165)~~] Substantially disturb--For purposes of coal exploration, to significantly impact land, air or water resources by such activities as blasting; mechanical excavation; drilling or altering coal or water exploratory holes or wells; removal of vegetation, topsoil, or overburden; construction of roads or other access routes; placement of structures, excavated earth, or waste material on the natural surface of land; or by other such activities; or to remove more than 250 tons of coal.

(168) [~~(166)~~] Successor in interest--Any person who succeeds to rights granted under a permit, by transfer, assignment, or sale of those rights.

(169) [~~(167)~~] Surface coal mining and reclamation operations--Surface coal mining operations and all activities necessary or incidental to the reclamation of such operations. This term includes the term surface coal mining operations.

(170) [~~(168)~~] Surface coal mining operations--Includes:

(A) activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of §134.015 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining; the use of explosives and blasting; in situ distillation or retorting; leaching or other chemical or physical processing; the cleaning, concentrating, or other processing or preparation of coal; and the loading of coal for interstate commerce at or near the mine-site. Provided, however, that such activities do not include the extraction of coal incidental to the extraction of other minerals, where coal does not exceed 16 2/3% of the tonnage of minerals removed annually from all sites operated by a person on contiguous tracts of land for purposes of commercial use or sale, or coal exploration subject to §134.014 and §134.031(d) of the Act; and provided further, that excavation for the purpose of obtaining coal includes extraction of coal from coal refuse piles; and

(B) areas upon which the activities described in subparagraph (A) of this definition occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities and for haulage and excavation, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are site structures, facilities, or other property or material on the surface, resulting from or incident to those activities.

(171) [~~(169)~~] Surface mining activities--Those surface coal mining and reclamation operations incident to the extraction of coal from the earth by removing the materials over a coal seam, before recovering the coal, by auger coal mining, or by recovery of coal from a deposit that is not in its original geologic location.

(172) [~~(170)~~] Surface operations and impacts incident to an underground coal mine--All activities involved in or related to underground coal mining which are either conducted on the surface of the land, produce changes in the land surface or disturb the surface, air or water resources of the area, including all activities listed in

§134.004(19) of the Act and the definition of surface coal mining operations contained in this section.

(173) [~~(171)~~] Suspended solids or nonfilterable residue--Expressed as milligrams per liter, organic or inorganic materials carried or held in suspension in water which are retained by a standard glass fiber filter in the procedure outlined by the U.S. Environmental Protection Agency regulations for wastewater and analyses (40 CFR 136).

(174) [~~(172)~~] Temporary diversion--A diversion of a stream or overland flow which is used during coal exploration or surface coal mining and reclamation operations and not approved by the Commission to remain after reclamation as part of the approved postmining land use.

(175) [~~(173)~~] Temporary impoundment--An impoundment used during surface coal mining and reclamation operations, but not approved by the Commission to remain as part of the approved postmining land use.

(176) [~~(174)~~] Thick overburden--More than sufficient spoil and other waste materials available from the entire permit area to restore the disturbed area to its approximate original contour. More than sufficient spoil and other waste materials occur where the overburden thickness times the swell factor exceeds the combined thickness of the overburden and coal bed prior to removing the coal, so that after backfilling and grading the surface configuration of the reclaimed area would not:

(A) closely resemble the surface configuration of the land prior to mining; or

(B) blend into and complement the drainage pattern of the surrounding terrain.

(177) [~~(175)~~] Thin overburden--Insufficient spoil and other waste materials available from the entire permit area to restore the disturbed area to its approximate original contour. Insufficient spoil and other waste materials occur where the overburden thickness times the swell factor, plus the thickness of other available waste materials, is less than the combined thickness of the overburden and coal bed prior to removing the coal, so that after backfilling and grading the surface configuration of the reclaimed area would not:

(A) closely resemble the surface configuration of the land prior to mining; or

(B) blend into and complement the drainage pattern of the surrounding terrain.

(178) [~~(176)~~] Ton--2,000 pounds avoirdupois (0.90718 metric ton).

(179) [~~(177)~~] Topsoil--The A and E soil-horizon layers of the four master soil horizons.

(180) [~~(178)~~] Toxic-forming materials--Earth materials or wastes which, if acted upon by air, water, weathering, or microbiological processes, are likely to produce chemical or physical conditions in soils or water that are detrimental to biota or uses of water.

(181) [~~(179)~~] Toxic mine drainage--Water that is discharged from active or abandoned mines or other areas affected by coal exploration or surface coal mining and reclamation operations, which contains a substance that through chemical action or physical effects is likely to kill, injure, or impair biota commonly present in the area that might be exposed to it.

(182) [~~(180)~~] Transfer, assignment, or sale of rights--A change in ownership or other effective control over the right to conduct surface coal mining operations under a permit issued by the Commission.

(183) [~~(181)~~] Unconsolidated streamlaid deposits holding streams--With respect to alluvial valley floors, all flood plains and terraces located in the lower portions of topographic valleys which contain perennial or other streams with channels that are greater than 3 feet in bankfull width and greater than 0.5 feet in bankfull depth.

(184) [~~(182)~~] Underground development waste--Waste rock mixtures of coal, shale, claystone, siltstone, sandstone, limestone, or related materials that are excavated, moved, and disposed of during development and preparation of areas incident to underground mining activities.

(185) [~~(183)~~] Underground mining activities--Includes:

(A) surface operations incident to underground extraction of coal or in situ processing, such as construction, use, maintenance, and reclamation of roads, above-ground repair areas, storage areas, processing areas, shipping areas, areas upon which are sited support facilities including hoist and ventilating ducts, areas utilized for the disposal and storage of waste, and areas on which materials incident to underground mining operations are placed; and

(B) underground operations such as underground construction, operation, and reclamation of shafts, adits, underground support facilities, in situ processing, and underground mining, hauling, storage, and blasting.

(186) [~~(184)~~] Undeveloped rangeland--For purposes of alluvial valley floors, lands where the use is not specifically controlled and managed.

(187) [~~(185)~~] Unwarranted failure to comply--The failure of the permittee to prevent the occurrence of any violation of the permit or any requirement of the Act, due to the indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation of such permit or the Act, due to indifference, lack of diligence, or lack of reasonable care.

(188) [~~(186)~~] Upland areas--With respect to alluvial valley floors, those geomorphic features located outside the floodplain and terrace complex, such as isolated higher terraces, alluvial fans, pediment surfaces, landslide deposits, and surfaces covered with residuum, mud flows or debris flows, as well as highland areas underlain by bedrock and covered by residual weathered material or debris deposited by sheetwash, rillwash, or windblown material.

(189) [~~(187)~~] Valid existing rights--A set of circumstances under which a person may, subject to Commission approval, conduct surface coal mining operations on lands where §134.022 of the Act and §12.71(a) of this title (relating to Areas Where Surface Coal Mining Operations are Prohibited or Limited) would otherwise prohibit such operations. Possession of valid existing rights only confers an exception from the prohibitions of §12.71(a) of this title and §134.022 of the Act. A person seeking to exercise valid existing rights must comply with all other pertinent requirements of the Act and this chapter.

(A) Property rights demonstration. Except as provided in subparagraph (C) of this paragraph, a person claiming valid existing rights must demonstrate that a legally binding conveyance, lease, deed, contract, or other document vests that person, or a predecessor in interest, with the right to conduct the type of surface coal mining operations intended. This right must exist at the time that the land came under the protection of §12.71(a) of this title or §134.022 of the Act. Applicable state statutory or case law will govern interpretation of documents

relied upon to establish property rights. If no applicable state law exists, custom and generally accepted usage at the time and place that the documents came into existence will govern their interpretation.

(B) Additional demonstrations. Except as provided in subparagraph (C) of this paragraph, a person claiming valid existing rights must also demonstrate compliance with one of the following standards:

*(i)* Good faith/all permits standard. All permits and other authorizations required to conduct surface coal mining operations have been obtained, or a good faith effort to obtain all necessary permits and authorizations has been made, before the land came under the protection of §12.71(a) of this title or §134.022 of the Act. At a minimum, an application must have been submitted for any permit required under Subchapter G of this chapter (relating to Surface Coal Mining and Reclamation Operations, Permits, and Coal Exploration Procedure Systems); or

*(ii)* Needed for and adjacent standard. The land is needed for and immediately adjacent to a surface coal mining operation for which all permits and other authorizations required to conduct surface coal mining operations have been obtained, or a good faith attempt to obtain all permits and authorizations has been made, before the land came under the protection of §12.71(a) of this title or §134.022 of the Act. To meet this standard, a person must demonstrate that prohibiting expansion of the operation onto that land would unfairly impact the viability of the operation as originally planned before the land came under the protection of §12.71(a) of this title or §134.022 of the Act. Except for operations in existence before August 3, 1977, or for which a good faith effort to obtain all necessary permits have been made before August 3, 1977, this standard does not apply to lands already under the protection of §12.71(a) of this title or §134.022 of the Act when the Commission approved the permit for the original operation or when the good faith effort to obtain all necessary permits for the original operation was made. In evaluating whether a person meets this standard, the Commission may consider factors such as:

*(I)* the extent to which coal supply contracts or other legal and business commitments that predate the time that the land came under the protection of §12.71(a) of this title or §134.022 of the Act depend upon use of that land for surface coal mining operations;

*(II)* the extent to which plans used to obtain financing for the operation before the land came under the protection of §12.71(a) of this title or §134.022 of the Act rely upon use of that land for surface coal mining operations;

*(III)* the extent to which investments in the operation before the land came under the protection of §12.71(a) of this title or §134.022 of the Act rely upon use of that land for surface coal mining operations; and

*(IV)* whether the land lies within the area identified on the life-of-mine map submitted under §12.136(3) of this title (relating to Maps: General Requirements) or §12.182(3) of this title (relating to Maps: General Requirements) before the land came under the protection of §12.71(a) of this title.

(C) Roads. A person who claims valid existing rights to use or construct a road across the surface of lands protected by §12.71(a) of this title or §134.022 of the Act must demonstrate that one or more of the following circumstances exist if the road is included within the definition of "surface coal mining operations" in this section:

*(i)* the road existed when the land upon which it is located came under the protection of §12.71(a) of this title or §134.022 of the Act, and the person has a legal right to use the road for surface coal mining operations;

*(ii)* a properly recorded right of way or easement for a road in that location existed when the land came under the protection of §12.71(a) of this title or §134.022 of the Act, and, under the document creating the right of way or easement, and under subsequent conveyances, the person has a legal right to use or construct a road across the right of way or easement for surface coal mining operations;

*(iii)* a valid permit for use or construction of a road in that location for surface coal mining operations existed when the land came under the protection of §12.71(a) of this title or §134.022 of the Act; or

*(iv)* valid existing rights exist under subparagraphs (A) and (B) of this paragraph.

(190) [~~(188)~~] Valley fill--A fill structure consisting of any material other than coal waste and organic material that is placed in a valley where side slopes of the existing valley measured at the steepest point are greater than 20 degrees or the average slope of the profile of the valley from the toe of the fill to the top of the fill is greater than 10 degrees.

(191) [~~(189)~~] Violation, failure, or refusal--With respect to §§12.696 - 12.699 of this title, a violation of or a failure or refusal to comply with any order of the Commission including, but not limited to, a condition of a permit, notice of violation, failure-to-abate cessation order, imminent harm cessation order, order to show cause why a permit should not be suspended or revoked, and order in connection with a civil action for relief, except an order incorporated in a decision issued under §134.175 of the Act.

(192) [~~(190)~~] Violation notice--Any written notification from a governmental entity of a violation of law, whether by letter, memorandum, legal or administrative pleading, or other written communication.

(193) [~~(191)~~] Water table--The upper surface of a zone of saturation, where the body of ground water is not confined by an overlying impermeable zone.

(194) [~~(192)~~] Willfully--With respect to §§12.696 - 12.699 of this title, that an individual acted:

(A) either intentionally, voluntarily, or consciously; and

(B) with intentional disregard or plain indifference to legal requirements in authorizing, ordering, or carrying out a corporate permittee's action or omission that constituted a violation, failure, or refusal.

(195) [~~(193)~~] Willful violation--An act or omission which violates the Act, state, or federal laws or regulations, or any permit condition required by the Act or this chapter, committed by a person who intends the result which actually occurs.

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 November 13, 2003.

TRD-200307792
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 475-1295

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## SUBCHAPTER G. SURFACE COAL MINING AND RECLAMATION OPERATIONS, PERMITS, AND COAL EXPLORATION PROCEDURES SYSTEMS

## DIVISION 6. SURFACE MINING PERMIT APPLICATIONS--MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

**16 TAC §12.142, §12.145**

The Commission proposes the amendments under Texas Natural Resources Code, §134.013, which authorizes the Commission to promulgate rules pertaining to surface coal mining operations.

Statutory authority: Texas Natural Resources Code, §134.013.

Cross-reference to statute: Texas Natural Resources Code, §134.013.

Issued in Austin, Texas, on November 13, 2003.

*§12.142. Operation Plan: Maps and Plans.*

Each application shall contain maps and plans of the proposed permit and adjacent areas as follows:

(1) (No change.)

(2) The following shall be shown for the proposed permit area unless specifically required for the permit and adjacent area by the requirements of this section:

(A) - (I) (No change.)

(J) each explosive storage-and-handling facility; [~~and~~]

(K) location of each sedimentation pond, permanent water impoundment, coal processing waste bank, and coal processing waste dam and embankment, in accordance with §12.148 of this title (relating to Reclamation Plan: Ponds, Impoundments, Banks, Dams, and Embankments), and fill area for the disposal of excess spoil in accordance with §12.153 of this title (relating to Disposal of Excess Spoil); and[~~.~~]

(L) the approximate location of any area in which coal combustion by-products will be disposed.

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

*§12.145. Reclamation Plan: General Requirements for Surface Mining.*

(a) (No change.)

(b) Each plan shall contain the following information for the proposed permit area:

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

(8) a description, including appropriate cross sections and maps, of the measures to be used to seal or manage mine openings, and to plug, case, or manage exploration holes, other bore holes, wells, and other openings within the proposed permit area, in accordance with §§12.331 - 12.333 of this title (relating to Casing and Sealing of Drilled Holes: General Requirements; [~~, to~~] Casing and Sealing of Drilled Holes: Temporary; and [~~, and to~~] Casing and Sealing of Drilled Holes: Permanent); [~~and~~]

(9) a description of steps to be taken to comply with the requirements of the Clean Air Act (42 U.S.C. 7401 et seq.), the Clean Water Act (33 U.S.C. 1251 et seq.), and other applicable air- and water-quality laws and regulations and health and safety standards; and[~~.~~]

(10) a description of any planned use of coal combustion products designed to achieve approximate original contour or any proposal to dispose of coal combustion by-products in a manner that achieves approximate original contour. When additional time to conduct rough backfilling and grading is requested to allow for the use of coal combustion products or the disposal of coal combustion by-products, the description shall include a planned time frame for those activities. The proposed time frame may include extensions of the time frames under §12.384(a) of this title (relating to Backfilling and Grading: General Requirements) to facilitate the cost-effective utilization of coal combustion products and by-products considering generation rates, transportation issues, market conditions, and other relevant factors. Ancillary features (e.g., sediment control structures, roads, and other infrastructure) associated with the use of coal combustion products or coal combustion by-products shall be considered mining-related activities which the permittee may retain within the Commission's mining permit for the life of the reclamation project until final bond release.

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 November 13, 2003.

TRD-200307804
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 475-1295

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## DIVISION 9. UNDERGROUND MINING PERMIT APPLICATIONS--MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

**16 TAC §12.187, §12.197**

The Commission proposes the amendments under Texas Natural Resources Code, §134.013, which authorizes the Commission to promulgate rules pertaining to surface coal mining operations.

Statutory authority: Texas Natural Resources Code, §134.013.

Cross-reference to statute: Texas Natural Resources Code, §134.013.

Issued in Austin, Texas, on November 13, 2003.

*§12.187. Reclamation Plan: General Requirements for Underground Mining.*

(a) (No change.)

(b) Each plan shall contain the following information for the proposed permit area:

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

(8) a description, including appropriate cross sections and maps, of the measures to be used to seal or manage mine openings,

and to plug, case or manage exploration holes, other bore holes, wells and other openings within the proposed permit area, in accordance with §§12.501-12.503 of this title (relating to Casing and Sealing of Exposed Underground Openings: General Requirements; [~~, to~~] Casing and Sealing of Underground Openings: Temporary; and [~~, and to~~] Casing and Sealing of Underground Openings: Permanent); [~~and~~]

(9) a description of steps to be taken to comply with the requirements of the Clean Air Act (42 U.S.C. 7401 et seq.), the Clean Water Act (33 U.S.C. 1251 et seq.), and other applicable air- and water-quality laws and regulations and health and safety standards; and[~~.~~]

(10) a description of any planned use of coal combustion products designed to achieve approximate original contour or any proposal to dispose of coal combustion by-products in a manner that achieves approximate original contour. When additional time to conduct rough backfilling and grading is requested to allow for the use of coal combustion products or the disposal of coal combustion by-products, the description shall include a planned time frame for those activities. The proposed time frame may include extensions of the time frames under §12.551(a) of this title (relating to Backfilling and Grading: General Requirements) to facilitate the cost-effective utilization of coal combustion products and by-products considering generation rates, transportation issues, market conditions, and other relevant factors. Ancillary features (e.g., sediment control structures, roads, and other infrastructure) associated with the use of coal combustion products or coal combustion by-products shall be considered mining-related activities which the permittee may retain within the Commission's mining permit for the life of the reclamation project until final bond release.

*§12.197. Operation Plan: Maps and Plans.*

Each application shall contain maps, plans, and cross sections of the proposed permit and adjacent areas as follows:

(1) (No change.)

(2) the following shall be shown for the proposed permit area unless specifically required for the permit and adjacent area by the requirements of this section:

(A) - (K) (No change.)

(L) location of each water and subsidence monitoring point; [~~and~~]

(M) location of each facility that will remain on the proposed permit area as a permanent feature, after the completion of underground mining activities; and[~~.~~]

(N) the approximate location of any area in which coal combustion by-products will be disposed.

(3) - (4) (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 November 13, 2003.

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Mary Ross McDonald
Managing Director
Railroad Commission of Texas
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For further information, please call: (512) 475-1295

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# SUBCHAPTER K. PERMANENT PROGRAM PERFORMANCE STANDARDS
# DIVISION 2. PERMANENT PROGRAM PERFORMANCE STANDARDS--SURFACE MINING ACTIVITIES

**16 TAC §12.384, §12.385**

The Commission proposes the amendments under Texas Natural Resources Code, §134.013, which authorizes the Commission to promulgate rules pertaining to surface coal mining operations.

Statutory authority: Texas Natural Resources Code, §134.013.

Cross-reference to statute: Texas Natural Resources Code, §134.013.

Issued in Austin, Texas, on November 13, 2003.

*§12.384. Backfilling and Grading: General Requirements.*

(a) Timing of backfilling and grading.

(1) Contour mining. Rough backfilling and grading shall follow coal removal by not more than 60 days or 1,500 linear feet. The Commission may grant additional time for rough backfilling and grading if the permittee can demonstrate, through a detailed written analysis under §12.145(b)(3) or (b)(10) of this title (relating to Reclamation Plan: General Requirements for Surface Mining), that additional time is necessary.

(2) Open pit mining with thin overburden. Rough backfilling and grading shall occur in accordance with the time schedule approved by the Commission, on the basis of the materials submitted under §12.145(b)(3) or (b)(10) of this title (relating to Reclamation Plan: General Requirements for Surface Mining), which shall specifically establish in stated increments the period between removal of coal and completion of backfilling and grading.

(3) Area strip mining (cyclic excavation). Rough backfilling and grading shall be completed within 180 days following coal removal and shall not be more than four spoil ridges behind the pit being worked, the spoil from the active pit being considered the first ridge. The Commission may grant additional time and/or distance for rough backfilling and grading if the permittee can demonstrate, through a detailed written analysis under §12.145(b)(3) or (b)(10) of this title (relating to Reclamation Plan: General Requirements for Surface Mining), that additional time and/or distance is necessary.

(4) Area strip mining (continuous excavation). Rough backfilling and grading shall occur in accordance with the time schedule approved by the Commission, on the basis of a detailed written analysis by the permittee under §12.145(b)(3) or (b)(10) of this title (relating to Reclamation Plan: General Requirements for Surface Mining), and any additional information which the Commission may require.

(b) (No change.)

*§12.385. Backfilling and Grading: General Grading Requirements.*

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

(f) In the case of a reclamation plan in which coal combustion products are designed to achieve approximate original contour or coal combustion by-products are proposed to be disposed of in a manner that achieves approximate original contour, the following information shall be submitted as applicable:

(1) an affidavit from the generator certifying that any coal combustion products to be used are exempt from the definition of "solid waste" under 30 TAC §335.1(131)(H) (relating to Definitions) or TCEQ letter-authorization as referenced in Table 1 of §12.3(33) of this title (relating to Definitions);

(2) an affidavit from the generator certifying that any coal combustion by-product disposal operations are in compliance with 30 TAC §§335.2 - 335.8 (relating to Permit Required; Technical Guidelines; General Prohibitions; Deed Recordation of Waste Disposal; Notification Requirements; Financial Assurance Required; and Closure and Remediation) and 30 TAC Chapter 335, Subchapter R (relating to Waste Classification).

(3) documentation (e.g., a signed lease or an affidavit from the landowner) that the landowner has consented to the use of coal combustion products or the disposal of coal combustion by-products on the landowner's property;

(4) chemical analyses of a representative sample of any coal combustion products planned to be used or any coal combustion by-products proposed to be disposed; and

(5) an estimated time frame for the use of coal combustion products or the disposal of coal combustion by-products as part of the timetable submitted under §12.145(b)(1) of this title (relating to Reclamation Plan: General Requirements for Surface Mining).

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.

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Mary Ross McDonald
Managing Director
Railroad Commission of Texas
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For further information, please call: (512) 475-1295

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## DIVISION 3. PERMANENT PROGRAM PERFORMANCE STANDARDS--UNDERGROUND MINING ACTIVITIES

**16 TAC §12.552**

The Commission proposes the amendments under Texas Natural Resources Code, §134.013, which authorizes the Commission to promulgate rules pertaining to surface coal mining operations.

Statutory authority: Texas Natural Resources Code, §134.013.

Cross-reference to statute: Texas Natural Resources Code, §134.013.

Issued in Austin, Texas, on November 13, 2003.

*§12.552. Backfilling and Grading: General Grading Requirements.*

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

(f) In the case of a reclamation plan in which coal combustion products are designed to achieve approximate original contour or coal combustion by-products are proposed to be disposed of in a manner that achieves approximate original contour, the following information shall be submitted as applicable:

(1) an affidavit from the generator certifying that any coal combustion products to be used are exempt from the definition of "solid waste" under 30 TAC §335.1(131)(H) (relating to Definitions) or TCEQ letter-authorization as referenced in Table 1 of §12.3(33) of this title (relating to Definitions);

(2) an affidavit from the generator certifying that any coal combustion by-product disposal operations are in compliance with 30 TAC §§335.2 - 335.8 (relating to Permit Required; Technical Guidelines; General Prohibitions; Deed Recordation of Waste Disposal; Notification Requirements; Financial Assurance Required; and Closure and Remediation) and 30 TAC Chapter 335, Subchapter R (relating to Waste Classification);

(3) documentation (e.g., a signed lease or an affidavit from the landowner) that the landowner has consented to the use of coal combustion products or the disposal of coal combustion by-products on the landowner's property;

(4) chemical analyses of a representative sample of any coal combustion products planned to be used or any coal combustion by-products proposed to be disposed; and

(5) an estimated time frame for the use of coal combustion products or the disposal of coal combustion by-products as part of the timetable submitted under §12.187(b)(1) of this title (relating to Reclamation Plan: General Requirements for Underground Mining).

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.

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Mary Ross McDonald
Managing Director
Railroad Commission of Texas
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For further information, please call: (512) 475-1295

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## CHAPTER 20. ADMINISTRATION
## SUBCHAPTER A. CONTRACTS AND PURCHASES
## DIVISION 2. RESOLUTION OF CONTRACT CLAIMS

**16 TAC §§20.21, 20.23, 20.25, 20.27, 20.29, 20.31, 20.33, 20.35, 20.37, 20.39, 20.41, 20.43, 20.45, 20.47, 20.49, 20.51, 20.53, 20.55, 20.57, 20.59, 20.61, 20.63, 20.65, 20.67, 20.69, 20.71, 20.73, 20.75**

The Railroad Commission of Texas proposes new §§20.21, 20.23, 20.25, 20.27, 20.29, 20.31, 20.33, 20.35, 20.37, 20.39, 20.41, 20.43, 20.45, 20.47, 20.49, 20.51, 20.53, 20.55, 20.57, 20.59, 20.61, 20.63, 20.65, 20.67, 20.69, 20.71, 20.73, and 20.75, relating to the resolution of contract claims, in Chapter 20, Subchapter A, new Division 2. Subchapter A, Contracts and Purchases, will be reorganized so that existing rules, §§20.1, 20.5, and 20.10 (relating to Procedures for Filing and Resolving

Protests of a Contract Solicitation or Award, Historically Underutilized Businesses, and Bid Opening and Tabulation) will be in new Division 1, to be entitled Bid Protests, HUBs, and Bid Openings. The proposed new §§20.21, 20.23, 20.25, 20.27, 20.29, 20.31, 20.33, 20.35, 20.37, 20.39, 20.41, 20.43, 20.45, 20.47, 20.49, 20.51, 20.53, 20.55, 20.57, 20.59, 20.61, 20.63, 20.65, 20.67, 20.69, 20.71, 20.73, and 20.75 will be in new Division 2, to be entitled Resolution of Contract Claims.

The Commission proposes the new sections as required by Texas Government Code, §2260.052(c), as added by Acts 1999, 76th Legislature, Chapter 1352, §9, effective August 30, 1999. The new sections are based on the model rules promulgated by the Office of the Attorney General pursuant to Texas Government Code, §2260.052(c), with minimal changes, including adaptation to the Commission's administrative structure, the elimination of subchapters, and the elimination of dates which are already past with regard to the applicability of pending contracts.

Proposed new §20.21, relating to Informal Procedures Encouraged, provides that the parties to a contract are encouraged to resolve any disagreement concerning the contract in the ordinary course of contract administration using informal procedures.

Proposed new §20.23, relating to Applicability, provides that new Division 2, Subchapter A, does not apply to an action of the Commission for which a contractor is entitled to a specific remedy pursuant to state or federal constitution or statute, and provides that new Division 2 does not apply to contracts: (1) between the Commission and the federal government or its agencies, another state or another nation; (2) between the Commission and a local governmental body, or a political subdivision of another state; (3) between a subcontractor and a contractor, when neither the contractor or the subcontractor is the Commission; (4) within the exclusive jurisdiction of state or local regulatory bodies other than the Commission; or (5) within the exclusive jurisdiction of federal courts or regulatory bodies.

Proposed new §20.25, relating to Definitions, defines words and terms that are used in the new Division 2. The word "Director" means the Executive Director of the Commission. The word "division" means Division 2 of Title 16, Part 1, Chapter 20, Subchapter A, of the Texas Administrative Code. The term "SOAH" means the State Office of Administrative Hearings.

Proposed new §20.27, relating to Prerequisites to Suit, provides that the procedures contained in this division are exclusive and required prerequisites to suit under Texas Civil Practice and Remedies Code, Chapter 107, and Texas Government Code, Chapter 2260.

Proposed new §20.29, relating to Sovereign Immunity, provides that this division does not waive the Commission's sovereign immunity to suit or liability.

Proposed new §20.31, relating to Notice of Claim of Breach of Contract, provides that a contractor may not assert a claim of breach of contract by the Commission under Texas Government Code, Chapter 2260, unless the contractor delivers a written and signed notice of the claim to the Director by hand, certified mail return receipt requested, or other verifiable delivery service; the notice states in detail: (1) the nature of the alleged breach of contract, including the date of the event that the contractor asserts as the basis of the claim and each contractual provision allegedly breached; (2) a description of damages that resulted from the alleged breach, including the amount and method used to calculate those damages; and (3) the legal theory of recovery, i.e., breach of contract, including the causal relationship between the alleged breach and the damages claimed; and the contractor delivers the notice no later than 180 days after the date of the event the contractor asserts as the basis of the claim. In addition, the contractor may submit supporting documentation or other tangible evidence to facilitate the Commission's evaluation of the contractor's claim.

Proposed new §20.33, relating to Commission Counterclaim, specifies the Commission's duties when asserting a counterclaim under Texas Government Code, Chapter 2260, including notice of the counterclaim, form and contents of the counterclaim, supporting documentation or other tangible evidence to facilitate the contractor's evaluation of the Commission's counterclaim, and the deadline for the delivery of the notice of counterclaim to the contractor. Proposed new subsection (e) states that nothing in the proposed rules precludes the Commission from initiating a lawsuit for damages against the contractor in a court of competent jurisdiction.

Proposed new §20.35, relating to Request for Voluntary Disclosure of Additional Information, provides that the parties may request to review and copy information in the possession or custody or subject to the control of the other party that pertains to the contract claimed to have been breached. The rule applies to all information in the parties' possession regardless of the manner in which it is recorded, including, without limitation, paper and electronic media. Proposed new subsection (c) provides that the contractor and the Commission may seek additional information directly from third parties, including, without limitation, the contractor's subcontractors; new subsection (d) provides that nothing in proposed §20.35 requires any party to disclose the requested information or any matter that is privileged under Texas law; and new subsection (e) provides that material submitted pursuant to this section and claimed to be confidential by the contractor or a third party must be handled pursuant to the requirements of Texas Government Code, Chapter 552.

Proposed new §20.37, relating to Duty to Negotiate, requires the parties to negotiate in accordance with the timetable set forth in proposed §20.39 (relating to Timetable) to attempt to resolve all claims and counterclaims. No party is obligated to settle with the other party as a result of the negotiation.

Proposed new §20.39, relating to Timetable, outlines the Commission's duties following receipt of a contractor's notice of claim; requires the parties to begin negotiations within a reasonable period of time; provides that the Commission may delay negotiations until after the 180th day after the date of the event giving rise to the claim of breach of contract in certain cases; and provides that the parties may conduct negotiations according to an agreed schedule as long as they begin negotiations no later than the deadlines set forth in proposed §20.39(b) or proposed §20.39(c), whichever is applicable. Proposed new subsection (e) states when the parties must complete the negotiations that are required by this division as a prerequisite to a contractor's request for a contested case hearing; proposed new subsection (f) allows the parties to agree in writing to extend the time for negotiations. The parties may enter into a series of written extension agreements that comply with the requirements of this section.

Proposed new §20.39(g) specifies how the contractor may request a contested case hearing before SOAH, pursuant to proposed §20.49 (relating to Request for Contested Case Hearing), and proposed new subsection (h) provides that the parties may agree to mediate the dispute at any time before the 270th day after the Commission receives the contractor's notice of claim or

before the expiration of any extensions agreed to by the parties pursuant to proposed §20.39(f).

Proposed new §20.39(i) provides that nothing in the section is intended to prevent the parties from agreeing to commence negotiations earlier than the deadlines established in proposed subsections (b) and (c), or from continuing or resuming negotiations after the contractor requests a contested case hearing before SOAH.

Proposed new §20.41, relating to Conduct of Negotiation, specifies the provisions for conducting negotiations, including the assistance of one or more neutral third parties, the exchange of relevant documents that support the respective claims, defenses, counterclaims, or positions, and that the material submitted pursuant to this subsection and claimed to be confidential by the contractor must be handled pursuant to the requirements of Texas Government Code, Chapter 552.

New §20.43, relating to Settlement Approval Procedures, requires the parties to disclose their settlement approval procedures prior to, or at the beginning of, negotiations. The parties should select negotiators who are knowledgeable about the subject matter of the dispute, who are in a position to reach agreement, and who can credibly recommend approval of an agreement.

Proposed new §20.45, relating to Settlement Agreement, states the requirements for a settlement agreement.

Proposed new §20.47, relating to Costs of Negotiation, provides that unless the parties agree otherwise, each party is responsible for its own costs incurred in connection with a negotiation, including, without limitation, the costs of consultant's fees and expert's fees.

Proposed new §20.49, relating to Request for Contested Case Hearing, specifies the provisions for a request for a contested case hearing. If a claim for breach of contract is not resolved in accordance with the rules in this division on or before the 270th day after the Commission receives the notice of claim, and after the expiration of any extension agreed to by the parties pursuant to proposed §20.39(f) (relating to Timetable), the contractor may file a request with the Commission for a contested case hearing before SOAH. The request must be in writing and state the legal and factual basis for the claim, and be delivered to the Director within 30 days after the 270th day or the expiration of any written extension agreed to pursuant to proposed §20.39(f) (relating to Timetable). The Commission must forward the contractor's request for a contested case hearing to SOAH within a reasonable period of time, not to exceed 30 days, after receipt of the request. The parties may agree to submit the case to SOAH before the 270th day after the notice of claim is received by the Commission if they have achieved a partial resolution of the claim or if they have reached an impasse in the negotiations and proceeding to a contested case hearing would serve the interests of justice.

Proposed new §20.51, relating to Mediation Timetable, specifies a timetable for mediation between the contractor and the Commission, including after the case has been referred to SOAH. SOAH may also refer a contested case for mediation pursuant to its own rules and guidelines, whether or not the parties have previously attempted mediation.

Proposed new §20.53, relating to Conduct of Mediation, prohibits a mediator from imposing his or her own judgment on the issues for that of the parties, requires the mediator to be acceptable to both parties, and provides that the mediation is subject to the provisions of Texas Government Code, Chapter 2009, the Governmental Dispute Resolution Act. The parties should select representatives who are knowledgeable about the dispute, who are in a position to reach agreement, or who can credibly recommend approval of an agreement.

Proposed new §20.55, relating to Agreement to Mediate, provides that the parties may agree to use mediation as an option to resolve a breach of contract claim at the time they enter into the contract and include a contractual provision to do so, and requires that any agreement to mediate include consideration of certain factors.

Proposed new §20.57, relating to Qualifications and Immunity of the Mediator, lists the qualifications that the mediator must possess, and provides that the parties must decide whether, and to what extent, knowledge of the subject matter and experience in mediation would be advisable for the mediator. Proposed new subsection (c) requires the parties to obtain from the prospective mediator a written statement of the ethical standards that will govern the mediation.

Proposed new §20.59, relating to Confidentiality of Mediation and Final Settlement Agreement, provides that mediation conducted under the proposed new rules in this division is confidential in accordance with Texas Government Code, §2009.054, and that the confidentiality of a final settlement agreement to which the Commission is a signatory that is reached as a result of the mediation is governed by Texas Government Code, Chapter 552.

Proposed new §20.61, relating to Costs of Mediation, provides that unless the contractor and Commission agree otherwise, each party is responsible for its own costs incurred in connection with the mediation. The costs of the mediation process itself must be divided equally between the parties. Each party is responsible for its own attorney's fees.

Proposed new §20.63, relating to Settlement Approval Procedures, provides that each party must disclose its settlement approval procedures to the other party prior to the mediation. The parties should select representatives who are knowledgeable about the subject matter of the dispute, who are in a position to reach agreement, and who can credibly recommend approval of an agreement.

Proposed new §20.65, relating to Initial Settlement Agreement, provides that the representatives of the parties must sign any settlement agreement reached during the mediation and that the agreement must describe each party's required procedures in connection with final approval of the agreement.

Proposed new §20.67, relating to Final Settlement Agreement, provides that a final settlement agreement reached during, or as a result of mediation, that resolves an entire claim or any designated and severable portion of a claim must be in writing and signed by representatives of the contractor and the Commission who have authority to bind each respective party; must identify any issue not resolved; and specifies that a partial settlement does not waive a party's rights under Texas Government Code, Chapter 2260.

Proposed new §20.69, relating to Referral to the State Office of Administrative Hearings, provides that if mediation does not resolve all issues raised by the claim, the contractor may request that the claim be referred to SOAH by the Commission.

Proposed new §20.71, relating to Assisted Negotiation Processes, provides that parties to a contract dispute under Texas Government Code, Chapter 2260 may agree, either

contractually or when a dispute arises, to use the assisted negotiation (alternative dispute resolution) processes described in proposed §20.75 (relating to Assisted Negotiation Methods) in addition to negotiation and mediation to resolve their dispute.

Proposed new §20.73, relating to Use of Assisted Negotiation Processes, lists the factors that may help parties decide whether one or more assisted negotiation processes could help resolve their dispute.

Proposed new §20.75, relating to Assisted Negotiation Methods, specifies the assisted negotiation methods. If the parties agree to use an assisted negotiation procedure, they shall agree in writing to a detailed description of the process prior to engaging in the process.

Rebecca Trevino, Director, Administration Division, has determined that for each year of the first five years the proposed new rules will be in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administrating the new rules. Due to the minimal number of contract disputes that involve the Commission and the informal dispute resolution process preferred by the Commission and its contractors to resolve the infrequent disputes to date, the Commission does not expect to incur any additional expense in resolving contract disputes because current Commission resources, e.g., offices and staff, will be adequate for the Commission to meet its undertaking pursuant to the proposed new rules. There are no fiscal implications for local governments because they are exempt from the proposed new rules as specified in §20.23(3) (relating to Applicability).

Ms. Trevino has also determined that for each year of the first five years the new rules are proposed to be in effect, the public benefit will be the resolution of contract disputes through informal methods that are significantly less expensive and less time-consuming than litigation or administrative contested case hearings. The proposed rules encourage the parties to use informal dispute resolution methods; cooperate in providing necessary documents to each other; disclose the identity of their witnesses and the substance of their witnesses' testimony; and work together to define issues and to arrive at a mutually satisfactory resolution of disputes.

Tom Morgan, Purchasing Manager, Administrative Division, has determined that the proposed rules will have no adverse effect on small businesses contracting with the Commission. In the past, sovereign immunity prevented breach of contract claims against the state and the only process available to the public for resolution of such a claim was to seek and obtain legislative consent to sue. If such consent was obtained, the claimant then had to bear the cost of litigation. Texas Government Code, Chapter 2260, and these proposed rules will provide an alternate process by which claims for breach of contract and counterclaims can be asserted and resolved. The proposed rules do not require the use of any particular negotiation mode or method. Proposed §20.37 (relating to Duty to Negotiate) requires only that the parties negotiate to resolve their dispute, and proposed §20.41 (relating to Conduct of Negotiation) provides that the mode or method of negotiation may be as simple or as complex as the parties decide. Proposed §20.47 (relating to Costs of Negotiation) specifies that absent an agreement to the contrary, the parties are responsible for costs they incur in a negotiation or other dispute resolution process. The parties are free to select, under the proposed rules, informal methods of dispute resolution involving little, if any, cost. While the proposed rules may, in the event of a contract dispute, impose economic costs on businesses contracting with the commission, all the proposed methods of negotiation, including the most complex methods described in the proposed rules, are less expensive and less time-consuming than litigation. The proposed rules will provide a cost savings to all businesses, regardless of size, that contract with the Commission.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.html; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments for 30 days after publication in the *Texas Register*. The Commission encourages all persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Ms. Trevino at (512) 463-7214. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.html.

The Commission proposes the new sections under Texas Government Code, §2260.052(c), which requires the Commission to develop rules to govern the negotiation and mediation of contract claims.

Statutory authority: Texas Government Code, §2260.052(c).

Cross reference to statute: Texas Government Code, §2260.052(c).

Issued in Austin, Texas on November 13, 2003.

*§20.21. Informal Procedures Encouraged.*

The parties to a contract are encouraged to resolve any disagreement concerning the contract in the ordinary course of contract administration using informal procedures.

*§20.23. Applicability.*

The rules in this division do not apply to:

(1) an action of the Commission for which a contractor is entitled to a specific remedy pursuant to state or federal constitution or statute;

(2) contracts between the Commission and the federal government or its agencies, another state or another nation;

(3) contracts between the Commission and a local governmental body, or a political subdivision of another state;

(4) contracts between a subcontractor and a contractor, when neither the contractor or the subcontractor is the Commission;

(5) contracts within the exclusive jurisdiction of state or local regulatory bodies other than the Commission; or

(6) contracts within the exclusive jurisdiction of federal courts or regulatory bodies.

*§20.25. Definitions.*

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

(1) Commission--The Railroad Commission of Texas.

(2) Contractor--An independent contractor who has entered into a contract directly with the Commission. The term does not include:

(A) a contractor's subcontractor, officer, employee, agent or other person furnishing goods or services to the contractor;

(B) an employee of a unit of state government; or

(C) a student at an institution of higher education.

(3) Day--A calendar day. If an act is required to occur on a day falling on a Saturday, Sunday, or holiday, the first working day which is not one of these days shall be counted as the required day for the purpose of this division.

(4) Director--The Executive Director of the Commission.

(5) Division--Division 2 of Title 16, Part 1, Chapter 20, Subchapter A, of the Texas Administrative Code.

(6) Mediation--mediation is assigned the meaning set forth in Texas Civil Practice and Remedies Code, §154.023(a), or any successor statute.

(7) Parties--A contractor and the Commission after entering into a contract in connection with which a claim of breach of contract has been filed under this division.

(8) SOAH--The State Office of Administrative Hearings.

*§20.27. Prerequisites to Suit.*

The procedures contained in the rules in this division are exclusive and required prerequisites to suit under Texas Civil Practice and Remedies Code, Chapter 107, and Texas Government Code, Chapter 2260.

*§20.29. Sovereign Immunity.*

The rules in this division do not waive the Commission's sovereign immunity to suit or liability.

*§20.31. Notice of Claim of Breach of Contract.*

(a) A contractor may not assert a claim of breach of contract by the Commission under Texas Government Code, Chapter 2260, unless the contractor complies with each of the following requirements:

(1) the contractor shall deliver a written notice of the claim to the Director by hand, certified mail return receipt requested, or other verifiable delivery service;

(2) the contractor or the contractor's authorized representative shall sign the notice.

(3) The written notice shall state in detail:

(A) the nature of the alleged breach of contract, including the date of the event that the contractor asserts as the basis of the claim and each contractual provision allegedly breached;

(B) a description of damages that resulted from the alleged breach, including the amount and method used to calculate those damages; and

(C) the legal theory of recovery, i.e., breach of contract, including the causal relationship between the alleged breach and the damages claimed; and

(4) The contractor shall deliver the notice of claim no later than 180 days after the date of the event that the contractor asserts as the basis of the claim.

(b) In addition to the mandatory contents of the notice of claim as required by this section, the contractor may submit supporting documentation or other tangible evidence to facilitate the Commission's evaluation of the contractor's claim.

*§20.33. Commission Counterclaim.*

(a) If the Commission asserts a counterclaim under Texas Government Code, Chapter 2260, it shall deliver a written notice of the claim to the contractor, or representative of the contractor who signed the notice of claim of breach of contract, by hand, certified mail return receipt requested, or other verifiable delivery service.

(b) The notice of counterclaim shall state in detail:

(1) the nature of the counterclaim;

(2) a description of damages or offsets sought, including the amount and method used to calculate those damages or offsets; and

(3) the legal theory supporting the counterclaim.

(c) In addition to the mandatory contents of the notice of counterclaim required by subsection (b) of this section, the Commission may submit supporting documentation or other tangible evidence to facilitate the contractor's evaluation of the Commission's counterclaim.

(d) The Commission shall deliver the notice of counterclaim to the contractor no later than 90 days after the Commission's receipt of the contractor's notice of claim.

(e) Nothing in the rules in this division precludes the Commission from initiating a lawsuit for damages against the contractor in a court of competent jurisdiction.

*§20.35. Request for Voluntary Disclosure of Additional Information.*

(a) Upon the filing of a claim or counterclaim, either party may request to review and copy information in the possession or custody or subject to the control of the other party that pertains to the contract claimed to have been breached, including, without limitation:

(1) accounting records;

(2) correspondence, including, without limitation, correspondence between the Commission and outside consultants it utilized in administering the contract, and correspondence between the contractor and its subcontractors, materialmen, and vendors;

(3) schedules;

(4) internal memoranda;

(5) documents created by the contractor in preparing its offer to the Commission and documents created by the Commission in analyzing the offers it received in response to a solicitation.

(b) Subsection (a) of this section applies to all information in the parties' possession regardless of the manner in which it is recorded, including, without limitation, paper and electronic media.

(c) The contractor and the Commission may seek additional information directly from third parties, including, without limitation, the contractor's subcontractors.

(d) This section does not require a party, or a third party, to disclose requested information that is privileged under Texas law.

(e) If the contractor, or a third party, claims that any material submitted to the Commission pursuant to this section is confidential, the Commission shall treat such material pursuant to the requirements of Texas Government Code, Chapter 552.

*§20.37. Duty to Negotiate.*

The parties shall negotiate in accordance with the timetable set forth in §20.39 of this division (relating to Timetable) to attempt to resolve all claims and counterclaims. No party shall be obligated to settle with another party as a result of the negotiation.

*§20.39. Timetable.*

(a) Following receipt of a contractor's notice of claim, the Director or, if designated in the contract, another officer or employee of the Commission, shall review the contractor's claim and the Commission's counterclaim, if any, and initiate negotiations with the contractor to attempt to resolve the claim and counterclaim.

(b) Except as noted in subsection (c) of this section, the parties shall begin negotiations within a reasonable period of time, not to exceed 60 days following the later of:

(1) the date of termination of the contract;

(2) the completion date in the contract; or

(3) the date the Commission receives the contractor's notice of claim.

(c) The Commission may delay negotiations until after the 180th day after the date of the event giving rise to the claim of breach of contract by:

(1) delivering written notice to the contractor that the commencement of negotiations will be delayed; and

(2) delivering written notice to the contractor when the Commission is ready to begin negotiations.

(d) The parties may conduct negotiations according to an agreed schedule as long as they begin negotiations no later than the deadlines set forth in subsection (b) or (c) of this section, whichever is applicable.

(e) Except as noted in subsection (f) of this section, the parties shall complete the negotiations that are required by the rules in this division as a prerequisite to a contractor's request for a contested case hearing no later than 270 days after the Commission receives the contractor's notice of claim.

(f) The parties may agree in writing to extend the time for negotiations on or before the 270th day after the Commission receives the contractor's notice of claim. The agreement shall provide for the extension of the statutory negotiation period until a date certain. The Director, or his designee, shall sign the agreement on behalf of the Commission. The contractor, or a representative of the contractor with authority to bind the contractor, shall also sign the agreement. The parties may enter into a series of written extension agreements that comply with the requirements of this section.

(g) The contractor may request a contested case hearing before SOAH pursuant to §20.49 of this division (relating to Request for Contested Case Hearing) after the 270th day after the Commission receives the contractor's notice of claim, and the expiration of any extensions agreed to under subsection (f) of this section.

(h) The parties may agree to mediate the dispute at any time before the 270th day after the Commission receives the contractor's notice of claim or before the expiration of any extensions agreed to by the parties pursuant to subsection (f) of this section.

(i) Nothing in this section is intended to prevent the parties from agreeing to commence negotiations earlier than the deadlines established in subsections (b) and (c) of this section, or from continuing or resuming negotiations after the contractor requests a contested case hearing before SOAH.

*§20.41. Conduct of Negotiation.*

(a) The parties may conduct a negotiation under the rules of this division by any method, technique, or procedure authorized under the contract or agreed upon by the parties, including, without limitation, negotiation in person, by telephone, by correspondence, by video conference, or by any other method that permits the parties to identify their respective positions, discuss their respective differences, confer with their respective advisers, exchange offers of settlement, and settle.

(b) The parties may conduct negotiations with the assistance of one or more neutral third parties. If the parties choose to mediate their dispute, the mediation shall be conducted in accordance with the rules in this division. Parties may choose an assisted negotiation process other than mediation, including without limitation, processes described in this division.

(c) To facilitate the meaningful evaluation and negotiation of the claim and any counterclaim, the parties may exchange relevant documents that support their respective claims, defenses, counterclaims, or positions.

(d) Material submitted pursuant to this section and claimed to be confidential by the contractor shall be handled pursuant to the requirements of Texas Government Code, Chapter 552.

*§20.43. Settlement Approval Procedures.*

The parties shall disclose their settlement approval procedures prior to, or at the beginning of, negotiations. The parties should select negotiators who are knowledgeable about the subject matter of the dispute, who are in a position to reach agreement, and who can credibly recommend approval of an agreement.

*§20.45. Settlement Agreement.*

(a) A settlement agreement may resolve an entire claim or any designated and severable portion of a claim.

(b) To be enforceable, a settlement agreement shall be in writing and signed by representatives of the contractor and the Commission who have authority to bind each respective party.

(c) A partial settlement shall not waive either party's rights under Texas Government Code, Chapter 2260, as to the parts of the claims or counterclaims that are not resolved.

*§20.47. Costs of Negotiation.*

Unless the parties agree otherwise, each party shall be responsible for its own costs incurred in connection with a negotiation, including, without limitation, the costs of consultant's fees and expert's fees.

*§20.49. Request for Contested Case Hearing.*

(a) If the parties do not resolve a claim for breach of contract in its entirety through negotiation, mediation, or other assisted negotiation process in accordance with the rules in this division on or before the 270th day after the Commission receives the notice of claim, and after the expiration of any extension agreed to by the parties pursuant to §20.39(f) of this division (relating to Timetable), the contractor may file a request with the Commission for a contested case hearing before SOAH.

(b) A request for a contested case hearing shall be in writing and shall state the legal and factual basis for the claim, and shall be delivered to the Director within 30 days after the 270th day or the expiration of any written extension agreed to pursuant to §20.39(f) of this division.

(c) The Commission shall forward the contractor's request for contested case hearing to SOAH within a reasonable period of time, not to exceed 30 days, after receipt of the request.

(d) The parties may agree to submit the case to SOAH before the 270th day after the notice of claim is received by the Commission if they have achieved a partial resolution of the claim or if they have reached an impasse in the negotiations and proceeding to a contested case hearing would serve the interests of justice.

*§20.51. Mediation Timetable.*

(a) The contractor and Commission may agree to mediate the dispute at any time before the 270th day after the Commission receives

a notice of claim of breach of contract, or before the expiration of any extension agreed to by the parties in writing.

(b) A contractor and the Commission may mediate the dispute even after the case has been referred to SOAH for a contested case. SOAH may also refer a contested case for mediation pursuant to its own rules and guidelines, whether or not the parties have previously attempted mediation.

*§20.53. Conduct of Mediation.*

(a) A mediator shall not impose his or her own judgment on the issues for that of the parties. The mediator shall be acceptable to both parties.

(b) The mediation is subject to the provisions of Texas Government Code, Chapter 2009, the Governmental Dispute Resolution Act.

(c) To facilitate a meaningful opportunity for settlement, the parties should select representatives who are knowledgeable about the dispute, who are in a position to reach agreement, or who can credibly recommend approval of an agreement.

*§20.55. Agreement to Mediate.*

(a) Parties may agree to use mediation as an option to resolve a breach of contract claim at the time they enter into the contract and include a contractual provision to do so. The parties may mediate a breach of contract claim even absent a contractual provision to do so if both parties agree.

(b) The parties should consider the following factors in any agreement to mediate:

(1) The source of the mediator. Potential sources of mediators include governmental officers or employees who are qualified as mediators under Texas Civil Practice and Remedies Code, §154.052; private mediators; SOAH; the Center for Public Policy Dispute Resolution at The University of Texas School of Law; an alternative dispute resolution system created under Texas Civil Practice and Remedies Code, Chapter 152; or another state or federal agency or through a pooling agreement with several state agencies. Before naming a mediator source in a contract, the parties shall contact the mediator source to be sure that it is willing to serve in that capacity. In selecting a mediator, the parties shall use the qualifications set forth in §20.57 of this title (relating to Qualifications and Immunity of the Mediator).

(2) The time period for the mediation. The parties shall allow enough time in which to make arrangements with the mediator and parties to schedule the mediation, to attend and participate in the mediation, and to complete any settlement approval procedures necessary to achieve final settlement.

(3) The location of the mediation.

(4) Allocation of costs of the mediator.

(5) The names of representatives who will attend the mediation on behalf of the parties by name or position within the Commission or contracting entity.

(6) The settlement approval process in the event the parties reach agreement at the mediation.

*§20.57. Qualifications and Immunity of the Mediator.*

(a) The mediator shall possess the qualifications required under Texas Civil Practice and Remedies Code, §154.052, be subject to the standards and duties prescribed by Texas Civil Practice and Remedies Code, §154.053, and have the qualified immunity prescribed by Texas Civil Practice and Remedies Code, §154.055, if applicable.

(b) The parties shall decide whether, and to what extent, knowledge of the subject matter and experience in mediation would be advisable for the mediator.

(c) Prior to the commencement of the mediation, the mediator shall provide each party a written statement of the ethical standards that will govern the mediation.

*§20.59. Confidentiality of Mediation and Final Settlement Agreement.*

(a) A mediation conducted under the rules in this division is confidential in accordance with Texas Government Code, §2009.054.

(b) The confidentiality of a final settlement agreement to which the Commission is a signatory that is reached as a result of the mediation is governed by Texas Government Code, Chapter 552.

*§20.61. Costs of Mediation.*

Unless the contractor and Commission agree otherwise, each party shall be responsible for its own costs incurred in connection with the mediation, including costs of document reproduction for documents requested by such party, and consultant or expert fees. The costs of the mediation process itself shall be divided equally between the parties. Each party shall be responsible for its own attorney's fees.

*§20.63. Settlement Approval Procedures.*

Each party shall disclose its settlement approval procedures to the other party prior to the mediation. The parties should select representatives who are knowledgeable about the subject matter of the dispute, who are in a position to reach agreement, and who can credibly recommend approval of an agreement.

*§20.65. Initial Settlement Agreement.*

The representatives of the contractor and the Commission shall sign any settlement agreement reached during the mediation. The agreement shall describe each party's procedures required to be followed in connection with final approval of the agreement.

*§20.67. Final Settlement Agreement.*

(a) Representatives of the contractor and the Commission who have authority to bind each respective party shall sign a written final settlement agreement reached during, or as a result of mediation, that resolves an entire claim or any designated and severable portion of a claim.

(b) If the parties do not resolve all issues raised by the claim and counterclaim, the agreement shall identify the issues that are not resolved.

(c) A partial settlement shall not waive a party's rights under Texas Government Code, Chapter 2260, as to the parts of the claim that are not resolved.

*§20.69. Referral to the State Office of Administrative Hearings.*

If mediation does not resolve all issues raised by the claim, the contractor may request that the claim be referred to SOAH by the Commission. Nothing in these rules prohibits the contractor and the Commission from mediating their dispute after the case has been referred for contested case hearing, subject to the rules of SOAH.

*§20.71. Assisted Negotiation Processes.*

Parties to a contract dispute under Texas Government Code, Chapter 2260, may agree, either contractually or when a dispute arises, to use the assisted negotiation (alternative dispute resolution) processes described in §20.75 of this division (relating to Assisted Negotiation Methods) in addition to negotiation and mediation to resolve their dispute.

*§20.73. Use of Assisted Negotiation Processes.*

The following factors may help parties decide whether one or more assisted negotiation processes could help resolve their dispute:

(1) The parties recognize the benefits of an agreed resolution of the dispute;

(2) The expense of proceeding to contested case hearing at SOAH is substantial and might outweigh any potential recovery;

(3) The parties want an expedited resolution;

(4) The ultimate outcome is uncertain;

(5) Factual or technical complexity or uncertainty exists and the parties would benefit from the expertise of a third-party for technical assistance or fact-finding;

(6) The parties are having substantial difficulty communicating effectively;

(7) A mediator third party could facilitate each party's realistic evaluation of its case;

(8) There is an on-going relationship between parties;

(9) The parties want to retain control over the outcome;

(10) There is a need to develop creative alternatives to resolve the dispute;

(11) There is a need for flexibility in shaping relief;

(12) The parties need to hear an evaluation of the case from someone other than their representatives.

*§20.75. Assisted Negotiation Methods.*

The parties may agree to use any of the following methods, or a combination of these methods, or any assisted negotiation process agreed to by the parties to seek resolution of a dispute under Texas Government Code, Chapter 2260. If the parties agree to use an assisted negotiation procedure, they shall agree in writing to a detailed description of the process prior to engaging in the process:

(1) Mediation;

(2) Early evaluation by a third-party neutral:

(A) The parties and their counsel shall, in a confidential conference, present a summary of the factual and legal bases of their claim to an experienced neutral with subject-matter expertise or with significant experience in the substantive area of law involved in the dispute;

(B) After the summary presentations, the third-party neutral shall identify areas of agreement for possible stipulations, assess the strengths and weaknesses of each party's position, and estimate, if possible, the likelihood of liability and the dollar range of damages that appear reasonable to him or her. The third-party neutral's assessments and estimates are not binding on the parties;

(C) This procedure is less complicated than the mini-trial, described in paragraph (4) of this section, and may be appropriate when only some issues are in dispute, such as where there are clear-cut differences over the appropriate amount of damages. This process may be particularly helpful when:

*(i)* the parties agree that the dispute can be settled;

*(ii)* the dispute involves specific legal issues;

*(iii)* the parties disagree on the amount of damages; or

*(iv)* the neutral is a recognized expert in the subject area or area of law involved;

(3) Neutral fact-finding by an expert:

(A) After most discovery in the dispute has been completed and the significance of particular technical or scientific issue is apparent, the parties may request a neutral third-party expert to study the particular issue and report his or her findings of fact on that issue;

(B) The parties may agree in writing that the fact-finding will be binding on them in later proceedings (and entered into as a stipulation in the dispute if the matter proceeds to contested case hearing), or that it will be advisory in nature, to be used only in further settlement discussions between representatives of the parties. This process may be particularly helpful when:

*(i)* factual issues requiring expert testimony may be dispositive of liability or damage issues;

*(ii)* the use of a neutral is cost effective; or

*(iii)* the neutral's findings could narrow factual issues for contested case hearing;

(4) Mini-trial:

(A) A representative of upper management from each party, with authority to settle, shall attend a mini-trial conducted by a third-party neutral selected by agreement of the parties. The mini-trial shall be divided into three phases: a limited information exchange phase, the actual hearing, and post-hearing settlement discussions. No written or oral statement made in the proceeding may be used as evidence or an admission in any other proceeding;

(B) The information exchange stage shall be sufficient for each party to understand and appreciate the key issues involved in the case. At a minimum, parties shall exchange key exhibits, introductory statements, and a summary of the witness' testimony;

(C) At the hearing, representatives of the parties present a summary of the anticipated evidence and any legal issues that must be decided before the case can be resolved. The third-party neutral presides over the presentation and may question witnesses and counsel, as well as comment on the arguments and evidence. Each party may agree to put on abbreviated direct and cross-examination testimony. The hearing generally takes no longer than one to two days;

(D) Settlement discussions, facilitated by the third-party neutral, take place after the hearing. The parties may ask the neutral to formally evaluate the evidence and arguments and give an advisory opinion as to the issues in the case. If the parties cannot reach an agreed resolution to the dispute, either side may declare the mini-trial terminated and proceed to resolve the dispute by other means;

(E) Mini-trials may be appropriate when:

*(i)* the dispute is at a stage where substantial costs can be saved by a resolution based on limited information gathering;

*(ii)* the matter justifies the senior executive time required to complete the process;

*(iii)* the issues involved include highly technical mixed questions of law and fact;

*(iv)* the matter involves trade secrets or other confidential or proprietary information; or

*(v)* the parties seek to narrow the large number of issues in dispute.

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 November 13, 2003.

TRD-200307790
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 475-1295

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# PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

## CHAPTER 80. LICENSED COURT INTERPRETERS

The Texas Department of Licensing and Regulation ("Department") proposes the repeal of 16 Texas Administrative Code, §80.24 and amendments to existing rules, §§80.10, 80.22, and 80.90 regarding the licensed court interpreters program.

The repeal removes §80.24 concerning waiver of examination requirements because the time period for applying for a waiver of the examination, as established in House Bill 2735, Section 5, 77th Legislative Session, has expired.

The amendments to §80.10 remove definitions that are not needed because Senate Bill 279 of the 78th Legislature removed references to the word "commissioner."

The amendments to §80.22 remove a reference to §80.24, which is proposed for repeal.

The amendments to §80.90 remove unnecessary language from a reference to Chapter 60 of the Department's rules.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed amendments and repeal are in effect there will be no cost to state or local government as a result of enforcing or administering the amendments.

Mr. Kuntz also has determined that for each year of the first five-year period the proposed amendments and repeal are in effect, the public benefit will be rules that are easier for the public and licensed court interpreters to comprehend.

There will be no effect on large, small, or micro-businesses as a result of the proposed amendments and repeal. There are no anticipated economic costs to persons who are required to comply with the rules as amended.

Comments on the proposal may be submitted to William H. Kuntz, Jr., Executive Director, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile 512/475-2872, or electronically: whkuntz@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register*.

**16 TAC §§80.10, 80.22, 80.90**

The amendments are proposed under Texas Government Code, Chapter 57 and Occupations Code, Chapter 51, which authorizes the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Government Code, Chapter 57 and Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the proposal.

*§80.10. Definitions.*

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

~~[(1) Commissioner--As used in Title 2, Texas Government Code, Chapter 57, and in these rules, has the same meaning as Executive Director.]~~

(1) [~~(2)~~] Dishonorable--Lacking in integrity, indicating an intent to deceive or take unfair advantage of another person, or bringing disrepute to the profession of court interpretation.

~~[(3) Executive Director--As used in Title 2, Texas Government Code, Chapter 57, and in these rules, has the same meaning as Commissioner.]~~

(2) [~~(4)~~] Unethical--Conduct that does not conform to generally accepted standards of conduct for professional court interpreters.

*§80.22. License Requirements--Examination.*

Each [~~Except as provided by §80.24 (relating to Licensing Requirements-Waiver of Examination Requirement), each~~] applicant must pass all parts of a Department approved language examination before the applicant will be licensed as a court interpreter for that language.

*§80.90. Sanctions--Administrative Sanctions/Penalties.*

If a person violates any provision of Title 2, Texas Government Code, Chapter 57, any provision of 16 Texas Administrative Code, Chapter 80, or any provision of an order of the Executive Director or Commission, proceedings may be instituted to impose administrative penalties, administrative sanctions, or both administrative penalties and sanctions in accordance with the provisions of Title 2, Texas Occupations Code, Chapter 51, or 16 Texas Administrative Code, Chapter 60 [~~(relating to the Texas Department of Licensing and Regulation)~~].

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 November 17, 2003.

TRD-200307894
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 463-7348

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**16 TAC §80.24**

*(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 Licensing and Regulation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The repeal is proposed under Texas Government Code, Chapter 57 and Occupations Code, Chapter 51, which authorizes the

Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the repeal are those set forth in Texas Government Code, Chapter 57 and Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the repeal.

*§80.24. License Requirements - Waiver of Examination Requirement.*

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 November 17, 2003.

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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 463-7348

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# TITLE 19. EDUCATION

## PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

### CHAPTER 1. AGENCY ADMINISTRATION

### SUBCHAPTER A. GENERAL PROVISIONS

**19 TAC §§1.1 - 1.13**

*(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 Higher Education Coordinating Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The Texas Higher Education Coordinating Board proposes the repeal of §§1.1 - 1.13, concerning Agency Administration (General Provisions). Specifically, the sections are being repealed in light of new legislative mandates regarding negotiated rulemaking and Alternate Dispute Resolution (ADR). The Office of General Counsel concluded that, despite the fact that few of the existing rules needed to be amended in any material way, the role of the ADR coordinator required the addition of several new sections, and the complete reorganization of existing Subchapters B and C.

Katie Johnsonius, Assistant General Counsel has determined that for each year of the first five years the repeal is in effect, there will not be any fiscal implication to state or local government as a result of enforcing or administering the repeal.

Ms. Johnsonius has also determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of administering the repeal will be improved clarity regarding the agency's process for managing contested cases of all types. There is no effect on small businesses, except to the extent that the proposed rules require that, in the absence of an agreement to the contrary, each party to a contract dispute shall pick up half the costs of alternative dispute resolution. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed, except to the extent that the proposed rules regarding contested cases also require that, in the absence of an agreement to the contrary, each party to a contested case shall pick up half the costs of alternative dispute resolution. There is no impact on local employment.

Comments on the proposed repeal may be submitted to Katie Johnsonius, Assistant General Counsel, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711; Katie.johnsonius@thecb.state.tx.us.

The repeal is proposed under the Texas Education Code, §§61.025 - 61.029, 61.031, 61.084, 61.301 - 61.319, and 61.041 - 61.405; Texas Government Code, §§552.231, 559.004, Chapter 2001, §§2003.021, 2155.076, 2161.003, 2255.001, Chapters 2260, 2008, and 2009; Texas Transportation Code, §201.112; Civil Practice and Remedies Code, Chapters 107 and 154, which provide the Coordinating Board with the authority to adopt rules concerning Agency Administration.

The repeal affects Texas Education Code §§61.025, 61.026, 61.028, 61.029, 61.031, 61.084, 61.301 - 61.319, and 61.401 - 61.405; Texas Government Code, §§552.231, 559.004, Chapter 2001, §§2003.021, 2155.076, 2161.003, 2255.001, Chapters 2260, 2008, and 2009; Texas Transportation Code, §201.112; Civil Practice and Remedies Code, Chapters 107 and 154.

*§1.1. Dates for Regular Quarterly Meetings of the Board.*

*§1.2. Authority of the Commissioner to Interpret Rules.*

*§1.3. Educational Data.*

*§1.4. Rules of Order.*

*§1.5. Coordinating Board Committees.*

*§1.6. Advisory Committees.*

*§1.7. Petition for the Adoption of Rules.*

*§1.8. Historically Underutilized Business (HUBs) Program.*

*§1.9. Training for Members of Governing Boards and Board Trustees.*

*§1.10. Administration of the Open Records Act.*

*§1.11. Protest Procedures for Resolving Vendor Protests Relating to Purchasing Issues.*

*§1.12. Foreign Travel.*

*§1.13. Internal Auditor.*

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 November 13, 2003.

TRD-200307813
Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: January 29, 2004
For further information, please call: (512) 427-6114

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### SUBCHAPTER B. HEARINGS AND APPEALS

**19 TAC §§1.21 - 1.29**

*(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 Higher Education Coordinating Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The Texas Higher Education Coordinating Board proposes the repeal of §§1.21 - 1.29, concerning Agency Administration (Hearings and Appeals). Specifically, the sections are being repealed in light of new legislative mandates regarding negotiated rulemaking and Alternate Dispute Resolution (ADR). The Office of General Counsel concluded that, despite the fact that few of the existing rules needed to be amended in any material way, the role of the ADR coordinator required the addition of several new sections, and the complete reorganization of existing Subchapters B and C.

Katie Johnsonius, Assistant General Counsel has determined that for each year of the first five years the repeal is in effect, there will not be any fiscal implication to state or local government as a result of enforcing or administering the repeal.

Ms. Johnsonius has also determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of administering the repeal will be improved clarity regarding the agency's process for managing contested cases of all types. There is no effect on small businesses, except to the extent that the proposed rules require that, in the absence of an agreement to the contrary, each party to a contract dispute shall pick up half the costs of alternative dispute resolution. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed, except to the extent that the proposed rules regarding contested cases also require that, in the absence of an agreement to the contrary, each party to a contested case shall pick up half the costs of alternative dispute resolution. There is no impact on local employment.

Comments on the proposed repeal may be submitted to Katie Johnsonius, Assistant General Counsel, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711; Katie.johnsonius@thecb.state.tx.us.

The repeal is proposed under the Texas Education Code, §§61.025 - 61.029, 61.031, 61.084, 61.301 - 61.319, and 61.041 - 61.405; Texas Government Code, §§552.231, 559.004, Chapter 2001, §§2003.021, 2155.076, 2161.003, 2255.001, Chapters 2260, 2008, and 2009; Texas Transportation Code, §201.112; Civil Practice and Remedies Code, Chapters 107 and 154, which provide the Coordinating Board with the authority to adopt rules concerning Agency Administration.

The repeal affects Texas Education Code §§61.025, 61.026, 61.028, 61.029, 61.031, 61.084, 61.301 - 61.319, and 61.401 - 61.405; Texas Government Code, §§552.231, 559.004, Chapter 2001, §§2003.021, 2155.076, 2161.003, 2255.001, Chapters 2260, 2008, and 2009; Texas Transportation Code, §201.112; Civil Practice and Remedies Code, Chapters 107 and 154.

*§1.21. Definitions.*
*§1.22. Scope and Purpose.*
*§1.23. State Office of Administrative Hearings.*
*§1.24. Classification of Parties.*
*§1.25. Petition for Hearing.*
*§1.26. Notice of Hearing.*
*§1.27. Exceptions to Proposal for Decision.*
*§1.28. Board Meeting to Consider Proposal for Decision.*
*§1.29. Motion for Rehearing.*

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 November 13, 2003.

TRD-200307814
Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: January 29, 2004
For further information, please call: (512) 427-6114

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## SUBCHAPTER C. BREACH OF CONTRACT CLAIMS

### 19 TAC §§1.40 - 1.47

*(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 Higher Education Coordinating Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The Texas Higher Education Coordinating Board proposes the repeal of §§1.40 - 1.47, concerning Agency Administration (Breach of Contract Claims). Specifically, the sections are being repealed in light of new legislative mandates regarding negotiated rulemaking and Alternate Dispute Resolution (ADR). The Office of General Counsel concluded that, despite the fact that few of the existing rules needed to be amended in any material way, the role of the ADR coordinator required the addition of several new sections, and the complete reorganization of existing Subchapters B and C.

Katie Johnsonius, Assistant General Counsel has determined that for each year of the first five years the repeal is in effect, there will not be any fiscal implication to state or local government as a result of enforcing or administering the repeal.

Ms. Johnsonius has also determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of administering the repeal will be improved clarity regarding the agency's process for managing contested cases of all types. There is no effect on small businesses, except to the extent that the proposed rules require that, in the absence of an agreement to the contrary, each party to a contract dispute shall pick up half the costs of alternative dispute resolution. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed, except to the extent that the proposed rules regarding contested cases also require that, in the absence of an agreement to the contrary, each party to a contested case shall pick up half the costs of alternative dispute resolution. There is no impact on local employment.

Comments on the proposed repeal may be submitted to Katie Johnsonius, Assistant General Counsel, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711; Katie.johnsonius@thecb.state.tx.us.

The repeal is proposed under the Texas Education Code, §§61.025 - 61.029, 61.031, 61.084, 61.301 - 61.319, and 61.041 - 61.405; Texas Government Code, §§552.231, 559.004, Chapter 2001, §§2003.021, 2155.076, 2161.003, 2255.001, Chapters 2260, 2008, and 2009; Texas Transportation Code, §201.112; Civil Practice and Remedies Code, Chapters 107 and 154, which provide the Coordinating Board with the authority to adopt rules concerning Agency Administration.

The repeal affects Texas Education Code §§61.025, 61.026, 61.028, 61.029, 61.031, 61.084, 61.301 - 61.319, and 61.401 - 61.405; Texas Government Code, §§552.231, 559.004, Chapter 2001, §§2003.021, 2155.076, 2161.003, 2255.001, Chapters 2260, 2008, and 2009; Texas Transportation Code, §201.112; Civil Practice and Remedies Code, Chapters 107 and 154.

*§1.40. Scope and Purpose.*
*§1.41. Applicability.*
*§1.42. Definitions.*
*§1.43. Prerequisites to Suit.*
*§1.44. Sovereign Immunity.*
*§1.45. Negotiation of Contract Disputes.*
*§1.46. Mediation of Contract Disputes.*
*§1.47. Assisted Negotiation 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.

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Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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## SUBCHAPTER D. STANDARDS OF CONDUCT

### 19 TAC §§1.60 - 1.67

*(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 Higher Education Coordinating Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The Texas Higher Education Coordinating Board proposes the repeal of §§1.60 - 1.67, concerning Agency Administration (Standards of Conduct). Specifically, the sections are being repealed in light of new legislative mandates regarding negotiated rulemaking and Alternate Dispute Resolution (ADR). The Office of General Counsel concluded that, despite the fact that few of the existing rules needed to be amended in any material way, the role of the ADR coordinator required the addition of several new sections, and the complete reorganization of existing Subchapters B and C.

Katie Johnsonius, Assistant General Counsel has determined that for each year of the first five years the repeal is in effect, there will not be any fiscal implication to state or local government as a result of enforcing or administering the repeal.

Ms. Johnsonius has also determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of administering the repeal will be improved clarity regarding the agency's process for managing contested cases of all types. There is no effect on small businesses, except to the extent that the proposed rules require that, in the absence of an agreement to the contrary, each party to a contract dispute shall pick up half the costs of alternative dispute resolution. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed, except to the extent that the proposed rules regarding contested cases also require that, in the absence of an agreement to the contrary, each party to a contested case shall pick up half the costs of alternative dispute resolution. There is no impact on local employment.

Comments on the proposed repeal may be submitted to Katie Johnsonius, Assistant General Counsel, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711; Katie.johnsonius@thecb.state.tx.us.

The repeal is proposed under the Texas Education Code, §§61.025 - 61.029, 61.031, 61.084, 61.301 - 61.319, and 61.041 - 61.405; Texas Government Code, §§552.231, 559.004, Chapter 2001, §§2003.021, 2155.076, 2161.003, 2255.001, Chapters 2260, 2008, and 2009; Texas Transportation Code, §201.112; Civil Practice and Remedies Code, Chapters 107 and 154, which provide the Coordinating Board with the authority to adopt rules concerning Agency Administration.

The repeal affects Texas Education Code §§61.025, 61.026, 61.028, 61.029, 61.031, 61.084, 61.301 - 61.319, and 61.401 - 61.405; Texas Government Code, §§552.231, 559.004, Chapter 2001, §§2003.021, 2155.076, 2161.003, 2255.001, Chapters 2260, 2008, and 2009; Texas Transportation Code, §201.112; Civil Practice and Remedies Code, Chapters 107 and 154.

*§1.60. Scope and Purpose.*
*§1.61. Definitions.*
*§1.62. Donations by Private Donors to the Board.*
*§1.63. Donations by a Private Donor to a Private Organization That Exists To Further the Purposes and Duties of the Board.*
*§1.64. Organizing a Private Organization That Exists To Further the Duties and Purposes of the Board.*
*§1.65. Relationship between a Private Organization and the Board.*
*§1.66. Standards of Conduct Between Board Employees and Private Donors.*
*§1.67. Miscellaneous.*

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 November 13, 2003.

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Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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## SUBCHAPTER E. RIGHT TO CORRECTION OF INCORRECT INFORMATION

### 19 TAC §§1.80 - 1.83

*(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 Higher Education Coordinating Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The Texas Higher Education Coordinating Board proposes the repeal of §§1.80 - 1.83, concerning Agency Administration (Right

to Correction of Incorrect Information). Specifically, the sections are being repealed in light of new legislative mandates regarding negotiated rulemaking and Alternate Dispute Resolution (ADR). The Office of General Counsel concluded that, despite the fact that few of the existing rules needed to be amended in any material way, the role of the ADR coordinator required the addition of several new sections, and the complete reorganization of existing Subchapters B and C.

Katie Johnsonius, Assistant General Counsel has determined that for each year of the first five years the repeal is in effect, there will not be any fiscal implication to state or local government as a result of enforcing or administering the repeal.

Ms. Johnsonius has also determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of administering the repeal will be improved clarity regarding the agency's process for managing contested cases of all types. There is no effect on small businesses, except to the extent that the proposed rules require that, in the absence of an agreement to the contrary, each party to a contract dispute shall pick up half the costs of alternative dispute resolution. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed, except to the extent that the proposed rules regarding contested cases also require that, in the absence of an agreement to the contrary, each party to a contested case shall pick up half the costs of alternative dispute resolution. There is no impact on local employment.

Comments on the proposed repeal may be submitted to Katie Johnsonius, Assistant General Counsel, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711; Katie.johnsonius@thecb.state.tx.us.

The repeal is proposed under the Texas Education Code, §§61.025 - 61.029, 61.031, 61.084, 61.301 - 61.319, and 61.041 - 61.405; Texas Government Code, §§552.231, 559.004, Chapter 2001, §§2003.021, 2155.076, 2161.003, 2255.001, Chapters 2260, 2008, and 2009; Texas Transportation Code, §201.112; Civil Practice and Remedies Code, Chapters 107 and 154, which provide the Coordinating Board with the authority to adopt rules concerning Agency Administration.

The repeal affects Texas Education Code §§61.025, 61.026, 61.028, 61.029, 61.031, 61.084, 61.301 - 61.319, and 61.401 - 61.405; Texas Government Code, §§552.231, 559.004, Chapter 2001, §§2003.021, 2155.076, 2161.003, 2255.001, Chapters 2260, 2008, and 2009; Texas Transportation Code, §201.112; Civil Practice and Remedies Code, Chapters 107 and 154.

*§1.80. Scope and Purpose.*
*§1.81. Definitions.*
*§1.82. Individual's Right to Correction of Incorrect Information.*
*§1.83. Correction Procedure.*

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.

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Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
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## CHAPTER 1. AGENCY ADMINISTRATION
## SUBCHAPTER A. GENERAL PROVISIONS

**19 TAC §1.1 - 1.14**

The Texas Higher Education Coordinating Board proposes new §§1.1 - 1.14, concerning Agency Administration (General Provisions). Specifically, the proposed new subchapters and sections reorganize existing Chapter 1, Subchapters A - E. In conducting the review of Chapter 1, in light of new legislative mandates regarding negotiated rulemaking and Alternate Dispute Resolution (ADR), the Office of General Counsel concluded that, despite the fact that few of the existing rules needed to be amended in any material way, the role of the ADR coordinator required the addition of several new sections, and the complete reorganization of existing Subchapters B and C. For that reason, we have posted separately the repeal of Chapter 1, in its entirety, and herein propose new subchapters and sections.

Proposed Subchapter A contains new rules regarding negotiated rulemaking and regarding the process by which a member of the public may propose the adoption, repeal, or amendment of a rule. Both new rules spell out agency procedures in order to ensure that such cases are treated in accordance with the requirements of the Texas Government Code. In addition to the new sections, some non-substantive language changes have been made, and many of the section numbers have changed.

Katie Johnsonius, Assistant General Counsel has determined that for each year of the first five years the sections are in effect, there will not be any fiscal implication to state or local government as a result of enforcing or administering the rules.

Ms. Johnsonius has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be improved clarity regarding the agency's process for managing contested cases of all types. There is no effect on small businesses, except to the extent that the proposed rules require that, in the absence of an agreement to the contrary, each party to a contract dispute shall pick up half the costs of alternative dispute resolution. There is no anticipated economic cost to persons who are required to comply with the sections as proposed, except to the extent that the proposed rules regarding contested cases also require that, in the absence of an agreement to the contrary, each party to a contested case shall pick up half the costs of alternative dispute resolution. There is no impact on local employment.

Comments on the proposed new sections may be submitted to Katie Johnsonius, Assistant General Counsel, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711; Katie.johnsonius@thecb.state.tx.us.

The new sections are proposed under the Texas Education Code, §§61.025 - 61.029, 61.031, 61.084, 61.301 - 61.319, and 61.041 - 61.405; Texas Government Code, §§552.231, 559.004, Chapter 2001, §§2003.021, 2155.076, 2161.003, 2255.001, Chapters 2260, 2008, and 2009; Texas Transportation Code, §201.112; Civil Practice and Remedies Code, Chapters 107 and 154, which provide the Coordinating Board with the authority to adopt rules concerning Agency Administration.

The new sections affect Texas Education Code §§61.025, 61.026, 61.028, 61.029, 61.031, 61.084, 61.301 - 61.319, and 61.401 - 61.405; Texas Government Code, §§552.231, 559.004, Chapter 2001, §§2003.021, 2155.076, 2161.003, 2255.001,

Chapters 2260, 2008, and 2009; Texas Transportation Code, §201.112; Civil Practice and Remedies Code, Chapters 107 and 154.

*§1.1. Dates for Regular Quarterly Meetings of the Board.*

Regular quarterly meetings of the Coordinating Board, hereinafter referred to as the Board, will be held in January, April, July, and October, with the understanding that the chair may at a regular quarterly meeting, alter the date of a subsequent meeting.

*§1.2. Authority of the Commissioner to Interpret Rules.*

Except as otherwise provided, no provisions of Board rules shall be deemed exhaustive of the jurisdiction of the Commissioner of Higher Education, hereinafter referred to as the Commissioner. The Commissioner shall have the responsibility to interpret Board rules whenever interpretation is necessary so that the business of the Board may move along with order and expediency.

*§1.3. Educational Data.*

To enable the Board to comply with the requirements of the legislature concerning the collection of data, each public junior and senior institution of higher education shall submit such reports to the Board as may be prescribed by the Educational Data Reporting System.

*§1.4. Rules of Order.*

When formal procedures are required in a Board meeting, the meeting shall be conducted under the rules of parliamentary law as set forth in the current edition of Roberts Rules of Order.

*§1.5. Coordinating Board Committees.*

(a) The chair of the Board shall appoint committees from the Board's membership as appropriate to conduct the business of the Board and shall designate the chair and vice chair of each committee.

(b) A committee meeting may be called by the committee chair. The designated committee chair shall conduct each committee meeting.

(c) Committees will adopt recommendations on the agenda items for consideration by the Board. In the event a decision cannot be reached by a committee on any agenda item, the Board will consider that agenda item without a recommendation from the committee.

(d) Each member of the Board is an ex-officio member of each committee and may participate in all committee meetings and vote on any committee actions.

*§1.6. Advisory Committees.*

(a) The Board may appoint advisory committees from outside the Board's membership to advise the Board as it may deem necessary, and the Commissioner may appoint advisory committees from outside the Board staff to advise the staff as the Commissioner may deem necessary.

(b) The use of advisory committees by the Board or by the Commissioner shall be in compliance with the provisions of Texas Government Code, Chapter 2110 regarding the composition and duration of committees, the reimbursement of committee member's expenses, the evaluation of committees, and the reporting to the Legislative Budget Board.

(c) An advisory committee is automatically abolished on the fourth anniversary of the date of its creation unless it has a specific duration prescribed by statute. A written statement shall be prepared by the Commissioner or his or her designee for each advisory committee setting forth the purpose of the committee, the task of the committee, the manner in which the committee will report to the Board or the Commissioner, the date on which the committee is created, and the date on which the committee will automatically be abolished. The written statements shall be maintained on file in the Board offices. At each quarterly Board meeting the Commissioner shall report to the Board any advisory committees created or abolished by effect of this rule since the previous quarterly meeting.

*§1.7. Petition for the Adoption of Rules.*

(a) An interested person by petition to the agency may request the adoption, amendment, or repeal of a rule.

(b) A petition under this section shall be in writing and shall contain:

(1) a specific reference to the agency's statutory authority to enact such a rule;

(2) the chapter and subchapter of the agency's rules in which, in the petitioner's opinion, the rule belongs;

(3) the reason that the petitioner believes the proposed rule is needed or desirable, in narrative form, with sufficient particularity to inform the board and any interested party fully of the facts upon which petitioner relies;

(4) the language that the petitioner proposes for adoption, in the exact form in which the petitioner wishes the rule or rules to be promulgated, published, or adopted;

(5) the petitioner's name, address, phone number, and signature. If the petitioner is represented by an attorney, the attorney shall give his or her bar card number, address, phone number, and fax number.

(c) The petition shall be served upon the Commissioner by personal delivery or by certified mail, with return receipt requested, or by other verifiable delivery service. A certificate evidencing service shall be included in the petition.

(d) Upon receipt of the petition for adoption of rule, the petition shall be referred to the agency's General Counsel for a determination whether the prerequisites found herein have been met.

(1) If the General Counsel finds that the petition prerequisites have been met, he or she shall refer the matter to the ADR coordinator for scheduling and reporting purposes, and to the Assistant Commissioner whose Division has jurisdiction over the subject matter of the proposed rule or rules for response. Not later than the 60th day after the date of submission of a petition under this section, the Assistant Commissioner to whom the matter was assigned shall:

(A) either:

*(i)* deny the petition in writing, stating its reasons for the denial; or

*(ii)* initiate a rulemaking proceeding under this subchapter; and

(B) report the determination to the ADR coordinator.

(2) If the General Counsel finds that prerequisites have not been met, he or she shall notify the petitioner in writing that the petition fails to meet the prerequisites herein, and the manner in which it failed.

*§1.8. Historically Underutilized Business (HUBs) Program.*

In accordance with the Government Code, §2161.003, the Board adopts by reference the rules of the Texas Building and Procurement Commission, found at Title 1 Texas Administrative Code, §§111.11 - 111.28, concerning the Historically Underutilized Business (HUB) Program. For purposes of implementing the GSC rules at the board, references to state agency or agency shall be considered to be a reference to the board.

*§1.9. Training for Members of Governing Boards and Board Trustees.*

(a) The Board shall provide training for members of institutional governing boards in accordance with provisions set forth in Texas Education Code, §61.084.

(b) The Board may prescribe an alternative training program for members of governing boards as permitted in §61.084.

(c) A registration fee will be paid by seminar participants in an amount adequate to cover the costs incurred by the Board and other state agencies in providing the program. Such amount will be determined prior to each seminar.

*§1.10. Administration of the Open Records Act.*

(a) The agency requires that all public information requests be in writing unless there are special circumstances. The Commissioner or his or her designee may determine whether a verbal request may be accepted.

(b) The person handling the request for public information shall review the request and determine what records are requested; who is requesting the records; whether inspection or actual copies of the records are requested; and whether the requested records are open, confidential, or partially open and partially confidential. The Office of General Counsel shall provide assistance in making these determinations.

(c) To the extent possible, the agency shall attempt to accommodate a requestor by providing information in the format requested. For example, if a requestor asks that information be provided on a diskette and the requested information is electronically stored, the agency will provide the information on diskette. The agency is not required to acquire software, hardware, or programming capabilities that it does not already possess to accommodate a particular kind of request except in accordance with the Open Records Act, (Texas Government Code, §552.231).

(d) Provision of a copy of public information in the requested medium must not violate the terms of any copyright agreement between the agency and a third party.

(e) Charges for public records shall be made in accordance with the rates established in the rules of the Texas Building and Procurement Commission with the following exceptions:

(1) The agency, at its discretion, may provide public information without charge or at a reduced charge if the waiver or reduction of the charge is in the public interest, because providing the copies primarily benefits the general public, or if the cost for the collection of a charge will exceed the amount of the charge.

(2) The agency may set the price for publications it publishes for public dissemination or it may disseminate them free of charge. This rule does not limit the costs of agency publications.

(f) The person handling the request for public information must have the records ready for inspection or copies duplicated within 10 business days after the date the agency received the request. If the records cannot be produced for inspection or duplication within 10 business days after the date the agency received the request, the agency shall certify that fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication.

(1) Prior to the end of the 10 business days or the set date and hour, if applicable, the agency shall notify the requestor of the estimated costs if the costs will be over $100.

(2) The agency may require a cash deposit on requests for copies of public information which are estimated to exceed $100.

(3) All efforts shall be made to process requests as efficiently as possible so that requested information will be provided at the lowest possible charge.

(4) Full disclosure shall be made to the requesting party as to how the charges were calculated.

(5) All charges for public information must be paid to the agency before the public information is actually provided to the requestor by inspection or duplication. Failure of the requestor to pay the costs of the copies within 30 days of notification of the estimated costs, or a longer period of time, if granted by the agency, shall be considered a withdrawal of the request for information.

(6) If a request for information requires programming or manipulation of data pursuant to Texas Government Code, §552.231, the time frame in this subsection shall not apply until the requestor files the written statement described in the Texas Government Code, §552.231(d)(1) or (2). Once the written statement is filed, the agency shall comply with this subsection.

*§1.11. Protest Procedures for Resolving Vendor Protests Relating to Purchasing Issues.*

(a) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation, evaluation, or award of a contract may formally protest to the Director of Business Services (the director). Such protests must be in writing and received in the director's office within 10 working days after such aggrieved person knows, or reasonably should have known, of the occurrence of the action which is protested, unless the director finds that good cause for delay is shown, or determines that a protest or appeal raises issues significant to the agency's procurement practices or procedures.

(b) Formal protests must conform to the requirements of this subsection and subsection (d) of this section, and shall be resolved in accordance with the procedure set forth in subsections (d) and (e) of this section. Copies of the protest must be mailed or delivered by the protestant to the other interested parties. For the purposes of this section, "interested parties" are all vendors who have submitted bids or proposals for the contract involved. Names and addresses of all interested parties may be obtained by sending a written request for this information to the director.

(c) In the event of a timely protest or appeal under this section, the agency shall not proceed further with the solicitation or with the award of the contract unless the director makes a written determination that the expeditious award of contract is necessary to protect substantial interests of the state. A copy of this determination shall be mailed to the protestant.

(d) A formal protest petition must be sworn and must contain:

(1) a specific identification of the statutory or regulatory provision(s) that the action complained of is alleged to have violated;

(2) a specific description of each act alleged to have violated the statutory or regulatory provision(s) identified in paragraph (1) of this subsection;

(3) a precise statement of the relevant facts;

(4) an identification of the issue or issues to be resolved;

(5) argument and authorities in support of the protest; and

(6) a statement that copies of the protest have been mailed or delivered to the other interested parties.

(e) The director shall have the authority to settle and resolve the dispute concerning the solicitation or award of a contract. The director may solicit written responses to the protest petition from other interested parties, and if he or she makes such a request, the protestant shall be given notice of the director's request and of any written responses to the request that the director receives. The director may consult with the Texas Building and Procurement Commission and the office of the General Counsel of the Board concerning the dispute.

(f) If the protest is not resolved by mutual agreement, the director shall issue a written determination on the protest.

(1) If the director determines that no violation of rules or statutes has occurred, he or she shall inform the protestant and other interested parties by a letter that sets forth the reasons for the determination.

(2) If the director determines that a violation of the rules or statutes has occurred in a case where a contract has not been awarded, he shall inform the protestant and other interested parties by a letter that sets forth the reasons for the determination and the remedial action that he or she has determined is appropriate.

(3) If the director determines that a violation of the rules or statutes has occurred in a case where a contract has been awarded, he shall inform the protestant and other interested parties by a letter which sets forth the reasons for the determination. In such a case, the director has the authority to declare the contract void. If he or she declares the contract void, this fact shall be included in the determination letter.

(g) The director's determination on a protest may be appealed by an interested party to the Assistant Commissioner for Administrative Services. An appeal of the director's determination must be in writing and must be received in the Assistant Commissioner for Administrative Services' office no later than 10 working days after the date of the director's determination. An appeal of the determination shall be limited to those issues raised in the protest petition and the determination letter. Copies of the appeal must be mailed or delivered by the appealing party to the other interested parties and must contain a sworn statement that such copies have been provided.

(h) The Assistant Commissioner for Administrative Services shall review the protest petition, the director's requests for input, and any written responses previously received from other interested parties, the determination, and the appeal, and shall issue a written decision on the protest.

(i) A decision issued in writing by the Assistant Commissioner for Administrative Services shall be the final administrative action of the agency.

*§1.12. Foreign Travel.*

Appropriated funds may not be used to pay expenses for a trip to foreign countries, except for Canada and Mexico, unless the Board has approved the travel before departure. The Board delegates the authority to approve foreign travel to the Commissioner of Higher Education. The Commissioner shall report annually to the Governor's Office of Budget and Planning and the Legislative Budget Board on all foreign travel and the required approvals.

*§1.13. Internal Auditor.*

(a) The Board shall appoint an internal auditor.

(b) The internal auditor shall report directly to the Board on all matters except for those administrative matters that require the decision of the Commissioner.

(c) The Board shall receive the advice and counsel of the Commissioner regarding matters of termination, discipline, transfer, or reclassification or changes in powers, duties or responsibilities of the internal auditor.

(d) The internal auditor shall develop an annual audit plan, conduct audits as specified in the audit plan and document deviations, and discuss audit reports with the Administration and Financial Planning Committee of the Board.

(e) The internal auditor shall provide all audit reports directly to the Board.

*§1.14. Negotiated Rulemaking.*

(a) The Board encourages negotiated rulemaking whenever appropriate. Rulemaking may be negotiated informally, in the manner that has been established by this agency, or it may be negotiated formally, in accordance with the procedures established in the Texas Government Code, at Chapter 2008.

(b) If the Assistant Commissioner whose Division has jurisdiction over the subject matter of the rule or rules to be adopted concludes that the agency may benefit from formal negotiated rulemaking, he or she shall request that the agency's ADR coordinator assist in determining whether it is advisable to proceed under the procedures established in Chapter 2008 of the Texas Government Code. If the ADR coordinator concludes that formal rulemaking is not advisable, the agency may nonetheless engage in informal negotiated rulemaking.

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 November 13, 2003.

TRD-200307818
Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: January 29, 2004
For further information, please call: (512) 427-6114

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## SUBCHAPTER B. DISPUTE RESOLUTION

**19 TAC §§1.20 - 1.27, 1.30 - 1.35, 1.40 - 1.48, 1.60 - 1.67**

The Texas Higher Education Coordinating Board proposes new §§1.20 - 1.27, 1.30 - 1.35, 1.40 - 1.48, and 1.60 - 1.67, concerning Agency Administration (Dispute Resolution). Specifically, the proposed new subchapters and sections reorganize existing Chapter 1, Subchapters A - E. In conducting the review of Chapter 1, in light of new legislative mandates regarding negotiated rulemaking and Alternate Dispute Resolution (ADR), the Office of General Counsel concluded that, despite the fact that few of the existing rules needed to be amended in any material way, the role of the ADR coordinator required the addition of several new sections, and the complete reorganization of existing Subchapters B and C. For that reason, we have posted separately the repeal of Chapter 1, in its entirety, and herein propose new subchapters and sections.

Proposed Subchapter B, has changed considerably. A new staff role of ADR coordinator is established. All contract disputes, as

well as all other cases in which a party has a right to a contested case hearing will be channeled through the ADR coordinator, whose responsibilities are now expressed in Subchapter B. For this reason, existing Subchapter C, relating to Breath of Contract Claims, and which requires negotiation, has been merged into proposed Subchapter B. In addition, Subchapter B brings the process for negotiated rulemaking that is now found in Subchapter A within the ADR coordinator's oversight. Proposed Subchapter B also gives the Office of General Counsel the responsibility for determining whether a petitioner for a contested case has satisfied all the pleading requirements and has established a right to a contested case.

Katie Johnsonius, Assistant General Counsel has determined that for each year of the first five years the sections are in effect, there will not be any fiscal implication to state or local government as a result of enforcing or administering the rules.

Ms. Johnsonius has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be improved clarity regarding the agency's process for managing contested cases of all types. There is no effect on small businesses, except to the extent that the proposed rules require that, in the absence of an agreement to the contrary, each party to a contract dispute shall pick up half the costs of alternative dispute resolution. There is no anticipated economic cost to persons who are required to comply with the sections as proposed, except to the extent that the proposed rules regarding contested cases also require that, in the absence of an agreement to the contrary, each party to a contested case shall pick up half the costs of alternative dispute resolution. There is no impact on local employment.

Comments on the proposed new sections may be submitted to Katie Johnsonius, Assistant General Counsel, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711; Katie.johnsonius@thecb.state.tx.us.

The new sections are proposed under the Texas Education Code, §§61.025 - 61.029, 61.031, 61.084, 61.301 - 61.319, and 61.041 - 61.405; Texas Government Code, §§552.231, 559.004, Chapter 2001, §§2003.021, 2155.076, 2161.003, 2255.001, Chapters 2260, 2008, and 2009; Texas Transportation Code, §201.112; Civil Practice and Remedies Code, Chapters 107 and 154, which provide the Coordinating Board with the authority to adopt rules concerning Agency Administration.

The new sections affect Texas Education Code §§61.025, 61.026, 61.028, 61.029, 61.031, 61.084, 61.301 - 61.319, and 61.401 - 61.405; Texas Government Code, §§552.231, 559.004, Chapter 2001, §§2003.021, 2155.076, 2161.003, 2255.001, Chapters 2260, 2008, and 2009; Texas Transportation Code, §201.112; Civil Practice and Remedies Code, Chapters 107 and 154.

*§1.20. Definitions.*

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

(1) Administrative Law Judge (ALJ)--The person appointed by the State Office of Administrative Hearings (SOAH) to hear a contested case and to propose findings of fact and conclusions of law, under §2003.041 of the Texas Government Code, for adoption by the Board, regarding a determination that has been made by the Commissioner with which the party disagrees.

(2) ADR--Alternative dispute resolution. A nonjudicial, informally conducted forum for the voluntary settlement of contested matters through the intervention of an impartial third party.

(3) Alternative dispute resolution coordinator or ADR coordinator--The agency employee appointed by the Commissioner to coordinate and oversee ADR procedures and mediators.

(4) Board--The Texas Higher Education Coordinating Board; as used in this subchapter, "Board" means the agency acting through its voting members in a decision-making capacity.

(5) Commissioner--The Commissioner of Higher Education; as used in this subchapter, "Commissioner" means the agency acting through its executive, and his or her designees, staff, or agents, as distinguished from the agency acting through Board members in a decision-making capacity.

(6) Contested Case--A circumstance in which the Board or Commissioner shall allow a full evidentiary hearing as provided under the APA and this subchapter, if the right is properly invoked. In such a case, the Board shall finally determine the rights, duties, or privileges of the party. Right to a hearing is established only by explicit statutory provisions or by rules found in Title 19 of the Texas Administrative Code. There is no statute in the Texas Education Code, or rule herein, which requires the Commissioner to initiate a contested case hearing in the absence of a written petition for same, as defined herein.

(7) Contested Case Status--The condition that is established by a person who has a right to a contested case hearing, by the filing of a properly pled petition.

(8) Mail or mailed--Deposit(ed) into United States mail, certified, return receipt requested, unless otherwise provided by this subchapter. In determining the timeliness of a pleading, a postmark shall be evidence of the date of mailing, and the markings on a green card or on certified mail shall be evidence of the date of receipt. Certified mail that is refused or not claimed shall be considered received upon the earliest date of notice. When a document has been placed into United States mail, certified, return receipt requested, it shall be assumed that it was received on the third day after it was mailed, in the absence of a showing otherwise.

(9) Mediator--The person appointed by the Board's ADR coordinator to preside over an ADR proceeding, regardless of which ADR method is used.

(10) Participant--When used in relation to ADR, the Commissioner, the Board's counsel, a respondent in a contested case, and his or her attorney; or if parties have been named, the named parties.

(11) Party--Each person or agency named or admitted as a party to a hearing.

(12) Private mediator--A person in the profession of mediation who is not a Texas state employee and who has met all the qualifications prescribed by Texas law for mediators

(13) SOAH--The State Office of Administrative Hearings

*§1.21. Scope and Purpose.*

(a) This subchapter, along with applicable provisions of the Administrative Procedure Act (§§2001.051-2001.902 of the Texas Government Code), the Negotiated Rulemaking Act (Tex. Gov't Code, ch. 2008), the Governmental Dispute Resolution Act, (Tex. Gov't Code, ch. 2009), Texas Government Code, Chapter 2260, and the contested case hearings rules promulgated by the State Office of Administrative Hearings (1 TAC Chapter 155), shall govern all proceedings to which a party has been given a right to a hearing by statute or by Board rules.

(b) The purpose of this subchapter is:

(1) to encourage the resolution and early settlement of rulemaking and contract disputes, and contested cases through voluntary settlement procedures, and;

(2) to establish clear procedures for the administration of all contested matters that may come before the Board.

*§1.22. Appointment of ADR Coordinator.*

(a) The Commissioner shall appoint an ADR coordinator as soon as practicable following:

(1) initial adoption of this subchapter, or

(2) an ADR coordinator's vacation of the office.

(b) The ADR coordinator shall, as soon as practicable after appointment, complete the minimum training standards set forth in §154.052 of the Texas Alternative Dispute Resolution Procedures Act, Tex. Civ. Stat. and Rem. Code.

(c) The ADR coordinator shall have the responsibility:

(1) to maintain necessary agency records while maintaining the confidentiality of participants;

(2) to establish a method of choosing mediators who possess the minimum qualifications described in TADR Act, §154.052;

(3) to require mediators to adhere to a particular standard of conduct or code of ethics;

(4) to provide information about available ADR processes to agency employees, and to both potential and current users of the ADR program;

(5) to arrange training or education that may be necessary to implement adopted ADR processes; and

(6) to establish a system to evaluate the ADR program and the mediators or other facilitators that the agency has used.

*§1.23. Deadlines for Filing a Petition for Contested Case Status.*

(a) At any time, the Commissioner may request that a matter within the jurisdiction of the agency, which by statute or rule entitles a person to a hearing, be given contested case status.

(b) If, in any matter in which the Texas Education Code or the rules herein give a party the right to a hearing, the Commissioner makes a determination, decision, order, ruling, or if he or she fails to act within a prescribed period of time, a party with standing in the matter shall file a written petition for contested case status with the Commissioner within the time frames below, or the action taken by the Commissioner will become final, and the party will have failed to exhaust all available administrative remedies, as established herein:

(1) in a contract dispute, no later than 180 days after the date of the event that the contractor asserts as the basis of the claim;

(2) for all other types of contested cases, 45 calendar days after the decision, order, ruling, or failure to act that is complained of is rendered.

*§1.24. Mandatory Contents of a Petition for Contested Case Status.*

(a) A petition for contested case status in any matter in which statutes or rules give a party the right to a hearing, shall contain the following:

(1) For a contract dispute:

(A) an explanation of the nature of the alleged breach of contract, including the date of the event that the contractor asserts as the basis of the claim, and each contractual provision allegedly breached;

(B) a description of damages that resulted from the alleged breach, including the amount and method used to calculate those damages; and

(C) the legal theory of recovery, i.e., breach of contract, including the causal relationship between the alleged breach and the damages claimed.

(D) In addition to the mandatory contents of the notice of claim as required herein, the contractor may submit supporting documentation or other tangible evidence to facilitate the agency's evaluation of the contractor's claim.

(E) The following types of contracts shall not be subject to the provisions herein. A petition for contested case status in a contract dispute must contain sufficient identification of the parties and the nature of the dispute to allow the agency to determine that the basis of the claim is not an action of the Board for which the contractor is entitled to a specific remedy pursuant to state or federal constitution or statute, or that the dispute is regarding a contract:

*(i)* between the Board and the federal government or its agencies, another state or another nation;

*(ii)* between the Board and two or more units of state government;

*(iii)* between the Board and a local governmental body, or a political subdivision of another state;

*(iv)* between a subcontractor and a contractor;

*(v)* subject to §201.112 of the Transportation Code;

*(vi)* within the exclusive jurisdiction of state or local regulatory bodies;

*(vii)* within the exclusive jurisdiction of federal courts or regulatory bodies; or

(2) The petition must contain the signature of the contractor or the contractor's authorized representative.

(b) In all types of contested cases other than contract disputes:

(1) a description of the determination, decision, order, ruling, or failure to act that is being complained of;

(2) the date of the determination, decision, order, ruling, or failure to act;

(3) a statement of the facts of which petitioner is aware and which he or she believes to be true, that would lead to a reasonable conclusion that petitioner is entitled to the relief sought;

(4) the specific statute or rule which the petitioner believes entitles him or her to request a contested case status;

(5) a description of the action that the petitioner wants the Board to take on the petitioner's behalf; and

(6) the signature of the petitioner, or the petitioner's authorized representative.

(7) Nothing in this section requires that the petitioner plead in his or her petition all evidence that he or she may rely upon in a formal contested case hearing. However, all issues that the petitioner intends to raise in a formal contested case hearing must be sufficiently pled in the petition to put the respondent on notice of the nature of the complaint.

*§1.25. Service of a Petition for Contested Case Status.*

Petitions for contested case status shall be served upon the officer stated herein, by personal delivery or by certified mail, with return receipt requested, or by other verifiable delivery service. A certificate evidencing service shall be included in the petition.

(1) For contract disputes, the petition shall be served upon the officer of the Board designated in the contract to receive a notice of claim of breach of contract under the Government Code, Chapter 2260; if no person is designated in the contract, the notice shall be delivered to the Assistant Commissioner for Administration;

(2) For all types of contested cases other than contract disputes, the petition shall be served upon the Commissioner.

*§1.26. Agency Determination Regarding Contested Case Status.*

All petitions for contested case status shall be reviewed by the Board's General Counsel.

(1) If the General Counsel finds that the prerequisites found herein have been met, he or she shall notify the petitioner that he or she has established the right to a contested case.

(2) If the petition concerns an alleged breach of contract, the General Counsel, after consulting with appropriate officers of the agency and with the Commissioner, shall determine whether a sufficient basis exists for a counterclaim, and if it is determined that it is in the best interest of the agency to file a counterclaim, shall assist in drafting the notice of counterclaim, which shall comply with the deadlines, content, and notice requirements found in §1.42 of this title (relating to Board Counterclaims).

(3) If the General Counsel finds that prerequisites have not been met, he or she shall refer the petition to the Assistant Commissioner whose division has jurisdiction over the issue or claim. The Assistant Commissioner shall either seek clarification from the petitioner to enable the Assistant Commissioner to conclude that the petition is substantially complete, or shall notify the petitioner in writing that the petition fails to state properly a claim that entitles the petitioner a right to a hearing, and the manner in which it failed. The petitioner shall perfect the pleading no later than the later of the following:

(A) the deadline specified in §1.23 of this title (relating to Deadlines for Filing a Petition for Contested Case Status); or

(B) 15 days after the receipt of notice that the pleading fails to state properly a claim that entitles the petitioner a right to a hearing.

*§1.27. Referral to ADR Coordinator.*

(a) Contract disputes shall be referred to the agency's ADR coordinator to establish the negotiations schedule and to determine, in collaboration with the person designated pursuant to §1.25 of this title (relating to Service of a Petition for Contested Case Status), all interested parties to the negotiations;

(b) If a petitioner in any other type of contested case requests ADR, the case shall be referred to the agency's ADR coordinator.

(c) The Commissioner may refer any other contested case to the ADR coordinator at his or her own instance.

*§1.30. General Principles of Alternative Dispute Resolution.*

The following principles shall apply in Alternative Dispute Resolution (ADR) implemented for contested cases:

(1) Any resolution reached as a result of the ADR procedure should be through the voluntary agreement of the parties.

(2) ADR procedures shall be consistent with the Tex. Gov't Code, ch. 2009; Tex. Gov't Code, ch. 2008, Tex. Civil Practices and Remedies Code, ch. 154; and the Administrative Procedures Act, (the APA), Texas Gov't Code, ch. 2001.

(3) ADR procedures herein are intended to supplement and not to limit other dispute resolution procedures available for use by a governmental body.

(4) ADR processes shall not be applied in a manner that denies a person a right granted under state or federal law or under a local charter, ordinance, or other similar provision, including any right to an administrative or judicial hearing that is allowed or mandated by the Texas Education Code or by laws of more general application.

(5) The agency's ADR coordinator may appoint a governmental officer, an agency employee, a qualified mediator who is an employee of another governmental entity, or a qualified private mediator for an ADR procedure.

(6) Mediators:

(A) shall be qualified as required by Tex. Civil Practices and Remedies Code §154.052,

(B) are subject to the standards and duties described in Tex. Civil Practices and Remedies Code §154.053,

(C) have the qualified immunity described in the Tex. Civil Practices and Remedies Code §154.055,

(D) shall maintain confidentiality as described in Tex. Civil Practices and Remedies Code §154.073 and Tex. Gov't Code §2009.054, and

(E) shall not testify in proceedings relating to or arising out of the matter in dispute.

(7) The parties have the right to object to the person appointed to serve as the mediator.

(8) No one may dictate the terms of the agreement reached by the participants as long as the resolution is legal and complies with any rules set up for the process, including the rules set forth herein.

(9) Oral and written communications between the parties, and between the parties and the mediator, related to the ADR process are confidential and may not be disclosed unless all the parties consent to the disclosure, or upon issuance of an opinion from the Office of the Attorney General that the evidence is subject to the Open Records Act. This includes any description of the conduct and demeanor of participants. Any notes or records made in an ADR procedure are confidential. The mediator may not, directly or indirectly, communicate with the judge or any commissioner, on any aspect of ADR negotiations made confidential by this section. If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be determined by a judge who is hearing a related matter to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order or whether the communications or materials are subject to disclosure.

(10) A final written agreement to which the Board is a signatory is subject to required disclosure, is excepted from disclosure, or is confidential, as provided by the TADR Act §154.073 and other laws, including Tex. Gov't Code, ch. 552, and Tex. Gov't Code §2009.054(b).

*§1.31. Alternative Dispute Resolution (ADR) Coordinator.*

(a) The Commissioner shall appoint an ADR coordinator as soon as practicable following:

(1) initial adoption of this subchapter; or

(2) an appointee's vacation of the office.

(b) The ADR coordinator shall, as soon as practicable after appointment, complete the minimum training standards set forth in §154.052 of the Texas Alternative Dispute Resolution Procedures Act, Tex. Civ. Stat. and Rem. Code.

(c) The ADR coordinator shall have the responsibility:

(1) to maintain necessary agency records while maintaining the confidentiality of participants;

(2) to establish a method of choosing mediators who possess the minimum qualifications described in TADR Act, §154.052;

(3) to require mediators to adhere to a particular standard of conduct or code of ethics;

(4) to provide information about available ADR processes to agency employees, potential users, and users of the program;

(5) to arrange training or education necessary to implement adopted ADR processes; and

(6) to establish a system to evaluate the program and the impartial third-parties.

*§1.32. Selection of a Neutral Third Party.*

(a) For each matter referred for ADR procedures, the ADR coordinator may select a neutral third party to facilitate the proceeding. The ADR coordinator may assign a substitute or additional neutral third party to a proceeding as he or she deems necessary.

(b) If all the participants agree upon the use of a private mediator, a private mediator may be hired for agency ADR procedures provided that:

(1) the participants unanimously agree to the selection of the person to serve as the mediator;

(2) the mediator agrees to be subject to the direction of the commission's ADR coordinator and to all time limits imposed by the coordinator, the ALJ, if applicable, and all statutes or regulations that apply;

(3) the participants unanimously agree upon the manner in which costs for the services of the mediator will be apportioned among the participants;

(4) fees shall be paid directly to the mediator.

(5) All mediators in Board mediation proceedings shall subscribe to the ethical guidelines for mediators adopted by the ADR Section of the State Bar of Texas.

(c) SOAH mediators, employees of other governmental bodies who are trained mediators, and private pro bono mediators may be assigned to contested cases as needed, provided that:

(1) each mediator shall first have received 40 hours of training as prescribed by Texas law.

(2) each mediator shall have some expertise in the area of the contested matter.

(3) if the mediator is an ALJ at SOAH, that person may not also sit as the judge for the case if the contested case goes to a formal contested case hearing.

*§1.33. Developing Mediators within the Agency.*

To the extent practicable, the Board shall establish a pool of staff mediators to resolve contested cases through ADR procedures.

(1) Each staff mediator shall receive 40 hours of formal training in ADR procedures through programs approved by the ADR coordinator, and shall be qualified as required by the TADR Act §154.052 before being allowed to facilitate a mediation to which any governmental entity is a party.

(2) Each staff mediator shall subscribe to the ethical guidelines for mediators adopted by the ADR Section of the State Bar of Texas.

(3) Other individuals may assist with mediation on an ad hoc basis in light of particular skills or experience that will facilitate the resolution of individual contested matters.

*§1.34. Negotiated Settlements Must be in Writing.*

Agreements of the participants reached as a result of ADR must be in writing, and are enforceable in the same manner as any other written contract.

*§1.35. Partial Settlements through ADR.*

When ADR procedures do not result in the full settlement of a contested case, the participants, in conjunction with the mediator, shall limit the contested issues through the entry of written stipulations. Such stipulations shall be forwarded or formally presented to the ALJ who is assigned to conduct the hearing on the merits and shall be included in the hearing record.

*§1.40. Agency Management of Contract Disputes.*

(a) The procedures contained in this subchapter in relation to contract disputes are exclusive and required prerequisites to suit under the Civil Practice and Remedies Code, Chapter 107, and the Government Code, Chapter 2260.

(b) This subchapter does not waive the Board's sovereign immunity to suit or liability.

*§1.41. Definitions.*

The following words and terms, when used in relation to contract disputes, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Claim--A demand for damages by the contractor based upon the Board's alleged breach of the contract.

(2) Contract--A written contract between the Board and a contractor by the terms of which the contractor agrees either:

(A) to provide goods or services, by sale or lease, to or for the Board; or

(B) to perform a project as defined by Government Code, §2166.001.

(3) Contractor--Independent contractor who has entered into a contract directly with the Board. The term does not include:

(A) The contractor's subcontractor, officer, employee, agent or other person furnishing goods or services to a contractor;

(B) An employee of the Board; or

(C) A student at an institution of higher education.

(4) Counterclaim--A demand by the Board based upon the contractor's claim.

(5) Day--A calendar day. If an act is required to occur on a day falling on a Saturday, Sunday, or holiday, the first working day that is not one of these days should be counted as the required day for purpose of this act.

(6) Event--An act or omission or a series of acts or omissions giving rise to a claim. The following list contains illustrative examples of events, subject to the specific terms of the contract:

(A) Examples of events in the context of a contract for goods or services:

*(i)* the failure of the Board to timely pay for goods and services;

*(ii)* the failure to pay the balance due and owing on the contract price, including orders for additional work, after deducting any amount owed the Board for work not performed under the contract or in substantial compliance with the contract terms;

*(iii)* the suspension, cancellation, or termination of the contract;

*(iv)* final rejection of the goods or services tendered by the contractor, in whole or in part;

*(v)* repudiation of the entire contract prior to or at the outset of performance by the contractor;

*(vi)* withholding liquidated damages from final payment to the contractor.

(B) Examples of events in the context of a project:

*(i)* the failure to timely pay the unpaid balance of the contract price following final acceptance of the project;

*(ii)* the failure to make timely progress payments required by the contract;

*(iii)* the failure to pay the balance due and owing on the contract price, including orders for additional work, after deducting any amount owed the Board for work not performed under the contract or in substantial compliance with the contract terms;

*(iv)* the failure to grant time extensions to which the contractor is entitled under the terms of the contract;

*(v)* the failure to compensate the contractor for occurrences for which the contract provides a remedy;

*(vi)* suspension, cancellation or termination of the contract;

*(vii)* rejection by the Board, in whole or in part, of the "work," as defined by the contract, tendered by the contractor;

*(viii)* repudiation of the entire contract prior to or at the outset of performance by the contractor;

*(ix)* withholding liquidated damages from final payment to the contractor;

*(x)* refusal, in whole or in part, of a written request made by the contractor in strict accordance with the contract to adjust the contract price, the contract time, or the scope of work.

(C) The lists in subparagraphs (A) and (B) of this paragraph should not be considered exhaustive but are merely illustrative in nature.

(7) Goods--Supplies, materials or equipment.

(8) Project--As defined in Government Code §2166.001, a building construction project that is financed wholly or partly by a specific appropriation, bond issue or federal money, including the construction of:

(A) a building, structure, or appurtenant facility or utility, including the acquisition and installation of original equipment and original furnishing; and

(B) an addition to, or alteration, modification, rehabilitation or repair of an existing building, structure, or appurtenant facility or utility.

(9) Services--The furnishing of skilled or unskilled labor or consulting or professional work, or a combination thereof, excluding the labor of an employee of the Board.

*§1.42. Board Counterclaims.*

(a) If the agency asserts a counterclaim under the Government Code, Chapter 2260, notice of the counterclaim shall be filed as provided by this section.

(b) The notice of counterclaim shall:

(1) be in writing;

(2) be delivered by hand, certified mail return receipt requested or other verifiable delivery service to the contractor or representative of the contractor who signed the petition for contested case status; and

(3) state in detail:

(A) the nature of the counterclaim;

(B) a description of damages or offsets sought, including the amount and method used to calculate those damages or offsets; and

(C) the legal theory supporting the counterclaim.

(c) The agency may submit supporting documentation or other tangible evidence to facilitate the contractor's evaluation of the agency's counterclaim.

(d) The notice of counterclaim shall be delivered to the contractor no later than 90 days after the agency's receipt of the contractor's petition for contested case status.

(e) Nothing herein precludes the Board from initiating a lawsuit for damages against the contractor in a court of competent jurisdiction.

*§1.43. Request for Voluntary Disclosure of Additional Information.*

(a) Upon the filing of a claim or counterclaim, the parties may request to review and copy, without limitation, the following information that may be in the possession or custody, or that is subject to the control of the other party, and that pertains to the contract claimed to have been breached, regardless of the manner in which the information is recorded, including paper and electronic media:

(1) accounting records;

(2) correspondence, including, without limitation, correspondence between the Board and outside consultants it utilized in preparing its bid solicitation or any part thereof or in administering the contract, and correspondence between the contractor and its subcontractors, materialmen, and vendors;

(3) schedules;

(4) the parties' internal memoranda; and

(5) documents created by the contractor in preparing its offer to the Board and documents created by the Board in analyzing the offers it received in response to a solicitation.

(b) The contractor and the agency may seek additional information directly from third parties, including, without limitation, third-party consultants, and the contractor's subcontractors.

(c) Nothing in this section requires any party to disclose the requested information or any matter that is privileged under Texas law.

Material submitted pursuant to this subsection and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the Public Information Act.

(d) Material submitted pursuant to this subsection and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the Public Information Act.

*§1.44. Duty to Negotiate.*

The parties shall negotiate in accordance with the timetable set forth in §1.45 of this title (relating to the Negotiation Timetable), to attempt to resolve all claims and counterclaims. No party is obligated to settle with the other party as a result of the negotiation.

*§1.45. Negotiation Timetable.*

(a) After the agency's General Counsel has determined that the petition for contested case status contains all essential requirements under §1.24 of this title (relating to Mandatory Contents of a Petition for Contested Case Status), and has referred the case to the agency's officer, designated in the contract to be in charge of the negotiations, he or she shall review the contractor's claim(s) and the Board's counterclaim(s), if any, and, with appropriate assistance from the agency's ADR coordinator, shall initiate negotiations with the contractor to attempt to resolve the claim(s) and counterclaim(s).

(b) Subject to subsection (c) of this section, the parties shall begin negotiations within a reasonable period of time, not to exceed 60 days following the later of:

(1) the date of termination of the contract;

(2) the completion date, or substantial completion date in the case of construction projects, in the original contract; or

(3) the date the unit of state government receives the contractor's petition for contested case status.

(c) The agency may delay negotiations until after the 180th day after the date of the event giving rise to the claim of breach of contract by:

(1) delivering written notice to the contractor that the commencement of negotiations will be delayed; and

(2) delivering written notice to the contractor when the Board is ready to begin negotiations.

(d) The parties may conduct negotiations according to an agreed schedule as long as they begin negotiations no later than the deadlines set forth in subsections (b) and (c) of this section, whichever is applicable.

(e) Subject to subsection (f) of this section, the parties shall complete the negotiations that are required by this section as a prerequisite to a contractor's request for contested case hearing no later than 270 days after the agency receives the contractor's notice of claim.

(f) On or before the 270th day after the agency receives the contractor's petition for contested case status, the parties may agree in writing to extend the time for negotiations. The agreement shall be signed by a representative of each party, who has authority to bind the party, and shall provide for the extension of the statutory negotiation period until a date certain. The parties may enter into a series of written extension agreements that comply with the requirements of this section.

(g) The contractor may request a contested case hearing before the State Office of Administrative Hearings ("SOAH") pursuant to §1.48 of this title (relating to Request for Contested Case Hearing), of this subchapter, after the 270th day after the agency receives the contractor's petition for contested case status, or after the expiration of any extension agreed to under subsection (f) of this section.

(h) The parties may agree to mediate the dispute at any time before the 270th day after the agency receives the contractor's petition for contested case status, or before the expiration of any extension agreed to by the parties pursuant to subsection (f) of this section. The mediation shall be governed by §1.46(c) of this title (relating to Conduct of Negotiations).

(i) Nothing in this subsection is intended to prevent the parties from agreeing to commence negotiations earlier than the deadlines established in subsections (b) and (c) of this section, or from continuing or resuming negotiations, or requesting mediation after the contractor requests a contested case hearing before SOAH.

*§1.46. Conduct of Negotiations.*

(a) The parties' settlement approval procedures shall be disclosed prior to, or at the beginning of, negotiations. To the extent possible, the parties shall select negotiators who are knowledgeable about the subject matter of the dispute, who are in a position to reach agreement, and who can credibly recommend approval of an agreement.

(b) Unless the parties agree otherwise, each party shall be responsible for its own costs incurred in connection with a negotiation, including, without limitation, the costs of attorney's fees, consultant's fees, expert's fees, and mediation costs.

(c) The parties may conduct negotiations with the assistance of one or more neutral third parties. A negotiation under this subchapter may be conducted by any method, technique, or procedure authorized under the contract or agreed upon by the parties, including, without limitation, negotiation in person, by telephone, by correspondence, by video conference, or by any other method that permits the parties to identify their respective positions, discuss their respective differences, confer with their respective advisers, exchange offers of settlement, and settle. Parties may choose an assisted negotiation process other than mediation, including without limitation, processes such as mini-trials, early case neutral case evaluation by an impartial third-party, and fact-finding by an expert. If the parties choose to mediate their dispute, the mediation shall be conducted in accordance with §1.27 of this title (relating to Referral to ADR Coordinator) through §1.35 of this title (relating to Partial Settlements through ADR).

(d) The agency's negotiation strategy and neutral third parties shall be approved by the ADR coordinator, and the results of the negotiations reported to the ADR coordinator.

*§1.47. Settlement Agreement.*

(a) A settlement agreement may resolve an entire claim or any designated and severable portion of a claim.

(b) To be enforceable, a settlement agreement must be in writing and signed by representatives of the parties who have authority to bind each party.

(c) Partial settlement does not waive a party's rights under the Government Code, Chapter 2260, as to the parts of the claims or counterclaims that are not resolved.

*§1.48. Request for Contested Case Hearing.*

(a) If a claim for breach of contract is not resolved in its entirety through negotiation, mediation or other assisted negotiation process in accordance with this subchapter on or before the 270th day after the agency receives the notice of claim, or after the expiration of any extension agreed to by the parties pursuant to §1.45 of this title (relating to Negotiation Timetable), the contractor may file a request with the agency for a contested case hearing before SOAH.

(b) A request for a contested case hearing shall state the legal and factual basis for the claim, and shall be delivered to the Commissioner or other officer designated in the contract to receive notice within a reasonable time after the 270th day or the expiration of any written extension agreed to pursuant to §1.45 of this title (relating to Negotiation Timetable).

(c) The agency shall forward the contractor's request for contested case hearing to SOAH within a reasonable period of time, not to exceed thirty days, after receipt of the request.

(d) The parties may agree to submit the case to SOAH before the 270th day after the notice of claim is received by the agency if they have achieved a partial resolution of the claim or if an impasse has been reached in the negotiations and proceeding to a contested case hearing would serve the interests of justice.

*§1.60. State Office of Administrative Hearings.*

Formal contested case hearings shall be conducted for the Board by SOAH, as authorized by Chapters 2001 and §2003.021 of the Texas Government Code.

*§1.61. Classification of Parties.*

(a) Designations of parties are as follows:

(1) Petitioner--the party requesting a hearing.

(2) Respondent--the party named as such by the petitioners.

(3) Intervenor--a person who shows an administratively cognizable or justiciable interest in the contested case.

(b) Regardless of errors as to designation of parties in the pleadings, parties shall be accorded their true status in a formal contested case hearing at SOAH.

*§1.62. Notice of Hearing.*

(a) All parties to a formal contested case hearing shall be mailed written notice at least 15 calendar days before the date set for the hearing. The notice shall include:

(1) a statement of time, place, and nature of the hearing;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) a reference to the particular section of the statutes and rules involved; and

(4) a short and plain statement of the matters asserted. The petitioner may satisfy this requirement by incorporating the petition by reference in the notice of hearing.

(b) If the petition was initiated by the Commissioner, service may be made by sending the notice to the party's last known address as shown by the Board's records. If the petition was initiated by a party other than the Commissioner, notice will be mailed to the address on that party's most recently filed pleading.

*§1.63. Proposed Findings of Fact and Conclusions of Law.*

If any party to a contested case hearing at SOAH files proposed findings of fact and conclusions of law within 10 days of the date on which the record is closed, or within any other period of time that the ALJ may prescribe, the ALJ shall rule on each proposal.

*§1.64. Default.*

(a) If party who filed the petition for contested case status fails to appear on the day and time set for the hearing, the Commissioner may move in that party's absence for a default, and the ALJ may issue a proposal for decision against the defaulting party. In the proposal for decision or order, the factual allegations against that party in the notice of hearing will be deemed admitted.

(b) If the party who filed the petition fails to appear on the day and time set for hearing, the Commissioner may move for dismissal of the case from the SOAH docket.

(c) The notice of hearing must include disclosure, in at least twelve-point, bold-face type, that a failure to appear on the date and time of the hearing will result in a default order or dismissal.

*§1.65. Exceptions to Proposal for Decision.*

(a) Pursuant to Chapter 2001 of the Texas Government Code, every party has the right to file exceptions to the Proposal for Decision issued by the ALJ and to present a brief with respect to the exceptions.

(b) All exceptions must be mailed within 10 working days of the proponent's receipt of the Proposal for Decision, with replies, if any, to be mailed within ten working days of the receipt of exceptions. Extensions of the deadline to file exceptions shall be negotiated between the parties; the first extension shall not be unreasonably withheld.

*§1.66. Board Meeting to Consider Proposal for Decision.*

(a) The Board shall take up the Proposal for Decision and adopt a final order in a contested case at the next regularly scheduled Board meeting after the hearing is finally closed, if sufficient time remains before the meeting for the parties to receive proper notice.

(b) At least 15 days notice shall be given by the Commissioner to all parties to a hearing of the time and place of the Board meeting at which the Proposal for Decision will be considered by the Board.

*§1.67. Motion for Rehearing.*

A motion for rehearing shall be filed not later than the 20th day after the party or the party's attorney of record is notified of the final decision or order that may become final under Texas Government Code, §2001.144. The procedures for a Motion for Rehearing shall be those procedures under Texas Government Code, §2001.146, and Texas appeals cases interpreting that 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.

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Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: January 29, 2004
For further information, please call: (512) 427-6114

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## SUBCHAPTER C. STANDARDS OF CONDUCT

**19 TAC §§1.80 - 1.87**

The Texas Higher Education Coordinating Board proposes new §§1.80 - 1.87, concerning Agency Administration (Standards of Conduct). Specifically, the proposed new subchapters and sections reorganize existing Chapter 1, Subchapters A - E. In conducting the review of Chapter 1, in light of new legislative mandates regarding negotiated rulemaking and Alternate Dispute Resolution (ADR), the Office of General Counsel concluded that, despite the fact that few of the existing rules

needed to be amended in any material way, the role of the ADR coordinator required the addition of several new sections, and the complete reorganization of existing Subchapters B and C. For that reason, we have posted separately the repeal of Chapter 1, in its entirety, and herein propose new subchapters and sections.

Proposed Subchapter C is now substantially similar to existing Subchapter D, relating to standards of conduct governing relationships between the Texas Higher Education Coordinating Board (Board), its officers and employees, and private donors and private organizations that exist to further the purposes, and to assist in accomplishing the duties of the Board. Some non-substantive language changes have been made, and the section numbers have all changed.

Proposed Subchapter D is now substantially similar to existing Subchapter E. It describes the process by which a person may correct information that the Board has recorded about them, and which is incorrect. Some non-substantive language changes have been made, and the section numbers have all changed.

Katie Johnsonius, Assistant General Counsel has determined that for each year of the first five years the sections are in effect, there will not be any fiscal implication to state or local government as a result of enforcing or administering the rules.

Ms. Johnsonius has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be improved clarity regarding the agency's process for managing contested cases of all types. There is no effect on small businesses, except to the extent that the proposed rules require that, in the absence of an agreement to the contrary, each party to a contract dispute shall pick up half the costs of alternative dispute resolution. There is no anticipated economic cost to persons who are required to comply with the sections as proposed, except to the extent that the proposed rules regarding contested cases also require that, in the absence of an agreement to the contrary, each party to a contested case shall pick up half the costs of alternative dispute resolution. There is no impact on local employment.

Comments on the proposed new sections may be submitted to Katie Johnsonius, Assistant General Counsel, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711; Katie.johnsonius@thecb.state.tx.us.

The new sections are proposed under the Texas Education Code, §§61.025 - 61.029, 61.031, 61.084, 61.301 - 61.319, and 61.041 - 61.405; Texas Government Code, §§552.231, 559.004, Chapter 2001, §§2003.021, 2155.076, 2161.003, 2255.001, Chapters 2260, 2008, and 2009; Texas Transportation Code, §201.112; Civil Practice and Remedies Code, Chapters 107 and 154. which provide the Coordinating Board with the authority to adopt rules concerning Agency Administration.

The new sections affect Texas Education Code §§61.025, 61.026, 61.028, 61.029, 61.031, 61.084, 61.301 - 61.319, and 61.401 - 61.405; Texas Government Code, §§552.231, 559.004, Chapter 2001, §§2003.021, 2155.076, 2161.003, 2255.001, Chapters 2260, 2008, 2009; Texas Transportation Code, §201.112; Civil Practice and Remedies Code, Chapters 107 and 154.

*§1.80. Scope and Purpose.*

(a) This subchapter establishes the criteria, procedures, and standards of conduct governing the relationship between the Texas Higher Education Coordinating Board (Board) and its officers and employees and private donors and private organizations that exist to further the duties and purposes of the Board.

(b) The purpose of this subchapter is to comply with the provisions of Texas Government Code, §2255.001.

*§1.81. Definitions.*

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

(1) Commissioner--The Commissioner of the Texas Higher Education Coordinating Board.

(2) Board--The Texas Higher Education Coordinating Board.

(3) Donation--A contribution of anything of value (financial or in-kind gifts such as goods or services) given to the Board for public higher education purposes or to a private organization that exists to further the duties or functions of the Board. The Board may not accept donations of real property (real estate) without the express permission and authorization of the legislature.

(4) Employee--A regular, acting, exempt, full-time or part-time employee of the agency.

(5) Private donor--People or private organizations that make a donation to the Board for higher education purposes, or that make a donation to a private organization that exists to further the purposes, and to assist in accomplishing the duties of the Board.

(6) Private organization--A private organization that exists to further the purposes and to assist in accomplishing the duties of the Board.

*§1.82. Donations by Private Donors to the Board.*

(a) A private donor may make donations to the Board to be spent for specified or unspecified public higher education purposes. If the donor specifies the purpose, the Board must expend the donation only for that purpose.

(b) All donations shall be expended in accordance with the provisions of the State Appropriations Act and shall be deposited in the state treasury unless exempted by specific statutory authority.

(c) All donations shall be coordinated through the Commissioner.

(d) The Board may not transfer a private donation to a foundation or private/public development fund without specific written permission from the donor and the written approval of the Commissioner.

*§1.83. Donations by a Private Donor to a Private Organization that Exists to Further the Purposes and Duties of the Board.*

(a) A private donor may make donations to a private organization that exists to further the purposes and to assist in accomplishing the duties of the Board.

(b) The private organization shall administer and use the donation in accordance with the provisions in the memorandum of understanding between the private organization and the Board, as described in §1.65(c) of this title (relating to Relationship between a Private Organization and the Board).

*§1.84. Organizing a Private Organization that Exists to Further the Duties and Purposes of the Board.*

(a) The "College for All Texans Foundation: Closing the Gaps" is designated as the official nonprofit partner (ONP) of the Board.

(b) The Chair of the Board and the Board of Trustees of the ONP may cooperatively appoint a board of trustees for the organization. The Commissioner shall serve as an ex officio trustee with no vote. Board employees may hold office and vote provided there is no conflict of interest in accordance with all federal and state laws and Board policies. This provision applies to the employee's spouse and children.

*§1.85. Relationship between a Private Organization and the Board.*

(a) The Board may provide to a private organization covered by these sections:

(1) fundraising and solicitation assistance;

(2) staff services to coordinate activities;

(3) administrative and clerical services;

(4) office and meeting space;

(5) training; and

(6) other miscellaneous services as needed to further the duties and purposes of the Board.

(b) The private organization may provide:

(1) postage;

(2) printing, including letterhead and newsletters;

(3) special event insurance;

(4) recognition of donors; and

(5) bond and liability insurance for organization officers.

(c) The private organization and the Board shall enter into a memorandum of understanding (MOU) which contains specific provisions regarding:

(1) the relationship between the private organization and the Board, and a mechanism for solving any conflicts or disputes;

(2) fundraising and solicitation;

(3) the use of all funds and other donations from fundraising or solicitation, less legitimate expenses as described in the MOU, for the benefit of the Board;

(4) the maintenance by the private organization of receipts and documentation of all funds and other donations received, including furnishing such records to the Board; and

(5) the furnishing to the Board of any audit of the private organization by the Internal Revenue Service or a private firm.

*§1.86. Standards of Conduct Between Board Employees and Private Donors.*

(a) A Board officer or employee shall not accept or solicit any gift, favor, or service from a private donor that might reasonably tend to influence his/her official conduct.

(b) An officer or employee shall not accept employment or engage in any business or professional activity with a private donor which the officer or employee might reasonably expect would require or induce him/her to disclose confidential information acquired by reason of his/her official position.

(c) An officer or employee shall not accept other employment or compensation from a private donor that would reasonably be expected to impair the officer or employee's independence of judgment in the performance of his/her official position.

(d) An officer or employee shall not make personal investments in association with a private donor that could reasonably be expected to create a substantial conflict between the officer or employee's private interest and the interest of the Board.

(e) An officer or employee shall not solicit, accept, or agree to accept any benefits for having exercised his/her official powers on behalf of a private donor or performed his official duties in favor of private donor.

(f) An officer or employee who has policy direction over the Board and who serves as an officer or director of a private donor shall not vote on any measure, proposal, or decision pending before the private donor if the Board might reasonably be expected to have an interest in such measure, proposal, or decision.

(g) An officer or employee shall not authorize a private donor to use property of the Board unless the property is used in accordance with a contract or memorandum of understanding between the Board and the private donor, or the Board is otherwise compensated for the use of the property.

*§1.87. Miscellaneous.*

The relationship between a private donor and a private organization and the Board, including fundraising and solicitation activities, is subject to all applicable federal and state laws, rules and regulations, and local ordinances governing each entity and its employees.

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.

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Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
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## SUBCHAPTER D. RIGHT TO CORRECTION OF INCORRECT INFORMATION

**19 TAC §§1.96 - 1.99**

The Texas Higher Education Coordinating Board proposes new §§1.96 - 1.99 concerning Agency Administration (Right to Correction of Incorrect Information). Specifically, the proposed new subchapters and sections reorganize existing Chapter 1, Subchapters A - E. In conducting the review of Chapter 1, in light of new legislative mandates regarding negotiated rulemaking and Alternate Dispute Resolution (ADR), the Office of General Counsel concluded that, despite the fact that few of the existing rules needed to be amended in any material way, the role of the ADR coordinator required the addition of several new sections, and the complete reorganization of existing Subchapters B and C. For that reason, we have posted separately the repeal of Chapter 1, in its entirety, and herein propose new subchapters and sections.

Proposed Subchapter D is now substantially similar to existing Subchapter E. It describes the process by which a person may correct information that the Board has recorded about them, and which is incorrect. Some non-substantive language changes have been made, and the section numbers have all changed.

Katie Johnsonius, Assistant General Counsel has determined that for each year of the first five years the sections are in effect, there will not be any fiscal implication to state or local government as a result of enforcing or administering the rules.

Ms. Johnsonius has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be improved clarity regarding the agency's process for managing contested cases of all types. There is no effect on small businesses, except to the extent that the proposed rules require that, in the absence of an agreement to the contrary, each party to a contract dispute shall pick up half the costs of alternative dispute resolution. There is no anticipated economic cost to persons who are required to comply with the sections as proposed, except to the extent that the proposed rules regarding contested cases also require that, in the absence of an agreement to the contrary, each party to a contested case shall pick up half the costs of alternative dispute resolution. There is no impact on local employment.

Comments on the proposed new sections may be submitted to Katie Johnsonius, Assistant General Counsel, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711; Katie.johnsonius@thecb.state.tx.us.

The new sections are proposed under the Texas Education Code, §§61.025 - 61.029, 61.031, 61.084, 61.301 - 61.319, and 61.041 - 61.405; Texas Government Code, §§552.231, 559.004, Chapter 2001, §§2003.021, 2155.076, 2161.003, 2255.001, Chapters 2260, 2008, and 2009; Texas Transportation Code, §201.112; Civil Practice and Remedies Code, Chapters 107 and 154, which provide the Coordinating Board with the authority to adopt rules concerning Agency Administration.

The new sections affect Texas Education Code §§61.025, 61.026, 61.028, 61.029, 61.031, 61.084, 61.301 - 61.319, and 61.401 - 61.405; Texas Government Code, §§552.231, 559.004, Chapter 2001, §§2003.021, 2155.076, 2161.003, 2255.001, Chapters 2260, 2008, and 2009; Texas Transportation Code, §201.112; Civil Practice and Remedies Code, Chapters 107 and 154.

*§1.96. Scope and Purpose.*

(a) This subchapter shall govern instances in which individuals request correction of incorrect information, for which the agency is responsible, pertaining to the individual or to a person that the requestor has the legal right to represent. This subchapter should not be read to contradict §1.10 of this title (relating to the Texas Public Information Act), the Family Educational Rights and Privacy Act (FERPA), or any other applicable state or federal law.

(b) The purpose of this subchapter is to implement Texas Government Code, §559.004, concerning individuals' Right to Correction of Incorrect Information.

*§1.97. Definitions.*

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

(1) Agency--Texas Higher Education Coordinating Board.

(2) Day--A calendar day. If an act is required to occur on a day falling on a Saturday, Sunday, or holiday, the first working day that is not one of these days should be counted as the required day for purpose of this act.

(3) Program or Division--Any subunit of the Agency, to be determined by the Agency.

(4) Requestor--The person who submits a request for correction of incorrect information, whether on his or her own behalf or on behalf of someone else.

*§1.98. Individual's Right to Correction of Incorrect Information.*

(a) An individual who finds that the information collected by and in the possession of the agency on a form or through electronic media, is incorrect, has a right to have the agency correct the information. The individual has no right to change information that was correct when it was submitted, but which is no longer correct. The information to be changed must be concerning the requestor, or concerning a person that the requestor has the legal right to represent. The agency may request proof of this authority, and if it does so, the requestor must provide the proof, before the agency processes the request.

(b) The individual must submit the correction request in writing to the program or division within the agency that is in possession of the information. The program or division may be identified by correspondence received from the agency, or through a request for public information from the agency, submitted in writing to: Open Records Officer, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78722

(c) The correction request must:

(1) specifically identify the information which the individual believes is incorrect;

(2) provide the agency with sufficient information to establish that the information is incorrect and was incorrect at the time it was submitted to the agency; and

(3) provide the correct information.

*§1.99. Correction Procedure.*

(a) The program or division within the agency that is the custodian of the target information shall provide an acknowledgement of receipt of the correction request to the requestor within 10 days from the receipt of the request.

(b) The program or division with custody and control of the information shall review the information identified by the individual as incorrect and the proof that the requestor has provided, and determine whether the information in the agency's record should be corrected.

(1) If the agency determines that the information is incorrect in an electronic record or form, an individual with authority to access the information shall enter the correction into the record by electronic media, at or near the place where the incorrect information appears with the date, and reason for the correction, by whom the correction was requested, and by whom the correction was made.

(2) If the agency determines that the information is incorrect in a paper record or form, an individual with authority to access the information shall insert the information as submitted by the individual requesting the correction, along with an entry of the date, and the name of the individual inserting the correction.

(3) If the agency determines that the information is correct, no correction shall be made to the information.

(c) The program or division that is the custodian of the target information shall notify the individual of its determination and, if the information was corrected, shall provide the requestor with a copy of the corrected information.

(d) The agency shall not charge or bill a requestor for correction of an incorrect record.

(e) The agency shall not alter or destroy an original agency record or document in its possession except as required or authorized by law.

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.

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Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: January 29, 2004
For further information, please call: (512) 427-6114

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# CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

## SUBCHAPTER A. GENERAL PROVISIONS

### 19 TAC §4.4

The Texas Higher Education Coordinating Board proposes amendments to §4.4, concerning excused absences for religious holy days for students in public institutions of higher education. The amendments were made in response to House Bill 256 (of the 78th Texas Legislature), which amended Texas Education Code, §51.991 (b). The statutory change removed a previous requirement that a student must notify his or her instructor within 15 days from the start of the semester of an absence for the purpose of observing a religious holy day. HB 256 also required that a student shall be excused from attending classes or other required activities, including examinations, during time needed for travel for the purpose of the observance of a religious holy day. The proposed amendments indicate that institutional policies and procedures for absences due to religious holy days shall be consistent with (or no more arduous than) the institution's policies and procedures relating to other excused absences. The recommended amendments also include a provision for the resolution of any disputes that could arise regarding the nature of an absence under this section and a provision for a reasonable time in which to make up the work that was missed during such an absence.

Dr. Marshall A. Hill, Assistant Commissioner for Universities and Health-Related Institutions, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the proposed rules.

Dr. Hill has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering these sections will be to allow students to participate in observances of religious holy days under conditions similar to those that apply to other institutional excused absences. There is no effect on small businesses. There is no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposed rules may be submitted to Marshall A. Hill, Ph.D., Texas Higher Education Coordinating Board, P. O. Box 12788, Austin, Texas 78711-2788, or by e-mail to Marshall.Hill@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposed rules in the *Texas Register*.

The amendment is proposed under the Texas Education Code, §51.911 (e), which requires the Board to adopt rules for the observance of religious holy days at institutions of higher education.

The amendment affects Texas Education Code, §51.911.

*§4.4. Student Absences on Religious Holy Days.*

(a) Under Texas Education Code, §51.911, all institutions of higher education shall excuse [~~allow~~] a student [~~who is absent~~] from attending classes or other required activities, including examinations, for the observance of a religious holy day, including travel for that purpose. A student whose absence is excused under this subsection may not be penalized for that absence and shall be allowed to take an examination or complete an assignment from which the student is excused [~~scheduled for that day~~] within a reasonable time after the absence [~~if, not later than the 15th day after the first day of the semester, the student notifies the instructor of each class the student had scheduled on that date that the student would be absent for a religious holy day~~].

(b) Each institution of higher education shall develop and include in its official bulletins, catalogs, and other appropriate publications a statement regarding its [~~attendance~~] policies and procedures for all excused absences. Policies and procedures for absences due to religious holy days shall be consistent with (or no more arduous than) the institution's policies and procedures relating to other excused absences. [~~If the institution publishes a list of important academic dates or other schedule of significant dates, it would be appropriate to include the deadline date for notification by students to faculty members as set out in this section.~~]

[~~(c) Notifications of planned absences must be in writing and must be delivered by the student either personally to the instructor of each class, with receipt of the notification acknowledged and dated by the instructor; or by certified mail, return receipt requested, addressed to the instructor of each class.~~]

[~~(d) Each institution may include in its policies and procedures provisions whereby the instructor may appropriately respond if the student fails to satisfactorily complete the assignment or examination within a reasonable time after the absence. Such provisions must be communicated to the student when the student notifies the instructor of a planned absence under this section.~~]

(c) Texas Education Code, §51.911 defines a religious holy day. If a student and an instructor disagree about the nature of the absence being for the observance of a religious holy day as defined therein, or if there is similar disagreement about whether the student has been given a reasonable time to complete any missed assignments or examinations, either the student or the instructor may request a ruling from the chief executive officer of the institution or his or her designee. The student and instructor shall abide by the decision of the chief executive officer or his/her designee.

(d) [~~(e)~~] Each institution may exclude from these policies and procedures any student absence for religious holy days which may interfere with patient care.

[~~(f) An institution choosing to establish more lenient polices with respect to the freedom of students to observe religious holy days may do so.~~]

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.

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Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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## CHAPTER 11. TEXAS STATE TECHNICAL COLLEGE SYSTEM
## SUBCHAPTER B. GENERAL PROVISIONS

**19 TAC §§11.24, 11.25, 11.28**

The Texas Higher Education Coordinating Board proposes amendments to §§11.24, 11.25, and 11.28 concerning Texas State Technical College system. Specifically, these amendments update references to these sections of Board rules for two-year associate degree granting institutions that have changed with the repeal and adoption of other Board rules amendments.

Dr. Glenda O. Barron has determined that for each year of the first five years the section is in effect, there will not be any fiscal implication to state or local government as a result of enforcing or administering the rules.

Dr. Barron has also determined that for each year of the first five years these sections is in effect, the public benefit anticipated as a result of administering these sections will be to provide appropriate references within these sections to other Board rules. There is no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposed amendments may be submitted to Dr. Glenda O. Barron, Texas Higher Education Coordinating Board, 1200 East Anderson Lane, Austin, Texas 78752; Glenda.Barron@thecb.state.tx.us.

The amendments are proposed under the Texas Education Code, §§61.051 and 61.027, 135.02, and 135.06, authorize the Coordinating Board to adopt policies, enact regulations, and establish rules for the Texas State Technical College System relating to the review of its role and mission statement, new program approval, approval and operation of extension centers, approval of land acceptance or acquisition, and the audit of its facilities.

The amendments affect Texas Education Code §61.051.

*§11.24. Approval of Land Acceptance or Acquisition.*

The governing board may accept, acquire by purchase, lease, sell, transfer, or exchange land in the name of the State of Texas and make improvement to facilities in any of the counties in which a campus or extension center is located according to procedures outlined in Chapter 17[~~, Subchapter C~~] of this title (relating to Campus Planning [~~Requesting Coordinating Board Endorsement of Real Property Acquisitions~~]).

*§11.25. Audit of Facilities.*

The Board shall periodically conduct a comprehensive audit of all educational and general facilities on the campuses of the Texas State Technical College System as outlined in Chapter 17[~~, Subchapter D~~] of this title (relating to Campus Planning [~~Audits of Educational and General Facilities~~)].

*§11.28. Other Provisions Related to the System.*

The Texas State Technical College System is subject to additional provisions of this title as prescribed in Chapter 4, Subchapters A, B, D, and F of this title (relating to Rules Applying to All Public Institutions of Higher Education in Texas and Chapter 9, Subchapters B, C, H, and I of this title (relating to Program Development in Public Community/Junior College Districts and Technical Colleges).

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 November 13, 2003.

TRD-200307824
Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: January 29, 2004
For further information, please call: (512) 427-6114

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## CHAPTER 25. OPTIONAL RETIREMENT PROGRAM
## SUBCHAPTER A. OPTIONAL RETIREMENT PROGRAM

**19 TAC §§25.1 - 25.3**

*(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 Higher Education Coordinating Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The Texas Higher Education Coordinating Board proposes the repeal of §§25.1 - 25.3 concerning Optional Retirement Program. Specifically, this repeal will delete the current Subchapter A and all sections within it regarding Optional Retirement Program. The repeal is the result of the Texas Higher Education Coordinating Board's review of Chapter 25, which was posted in the Texas Register on September 19, 2003. Amendments are being proposed to Chapter 25 concerning ORP eligibility, uniformity policies, recent legislative changes, and improvement of clarity and consistency. These amendments will require the addition of several sections and a re-organization of the existing rules. For that reason, the Board proposes the repeal of Chapter 25, in its entirety, and separately posts proposed new sections.

Ms. Toni Alexander, ORP Coordinator for the Texas Higher Education Coordinating Board, has determined that there will not be any fiscal implications to state or local government as a result of the rules repeal.

Ms. Alexander has also determined that for each year of the first five years that the repeal is in effect, there will be no public benefit

anticipated. There is no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the repeal. There is no impact on local employment.

Comments on the proposed repeal may be submitted to Toni Alexander, ORP Coordinator, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711; toni.alexander@thecb.state.tx.us.

The repeal of these sections are proposed under the Texas Government Code, §§830.001-830.205 which provide the Coordinating Board with the authority to adopt rules regarding the Optional Retirement Program.

The repeal of the sections affect the Texas Government Code, §§830.001-830.205.

*§25.1. Purpose.*

*§25.2. ORP Eligibility Standards.*

*§25.3. ORP 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 November 13, 2003.

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Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
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**19 TAC §§25.1 - 25.6**

The Texas Higher Education Coordinating Board proposes new §§25.1 - 25.6 of Board rules, concerning the Optional Retirement Program (ORP). The proposed new subchapter and sections re-organize existing Subchapter A concerning the Optional Retirement Program. In conducting the review of Chapter 25 in light of bills passed by the 78th Legislature, advice from the Board's General Counsel, and recent ORP policy interpretations by Board staff, it was determined that amendments to Chapter 25 were needed regarding ORP eligibility, uniformity policies, recent legislative changes, and improvement of clarity and consistency. These amendments will require the addition of several sections and a re-organization of the existing rules. For that reason, the Board has posted separately the repeal of Chapter 25, in its entirety, and herein proposes a new Subchapter A and sections.

Proposed new §25.3 is a new definitions section. Proposed new §25.4 is a re-organization of the existing §25.2 on ORP eligibility standards to: (1) incorporate the 90-day waiting period for active membership in the Teacher Retirement System (TRS) which will delay an ORP-eligible employee's opportunity to elect ORP in lieu of TRS; (2) update the existing ORP eligibility rules for improved clarity and consistency; and (3) incorporate ORP interpretations provided by Board staff regarding dual employment in positions at different institutions, eligibility for counselors, institutional reviews of ORP-eligible positions, and procedures for handling administrative errors involving eligibility determination.

Proposed new §25.5 is a re-organization of the existing §25.3 on ORP vesting and participation standards for improved clarity and consistency and to incorporate ORP vesting and participation provisions regarding employment in a non-benefits-eligible position and dual employment in positions at different institutions.

Proposed new §25.6 is a new section on uniformity of institutional administration of ORP. This section addresses: (1) distribution restrictions, including a prohibition on loans and procedures that an institution may use if a company provides an unauthorized distribution; (2) a requirement that contributions shall be made on a tax-deferred basis; (3) a requirement that ORP contracts shall include a provision that the ORP company is responsible for qualifying domestic relations orders and paying benefits in accordance with Texas Government Code, Chapter 804; (4) procedures for reimbursing to the originating fund any employer contributions that an ORP participant forfeited by terminating prior to vesting; (5) a minimum number of ORP companies that institutions shall authorize; (6) a minimum number of opportunities that institutions shall provide for participants to change ORP companies; (7) a requirement that all institutions shall establish certain policies regarding solicitation of ORP-eligible employees by representatives of authorized ORP companies; (8) a requirement that companies shall provide certain information to ORP participants concerning their account balances and transactions on at least an annual basis; (9) a requirement that companies shall submit confirmation of receipt of funds directly to each participant on at least a quarterly basis; (10) a requirement that companies shall submit confirmation of transfers directly to the participant immediately upon execution; (11) a requirement that institutions shall send all ORP contributions to the companies by electronic funds transfer and within three days of legal availability; (12) a requirement that institutions shall submit annual reports to the Board regarding ORP participation and any other information required by the Board to fulfill its duties under the ORP statute; (13) a requirement that institutions shall provide newly ORP-eligible employees with basic information on TRS and ORP (provided by the Board) on or before their first eligibility date; and (14) a requirement that institutions shall provide written notification to all newly ORP-eligible employees of a participant's ORP responsibilities and that the institution has no fiduciary responsibility for the market value of a participant's investments or for the financial stability of the vendors chosen by a participant.

Proposed new §25.6 incorporates: (1) procedures for handling IRS limits on contributions; (2) a prohibition on co-mingling of ORP funds with any other funds except for TRS employee contributions that were withdrawn in conjunction with a participant's ORP election; (3) a prohibition on contributions to two retirement programs within the same calendar month; (4) the definition of eligible compensation; (5) procedures for providing supplemental ORP employer contributions authorized by Texas Government Code, Chapter 830, §830.2015; (6) a requirement that ORP employer contributions shall be funded proportionately to salary source; (7) a requirement that an institution's list of authorized ORP companies and products shall provide a reasonable variety of choices among types of accounts and funds, including at least one company that offers 403(b)(1) annuity accounts and at least one company that offers 403(b)(7) custodial accounts; (8) a requirement that an institution shall not authorize a company to receive contributions from unvested participants unless the company has certified that the entire amount of actual unvested employer contributions will be returned to the institution if the participant terminates prior to vesting; (9) a requirement that institutions shall start sending a participant's contributions to the participant's newly selected company no later than 35 days after the date the participant signs and submits the appropriate forms

to the institution; (10) a provision that all of an active participant's ORP contributions, even those sent to previously selected companies and those made during prior periods of employment are covered by the distribution restrictions; (11) a provision that institutions may allow participants to continue contributing to a company even after it is no longer on the institution's authorized list ("grandfathered" company) and may allow participants who directly transfer from another institution to continue contributing to the same company that they were contributing to at the other institution, provided the institution verifies that the contract includes the distribution restrictions; (12) provisions regarding authorization of company representatives; (13) provisions regarding investment advisory fees; (14) a notification requirement for institutions to inform terminating participants of the institution's procedures for handling certification of a participant's eligibility for retiree group health insurance; and (15) a requirement that institutions shall establish procedures that will document when participants have received the notices required by this section.

Ms. Toni Alexander, ORP Coordinator for the Texas Higher Education Coordinating Board, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Alexander has also determined that for each year of the first five years the section is in effect, there is no public benefit because these rules affect a retirement program for higher education employees. There is no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Toni Alexander, ORP Coordinator, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711; toni.alexander@thecb.state.tx.us.

The new sections are proposed under the Texas Government Code, §§830.001-830.205 which provide the Coordinating Board with the authority to adopt rules regarding the Optional Retirement Program.

The new sections affect Texas Government Code, §§830.001-830.205.

*§25.1. Purpose.*

The purpose of these rules is to administer the Optional Retirement Program, to establish eligibility for the Optional Retirement Program and to provide for greater uniformity of procedures for administration of the Optional Retirement Program by Texas public institutions of higher education.

*§25.2. Authority.*

The authority for these provisions is provided by Texas Government Code, Chapter 830.

*§25.3. Definitions.*

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

(1) Active Participation--Period of employment during which an ORP participant makes regular ORP contributions through payroll deduction based on the statutory percentage of the employee's salary earned during that period, which along with the matching employer contributions, are sent by the ORP employer to an authorized ORP company. A faculty member who is not employed by a Texas public institution of higher education during the three summer months but who was participating in ORP at the end of the spring semester immediately preceding the summer and who resumes ORP participation with the same or another Texas public institution of higher education in the fall semester immediately following that summer shall normally be considered an active participant during the three summer months.

(2) Applicable Retirement System--The Teacher Retirement System of Texas for employees of Texas public institutions of higher education and the Employees Retirement System of Texas for employees of the Board.

(3) Board--The Texas Higher Education Coordinating Board.

(4) Break in Service--A period following a participant's termination of all employment with all Texas public institutions of higher education or the Board that is at least one full calendar month in which no ORP contribution is made, excluding the three summer months for faculty members who were participating in ORP at the end of the spring semester immediately preceding the summer and who resume ORP participation with the same or another Texas public institution of higher education in the fall semester immediately following that summer, and excluding periods of leave-without-pay. A transfer between Texas public institutions of higher education with less than a full calendar month in which no ORP contribution shall not be considered a break in service.

(5) ERS--The Employees Retirement System of Texas.

(6) Full-time--For purposes of determining initial ORP eligibility, the term "full-time" shall mean employment for the standard full-time workload established by the institution ("100 percent effort") at a rate comparable to the rate of compensation for other persons in similar positions for a definite period of four and one-half months or a full semester of more than four calendar months.

(7) Initial ORP Eligibility Date--The first day of an ORP-eligible employee's 90-day ORP election period. An employee's initial ORP eligibility date shall be determined as follows:

(A) Non-Members. For a new employee of a Texas public institution of higher education who has never been a member of TRS (or a new employee of the Board who has never been a member of ERS), or who is a former member of the applicable retirement system who canceled membership by withdrawing employee contributions from the retirement system after termination from a prior period of employment, the initial ORP eligibility date shall be the 91st calendar day of employment in a TRS-eligible position (or, for employees of the Board, an ERS-eligible position) that is also an ORP-eligible position.

(B) Current Members. For an employee who is a current member of TRS (or, for employees of the Board, a current member of ERS) at the time that he or she becomes employed in an ORP-eligible position, the initial ORP eligibility date shall be the first day of employment in an ORP-eligible position.

(8) Initial ORP Eligibility Period--The period of time beginning with the first date of employment in an ORP-eligible position, without regard to a person's 90-day waiting period for membership in TRS or ERS, if applicable, that is expected to be 100 percent effort for a period of at least one full semester or four and one-half months.

(9) Major Department Requirement--One of the factors used to determine whether a position is ORP-eligible in the "Other Key Administrator" category as defined in §25.4(k) of this title (relating to Eligible Positions). To meet this requirement, a department

or budget entity at a public institution of higher education shall be considered a "major" department by the institution based on the specific organizational size and structure of that institution, and shall have its own budget, policies and programs.

(10) ORP--The Optional Retirement Program.

(11) ORP Election Period--The period of time during which ORP-eligible employees have a once-per-lifetime opportunity to elect to participate in ORP in lieu of the applicable retirement system. The ORP election period shall begin with an employee's initial ORP eligibility date and end on the earlier of:

(A) the date the employee makes an ORP election by signing and submitting the appropriate forms to the ORP employer; or

(B) the 90th calendar day after the employee's initial ORP eligibility date, not including the initial ORP eligibility date and including the 90th calendar day. If the 90th calendar day after the initial ORP eligibility date falls on a weekend or holiday, the deadline shall be extended until the first working day after the 90th calendar day.

(12) ORP Employer--All public institutions of higher education in Texas and the Board.

(13) ORP Retiree--An individual who participated in ORP while employed with a Texas public institution of higher education or the Board and who established retiree status by enrolling in retiree group health insurance provided by ERS, The University of Texas System, or The Texas A&M University System, regardless of whether currently enrolled.

(14) Principal Activity Requirement--One of the factors used to determine whether a position is ORP-eligible based on the percent of effort required by the position to be devoted to ORP-eligible duties. To meet the principal activity requirement, at least 51 percent of the position's duties shall be devoted to ORP-eligible duties in one of the ORP-eligible categories defined in §25.4(k) of this title (relating to Eligible Positions), with two exceptions:

(A) During Initial ORP Eligibility Period. During an employee's initial ORP eligibility period (when the position is required to be 100 percent effort to qualify as ORP-eligible), if the ORP-eligible duties associated with an ORP-eligible category are less than 51 percent of the activities for a particular position, the position shall be considered to meet the principal activity requirement if all of the position's other duties are ORP-eligible duties under one of the other ORP-eligible categories defined in §25.4(k) of this title (relating to Eligible Positions), for a total of 100 percent effort devoted to ORP-eligible duties, as would be the case, for example, for a position with required duties that are 50 percent instruction and/or research (faculty position) and 50 percent department chair (faculty administrator position).

(B) After Initial ORP Eligibility Period. For a participant who has completed the initial ORP eligibility period but who has not vested in ORP and who fills a position that is less than 100 percent effort but at least 50 percent effort, then the principal activity requirement shall be considered met if at least 50 percent effort is devoted to applicable ORP-eligible duties in one of the ORP-eligible categories defined in §25.4(k) of this title (relating to Eligible Positions).

(15) TRS--The Teacher Retirement System of Texas.

*§25.4. Eligibility to Elect ORP.*

(a) Eligibility Criteria. An employee shall meet all of the following criteria to be eligible to make a once-per-lifetime irrevocable election of ORP in lieu of the applicable retirement system:

(1) ORP-eligible Position: Employment in an ORP-eligible position as defined in subsection (k) of this section;

(2) 100 Percent Effort: Employment in the ORP-eligible position on a full-time basis (i.e., 100 percent effort) for a period of at least one full semester or four and one-half months, including the 90-day waiting period for active membership in the applicable retirement system, if applicable. The 100 percent effort requirement shall be satisfied by employment with only one institution, except in the case where an individual is simultaneously employed in ORP-eligible positions with more than one component institution under the same governing board;

(3) First Election Opportunity: No previous opportunity to elect ORP in lieu of the applicable retirement system during the current or a prior period of employment at the same or another Texas public institution of higher education or the Board; and

(4) Active Membership in Retirement System: Current membership or eligibility for active membership in the applicable retirement system as provided in subsection (h) of this section.

(b) ORP Participation after Election. Once an employee makes an election of ORP, the employee's eligibility to continue participating in ORP shall be determined in accordance with §25.5 of this title (relating to ORP Vesting and Participation).

(c) Non-Texas ORP Plans. Prior enrollment, participation or vested status in any plan other than the ORP plan authorized under Texas Government Code, Chapter 830, shall have no bearing on an employee's eligibility to elect ORP, except that the employee must be eligible for active membership in the applicable retirement system as provided in subsection (h) of this section.

(d) Separate Elections. An election of ORP in lieu of TRS at a Texas public institution of higher education shall be considered separate and distinct from an election of ORP in lieu of ERS at the Board.

(1) An employee's prior election of ORP in lieu of ERS at the Board on or after September 1, 1994, shall have no bearing on that person's eligibility to elect ORP in lieu of TRS at a Texas public institution of higher education.

(2) An election of ORP by a Board employee prior to September 1, 1994, was made in lieu of TRS; therefore, an institution shall treat an employee's election of ORP in lieu of TRS at the Board prior to September 1, 1994, in the same manner as if the election had been made at an institution.

(3) An employee's prior election of ORP in lieu of TRS at an institution, or an employee's election of ORP in lieu of TRS at the Board prior to September 1, 1994, shall have no bearing on that person's eligibility to elect ORP in lieu of ERS at the Board.

(e) Opportunity to Elect. The governing board of each Texas public institution of higher education shall provide an opportunity to all eligible employees in the component institutions governed by the board to elect ORP in lieu of TRS in accordance with these rules. The Board shall provide an opportunity to all eligible employees to elect ORP in lieu of ERS in accordance with these rules.

(f) 90-Day ORP Election Period. An eligible employee's election to participate in ORP shall be made by signing and submitting the appropriate forms to the ORP employer before the 91st day after becoming eligible.

(1) After 90-Day TRS/ERS Waiting Period. The 90-day ORP election period shall follow the 90-day TRS/ERS membership waiting period for new employees, if applicable.

(2) Beginning and Ending Dates. The 90-day ORP election period shall begin on the employee's initial ORP eligibility date, as defined in §25.3 of this title (relating to Definitions), and shall end on the earlier of:

(A) the date the employee makes an ORP election by signing and submitting the appropriate forms to the ORP employer; or

(B) the 90th calendar day after the employee's initial ORP eligibility date, not including the initial ORP eligibility date and including the 90th calendar day. If the 90th calendar day after the initial ORP eligibility date falls on a weekend or holiday, the deadline shall be extended until the first working day after the 90th calendar day.

(3) Once-per-Lifetime Irrevocable Election. In accordance with the ORP statute and to comply with Internal Revenue Code provisions to exempt ORP from elective deferral status, an employee who is eligible to elect ORP shall have a once-per-lifetime opportunity to elect ORP in lieu of the applicable retirement system.

(A) Default Election. Failure to elect ORP during the 90-day ORP election period shall be a default election to continue membership in the applicable retirement system.

*(i)* ORP in Lieu of TRS. An employee of a Texas public institution of higher education who does not elect ORP in lieu of TRS during the 90-day ORP election period shall never again be eligible to elect ORP in lieu of TRS, even if subsequently employed in an ORP-eligible position at the same or another Texas public institution of higher education.

*(ii)* ORP in Lieu of ERS. An employee of the Board who does not elect ORP in lieu of ERS during the 90-day ORP election period shall never again be eligible to elect ORP in lieu of ERS, even if subsequently employed in an ORP-eligible position at the Board.

(B) Irrevocable. An election of ORP shall be irrevocable. An employee who elects ORP shall remain in ORP, except as provided by subsections (f) and (g) of §25.5 of this title (relating to ORP Vesting and Participation).

(C) Separate Elections. As provided in subsection (d) of this section, an election of ORP in lieu of TRS at a Texas public institution of higher education shall be considered separate and distinct from an election of ORP in lieu of ERS at the Board; therefore, an election of ORP in lieu of one retirement system shall not preclude an eligible employee's election of ORP in lieu of the other retirement system if subsequently employed in a position that is eligible to elect ORP in lieu of the other retirement system.

(4) Company Selection Required at Election. An employee who elects to participate in ORP shall select an ORP company from the ORP employer's authorized list in conjunction with the election of ORP. An ORP employer shall establish a policy that failure to select an authorized company may result in disciplinary action up to and including termination of employment because retirement contributions are required by law as a condition of employment.

(5) Waiver of Retirement System Benefits. An election of ORP shall be a waiver of the employee's rights to any benefits that may have accrued from prior membership in the applicable retirement system, even if the participant has met the applicable system's vesting requirement. Except as provided by subsections (f) and (g) of §25.5 of this title (relating to ORP Vesting and Participation), an ORP participant shall not be eligible to become an active member of the applicable retirement system or receive any benefits from the system other than a return of employee contributions that may have been deposited with the system (and accrued interest, if any).

(g) Participation Start Date. The first day that ORP contributions are made shall be determined as follows.

(1) Election on Initial ORP Eligibility Date. The participation start date for ORP-eligible employees who elect ORP on their initial ORP eligibility date, as defined in §25.3 of this title (relating to Definitions), by signing and submitting the appropriate forms on or before their initial ORP eligibility date shall be based on whether they were subject to the 90-day TRS/ERS waiting period.

(A) If 90-Day TRS/ERS Waiting Period is not Applicable.

*(i)* New Employees. For new employees who are not subject to the 90-Day TRS/ERS waiting period because they are already members of the applicable retirement system, and who sign and submit the appropriate ORP election forms on or before their initial ORP eligibility date, the participation start date shall be the initial ORP eligibility date (i.e., first day of ORP-eligible employment).

*(ii)* Transfers within Same ORP Employer. For employees who are not subject to the 90-day TRS/ERS waiting period because they are already members of the applicable retirement system, who transfer to an ORP-eligible position within the same ORP employer, and who sign and submit the appropriate ORP election forms on or before their initial ORP eligibility date, the participation start date shall be the initial ORP eligibility date (i.e., first day of ORP-eligible employment), unless the initial ORP eligibility date is not the first day of the month, in which case, to avoid dual contributions to both the applicable retirement system and ORP during the same month, as provided in §25.6(a)(4) of this title (relating to No Dual Contributions), the participation start date shall be the first day of the month following the month in which the initial ORP eligibility date falls, or the first day of the applicable payroll period, if payroll is not processed on a monthly basis.

(B) After 90-Day TRS/ERS Waiting Period. To avoid partial month contributions for employees who are subject to the 90-day TRS/ERS waiting period, the amount of the ORP contribution for the month in which their initial ORP eligibility date falls shall be based on salary earned during that entire month, so the participation start date shall be the first day of the month in which the initial ORP eligibility date falls, or the first day of the applicable payroll period, if payroll is not processed on a monthly basis.

(2) Election After Initial ORP Eligibility Date. The participation start date for ORP-eligible employees who sign and submit the appropriate ORP election forms after their initial ORP eligibility date, shall be the first day of the month following the date that the forms are signed and submitted, with the following exceptions.

(A) During Month of Initial ORP Eligibility Date. ORP employers may establish a policy that employees who elect ORP by signing and submitting the appropriate forms after their initial ORP eligibility date but before the payroll has been processed for the month in which the initial ORP eligibility date falls may be treated in the same manner as the employees described in paragraph (1) of this subsection.

(B) After Month of Initial ORP Eligibility Date: ORP employers may establish a policy that employees who elect ORP by signing and submitting the appropriate forms after the month in which their initial ORP eligibility date falls, but before the payroll has been processed for the month in which the forms are signed and submitted, may start participating in the month in which the forms are signed and submitted rather than the first of the following month. To avoid partial month payments, contributions for these participants shall be based on salary earned during the entire month in which the forms are signed

and submitted, or during the entire pay period in which the forms are signed and submitted, if payroll is not processed on a monthly basis.

(3) Retirement System Membership Before Election. As provided in subsection (i) of this section, ORP-eligible employees who elect ORP after their initial ORP eligibility date, except as provided in subparagraph (2)(A) of this subsection, shall be reported as members of the applicable retirement system for any months prior to their election of ORP. As provided in §25.6(b) of this title (relating to Withdrawal of Retirement System Funds), employee contributions made to the applicable retirement system prior to an election of ORP may be withdrawn from the retirement system after an election of ORP is made, and may be rolled over to the participant's ORP account.

(h) Active Membership in Retirement System Requirement. Participation in ORP shall be an alternative to active membership in the applicable retirement system; therefore, a person who becomes employed in an ORP-eligible position shall not be eligible to elect ORP unless he or she is either a current member of the applicable retirement system (i.e., has employee contributions on account with the applicable retirement system) or has satisfied the 90-day waiting period for active membership in the applicable retirement system.

(1) 90-Day TRS/ERS Waiting Period. Employees who are not current members of TRS when they become employed in an ORP-eligible position at a Texas public institution of higher education shall not be eligible to elect ORP in lieu of TRS until the 90-day TRS waiting period has been satisfied. Employees who are not current members of ERS when they become employed in an ORP-eligible position at the Board shall not be eligible to elect ORP in lieu of ERS until the 90-day ERS waiting period has been satisfied.

(2) Retirees Not Eligible. Employees who have retired from TRS or ERS are no longer active members of the applicable retirement system; therefore, a TRS retiree shall not be eligible to elect ORP in lieu of TRS at a Texas public institution of higher education and an ERS retiree shall not be eligible to elect ORP in lieu of ERS at the Board.

(i) Automatic Retirement System Enrollment. A new employee at a Texas public institution of higher education who is eligible to elect ORP in lieu of TRS shall be automatically enrolled in TRS, following the 90-day TRS waiting period, if applicable, until an election to participate in ORP is made by signing and submitting the appropriate forms to the institution as provided in subsection (g) of this section. A new Board employee who is eligible to elect ORP in lieu of ERS shall be automatically enrolled in ERS, following the 90-day ERS waiting period, if applicable, until an election to participate in ORP is made by signing and submitting the appropriate forms to the Board as provided in subsection (g) of this section.

(j) Dual Employment in TRS/ORP Positions at Different ORP Employers.

(1) Dual Membership Not Permitted. A member of TRS who is employed in a position in the Texas public school system (including all Texas ISDs and regional service centers) or with a state agency that is covered by TRS, and who concurrently becomes employed in an ORP-eligible position with a Texas public institution of higher education and elects to participate in ORP, shall not remain an active member of TRS as an employee of the non-Texas ORP employer once the election of ORP is effective. TRS contributions may not be made for the participant's employment with the non-Texas ORP employer.

(2) Returning to TRS. If the individual described in paragraph (1) of this subsection terminates ORP participation while concurrently employed in a TRS-eligible position at another employer, then he or she shall return to TRS membership and shall be ineligible for any future ORP participation in lieu of TRS.

(k) Eligible Positions. The following positions shall be considered ORP-eligible. Only those employees who fill ORP-eligible positions and who meet the eligibility requirements established in this chapter shall be eligible to elect ORP or to continue participating in ORP prior to vesting.

(1) Faculty Member--A member of the faculty whose duties include teaching and/or research as a principal activity, as defined in §25.3 of this title (relating to Definitions), and who holds the title of professor, associate professor, assistant professor, instructor, lecturer, or equivalent faculty title, including "visiting professor" if the position is at least one full semester in duration.

(2) Faculty Administrator--An administrator responsible for teaching and research faculty whose principal activity, as defined in §25.3 of this title (relating to Definitions), is planning, organizing, and directing the activities of faculty and who holds the title of dean, associate dean, assistant dean, director, department chair, or head of academic department.

(3) Executive Administrator--An administrator who holds the title of chancellor, deputy chancellor, vice chancellor, associate vice chancellor, assistant vice chancellor, or the equivalent, and an administrator who holds the title of president, executive vice president, provost, vice president, associate vice president, assistant vice president, or the equivalent.

(4) Other Key Administrator--An administrator other than a faculty administrator or an executive administrator whose position is considered a key administrative position within the institution's organizational structure and that meets the requirements of this paragraph. The most common position titles in this category are director or associate director, but included titles may vary by institution based on differences in organizational structure, size, mission, etc. All positions in this category, including positions with the title of director or associate director, shall meet the following criteria:

(A) serves as director or other administrative head of a major department or budget entity, as defined in §25.3 of this title (relating to Definitions), excluding the title of assistant director unless the assistant director position has responsibility for what is considered a major department or budget entity that is within a larger department or budget entity, as may be the case at large institutions;

(B) is responsible for the preparation and administration of the budget, policies, and programs of the major department or budget entity;

(C) usually reports to the office of a chancellor, president, vice chancellor, vice president, dean, or equivalent; and

(D) is generally and customarily recruited from the same pool of candidates that other colleges and universities across the nation are recruiting from for this type of position by, for example, advertising in national publications such as the Chronicle of Higher Education or in newsletters or websites of national professional associations or at meetings of such associations.

(E) A position shall not be considered ORP-eligible under this category unless it can be reasonably demonstrated that all of the applicable criteria have been met. If there is significant ambiguity concerning whether a position meets the criteria for this category, the default finding shall be that the position is not ORP-eligible.

(5) Librarian--A professional librarian who holds, at a minimum, a master's degree in library science or information science,

and whose principal activity, as defined in §25.3 of this title (relating to Definitions), is library services.

(6) Athletic Coach--An athletic coach, associate athletic coach, or assistant athletic coach whose principal activity, as defined in §25.3 of this title (relating to Definitions), is coaching, excluding an athletic trainer, and excluding an athletic director or assistant athletic director unless the principal activity is coaching rather than administrative.

(A) Athletic trainers may be included in the "professional" category if the position requires the trainer to be a physician.

(B) Athletic directors whose principal activity is not coaching normally shall be included in one of the administrator categories.

(7) Professional--An employee whose principal activity, as defined in §25.3 of this title (relating to Definitions), is performing the duties of a professional career position, including, but not necessarily limited to, physician, attorney, engineer, and architect, that meets the following criteria:

(A) requires a terminal professional degree in a recognized professional career field that requires occupation-specific knowledge and appropriate professional licensure;

(B) is a non-classified position; and

(C) is generally and customarily recruited from the same pool of candidates that other colleges and universities across the nation are recruiting from for this type of position by, for example, advertising in national publications such as the Chronicle of Higher Education or in newsletters of national professional associations or at meetings of such associations.

(D) A position shall not be considered ORP-eligible under this category unless it can be reasonably demonstrated that all of the applicable criteria have been met. If there is significant ambiguity concerning whether a position meets the criteria for this category, the default finding shall be that the position is not ORP-eligible.

(8) Board Administrative Staff--A member of the executive or professional staff of the Board, as determined by the Commissioner of Higher Education, who fills a position with the following requirements:

(A) college graduation and prior experience in higher education or experience of such kind and amounts to provide a comparable background; and

(B) national mobility requirements similar to those of faculty.

(l) Position-Required Qualifications. A "professional" or a "librarian" as defined in subsection (k) of this section shall not be considered eligible to elect ORP based solely on his or her professional or librarian qualifications. To be considered eligible to elect ORP, the professional or librarian shall fill a position that requires the professional or librarian qualifications, respectively. For example, an attorney who fills a position that does not require that the position be filled by an attorney shall not be considered ORP-eligible based solely on the fact that the person is an attorney.

(m) Counselors. The eligibility of counselors shall be determined as follows.

(1) Faculty. If the institution has established policies that consider and treat counselors in the same manner as faculty in such areas as, for example, contracts, oversight, and work schedules, then ORP eligibility for a counselor position shall be determined under the same requirements as a faculty position, except that the principal activity shall be counseling rather than teaching and/or research, and the title shall be counselor rather than the faculty titles listed in that category.

(2) Staff. If the institution has established policies that consider and treat counselors in the same manner as staff rather than faculty, then ORP eligibility for a counselor position shall be determined under the faculty category. Depending on the duties and required qualifications, a counselor who is considered staff rather than faculty may meet the criteria for one of the non-faculty ORP-eligible positions.

(n) Review of Positions for ORP Eligibility.

(1) Comprehensive Review. ORP employers shall periodically conduct a comprehensive review of all non-classified positions to ensure that ORP eligibility requirements are being applied fairly and consistently across all departments and divisions.

(2) New Position. ORP employers shall analyze newly created non-classified positions for ORP eligibility determination and shall maintain proper documentation of the analysis and determination for future reference.

(3) Re-classified Position. ORP employers shall re-classify a position as ORP-eligible if changes in the position's responsibilities or organizational structure result in a position that meets the ORP-eligibility requirements.

(A) Option to Elect ORP. ORP employers shall provide the incumbent in a position that is re-classified as ORP-eligible an opportunity to elect ORP as if newly hired into the position.

(B) Initial ORP Eligibility Date. The incumbent's initial ORP eligibility date, as defined by §25.3 of this title (relating to Definitions), shall be the date that the re-classification is effective, unless the re-classification is retro-active to a prior month, in which case, the initial ORP eligibility date shall be the date that the employee is notified of the re-classification.

(o) Administrative Errors.

(1) Orientation Procedures. Each ORP employer shall develop and implement effective orientation and enrollment procedures to ensure appropriate and timely processing of newly eligible employees' retirement plan choices.

(2) Rectification. In the event an administrative error occurs which prevents the normal processing of an ORP-eligible employee's election, the ORP employer shall rectify the error as soon as practicable and in a manner that results in a situation that is as close to the originally expected outcome as possible, within applicable laws and rules.

(3) Documentation and Prevention. When an administrative error occurs, the ORP employer shall:

(A) maintain documentation of the error and the actions taken by the ORP employer to address the problem, with a copy placed in the employee's file; and

(B) immediately develop and implement appropriate administrative procedures to avoid such errors in the future.

(4) Failure to Notify Error. If an ORP employer fails to notify an ORP-eligible employee of his or her eligible status on or before the employee's initial ORP eligibility date, the ORP employer shall notify the eligible employee as soon as the oversight is discovered. The 90-day ORP election period for the eligible employee shall begin on the date that the employee is notified, and the participation

start date shall be determined in accordance with subsection (g) of this section.

(p) Texas Commissioner of Education.

(1) ORP Eligibility. Notwithstanding other provisions in this chapter, the Texas Commissioner of Education shall be eligible to elect ORP in lieu of ERS.

(2) Employment in Higher Education. Notwithstanding other provisions in this chapter, a Texas public institution of higher education shall, for the purpose of determining ORP eligibility for a former Texas Commissioner of Education who is subsequently employed by the institution, treat an election of ORP in lieu of ERS made by the Texas Commissioner of Education at the Texas Education Agency in the same manner as if the election of ORP had been made in lieu of TRS at another Texas public institution of higher education.

*§25.5. ORP Vesting and Participation.*

(a) Vesting Requirement. An ORP participant at a Texas public institution of higher education shall be considered vested in ORP on the first day of the second year of active participation, as defined in §25.3 of this title (relating to Definitions), in ORP in lieu of TRS at one or more Texas public institutions of higher education. An ORP participant at the Board shall be considered vested in ORP on the first day of the second year of active participation, as defined in §25.3 of this title (relating to Definitions), in ORP in lieu of ERS at the Board.

(1) Year Defined. For purposes of this subsection, a year shall mean twelve cumulative, but not necessarily consecutive, months of ORP participation.

(2) Leave-without-Pay. A full calendar month of leave without pay shall not be included in the calculation of a year for vesting purposes.

(3) Summer Credit. Because a year for academic faculty members does not normally include the three summer months, an academic faculty member shall be credited the three summer months toward vesting in ORP provided the faculty member is participating in ORP at the end of the spring semester immediately preceding the summer and resumes participation in an ORP-eligible position at the same or another Texas public institution of higher education at the beginning of the fall semester immediately following the same summer.

(4) More than One Period of Employment. As provided in subsection (c) of this section, partial vesting credit shall be retained when there is a break in participation prior to satisfying the vesting requirement. Therefore, the vesting requirement may be satisfied during more than one period of participation. For example, a new faculty member who terminated employment after six months of active participation, and subsequently returns to ORP-eligible employment at the same or another public Texas institution of higher education, shall only have to participate for an additional six months to meet the definition of "year" for vesting purposes.

(5) Non-Texas ORP Plan. The vesting requirement shall not be satisfied by prior enrollment, participation or vested status in any plan other than the ORP plan authorized under Texas Government Code, Chapter 830.

(6) Separate Vesting. Because the election of ORP in lieu of TRS at a Texas public institution of higher education and the election of ORP in lieu of ERS at the Board shall be considered separate and distinct elections, the vesting requirement for ORP in lieu of TRS shall not be satisfied by previous participation or vested status in ORP in lieu of ERS at the Board. The vesting requirement for ORP in lieu of ERS at the Board shall not be satisfied by previous participation or vested status in ORP in lieu of TRS at a Texas public institution of higher education.

(b) Once Vested, Always Vested.

(1) Only One Vesting Period. An ORP participant who satisfies the vesting requirement for ORP in lieu of TRS shall not be required to satisfy the vesting requirement again by any Texas public institution of higher education. An ORP participant who satisfies the vesting requirement for ORP in lieu of ERS shall not be required to satisfy the vesting requirement again by the Board.

(2) Withdrawal of ORP Funds has No Effect. A reemployed ORP participant's vested status shall not be affected by any partial or total withdrawals of ORP funds made after termination from a prior period of employment.

(c) Partial Vesting Credit Retained. Unvested ORP participants shall retain partial vesting credit in the following circumstances.

(1) Termination of Employment. An ORP participant who terminates employment in all Texas public institutions of higher education prior to satisfying the vesting requirement shall, upon returning to ORP-eligible employment with the same or a different Texas public institution of higher education, retain credit for previous ORP participation in lieu of TRS. An ORP participant who terminates employment with the Board prior to satisfying the vesting requirement shall, upon returning to ORP-eligible employment with the Board, retain credit for previous ORP participation in lieu of ERS.

(2) Leave-Without-Pay. An ORP participant who goes on leave without pay for a full calendar month or more prior to satisfying the vesting requirement shall, upon resuming active ORP participation with the same or a different Texas public institution of higher education, retain credit for previous ORP participation in lieu of TRS. An ORP participant at the Board who goes on leave without pay for a full calendar month or more prior to satisfying the vesting requirement shall, upon resuming active ORP participation with the Board, retain credit for previous ORP participation in lieu of ERS.

(3) Direct Transfers. An ORP participant who, prior to satisfying the vesting requirement, directly transfers from one ORP-eligible position to another at the same or a different Texas public institution of higher education, shall retain credit for previous ORP participation in lieu of TRS. An ORP participant who, prior to satisfying the vesting requirement, directly transfers from one ORP-eligible position to another at the Board, shall retain credit for previous ORP participation in lieu of ERS.

(4) An ORP participant's partial vesting credit shall not be affected by any partial or total withdrawals of ORP employee contributions made after termination of employment.

(d) Vested Status.

(1) A vested ORP participant shall have ownership rights to the employer contributions in his or her ORP accounts, meaning that, upon termination of employment, he or she may access both the employee and employer contributions (and any net earnings) in his or her ORP accounts.

(2) A vested ORP participant shall remain in ORP even if subsequently employed in a position that is not ORP-eligible, as provided in subsection (f) of this section.

(e) Unvested ORP Employer Contributions Forfeited. An ORP participant who terminates employment prior to meeting the vesting requirement shall forfeit all ORP employer contributions made during that period of employment. Forfeited funds shall not be recoverable, even if the participant later satisfies the vesting

requirement in a subsequent period of ORP-eligible employment. Such a participant shall be considered vested only in ORP employer contributions made during the subsequent and any future employment periods.

(f) Employment in a non-ORP-Eligible Position. An ORP participant who becomes employed in a position that is not eligible for ORP, but is eligible for the applicable retirement system, shall remain in ORP or become a member of the applicable retirement system in accordance with the following provisions.

(1) Not Vested in ORP. An ORP participant who has not satisfied the ORP vesting requirement and who becomes employed in a position that is not eligible for ORP, but is eligible for the applicable retirement system, shall become a member of the applicable retirement system, and shall thereafter be ineligible to participate in ORP in lieu of the applicable retirement system, even if subsequently employed in an ORP-eligible position and/or if membership in the applicable retirement system is canceled through a withdrawal of employee contributions.

(A) ORP in Lieu of TRS. An ORP participant who elected ORP in lieu of TRS, who has not satisfied the ORP vesting requirement, and who becomes employed with any Texas public institution of higher education in a position that is not eligible for ORP, but is eligible for TRS, shall become a member of TRS for the remainder of his or her employment in Texas public higher education. This individual shall never be eligible to participate in ORP in lieu of TRS again, even if subsequently employed in an ORP-eligible position at the same or another Texas public institution of higher education and/or if the individual cancels his or her TRS membership by withdrawal of employee contributions.

(B) ORP in Lieu of ERS. An ORP participant who elected ORP in lieu of ERS at the Board, who has not satisfied the ORP vesting requirement, and who becomes employed with the Board in a position that is not eligible for ORP, but is eligible for ERS, shall become a member of ERS for the remainder of his or her employment with the Board. This individual shall never be eligible to participate in ORP in lieu of ERS again, even if subsequently employed in an ORP-eligible position at the Board and/or if the individual cancels his or her ERS membership by withdrawal of employee contributions.

(2) Vested in ORP. An ORP participant who has satisfied the ORP vesting requirement and who becomes employed in a position that is not eligible for ORP, shall remain in ORP unless he or she became an active member of the applicable retirement system during a break in service prior to employment in the non-ORP-eligible position, in which case, he or she shall never be eligible for ORP in lieu of the applicable retirement system again, even if subsequently employed in an ORP-eligible position and/or if membership in the applicable retirement system was canceled through a withdrawal of employee contributions.

(A) ORP in Lieu of TRS. An ORP participant who has vested in ORP in lieu of TRS and subsequently becomes employed with any Texas public institution of higher education in a position that is not ORP-eligible, but is TRS-eligible, shall continue to participate in ORP and shall not be eligible for TRS membership, unless he or she terminates employment with all Texas public institutions of higher education and becomes employed in a TRS-eligible position with the Texas public school system (e.g., Independent School Districts, regional service centers) or any other Texas public educational institution or agency that is covered by TRS but does not offer ORP in lieu of TRS, which will require the participant to become a member of TRS. Such an individual, upon becoming subsequently reemployed with any Texas public institution of higher education:

*(i)* shall not resume participation in ORP; and

*(ii)* shall not thereafter be eligible to participate in ORP in lieu of TRS ever again, regardless of the individual's previous ORP vested status, employment in an ORP-eligible position, or if the individual's TRS membership was canceled by withdrawal of employee contributions following termination of employment from the TRS-covered position.

(B) ORP in Lieu of ERS. An ORP participant who has vested in ORP in lieu of ERS at the Board and subsequently becomes employed with the Board in a position that is not ORP-eligible, but is ERS-eligible, shall, nevertheless, continue to participate in ORP and shall not be eligible for ERS membership, unless he or she terminates employment with the Board and becomes employed in an ERS-eligible position with a Texas state agency that does not offer ORP in lieu of ERS, which will require the participant to become a member of ERS. Such an individual, upon becoming subsequently reemployed with the Board:

*(i)* shall not resume participation in ORP; and

*(ii)* shall not be eligible to participate in ORP in lieu of ERS ever again, regardless of the individual's previous ORP vested status, employment in an ORP-eligible position, or if the individual's ERS membership was canceled by withdrawal of employee contributions following termination of employment from the ERS-covered position.

(g) Employment in a Non-Benefits-Eligible Position. An employee who elected ORP in lieu of TRS and who terminates employment in the ORP-eligible position and becomes employed with the same or another Texas public institution of higher education in a non-benefits-eligible position shall not be eligible to participate in ORP (i.e., have contributions sent to the ORP company) for the period of time while employed in the non-benefits-eligible position.

(1) Definition. For purposes of this subsection, a non-benefits-eligible position shall be defined as a position that is one or more of the following:

(A) less than 50 percent effort;

(B) expected to last less than a full semester or a period of four and one-half months (i.e., temporary); or

(C) requires student status as a condition of employment.

(2) No Combining of Percent Effort at Different Institutions. When calculating an employee's percent effort to determine whether a position is non-benefits-eligible as provided in paragraph (1) of this subsection, an institution shall include only the individual's employment with that institution, except in the case where an individual is simultaneously employed with more than one component institution under the same governing board. For example, an individual who is simultaneously employed at 25 percent effort with Institution A and at 50 percent effort with Institution B shall not be eligible to participate in ORP at Institution A even though he or she may already be participating at Institution B based on a minimum 50 percent effort at Institution B.

(3) Regardless of Vested Status. An employee shall not be eligible to participate in ORP while employed in a non-benefits-eligible position regardless of his or her ORP vested status.

(4) No Effect on ORP Eligibility. Because a non-benefits-eligible position is not eligible for TRS, employment in a non-benefits-eligible position normally shall have no effect on an employee's ORP

eligibility status upon his or her subsequent return to a benefits-eligible position, regardless of vested status.

(5) Alternate Plan at Certain Community Colleges. Participation in an alternate retirement plan for part-time employees who are not eligible for TRS at a community college that has opted out of the federal social security program shall have no effect on a person's ORP eligibility status upon his or her subsequent return to a benefits-eligible position.

(h) Retirement System Membership after ORP Vesting. A vested ORP participant shall not be eligible for active membership in the applicable retirement system unless he or she terminates all employment with the ORP employer and becomes employed in a position that is eligible for the applicable retirement system with an employer that does not offer ORP.

(1) ORP in Lieu of TRS. A vested ORP participant who elected ORP in lieu of TRS shall not be thereafter eligible for TRS membership, unless he or she terminates employment with all Texas public institutions of higher education and becomes employed in a TRS-eligible position with the Texas public school system (e.g., Independent School Districts, regional service centers) or any other Texas public educational institution or agency that is covered by TRS but does not offer ORP in lieu of TRS, which will require the participant to become a member of TRS. Such an individual, upon becoming subsequently reemployed with any Texas public institution of higher education:

(A) shall not resume participation in ORP; and

(B) shall not thereafter be eligible to participate in ORP in lieu of TRS ever again, regardless of the individual's previous ORP vested status, employment in an ORP-eligible position, or if the individual's TRS membership was canceled by withdrawal of employee contributions following termination of employment from the TRS-covered position.

(2) ORP in Lieu of ERS. A vested ORP participant who elected ORP in lieu of ERS shall not thereafter be eligible for ERS membership, unless he or she terminates employment with the Board and becomes employed in an ERS-eligible position with a Texas state agency that does not offer ORP in lieu of ERS, which will require the participant to become a member of ERS. Such an individual, upon becoming subsequently reemployed with the Board:

(A) shall not resume participation in ORP; and

(B) shall not be eligible to participate in ORP in lieu of ERS ever again, regardless of the individual's previous ORP vested status, employment in an ORP-eligible position, or if the individual's ERS membership was canceled by withdrawal of employee contributions following termination of employment from the ERS-covered position.

(i) ORP Retirees Not Eligible to Participate. ORP retirees, as defined in § 25.3 of this title (relating to Definitions), who later return to employment with the same or another Texas public institution of higher education or with the Board in what would otherwise be considered a benefits-eligible position shall not be eligible to participate in ORP, with the following exceptions:

(1) ORP retirees who enrolled in retiree group health insurance on or before June 1, 1997;

(2) employees who elected ORP in lieu of ERS at the Board and who, after terminating employment with the Board and enrolling in retiree group health insurance as an ORP retiree from the Board, subsequently become employed in an ORP-eligible position at a Texas public institution of higher education;

(3) employees who elected ORP in lieu of TRS at a Texas public institution of higher education and who, after terminating employment with all Texas public institutions of higher education and enrolling in retiree group health insurance as an ORP retiree from a Texas public institution of higher education, subsequently become employed in an ORP-eligible position at the Board; and

(4) ORP retirees who enroll in retiree group health insurance as part of a phased retirement program.

(A) Definition. For the purposes of this subsection, a phased retirement program shall be a locally designed option that is offered by a limited number of institutions as a means of transitioning active employees to retired status through a contractual agreement that requires the employee to meet certain milestones during the contractual period, which is typically one or two years, such as a reduction in percentage of effort and enrollment in retiree group health insurance prior to termination of employment, if permitted by the group insurance plan. At the end of the contractual period, the employee is considered to be in a retired status for all purposes.

(B) Exemption. ORP participants who are covered by a phased retirement program agreement shall remain eligible for ORP contributions during the contractual period as long as they maintain at least 50 percent effort, even after they are required to enroll in retiree group health insurance as an ORP retiree. Once the contractual period has expired, the participant shall no longer be exempt from the provisions of this subsection.

(j) Termination of Participation. An employee shall terminate participation in ORP only upon death, retirement (including disability retirement), or termination of employment with all Texas public institutions of higher education (if the election of ORP was in lieu of TRS) or termination of employment with the Board (if the election of ORP was in lieu of ERS).

(1) Employment Transfer is not a Termination. A participant's transfer of employment between Texas public institutions of higher education without a break in service, as defined in §25.3 of this title (relating to Definitions), shall not be considered a termination of employment for ORP purposes, unless the new position is not benefits-eligible, as defined in subsection (g) of this section.

(2) Transfer of Funds is not a Termination. A transfer of ORP funds between ORP accounts or ORP companies shall not be considered a termination of employment for ORP purposes.

*§25.6. Uniform Administration of ORP.*

(a) Contributions.

(1) Tax-Deferred. In accordance with the ORP statute and to comply with Internal Revenue Code provisions to exempt ORP from elective deferral status, all ORP contributions shall be made on a tax-deferred basis.

(2) IRS Limits on Defined Contributions. Contributions to a participant's ORP account shall not exceed the maximum amount allowed under §415(c) of the Internal Revenue Code of 1986, as amended.

(A) 415(m) Plan. Institutions are authorized by the ORP statute to establish a plan authorized under §415(m) of the Internal Revenue Code of 1986, as amended, for a participant's ORP contributions that exceed the 415(c) limits.

(B) Stopping ORP Contributions. In the absence of a 415(m) plan, an ORP employer shall discontinue ORP contributions for participants who reach the 415(c) limit for the remainder of the applicable tax year.

(C) Interaction with TSA/TDA Program. An employee's contributions under the voluntary supplemental Tax-Sheltered Annuity/Tax-Deferred Account Program shall be included in the 415(c) limits.

(3) No Co-Mingling of ORP and non-ORP Funds.

(A) No Non-Texas ORP Funds. No non-Texas ORP funds may be rolled over or transferred to an ORP account prior to the earlier of the participant's termination of ORP participation or reaching age 70-1/2, other than a rollover of the participant's employee contributions, and any accrued interest, that were withdrawn from the applicable retirement system in conjunction with the participant's election of ORP in lieu of that retirement system.

(B) No TSA/TDA Funds. Amounts that have been contributed by the participant through the Tax-Sheltered Annuity/Tax-Deferred Account Program, including any amounts that may have been contributed during the employee's 90-day waiting period for membership in the applicable retirement system, may not be rolled over or transferred to an ORP account prior to the earlier of the participant's termination of ORP participation or reaching age 70-1/2.

(C) Texas ORP Account Required. ORP contributions may only be made to an account that is authorized by the participant's current ORP employer for Texas ORP contributions, even if the participant already has an account with a company from a prior period of employment with another employer, whether a Texas ORP employer or not.

(4) No Dual Contributions. A contribution to the applicable retirement system and to an ORP company within the same calendar month shall not be permitted, except when a person terminates employment in a position covered by the applicable retirement system and, prior to the end of the calendar month in which the termination occurs, becomes employed in an ORP-eligible position at a different ORP employer and elects to participate in ORP by signing and submitting the appropriate forms to the ORP employer in such manner that the ORP participation start date is prior to the end of that same calendar month, as provided in §25.4(g) of this title (relating to Participation Start Date).

(5) Eligible Compensation.

(A) Definition. For purposes of determining the amount of a participant's ORP contribution, institutions shall use the same definition of eligible compensation that is used for TRS members in §821.001 of the Texas Government Code.

(B) IRS Limits. The maximum amount of salary that can be taken into account for ORP purposes shall not exceed the limits established by §401(a)(17) of the Internal Revenue Code of 1986, as amended. An individual who first participated in ORP prior to September 1, 1996, regardless of a subsequent break in service, shall qualify for the "grandfathered" rate established by IRC §401(a)(17).

(6) Contribution Rates. The amount of each participant's ORP contribution shall be a percentage of the participant's eligible compensation as established by the ORP statute and the General Appropriations Act for each biennium. Each contribution shall include an amount based on the employee rate and an amount based on the employer rate.

(A) Employee Rate. The employee contribution rate shall neither exceed nor be less than the rate established in the ORP statute for employee contributions.

(B) Employer Rate. The employer contribution rate shall consist of a state base rate (minimum), as established each biennium in the General Appropriations Act, and an optional supplemental rate, as provided in subparagraph (C) of this subsection.

(C) Supplemental Employer Rate. Institutions may provide a supplement to the state base rate under the following conditions.

*(i)* Amount of Supplemental Rate. The supplemental rate may be any amount that, when added to the state base rate, does not exceed the maximum employer rate established in the ORP statute. For example, if the state base rate is 6 percent and the maximum statutory rate is 8.5 percent, then the supplement may be any amount up to and including 2.5 percent.

*(ii)* Component Institution Policies. Governing boards may establish a supplemental rate policy that covers all component institutions or may establish different policies for individual components.

*(iii)* Annual Determination. The governing board of each institution shall determine the amount of the supplement once per fiscal year, to be effective for the entire fiscal year.

*(iv)* Method 1- All Participants. Institutions may provide the same supplemental rate to all ORP participants, regardless of the participant's first date to participate in ORP or a break in service. If this method is selected, each ORP participant shall receive the same supplemental rate as every other participant.

*(v)* Method 2- Two Groups. Institutions may, instead of providing the same supplemental rate to all participants, provide two different supplemental rates based on a participant's first date to participate in ORP, as follows.

*(I)* Grandfathered. Each participant whose first date to participate in ORP in lieu of the applicable retirement system at any ORP employer, is prior to September 1, 1995, shall receive the same supplemental rate as other participants in this group, regardless of any break in service. This group of participants shall be referred to as the grandfathered group.

*(II)* Non-Grandfathered. Each participant whose first date to participate in ORP in lieu of the applicable retirement system at any ORP employer is on or after September 1, 1995, shall receive the same supplemental rate as other participants in this group, regardless of any break in service. This group of participants shall be referred to as the non-grandfathered group.

(7) Proportionality.

(A) ORP employers Other than Community Colleges. Texas public institutions of higher education, not including public community colleges, and the Board shall pay ORP employer contributions on a proportionate basis from the same funding source that a participant's salary is paid from. General Revenue funds may only be used for ORP employer contributions for the portion of a participant's salary that is actually paid with General Revenue.

(B) Public Community Colleges. Public community colleges shall pay ORP employer contributions on a proportionate basis from the same funding source that a participant's salary is paid from, except that all participants who are eligible to have all or part of their salary paid from General Revenue shall be eligible for General Revenue funding of their ORP employer contributions for the part of their salaries that is eligible for General Revenue funding, whether or not the salary is actually paid from General Revenue. Eligibility for General Revenue funding shall be based on the Elements of Expenditure.

(8) Three-Day Submission Deadline. ORP employers shall send ORP contributions to the ORP company within three business days of legal availability, except for contributions made on a supplemental payroll or contributions that are sent to a grandfathered company with less than 50 participants.

(A) Legal Availability. Contributions shall generally be considered legally available on payday. For ORP employers that normally pay participants on a twice-monthly basis, the three-day minimum shall apply to each payday in the month.

(B) Grandfathered Company. For purposes of this paragraph, a grandfathered company shall be a company that is no longer on a particular ORP employer's active list of authorized ORP companies, but that continues to receive ORP contributions for certain participants as authorized by that ORP employer.

(C) Exception Deadline. Contributions that are excepted from the three-day submission deadline shall be sent to the company as soon as practicable, but not later than 10 business days after they are legally available.

(9) Electronic Funds Transfer (EFT).

(A) Requirement. ORP employers shall send all ORP contributions, including contributions based on a supplemental payroll and contributions sent to a grandfathered company as defined in paragraph (8) of this subsection, to each ORP company by electronic funds transfer (EFT) if the ORP employer is currently able to send funds by EFT and the company is currently able to receive funds by EFT.

(B) Inability to Receive. If a company is unable to receive funds by EFT, the ORP employer shall send contributions to the ORP company by check and provide the following notifications.

*(i)* Certification. The ORP employer shall certify to the Board, on the ORP employer's annual ORP report as required by subsection (g) of this section, that the company is unable to receive funds by EFT.

*(ii)* Participant Notification. At least once per fiscal year, the ORP employer shall provide notice to each participant indicating which ORP companies are unable to receive funds by EFT.

(10) Same-Day Credit. ORP companies shall deposit each participant's ORP contributions into the accounts and/or funds designated by the participant effective on the same day that the contributions are received by the company. A company that does not comply with this provision shall not be eligible to be authorized as an ORP company by any ORP employer.

(11) Forfeited ORP Employer Contributions. If a participant forfeits ORP employer contributions under §25.5(a) of this title (relating to Vesting Requirement), the ORP employer shall return the forfeited contributions to the originating fund in accordance with the following procedures.

(A) 93-Day Deadline for Request. Not later than 93 calendar days after the last day of the calendar month in which an unvested participant terminates all employment with all ORP employers, the ORP employer shall send a request to the ORP company or companies for a return of the ORP employer contributions that were sent to the company or companies for that participant during that period of employment. This request may be referred to as a vesting letter because it indicates that the participant has not met the vesting requirement.

*(i)* 93 Days is Outside Limit. An ORP employer may send the request for forfeited ORP employer contributions immediately upon a participant's termination if the ORP employer has knowledge that the participant has not become employed and is not anticipating becoming employed in a position that is eligible for ORP in lieu of the same retirement system at the same or another ORP employer within the 93-day period.

*(ii)* If Deadline is Missed. If the ORP employer fails to request the forfeited amounts within the 93-day deadline, then the ORP employer shall make the request immediately upon discovering the oversight, even if the participant later resumes participation after the 93-day deadline as described in subparagraph (B) of this paragraph.

(B) If Participant Returns After 93 Days. If an unvested participant returns to employment that is eligible for ORP in lieu of the same retirement system at the same or another ORP employer and resumes active participation on a date that is more than 93 calendar days after the last day of the calendar month in which he or she previously terminated, the participant's unvested ORP employer contributions from the prior period of employment shall still be forfeited, even if the participant subsequently satisfies the vesting requirement.

(C) Forfeited Amount. The forfeited amount shall be the actual amount of ORP employer contributions sent to the participant's ORP accounts during his or her current period of employment.

*(i)* Excess Amounts not Included. The forfeited amount shall not include any amounts in the participant's ORP account in excess of the actual ORP employer contributions that are attributable to net earnings.

*(ii)* If Account is Less than Actual Amount. The entire amount of actual ORP employer contributions shall be returned even if the account balance is less than the amount of the actual ORP employer contributions because of investment loss, transfer, or other occurrence or transaction.

*(I)* Company's Responsibility. The ORP company shall be responsible for making arrangements to cover any loss of unvested ORP employer contributions, so that the entire amount of actual ORP employer contributions is returned to the ORP employer upon request.

*(II)* Certification. Before an ORP employer may authorize a company to receive ORP contributions from unvested participants, as provided in subsection (c) of this section, the ORP employer shall require the company to certify that the entire amount of actual unvested ORP employer contributions will be returned upon request. The ORP employer may require the company to indicate what method will be used, for example, restriction of unvested funds to money market or similar accounts.

(D) Company Response Deadline. Within 30 days of receiving the ORP employer's request for a return of unvested ORP employer contributions, the ORP company shall:

*(i)* process a reimbursement to the ORP employer; and

*(ii)* send notification of the transaction to the employee indicating the reason for the reduction in the account balance.

(E) Deposit into Originating Fund. The ORP employer shall deposit the reimbursed ORP employer contributions into the originating fund or funds in accordance with instructions from the Texas Comptroller of Public Accounts and any other applicable policies and procedures.

(F) Resumption of Participation within 93 Days.

*(i)* If unvested ORP employer contributions are returned to the originating fund when the participant did, in fact, resume ORP participation in lieu of the same retirement system at the same

or another ORP employer within 93 calendar days of the last day of the calendar month in which the termination occurred, the ORP employer that requested the reimbursement shall, immediately upon being notified of the employee's resumption of participation, return the reimbursed amount to the ORP company for re-deposit into the participant's account.

*(ii)* The ORP employer with which the participant resumes participation, if not the ORP employer that requested the reimbursement, shall immediately notify the ORP employer that requested the reimbursement of the participant's status.

*(iii)* The entire amount of actual ORP employer contributions that were returned to the originating fund under the provisions in this paragraph shall be sent back to the company. There shall be no allowance for any earnings or losses on the ORP employer contributions that may have accrued during the time that the amounts were not in the participant's account.

(b) Withdrawal of Retirement System Funds. An employee who elects to participate in ORP may withdraw any employee contributions (plus accrued interest, if any) that he or she may have accumulated in the applicable retirement system prior to the election of ORP. Contributions refunded by the applicable retirement system to ORP participants may be rolled over to the participant's ORP account.

(c) ORP Companies.

(1) Authorized by Each ORP Employer. Each ORP employer shall establish its own list of companies that are authorized to provide ORP products to that employer's ORP participants. Governing boards with more than one component institution may establish one list for all components or separate lists for one or more component institutions.

(2) Qualified Companies. Companies authorized by an ORP employer shall be qualified to do business in the state of Texas as determined by the Texas Department of Insurance, the Texas State Securities Board, and any other applicable state or federal agency.

(3) Minimum Number of Companies.

(A) Minimum of Four. Each ORP employer shall authorize a minimum of four qualified companies, including at least one company that offers 403(b)(1) annuity accounts and at least one company that offers 403(b)(7) custodial accounts.

(B) Variety of Choices. Each ORP employer's list of authorized companies and products shall provide a reasonable variety of choices among types of accounts and funds.

(C) No Maximum Number. Each ORP employer may authorize as many ORP companies as the ORP employer deems appropriate.

(4) Return of Unvested Employer Contributions. Before an ORP employer may authorize a company to receive ORP contributions from unvested participants, the ORP employer shall require the company to certify that the entire amount of actual unvested ORP employer contributions will be returned upon request, in accordance with the procedures in paragraph (a)(11) of this section. The ORP employer may require the company to indicate what method will be used, for example, restriction of unvested funds to money market or similar accounts.

(5) Authorization Policies and Procedures. Each ORP employer shall be responsible for establishing local policies and procedures for authorizing or certifying companies to provide ORP products to the ORP employer's ORP participants. Governing boards with more than one component institution may establish one policy for all components or separate policies for one or more component institutions.

(A) Consultants. ORP employers may enlist the assistance of consultants or other outside parties to develop selection criteria.

(B) Competitive Bids. ORP employers may scrutinize the quality of ORP products and select ORP companies and products through a competitive bid process.

(C) Participant Requests. ORP employers shall not be required to authorize any ORP company, company representative, or product requested by any participant, although ORP employers may take such requests into account if it may be done in accordance with applicable laws, rules and policies.

(D) Periodic Review of Policies. Each ORP employer shall periodically review and update its authorization or certification policies and procedures.

(E) Periodic Re-Authorization. Each ORP employer shall periodically re-authorize or re-certify companies.

(6) Participant's Change of Companies.

(A) Two Opportunities per Year. Each ORP employer shall provide ORP participants with at least two opportunities during each fiscal year to select a different company from the ORP employer's list of authorized companies. The opportunities may be provided on set dates during the year or on a flexible individualized basis.

(B) Two Changes per Year. Each ORP employer shall allow a participant to change his or her company selection on either or both of the opportunities provided by the ORP employer under subparagraph (A) of this paragraph.

(C) Effective within 35 Days. The ORP employer shall start sending the participant's ORP contributions to his or her newly selected company beginning with the next payroll period if practicable, but not later than 35 days after the date the participant signs and submits the appropriate forms to the ORP employer.

*(i)* Problems. If the ORP employer cannot comply with this deadline due to circumstances beyond the ORP employer's control, the ORP employer shall notify the participant of the problem and shall provide the participant with an opportunity to change his or her company selection.

*(ii)* Additional Change. A participant's change of companies made in accordance with clause (i) of this subparagraph shall not be counted against the number of changes required under subparagraph (B) of this paragraph.

(D) Prior Contributions. Amounts contributed by the participant to previously selected ORP companies, including ORP contributions made during prior periods of employment with the same or another ORP employer, shall be under the same statutory distribution restrictions as the contributions in the participant's account with his or her newly selected ORP company.

(7) Grandfathered Companies.

(A) ORP employers may allow participants to continue contributing to an ORP company that is no longer on the ORP employer's active authorized list. Such a company shall be referred to as a grandfathered company.

(B) Institutions may allow participants who directly transfer from another Texas public institution of higher education to continue contributing to the same ORP company that they were

contributing to at their prior ORP employer, provided the institution verifies that the contract includes the statutory distribution restrictions.

(8) Confirmation of ORP Contributions. ORP employers shall require ORP companies that receive contributions for the ORP employer's ORP participants to submit confirmation of receipt of funds directly to each participant at least quarterly. The confirmation shall contain the date and amount of each ORP contribution received during the reporting period.

(9) Confirmation of Funds Transfer. ORP employers shall require ORP companies that receive contributions for the ORP employer's ORP participants to, immediately upon execution of a transfer from one fund or investment or account to another fund or investment or account, submit a confirmation directly to the participant, unless specifically waived by the participant in writing. The confirmation shall include all transfer information, including a statement of any applicable charges.

(10) Required Company Reports. Each ORP employer shall require all ORP companies that receive contributions for the ORP employer's ORP participants to submit, at least annually, a report or reports to each participant having ORP accounts with that company, including accounts that are no longer receiving current contributions, containing the information indicated in paragraphs (11), (12) and (13) of this subsection.

(11) For all accounts, the following information shall be provided:

(A) name and address of the participant;

(B) identifying number;

(C) total payments received during the reporting period;

(D) expense charges during the reporting period;

(E) net payments during the reporting period;

(F) total value of account at the end of the reporting period; and

(G) net cash surrender value of account at the end of the reporting period reflecting all potential charges against the account if it were surrendered for cash as of the last day of the reporting period.

(12) For fixed and variable annuity accounts, the following additional information shall be provided:

(A) interest rate or rates paid on the account from the previous reporting period to the end of the current reporting period; and

(B) where multilevel rates of interest were paid on an account, a breakdown showing the amount in the participant's account at each interest level, the amount of interest earned at each interest level, and the rates of interest.

(13) For variable annuity and custodial accounts, the following additional information shall be provided:

(A) units of each fund or investment or account purchased during the reporting period;

(B) total units of each fund or investment in the account at the end of the reporting period; and

(C) value of unit of each fund or investment or account at the end of the reporting period.

(14) Optional Information. ORP employers may require ORP companies to provide participants with other information in addition to the reporting requirements in paragraph (10) of this subsection, including, but not limited to:

(A) additional account-related information;

(B) information about the company; and

(C) general educational information related to investments.

(15) Authorized Company Representatives.

(A) Designated Representatives. ORP employers may require ORP companies to designate representatives, or may require that the company and the ORP employer jointly designate representatives, who are authorized to communicate directly with the ORP employer's ORP-eligible employees concerning the company and its products.

(B) Restricted Number. ORP employers may restrict the number of representatives authorized to represent each company.

(C) Brokers. ORP employers may authorize brokers who represent more than one authorized company. Such authorization may be in addition to the number of designated representatives of a particular company.

(D) Representative's ORP Knowledge. ORP employers may require ORP companies to certify that their designated representatives are sufficiently trained and knowledgeable about ORP, including an understanding of the statutory distribution restrictions that must be included in all ORP contracts.

(E) Responsibility to Correct Mistakes. ORP employers may require a company to fully rectify, at the company's cost, any mistakes made by a designated company representative concerning the delivery of incorrect ORP information and any resulting problems.

(16) Solicitation Practices. Each ORP employer shall establish the following procedures related to company solicitation practices.

(A) Sales Presentations. Authorized representatives shall be permitted to make sales presentations to ORP-eligible employees on the ORP employer's premises, under the following conditions:

*(i)* only at the employee's request;

*(ii)* as a guest of the employee and ORP employer; and

*(iii)* in compliance with the ORP employer's applicable policies and procedures.

(B) Prohibited Gifts. ORP company representatives shall be prohibited from providing gifts or monetary rewards directly or indirectly to any employee of the ORP employer for information on newly eligible employees.

(C) Bulk Campaigning Prohibited. Authorized representatives shall be responsible for providing appropriate sales literature and service at locations designated by the ORP employer. Unless specifically authorized by the ORP employer, ORP company representatives shall be prohibited from using campus bulk mailing (including electronic mail) or telephone campaigning.

(D) Violations. ORP employers shall reserve the right to restrict solicitation privileges of authorized representatives based on violations of the solicitation procedures in this paragraph and each ORP employer's local policies and procedures.

(d) Qualified Domestic Relations Orders (QDROs).

(1) Company Responsibilities. Each ORP employer shall ensure that all ORP contracts include a provision that the ORP company is solely responsible for determining whether a domestic relations order is qualified and payable in accordance with Texas Government Code, Chapter 804.

(2) Company Interpretation. ORP employers may include criteria relating to an ORP company's interpretation of Texas Government Code, Chapter 804, in the ORP employer's ORP company authorization or certification process as provided in subsection (c) of this section.

(e) Investment Advisory Fees. Participants may pay certain investment advisory fees with tax-deferred funds in their ORP account in accordance with the following conditions.

(1) Investment advisory fees may only be paid with amounts in a participant's ORP account in accordance with the following provisions.

(A) The investment advisory fees for each fiscal year shall not exceed two percent of the annual value of the participant's account as of the last day of that fiscal year.

(B) The fees shall be paid directly to a registered investment advisor that provides advice to the participant.

(C) The investment advisor to whom the fees are paid shall be registered with the Securities and Exchange Commission and any other applicable federal or state agencies, and shall be engaged full-time in the business of providing investment advice.

(D) The participant and the investment advisor shall enter into a contract for a term of no more than one year. A contract that automatically renews each year shall be considered acceptable as long as both parties have the right to sever the relationship, with reasonable notification, at any time.

(2) An ORP employer shall not prohibit participants from utilizing this right and shall not restrict the payment percentage to less than two percent.

(3) An ORP employer may include in its ORP company authorization or certification process, as provided in subsection (c) of this section, a provision that prohibits commissions to an individual who also receives investment advisory fees for the same ORP account.

(4) An ORP company may request the ORP employer to sign a statement that investment advisory fees are permissible under the plan to provide assurance to the company that it is releasing ORP funds to the advisor in accordance with applicable ORP provisions.

(A) An ORP employer shall not sign the company's form indicating that investment advisory fees are permissible under the plan unless the ORP employer has received satisfactory documentation that the four conditions described in paragraph (1) of this subsection have been met.

(B) An ORP employer shall not sign a form that actually authorizes the payments because that is a relationship between the advisor, the participant and the company.

(f) Distribution Restrictions.

(1) Restricted Access.

(A) No Pre-Termination Access unless Age 70-1/2. ORP participants shall not access any of their ORP funds by any means until the earlier of the date that they:

*(i)* terminate all employment with all ORP employers; or

*(ii)* reach age 70-1/2 years.

(B) No Loans or Hardship Withdrawals.

*(i)* Loans, financial hardship withdrawals, or any other method that provides a participant with any type of access to ORP funds prior to the earlier of termination of employment or attainment of age 70-1/2 shall not be permitted.

*(ii)* ORP products may provide for loans or hardship withdrawals after the participant's termination of employment or attainment of age 70-1/2, if permissible under applicable laws and regulations.

(C) Previously Contributed Amounts. ORP contributions made during prior periods of employment with the same or another ORP employer and ORP contributions made to previously selected ORP companies with the current ORP employer shall be under the same statutory distribution restrictions as the contributions in the participant's current active account.

(D) Employment Transfer is not a Termination. A participant's transfer of employment between Texas public institutions of higher education without a break in service, as defined in §25.3 of this title (relating to Definitions), shall not be considered a termination of employment for ORP purposes, unless the new position is not benefits-eligible, as defined in §25.5(g) of this title (relating to Employment in a Non-Benefits-Eligible Position).

(E) Transfer of Funds is not a Termination. A transfer of ORP funds between ORP accounts or ORP companies shall not be considered a termination of employment for ORP purposes.

(F) Simultaneous Contributions and Withdrawals. An ORP participant shall not simultaneously make ORP contributions and withdraw funds from ORP accounts unless that participant is at least age 70-1/2.

(G) Documentation of Restrictions. ORP employers shall ensure that:

*(i)* all ORP contracts specifically contain the statutory ORP distribution restriction provisions, which are sometimes referred to as the ORP endorsement; and

*(ii)* all information provided to employees by ORP company representatives sufficiently describes these ORP distribution restrictions that are above and beyond the federal restrictions in a standard non-ORP 403(b) contract.

(2) Authorization to Release ORP Funds. An ORP company shall not release any ORP funds to a participant until receipt of notification from the participant's ORP employer that a break in service has occurred, except when the participant has reached age 70-1/2, in which case, the ORP company may release funds upon verification that the participant has reached age 70-1/2. The ORP employer's termination notification may be referred to as a vesting letter because it indicates whether the participant has met the ORP vesting requirement.

(A) Unvested Participants. If a participant terminates prior to meeting the vesting requirement, the ORP employer's notification shall include a request for the return of the participant's forfeited ORP employer contributions, as provided in §25.6(a)(11) of this title (relating to Forfeited ORP Employer Contributions).

(B) Vested Participants. If a participant terminates after meeting the vesting requirement, all funds shall be available in accordance with applicable federal law and contractual provisions, but

non-ORP-related early withdrawal penalties, such as additional federal income taxes or contractual surrender fees, may apply depending on factors such as the participant's product selection and age at termination.

(3) Prohibited Distribution by ORP Company. If an ORP company provides a participant with any access to ORP funds prior to the earlier of the participant's termination of employment with all ORP employers or attainment of age 70-1/2, then that company shall be responsible for making a prohibited distribution and the following provisions apply.

(A) Redeposit. The participant's ORP employer shall require the company to:

*(i)* redeposit funds to the employee's ORP account as if no withdrawal had been made; and

*(ii)* provide written verification to the ORP employer that the account has been fully restored with no adverse impact to the employee.

(B) Company Suspension. The ORP employer may suspend a company from doing further business with the ORP employer's participants at any time a company fails to comply with these procedures.

(g) ORP Employer Reports.

(1) Required Information. All ORP employers shall submit the following information to the Board:

(A) number of ORP participants;

(B) amount of contributions sent to ORP companies;

(C) list of ORP-eligible positions; and

(D) any other information required by the Board.

(2) Annual Report.

(A) Format. The required information shall be provided in a reporting format developed by the Board, which may include an electronic format.

(B) Due Date. The required information shall be reported on a fiscal year basis and shall normally be due on November 1 of each year for the most recent fiscal year ending August 31.

(3) Additional Information as Needed. ORP employers shall provide additional information to the Board as needed to carry out its functions under the ORP statute, which may be in the form of ad hoc reports, formal or informal surveys, or other format, and may be requested in an electronic format.

(h) Required Notices to Employees.

(1) Basic Information for Newly Eligible Employees. On or before an ORP-eligible employee's initial ORP eligibility date, which is the first day of his or her 90-day ORP election period, each institution shall provide the ORP-eligible employee with written introductory information on ORP developed by the Board and titled, "An Overview of TRS and ORP for Employees Eligible to Elect ORP."

(A) Uniform and Unbiased. The purpose of this notification requirement is to ensure that all employees who become eligible to elect ORP are provided general, uniform and unbiased information on which to base their decision.

(B) Electronic Notification. An institution may meet this notification requirement by:

*(i)* placing the electronic version of the Overview document that is provided by the Board on its website, and/or placing a link on its website to the Overview document on the Board's website;

*(ii)* providing the ORP-eligible employee with local internet/intranet access to the electronic version of the document or link; and

*(iii)* within the required timeframe, notifying the ORP-eligible employee in writing of the location of the electronic version or link.

(C) Employees Subject to 90-Day TRS Waiting Period. Institutions may provide the required ORP information on or before the employee's first date of employment if the employee is subject to the 90-day TRS waiting period. An election of ORP in lieu of TRS shall not be made before the employee has satisfied the TRS waiting period, but the ORP employer may encourage ORP-eligible employees to consider their retirement plan choices during the TRS waiting period. For employees who elect ORP, this will maximize their ORP contributions and minimize the time it takes to satisfy the ORP vesting period.

(2) Participant's ORP Responsibilities. On or before an ORP-eligible employee's initial ORP eligibility date, which is the first day of his or her 90-day ORP election period, each ORP employer shall provide written notification to the ORP-eligible employee that:

(A) an election of ORP entails certain responsibilities for the employee, including selection and monitoring of ORP companies and investments; and

(B) the ORP employer has no fiduciary responsibility for the market value of a participant's ORP investments or for the financial stability of the ORP companies chosen by the participant.

(3) Possible Retiree Group Health Insurance Eligibility. ORP employers shall include in their normal out-processing procedures for terminated employees, a notification to ORP participants that includes the following information:

(A) the participant's possible future eligibility for retiree group health insurance as an ORP retiree;

(B) the ORP employer's policies for handling certification that an ORP participant meets the eligibility requirements for enrollment in retiree group health insurance as an ORP retiree; and

(C) a caution to the participant to refrain from withdrawing all of his or her ORP funds if the participant anticipates enrolling in retiree group health insurance as an ORP retiree at a later date.

(D) The notification may be either general in nature or specific to each participant.

(4) Verification of Notification Receipt. ORP employers shall develop forms and/or procedures to carry out the notification requirements in this subsection that provide documentation of the employee's acknowledgement of receipt of this information, including the date of receipt, such as a signature or electronic verification.

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 November 13, 2003.

TRD-200307826

Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: January 29, 2004
For further information, please call: (512) 427-6114

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# TITLE 22. EXAMINING BOARDS

## PART 5. STATE BOARD OF DENTAL EXAMINERS

## CHAPTER 117. FACULTY AND STUDENTS IN ACCREDITED DENTAL SCHOOLS

**22 TAC §117.1**

The Texas State Board of Dental Examiners (Board) proposes amendments to §117.1, concerning exemptions. The amendment provides that members of the faculty of a reputable dental or dental hygiene college or school are no longer exempt from licensure and must be licensed to practice dentistry in Texas or must obtain a license to practice where such faculty members perform their services for the sole benefit of such school or college. Senate Bill 263, §26, 78th Legislature amends the exemption for licensure faculty members of dental or dental hygiene schools.

Mr. Bobby D. Schmidt, Executive Director, Texas State Board of Dental Examiners has determined for the first five year period the amended rule is in effect there will be limited fiscal implications for local or state government as a result of enforcing or administering the rule.

There is an anticipated economic cost to persons who are required to comply with the amended section. Those persons required to comply with the amendment will have to obtain a faculty license. There is no anticipated local employment impact as a result of enforcing this amended section.

Mr. Schmidt has determined that for each year of the first five years the amended rule is in effect, the public benefit anticipated as a result of enforcing the rule will be the licensure of qualified individuals to practice dentistry in the State of Texas.

The fiscal implications for small or large businesses will be minimal or none at all. Therefore, the Board has determined that compliance with the proposed amended rule will not have an adverse economic impact on small business when compared to large businesses. The requirement under §117.1 will impact individuals who make application for faculty licensure and not small businesses.

Comments on the proposal may be submitted to Bobby D. Schmidt, M.Ed. Executive Director, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 475-1660. To be considered, all written comments must be received by the Texas State Board of Dental Examiners no later than 30 days from the date that this amended rule is published in the *Texas Register*.

The amendment is proposed under Texas Government Code §§2001.021 et seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties, and Senate Bill 263, §26, 78th Legislature, 2003, which requires the Board to establish rules for the licensure of faculty members of dental or dental hygiene schools.

Title 3, Subtitle D, Chapter 267 of the Occupations Code and Title 22, Texas Administrative Code, Section 117 are affected by this proposal.

*§117.1. Exemptions.*

(a) The definition of dentistry as contained in the Occupations Code, Title 3, Chapter 251.003 [~~Texas Civil Statutes Articles 4543-4551j, as amended~~], shall not apply to the following:

[~~(1) Members of the faculty of a reputable dental or dental hygiene college or school who are not licensed to practice dentistry in Texas where such faculty members perform their services for the sole benefit of such school or college.~~]

(1) [~~(2)~~] Students of a reputable dental college or school who are candidates for a degree and who perform their operations without pay except for actual costs of materials, in the presence of an under the direct personal supervision of a demonstrator or teacher who is a member of the faculty of a reputable dental college or school approved by the State Board of Dental Examiners, or for an on behalf of and in a school, hospital, state institution, public health clinic, or other facility approved for student dental services by the State Board of Dental Examiners.

(2) [~~(3)~~] Students of a reputable dental hygiene college or school who are candidates for a degree who practice dental hygiene without pay in strict conformity with the laws of this state regulating the practice of dental hygiene under the direct personal supervision of a demonstrator or teacher who is a member of the faculty of a reputable dental hygiene college or school approved by the State Board of Dental Examiners, or for and on behalf of and in a school, hospital, state institution, public health clinic, or other facility approved for student dental hygiene services by the State Board of Dental Examiners.

(3) [~~(4)~~] Dental interns who pursue advanced education in dentistry under the auspices of an institution, such as a dental school or hospital, which offers the type of advanced program designed to meet accreditation requirements as established by the Commission on Dental Accreditation of the American Dental Association. Dental interns may perform any clinical service included in the program of advanced education for which he/she is enrolled, as long as such service is accomplished under the auspices of the sponsoring institution, and as authorized by the program supervisor. A dental intern not licensed in Texas may not assess fees for clinical services rendered. An unlicensed dental intern may not engage in private practice.

(4) [~~(5)~~] Dental residents who pursue advanced education in dentistry under the auspices of an institution, such as a dental school or hospital, which offers the type of advanced program designed to meet accreditation requirements as established by the Commission of Dental Accreditation of the American Dental Association. The residency program usually follows an internship and the objective customarily is to prepare specialists in selected field of clinical dentistry. Dental residents may perform any clinical service included in the program of advanced education for which he/she is enrolled, as long as such service is accomplished under the auspices of the sponsoring institution, and as authorized by the program supervisor. A dental resident not licensed in Texas may not asses fees for clinical services rendered. An unlicensed dental resident may not engage in private practice.

[~~(b) Members of the faculty of a reputable dental college or school who perform their services for the sole benefit of such school or college shall be entitled to apply for and to receive a non-renewable identification number issued by the SBDE to be used solely for the purpose of applying for a Controlled Substances narcotics registration~~

~~from the Texas Department of Public Safety and the Drug Enforcement Administration to prescribe, administer, or dispense controlled substances.]~~

(b) [~~(c)~~] Dental interns and residents shall be entitled to apply for and to receive an identification number issued by the SBDE to be used solely for the purpose of applying for a Controlled Substances narcotics registration from the Texas Department of Public Safety and the Drug Enforcement Administration to prescribe, administer, or dispense controlled substances.

~~[(d) The SBDE will void each identification number issued to faculty members two years after the date of issuance. Identification numbers issued to interns and residents will be voided upon termination of the internship or residency as applicable.]~~

(c) [~~(e)~~] The SBDE will notify the Texas Department of Public Safety and the Drug Enforcement Administration when an identification number is issued and when an identification number is voided.

(d)[~~(f)~~]Each application for an SBDE identification number shall be accompanied by a fee in an amount set by the Board.

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 November 14, 2003.

TRD-200307855
Bobby D. Schmidt, M.Ed.
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 475-0972

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**22 TAC §117.2**

The Texas State Board of Dental Examiners (Board) proposes new §117.2, concerning dental faculty licensure. The new language provides that any person who serves as a faculty member of a dental school must hold a dental school faculty license. Senate Bill 263, §26, 78th Legislature amends the requirements for licensure of faculty members of a dental or dental hygiene school.

Mr. Bobby D. Schmidt, Executive Director, Texas State Board of Dental Examiners has determined for the first five year period the new rule is in effect there will be limited fiscal implications for local or state government as a result of enforcing or administering the rule.

There is an anticipated economic cost to persons who are required to comply with the new section. There is no anticipated local employment impact as a result of enforcing this new section.

Mr. Schmidt has determined that for each year of the first five years the new rule is in effect, the public benefit anticipated as a result of enforcing the rule will be the licensure of qualified individuals to serve as a faculty member of a dental school in the state of Texas.

The fiscal implications for small or large businesses will be minimal or none at all. Therefore, the Board has determined that compliance with the proposed new rule will not have an adverse economic impact on small business when compared to large businesses. The requirement under §117.2 will impact individuals who make application for licensure by credentials and not small businesses.

Comments on the proposal may be submitted to Bobby D. Schmidt, M.Ed. Executive Director, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 475-1660. To be considered, all written comments must be received by the Texas State Board of Dental Examiners no later than 30 days from the date that this new rule is published in the *Texas Register*.

The new section is proposed under Texas Government Code §§2001.021 et seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties, and Senate Bill 263, §26, 78th Legislature, 2003, which requires the Board to establish rules for the licensure of faculty members of dental or dental hygiene schools.

Title 3, Subtitle D, Chapter 267 of the Occupations Code and Title 22, Texas Administrative Code, Section 117 are affected by this proposal.

*§117.2. Dental Faculty Licensure.*

(a) Effective March 1, 2004, the SBDE will issue a license to a dental school faculty member that provides direct patient care, upon payment of a fee in an amount set by the Board, who meets all the following criteria:

(1) has graduated from a dental school;

(2) holds a full-time or part-time salaried faculty position at a dental or dental hygiene school accredited by the Commission on Dental Accreditation of the American Dental Association;

(3) obtains endorsement of the application from the Dean, Department Chair, or Program Director of the employer-school;

(4) pays an application fee set by the Board; and

(5) has taken and passed the jurisprudence examination administered by the SBDE or its designated testing service.

(b) An applicant for a license under this chapter must file an application for the license within six months of employment date.

(c) A license under this chapter must be renewed annually.

(d) A license issued under this chapter expires on the termination of employment with the dental or dental hygiene school.

(e) A license holder whose employment with a dental or dental hygiene school terminates and who is subsequently employed by the same or different dental or dental hygiene school must comply with requirements for obtaining an original license, except that the person is not required to re-take the jurisprudence exam.

(f) A license issued under this chapter does not authorize the license holder to engage in the practice of dentistry or dental hygiene outside the auspices of the employing dental or dental hygiene school 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 November 14, 2003.

TRD-200307856

Bobby D. Schmidt, M.Ed.
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 475-0972

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**22 TAC §117.3**

The Texas State Board of Dental Examiners (Board) proposes new §117.3, concerning dental hygiene faculty licensure. The new language provides that any person who serves as a faculty member of a dental hygiene school must hold a dental or dental hygiene school faculty license. Senate Bill 263, §26, 78th Legislature amends the requirements for licensure of faculty members of a dental or dental hygiene school.

Mr. Bobby D. Schmidt, Executive Director, Texas State Board of Dental Examiners has determined for the first five year period the new rule is in effect there will be limited fiscal implications for local or state government as a result of enforcing or administering the rule.

There is an anticipated economic cost to persons who are required to comply with the new section. There is no anticipated local employment impact as a result of enforcing this new section.

Mr. Schmidt has determined that for each year of the first five years the new rule is in effect, the public benefit anticipated as a result of enforcing the rule will be the licensure of qualified individuals to serve as a faculty member of a dental hygiene school in the state of Texas.

The fiscal implications for small or large businesses will be minimal or none at all. Therefore, the Board has determined that compliance with the proposed new rule will not have an adverse economic impact on small business when compared to large businesses. The requirement under §117.3 will impact individuals who make application for licensure by credentials and not small businesses.

Comments on the proposal may be submitted to Bobby D. Schmidt, M.Ed. Executive Director, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 475-1660. To be considered, all written comments must be received by the Texas State Board of Dental Examiners no later than 30 days from the date that this new rule is published in the *Texas Register*.

The new section is proposed under Texas Government Code §§2001.021 et seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties, and Senate Bill 263, §26, 78th Legislature, 2003, which requires the Board to establish rules for the licensure of faculty members of dental or dental hygiene schools.

Title 3, Subtitle D, Chapter 267 of the Occupations Code and Title 22, Texas Administrative Code, Section 117 are affected by this proposal.

*§117.3. Dental Hygiene Faculty Licensure.*

(a) Effective March 1, 2004, the SBDE will issue a license to a dental hygiene school faculty member that provides direct patient care, upon payment of a fee in an amount set by the Board, who meets all the following criteria:

(1) has graduated from a dental hygiene school;

(2) holds a full-time or part-time salaried faculty position at a dental or dental hygiene school accredited by the Commission on Dental Accreditation of the American Dental Association;

(3) obtains endorsement of the application from the Dean, Department Chair, or Program Director of the employer-school;

(4) pays an application fee set by the Board; and

(5) has taken and passed the jurisprudence examination administered by the SBDE or its designated testing service.

(b) An applicant for a license under this chapter must file an application for the license within six months of employment date.

(c) A license under this chapter must be renewed annually

(d) A license issued under this chapter expires on the termination of employment with the dental or dental hygiene school

(e) A license holder whose employment with a dental or dental hygiene school terminates and who is subsequently employed by the same or different dental or dental hygiene school must comply with requirements for obtaining an original license, except that the person is not required to re-take the jurisprudence exam.

(f) A license issued under this chapter does not authorize the license holder to engage in the practice of dentistry or dental hygiene outside the auspices of the employing dental or dental hygiene school 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 November 14, 2003.

TRD-200307857
Bobby D. Schmidt, M.Ed.
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 475-0972

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# PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

## CHAPTER 501. RULES OF PROFESSIONAL CONDUCT

## SUBCHAPTER A. GENERAL PROVISIONS

**22 TAC §501.51, §501.52**

The Texas State Board of Public Accountancy (Board) proposes amendments to §501.51 concerning Preamble and General Principles and §50.1.52 concerning Definitions in Subchapter A regarding General Provisions. The Board is simultaneously withdrawing a prior proposal to renumber Chapter 501 that was in the October 10, 2003 issue of the *Texas Register* (28 TexReg 8775).

The amendment to §501.51 was changed in subsection (e) to numerically list the services to which the board's rules apply and to add internal auditing and forensic accounting to that list of services. Subsection (e) was further changed to delete the statement that licensees practicing outside the United States

should comply with that country's standards. New subsection (h) was added to provide an interpretive comment specifically stating that outsource internal audit services are client practice engagements. The amendment to §501.52 adds a new paragraph (21) to the former rule which states that the practice of public accountancy is defined in the Public Accountancy Act. These amendments are the result of rule review conducted pursuant to §2001.039 of the Government Code. Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The Board has reviewed §§501.51 and 501.52 in Subchapter A and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 501 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendments will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendments will be zero because the proposed amendments do not require anyone to do or not do anything new or additional.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendments will be zero because the proposed amendments do not require anyone to do or not do anything new or additional.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendments will be zero because the proposed amendments do not require anyone to do or not do anything new or additional.

Mr. Treacy has determined that for the first five-year period the amendments are in effect the public benefits expected as a result of adoption of the proposed amendment to §501.51 will be a clear understanding that outsource internal audit services are considered by the board to be client practice engagements. The public benefits expected as a result of adoption of the proposed amendment to §501.52 will be that new subsection 21 directs readers to the statutory definition of the practice of public accountancy.

The probable economic cost to persons required to comply with the amendments will be zero because the proposed amendments do not require anyone to do or not do anything new or additional.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendments will not affect a local economy.

The Board requests comments on the substance and effect of the proposed amendments from any interested person. Comments must be received at the Board no later than noon on Monday, December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed amendments will not have an adverse economic effect on small businesses because the proposed amendments do not require anyone to do or not do anything new or additional.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendments will have an adverse economic effect on small business; if the amendments are believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendments are to be adopted; and if the amendments are believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the amendments under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The amendments are proposed under the Public Accountancy Act, Tex. Occupations Code, §901.151 (Vernon 2001) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by these proposed amendments.

*§501.51. Preamble and General Principles.*

(a) These rules of professional conduct were promulgated under the Public Accountancy Act, which directs the Texas State Board of Public Accountancy to promulgate rules of professional conduct "in order to establish and maintain high standards of competence and integrity in the practice of public accountancy and to insure that the conduct and competitive practices of licensees serve the purposes of the Act and the best interest of the public."

(b) The services usually and customarily performed by those in the public, industry, or government practice of accountancy involve a high degree of skill, education, trust, and experience which are professional in scope and nature. The use of professional designations carries an implication of possession of the competence associated with a profession. The public, in general, and the business community, in particular, rely on this professional competence by placing confidence in reports and other services of accountants. The public's reliance, in turn, imposes obligations on persons utilizing professional designations, both to their clients and to the public in general. These obligations include maintaining independence of thought and action, continuously improving professional skills, observing[~~, where applicable,~~] generally accepted accounting principles and generally accepted auditing standards, promoting sound and informative financial reporting, holding the affairs of clients in confidence, upholding the standards of the public accountancy profession, and maintaining high standards of personal and professional conduct in all matters.

(c) The board has an underlying duty to the public to insure that these obligations are met in order to achieve and maintain a vigorous profession capable of attracting the bright minds essential to serving adequately the public interest.

(d) These rules recognize the First Amendment rights of the general public as well as licensees and do not restrict the availability of accounting services. However, public accountancy, like other professional services, cannot be commercially exploited without the public being harmed. While information as to the availability of accounting services and qualifications of licensees is desirable, such information should not be transmitted to the public in a misleading fashion.

(e) The rules are intended to have application to all kinds of professional services performed [~~for the public~~] in the practice of public accountancy, including services relating to:

(1) accounting, auditing and other assurance services,

(2) taxation,

(3) financial advisory services,

(4) litigation support,

(5) internal auditing,

(6) forensic accounting, and

(7) management advice and consultation.[, ~~to mention only the broad areas in which services are currently being offered by those in the practice of public accountancy. A licensee who is engaged in the practice of public accountancy outside the United States may conduct that practice in accordance with the standards of professional conduct applicable to the country in which he is practicing.~~]

(f) Finally, these rules also recognize the duty of certified public accountants to refrain from committing acts discreditable to the profession. These acts, whether or not related to the accountant's practice, impact negatively upon the public's trust in[~~view of~~] the profession.

(g) In the interpretation and enforcement of these rules, the board may consider relevant interpretations, rulings, and opinions issued by the boards of other jurisdictions and appropriate committees of professional organizations, but will not be bound thereby.

(h) Interpretive Comment: Outsourced internal audit services are considered engagements in the client practice of public accountancy as defined in §501.52(9) of this title (relating to Definitions).

*§501.52. Definitions.*

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. The masculine shall be construed to include the feminine or neuter and vice versa, and the singular shall be construed to include the plural and vice versa.

(1) Act--The Public Accountancy Act, Chapter 901, Occupations Code.

(2) Advertisement--A message which is transmitted to persons by, or at the direction of, a certificate or registration holder and which has reference to the availability of the certificate or license holder to perform Professional Services.

(3) Affiliated entity--An entity controlling or being controlled by or under common control with another entity, directly or indirectly, through one or more intermediaries.

(4) "Attest Service" means:

(A) an audit or other engagement required by the board to be performed in accordance with the auditing standards adopted by the American Institute of Certified Public Accountants or another national accountancy organization recognized by the board;

(B) a review, compilation or other engagement required by the board to be performed in accordance with standards for accounting and review services adopted by the American Institute of Certified Public Accountants or another national accountancy organization recognized by the board;

(C) an engagement required by the board to be performed in accordance with standards for attestation engagements adopted by the American Institute of Certified Public Accountants or another national accountancy organization recognized by the board; or

(D) any other assurance service required by the board to be performed in accordance with professional standards adopted by the American Institute of Certified Public Accountants or another national accountancy organization recognized by the board.

(5) Board--The Texas State Board of Public Accountancy.

(6) Certificate or registration holder--The holders of all currently valid:

(A) certificates issued to individuals who have been awarded the designation certified public accountant by the board pursuant to the Act, or pursuant to corresponding provisions of a prior Act;

(B) registrations with the board under §901.355 of the Act; and

(C) firm licenses or registrations.

(7) Charitable Organization--An organization which has been granted tax-exempt status under the Internal Revenue Code of 1986, §501(c), as amended.

(8) Client--A person who enters into an agreement with a license holder or a license holder's employer to receive a professional accounting service.

(9) Client Practice of Public Accountancy is the offer to perform or the performance by a certificate or registration holder for a client or a potential client of a service involving the use of accounting, attesting, or auditing skills. The phrase "service involving the use of accounting, attesting, or auditing skills" includes:

(A) the issuance of reports on, or the preparation of, financial statements, including historical or prospective financial statements or any element thereof;

(B) the furnishing of management or financial advisory or consulting services;

(C) the preparation of tax returns or the furnishing of advice or consultation on tax matters;

(D) the advice or recommendations in connection with the sale or offer for sale of products (including the design and implementation of computer software), when the advice or recommendations routinely require or imply the possession of accounting or auditing skills or expert knowledge in auditing or accounting; and/or

(E) litigation support services.

(10) Commission--Compensation for recommending or referring any product or service to be supplied by another person.

(11) Contingent fee--A fee for any service where no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service. However, a certificate or registration holder's non-Contingent fees may vary depending, for example, on the complexity of the services rendered. Fees are not contingent if they are fixed by courts or governmental entities acting in a judicial or regulatory capacity, or in tax matters if determined based on the results of judicial proceedings or the findings of governmental agencies acting in a judicial or regulatory capacity, or if there is a reasonable expectation of substantive review by a taxing authority.

(12) Financial Statements--A presentation of financial data, including accompanying notes, derived from accounting records and intended to communicate an entity's economic resources or obligations at a point in time, or the changes therein for a period of time, in accordance with generally accepted accounting principles. Incidental financial data to support recommendations to a client or in documents for which the reporting is governed by Statements or

Standards for attestation Engagements and tax returns and supporting schedules do not constitute financial statements for the purposes of this definition.

(13) Firm--A proprietorship, partnership, or professional or other corporation, or other business engaged in the practice of public accountancy.

(14) Good standing--Compliance by a certificate or registration holder with the Board's licensing rules, including the mandatory continuing education requirements and payment of the annual license fee, and any penalties and other costs attached thereto. In the case of board-imposed disciplinary or administrative sanctions, the certificate or registration holder must be in compliance with all the provisions of the board order to be considered in Good standing.

(15) Licensee--The holder of a license issued by the board to a certificate or registration holder pursuant to the Act, or pursuant to provisions of a prior Act.

(16) Peer review or Quality Review--The study, appraisal, or review of the professional accounting work of a public accountancy firm that performs attest services by a certificate holder who is not affiliated with the firm.

(17) Person--An individual, partnership, corporation, registered limited liability partnership, or limited liability company.

(18) Practice unit--An office of a firm required to be licensed with the board for the purpose of practicing public accountancy.

(19) Professional services or professional accounting work--means services or work that requires the specialized knowledge or skills associated with certified public accountants, including:

(A) issuing reports on financial statements;

(B) providing management or financial advisory or consulting services;

(C) preparing tax returns; and

(D) providing advice in tax matters.

(20) Report--When used with reference to financial statements, means either an engagement performed through the application of procedures under the Statement on Standards for Accounting and Review Services or any opinion, report, or other form of language that states or implies assurance as to the reliability of any financial statements and/or includes or is accompanied by any statement or implication that the person or firm issuing it has special knowledge or competence in accounting or auditing. Such a statement or implication of special knowledge or competence may arise from use by the issuer of the report of names or titles indicating that he or it is an accountant or auditor or from the language of the report itself. The term "report" includes any form of language which disclaims an opinion when such form of language is conventionally understood to imply any assurance as to the reliability of the financial statements to which reference is made. It also includes any form of language conventionally used with respect to a compilation or review of financial statements, and any other form of language that implies such special knowledge or competence.

(21) Interpretive Comment: The practice of public accountancy is defined in §901.003 of the Act (relating to the Practice of Public Accountancy).

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 November 13, 2003.

TRD-200307827
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 305-7848

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## SUBCHAPTER C. RESPONSIBILITIES TO CLIENTS

### 22 TAC §§501.71, 501.73, 501.75 - 501.77

The Texas State Board of Public Accountancy (Board) proposes amendments to §501.71 concerning Receipt of Commissions and Other Compensation, §501.73 concerning Integrity and Objectivity, §501.75 concerning Confidential Client Communications, §501.76 concerning Records and Work Papers and §501.77 concerning Acting through Others in Subchapter C regarding Responsibilities to Clients. The Board is simultaneously withdrawing a prior proposal to renumber Chapter 501 that was in the October 10, 2003 issue of the *Texas Register* (28 TexReg 8775).

The amendment to §501.71 adds a new subsection (f) that refers to §501.73 for payment of commissions. The amendment to §501.73 adds a new subsection (f) which makes reference to the section on Other Professional Standards. The amendment to §501.75 deletes "court proceedings" because it is restrictive and replaces "peer" reviews with "quality" reviews. The amendment to §501.76 in subsection (f), increases the record keeping period for attest services to five years. Failure to maintain such records has been added as a violation of this section. New subsection (g) recommends licensees obtain documentation of delivery of records to a client. The amendment to §501.77 adds "including non-CPA owners and employees" to subsection (a). These amendments are the result of rule review conducted pursuant to §2001.039 of the Government Code. Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The Board has reviewed §§501.71, 501.73, 501.75, 501.76, and 501.77 in Subchapter C and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 501 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendments will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendments will be zero because the proposed amendments do not require the state to do or not do anything new or additional.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendments will be zero because the amendments do not require the

state and local governments to do or not do anything new or additional.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendments will be zero because the proposed amendments do not require the state to do or not do anything new or additional.

Mr. Treacy has determined that for the first five-year period the amendments are in effect the public benefits expected as a result of adoption of the proposed amendment to §501.71 will be that new subsection (f) refers readers to §501.73 for payment of fees, the public benefits for §501.73 will be that new subsection (f) directs readers to other section for other possible issues, for §501.75 will be that the rule will be easier for readers to understand, for §501.76 will be that documents and working papers will be retained and therefore available for longer periods and for §501.77 will be clarification that this rule applies to non-CPA owners and employees.

The probable economic cost to persons required to comply with the amendments to §§501.71, 501.73, 501.75, and 501.77 will be zero because the proposed amendments do not require anyone to do or not do anything new or additional. The probable economic cost to persons required to comply with §501.76 is impossible for the board to estimate with any reliable accuracy. For attestation, the cost would be the incremental cost of retaining records for one additional year. With a request for anyone to provide accurate historical data, the board estimates that the additional cost to retain might be $100.00.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendments will not affect a local economy.

The Board requests comments on the substance and effect of the proposed amendments from any interested person. Comments must be received at the Board no later than noon on Monday, December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed amendments to §§501.71, 501.73, 501.75, and 501.77 will not have an adverse economic effect on small businesses because the proposed amendments do not require anyone to do or not do anything new or additional. In regards to §501.76 as explained previously herein, the additional or incremental cost does not rise to the level of an adverse economic effect.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendments will have an adverse economic effect on small business; if the amendments are believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendments are to be adopted; and if the amendments are believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the amendments under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The amendments are proposed under the Public Accountancy Act ("Act"), Tex. Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by these proposed amendments.

*§501.71. Receipt of Commissions and Other Compensation.*

(a) A certificate or registration holder shall not for a commission recommend or refer to a client any product or service or refer any product or service to be supplied to a client, or receive a commission, when the licensee or the licensee's firm also performs services for that client requiring independence under §501.70 of this chapter (relating to Independence).

(b) This prohibition applies during the period in which the certificate or registration holder is engaged to perform any of the services requiring independence and during the period covered by any of the historical financial statements involved in such services requiring independence.

(c) A certificate or registration holder who receives or agrees to receive other compensation with respect to services or products recommended, referred, or sold by him to another person shall, no later than the making of such recommendation, referral, or sale, make the following disclosures in writing to such other persons:

(1) if the other person is a client, the nature, source, and amount of all such other compensation; or

(2) if the other person is not a client, the nature and source of any such other compensation.

(d) The disclosure shall be made regardless of the amount of other compensation involved.

(e) This section does not apply to payments received from the sale of all, or a material part, of an accounting practice, or to retirement payments to persons formerly engaged in the practice of public accountancy.

(f) Interpretive Comment: Reference should be made to §501.73(d) of this title (relating to Integrity and Objectivity) for issues relating to the payment of fees by a certificate or registration holder to any person to obtain clients for the certificate or registration holder.

*§501.73. Integrity and Objectivity*

(a) A certificate or registration holder in the performance of professional services shall maintain integrity and objectivity, shall be free of conflicts of interest and shall not knowingly misrepresent facts nor subordinate his or her judgment to others. In tax practice, however, a certificate or registration holder may resolve doubt in favor of his client as long as there is reasonable support for the position.

(b) A conflict of interest may occur if a certificate or registration holder performs a professional service for a client or employer and the certificate or registration holder has a relationship with another person, entity, product, or service that could, in the certificate or registration holder's professional judgment, be viewed by the client, employer, or other appropriate parties as impairing the certificate or registration holder's objectivity. If the certificate or registration holder believes that the professional service can be performed with objectivity, and the relationship is disclosed to and consent is obtained from such client, employer, or other appropriate parties, then this rule shall not operate to prohibit the performance of the professional service because of a conflict of interest.

(c) Certain professional engagements, such as audits, reviews, and other services, require independence. Independence impairments

under §501.70 (relating to Independence), its interpretations and rulings cannot be eliminated by disclosure and consent.

(d) A certificate or registration holder shall not pay a commission to a third party to obtain a client unless, prior to being engaged by such client, the certificate or registration holder discloses to the client in writing the fact and the fixed or variable amount of such commission. This section does not apply to payments made to a certificate or registration holder for the purchase of all, or a material part, of an accounting practice, or to retirement payments to persons formerly engaged in the practice of public accountancy.

(e) A certificate or registration holder shall not concurrently engage in the practice of public accountancy and in any other business or occupation which impairs independence or objectivity in rendering professional services, or which is conducted so as to augment or benefit the accounting practice unless these rules are observed in the conduct thereof.

(f) Interpretive Comment: Reference should be made to §501.62(4) and (5) of this title (relating to Other Professional Standards) where applicable.

*§501.75. Confidential Client Communications.*

Except by permission of the client or the authorized representatives of the client, a certificate or registration holder or any partner, officer, shareholder, or employee of a certificate or registration holder shall not voluntarily disclose information communicated to him by the client relating to, and in connection with, professional services rendered to the client by the certificate or registration holder. Such information shall be deemed confidential. However, nothing herein shall be construed as prohibiting the disclosure of information required to be disclosed by the standards of the public accounting profession in reporting on the examination of financial statements or as prohibiting disclosures [~~in court proceedings,~~] pursuant to a subpoena or other compulsory process, in investigations or proceedings under the Act, in ethical investigations conducted by private professional organizations, or in the course of peer[~~quality~~] reviews.

*§501.76. Records and Work Papers.*

(a) Upon request, regardless of the status of the client or former client's account, a certificate or registration holder shall provide to the client or former client any accounting or other records, whether in the form of hard copy or computer readable format, belonging to, or obtained from or on behalf of, the client that the certificate or registration holder removed from the client's premises or received on behalf of the client. The certificate or registration holder may make and retain copies of such records when they form the basis of work done by him. For a reasonable charge for personnel time and photocopying, a certificate or registration holder shall furnish to his client or former client, upon request made within a reasonable time after original issuance of the document in question:

(1) a copy of the client's tax return;

(2) a copy of any report or other document previously issued by the certificate or registration holder to or for such client provided that furnishing such reports to or for a client or former client would not cause the certificate or registration holder to be in violation of the portions of Section 501.60 of this title (relating to Auditing Standards) concerning subsequent events;

(3) a copy of the certificate or registration holder's working papers, to the extent that such working papers include records which would ordinarily constitute part of the client's books and records and are not otherwise available to the client.

(b) A certificate or registration holder, when performing an engagement that is terminated prior to the completion of the engagement, is required to return or furnish the originals of only those records originally obtained by the certificate or registration holder from the client.

(c) Working papers developed by a certificate or registration holder during the course of a professional engagement as a basis for, and in support of, an accounting, audit, consulting, tax, or other professional report prepared by the certificate or registration holder for a client, shall be and remain the property of the certificate or registration holder who developed the working papers.

(1) Working papers, whether in the form of hard copy or computer readable format, are those papers developed by the certificate or registration holder incident to the performance of his engagement which do not result in changes to the client's records or are in part of the records ordinarily maintained by the client.

(2) Analyses of inventory or other accounts as part of the certificate or registration holder's selective audit procedures, even when prepared by client personnel at the request of the certificate or registration holder, are the certificate or registration holder's working papers.

(3) If the analyses described in paragraph (2) of this subsection result in changes to the client's records, the certificate or registration holder is required to furnish the details from his working papers in support of the journal entries recording such changes unless the journal entries themselves contain all necessary details.

(d) Working papers include, but are not limited to:

(1) letters of confirmation and representation;

(2) excerpts of company documents;

(3) audit programs;

(4) internal memoranda;

(5) schedules;

(6) flowcharts; and

(7) narratives.

(e) Working papers which constitute client records include, but are not limited to:

(1) worksheets in lieu of books of original entry such as listings and distributions of cash receipts or cash disbursements;

(2) worksheets in lieu of general ledger or subsidiary ledgers, such as accounts receivable, job cost and equipment ledgers, or similar depreciation records;

(3) all adjusting and closing journal entries and supporting details when the supporting details are not fully set forth in the explanation of the journal entry; and

(4) consolidating or combining journal entries and worksheets and supporting detail in arriving at final figures incorporated in an end product such as financial statements or tax returns.

(f) Documentation or working papers required by professional standards for attest services shall be maintained in paper or electronic format by a certificate or registration holder for a period of not less than five[~~four~~] years from the date of any report issued in connection with the attest service, unless otherwise required by another regulatory body. Failure to maintain such documentation or working papers constitutes a violation of this section and may be deemed an admission that they do not comply with professional standards.

(g) Interpretive Comment: It is recommended that a certificate or registration holder obtain a receipt or other written documentation of the delivery of records to a client.

*§501.77. Acting through Others.*

(a) A certificate or registration holder shall not permit others including non-CPA owners and employees, to carry out on his behalf, either with or without compensation, acts, which, if carried out by the certificate or registration holder, would place him in violation of these rules of professional conduct.

(b) The board shall consider that the conduct of any non-CPA owner or employee in connection with the business of a licensed firm is the conduct of that licensed firm for the purposes of the rules of professional 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.

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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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## SUBCHAPTER D. RESPONSIBILITIES TO THE PUBLIC

### 22 TAC §§501.80, 501.81, 501.85

The Texas State Board of Public Accountancy (Board) proposes amendments to §501.80 concerning Practice of Public Accountancy, §501.81 concerning Firm License Requirements and §501.85 concerning Complaint Notice in Subchapter D. The Board is simultaneously withdrawing a prior proposal to renumber Chapter 501 that was in the October 10, 2003 issue of the *Texas Register* (28 TexReg 8775).

The amendment to §501.80 adds a new subsection (c) to the rule, which states that the section incorporates the definitions of the practice of public accountancy, professional services, and accounting work found in other sections and the Act. The amendment to §501.81 adds a new subsection (f) to the rule that requires a licensee who is employed by an unlicensed entity that offers the client practice of public accountancy services to use the disclaimer in subsection (c). The amendment to §501.85 simplifies the board's address by changing Roman Numeral III to 3. These amendments are the result of rule review conducted pursuant to §2001.039 of the Government Code. Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The Board has reviewed §§501.80, 501.81 and 501.85 in Subchapter D and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 501 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendments will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendments will be zero because the proposed amendments do not require anyone to do or not do anything new or additional.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendments will be zero because the proposed amendments do not require anyone to do or not do anything new or additional.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendments will be zero because the proposed amendments do not require anyone to do or not do anything new or additional.

Mr. Treacy has determined that for the first five-year period the amendments are in effect the public benefits expected as a result of adoption of the proposed amendment to §501.80 will be other named definitions found in other cited sections are incorporated into this section. The public benefits expected as a result of adoption of the proposed amendment to §501.81 will be that licensees employed by unlicensed firms will have a better understanding as to when they must use the disclaimer. The public benefits expected as a result of adoption of the proposed amendment to §501.85 will be that the board's address will be simplified.

The probable economic cost to persons required to comply with the amendment will be zero because the proposed amendments do not require anyone to do or not do anything new or additional.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendments will not affect a local economy.

The Board requests comments on the substance and effect of the proposed amendments from any interested person. Comments must be received at the Board no later than noon on Monday, December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed amendments will not have an adverse economic effect on small businesses because the proposed amendments do not require anyone to do or not do anything new or additional.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendments will have an adverse economic effect on small business; if the amendments are believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendments are to be adopted; and if the amendments are believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the amendments under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The amendments are proposed under the Public Accountancy Act, Tex. Occupations Code, §901.151 (Vernon 2001) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by these proposed amendments.

*§501.80. Practice of Public Accountancy.*

(a) A certificate or registration holder may not engage in the practice of public accountancy unless he holds a valid license issued by the board. A license is not valid for any date or for any period prior to the date it is issued by the board and it automatically expires and is no longer valid after the end of the period for which it is issued.

(b) Any licensee of this board in good standing as a certified public accountant or public accountant may use such designation whether or not the licensee is in the client, industry, or government practice of public accountancy. However, a licensee who is not in the client practice of public accountancy may not in any manner, through use of the CPA designation or otherwise, claim or imply independence from his employer or that the licensee is in the client practice of public accountancy.

(c) Interpretive Comment: This section incorporates the definitions of the practice of public accountancy and professional services and accounting work found in §501.52(9) and §501.52(19) of this title (relating to Definitions) as well as §901.003 of the Act (relating to Practice of Public Accountancy).

*§501.81. Firm License Requirements.*

(a) A Firm, including a sole proprietorship, may not provide attest services or use the title "CPA," "CPAs," "CPA Firm," "Certified Public Accountants," "Certified Public Accounting Firm," or "Auditing Firm" or any variation of those titles unless the firm holds a firm license.

(b) An individual may not provide attest services unless:

(1) the individual has a license or registration issued under the Act; and

(2) the individual offers the attest services through an entity holding a firm license.

(c) Each advertisement or written promotional statement that refers to a CPA's designation and his or her association with an unlicensed entity in the client practice of public accountancy must include the disclaimer: "This firm is not a CPA firm." The disclaimer must be included in conspicuous proximity to the name of the unlicensed entity and be printed in type not less bold than that contained in the body of the advertisement or written statement. If the advertisement is in audio format only, the disclaimer shall be clearly declared at the conclusion of each such presentation.

(d) The requirements of subsection (c) of this section do not apply with regard to a certificate or registration holder performing services:

(1) as a licensed attorney at law of this state while in the practice of law or as an employee of a licensed attorney when acting within the scope of the attorney's practice of law; or

(2) as an employee, officer, or director of a federally-insured depository institution, when lawfully acting within the scope of the legally permitted activities of the institution's trust department.

(e) On the third determination by the board that a certificate holder has practiced without a license or through an unregistered entity in violation of subsection (c) of this section, the individual's certificate shall be subject to revocation and may not be reinstated for at least 12 months from the date of the revocation.

(f) Interpretive Comment: A certificate or registration holder who is employed by an unlicensed firm that offers services that fall within the definitions of the client practice of public accountancy as defined in §501.2(9) and §501.2(19) of this title (relating to Definitions) and §901.003 of the Act (relating to Practice of Public Accountancy) must comply with the disclaimer requirement found in subsection (c) of this section.

*§501.85. Complaint Notice.*

When a firm receives a complaint that an alleged violation of the Act or Rules of Professional Conduct has occurred, a certificate or registration holder shall provide to the complainant a statement that: Complaints concerning Certified Public Accountants may be addressed in writing to the Texas State Board of Public Accountancy at 333 Guadalupe, Tower 3[III], Suite 900, Austin, Texas 78701-3900, telephone (512) 305-7800, email to enforcement@tsbpa.state.tx.us, or fax (512) 305-7854.

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.

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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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## SUBCHAPTER E. RESPONSIBILITIES TO THE BOARD/PROFESSION

**22 TAC §§501.90 - 501.93**

The Texas State Board of Public Accountancy (Board) proposes amendments to §501.90, concerning Discreditable Acts, §501.91, concerning Reportable Events, §501.92, concerning Frivolous Complaints and §501.93, concerning Responses in Subchapter E, regarding Responsibilities to the Board/Profession. The Board is simultaneously withdrawing a prior proposal to renumber Chapter 501 that was in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8775).

The amendment to §501.90 adds a new part to paragraph (5) of the rule. The new part states that a final conviction, imposition of deferred adjudication or community supervision involving moral turpitude, alcohol abuse or controlled substances is a discreditable act. New paragraph (19) adds a reference to Board Rule, §519.16, and also states that any crime of moral turpitude, alcohol abuse or controlled substances directly relates to the practice of public accountancy and defines moral turpitude as a crime involving grave infringement of the moral sentiment of the community. The amendment to §501.91(a)(1) moves "any crime of which fraud or dishonesty is an element" from subparagraph (A) to (C). It also moves language regarding the qualifications, functions or duties of a public accountant from subparagraph (B) to subparagraph (D). The remaining part of subparagraph (B) is re-written to include only crimes of moral turpitude. Subparagraph (C) adds alcohol abuse and controlled substances to the list of crimes that must be reported to the Board. The amendment to §501.92 adds a "registration" holder to the rule, as a person who must comply with this section. The amendment to §501.93 adds "faxing" and "facsimile" to the methods the Board may use to communicate with its licensees. These amendments are the result of rule review conducted pursuant to §2001.039 of

the Government Code. Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The Board has reviewed §§501.90 - 501.93 in Subchapter E and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Texas Administrative Code, Title 22, Part 22, Chapter 501 in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendments will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendments will be zero because the proposed amendments do not require anyone to do or not do anything new or additional and also for §501.90 and §501.91 the Board has already been pursuing these types of cases.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendments will be zero because the proposed amendments do not require anyone to do or not do anything new or additional and also for §501.90 and §501.91 the Board has already been pursuing these types of cases.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendments will be zero because the proposed amendments do not require anyone to do or not do anything new or additional and also for §501.90 and §501.91 the Board has already been pursuing these types of cases.

Mr. Treacy has determined that for the first five-year period the amendments are in effect the public benefits expected as a result of adoption of the proposed amendments to §501.90 and §501.91 will be that it will be clearly stated that crimes involving moral turpitude will continue to be investigated and prosecuted by the board as discreditable acts. The public benefits expected as a result of adoption of the proposed amendment to §501.92 will be that an inapplicable term will be removed from the rule. The public benefits expected as a result of adoption of the proposed amendment to §501.93 will be that the board's use of facsimiles to communicate with its licensees be included in the rule.

The probable economic cost to persons required to comply with the amendments to §501.90 and §501.91 should not change because the board had been pursing these types of cases. The probable economic cost to persons required to comply with the amendments to §501.92 and §501.93 will be zero because the proposed amendments do not require anyone to do or not do anything new or additional.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendments will not affect a local economy.

The Board requests comments on the substance and effect of the proposed amendments from any interested person. Comments must be received at the Board no later than noon on Monday, December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed amendments will not have an adverse economic effect on small businesses because in regards to §501.90 and §501.91 the board has been pursuing these types of cases. In regards to §501.92 and §501.93 Mr. Treacy has determined that the proposed amendments will not have an adverse economic effect on small businesses because the proposed amendments do not require anyone to do or not do anything new or additional.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendments will have an adverse economic effect on small business; if the amendments are believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendments are to be adopted; and if the amendments are believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the amendments under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The amendments are proposed under the Public Accountancy Act, Texas Occupations Code, §901.151 (Vernon 2001) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by these proposed amendments.

*§501.90. Discreditable Acts.*

A certificate or registration holder shall not commit any act that reflects adversely on his fitness to engage in the practice of public accountancy. A discreditable act includes but is not limited to:

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

(5) final conviction of any crime or imposition of deferred adjudication or community supervision in connection with a criminal prosecution, an element of which is dishonesty or fraud under the laws of any state or the United States, or a criminal prosecution for a crime of moral turpitude, or a criminal prosecution involving alcohol abuse or controlled substances;

(6) - (16) (No change.)

(17) voluntarily disclosing information communicated to the certificate holder by an employer, past or present, or through the certificate holder's employment in connection with accounting services rendered to the employer, except:

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

(C) pursuant to a subpoena or other compulsory process [~~in a court proceeding~~];

(D) - (E) (No change.)

(18) (No change.)

(19) Interpretive Comment: The board has found in §519.16 of this title (relating to Misdemeanors that Subject a Certificate or Registration Holder to Discipline by the Board) and §525.1 of this title (relating to Applications for the Uniform CPA Examination, Issuance of the CPA Certificate, a License, or Renewal of a License for Individuals with Criminal Backgrounds) that any crime of moral turpitude directly relates to the practice of public accountancy. A crime of moral turpitude is defined in this chapter as a crime involving

grave infringement of the moral sentiment of the community. The board has found in §519.16 of this title that any crime involving alcohol abuse or controlled substances directly relates to the practice of public accountancy.

*§501.91. Reportable Events.*

(a) A licensee shall report in writing to the board the occurrence of any of the following events within 30 days of the date the licensee has knowledge of these events:

(1) the conviction or imposition of deferred adjudication of the licensee of any of the following:

(A) a felony [~~or any crime of which fraud or dishonesty is an element~~];

(B) a [~~any~~] crime of moral turpitude; [~~related to the qualifications, functions, or duties of a public accountant or certified public accountant, or to acts or activities in the course and scope of the practice of public accountancy or as a fiduciary.~~]

(C) any crime of which fraud or dishonesty is an element or that involves alcohol abuse or controlled substances; and

(D) any crime related to the qualifications, functions, or duties of a public accountant or certified public accountant, or to acts or activities in the course and scope of the practice of public accountancy or as a fiduciary.

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

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

(e) Interpretive Comment: A crime of moral turpitude is defined in this chapter as a crime involving grave infringement of the moral sentiment of the community.

*§501.92. Frivolous Complaints.*

A certificate or registration holder who, in writing to the board, accuses another certificate holder of violating the rules of the board shall assist the board in any investigation and/or prosecution resulting from the written accusation. Failure to do so, such as not appearing to testify at a hearing or to produce requested documents necessary to the investigation or prosecution, without good cause is a violation of this rule.

*§501.93. Responses.*

(a) An applicant, certificate or registration holder shall substantively respond in writing to any communication from the board requesting a response, within 30 days of the mailing or faxing of such communication by registered or certified mail or facsimile to the last address or facsimile number furnished to the board by the applicant, certificate or registration holder.

(b) An applicant, certificate or registration holder shall provide copies of documentation and/or working papers in response to the board's request at no expense to the board within 30 days of the date of transmission of the facsimile or of the mailing of such a request by registered or certified mail to the last address furnished to the board by the applicant, certificate or registration holder. An applicant, certificate or registration holder may comply with this subsection by providing the board with original records for the board to duplicate. In such a circumstance, upon request the board will provide an affidavit from the custodian of records documenting custody and control of the records.

(c) - (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.

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Rande Herrell
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# CHAPTER 511. CERTIFICATION AS A CPA

## SUBCHAPTER B. CERTIFICATION BY EXAMINATION

### 22 TAC §511.22

The Texas State Board of Public Accountancy (Board) proposes an amendment to §511.22, concerning Initial Filing of the Application of Intent.

The amendment to §511.22 will make modifications needed to implement the computer-based Uniform CPA Examination. The amendment will make some minor editorial corrections, insert an acronym for the lengthy name of a law, substitute notarized copy for certified copy, and clarify the documentation that is required to comply with a federal statute. This amendment is the result of rule review conducted pursuant to §2001.039 of the Government Code. Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The Board has reviewed §511.22 and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Texas Administrative Code, Title 22, Part 22, Chapter 511 in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be zero because the amendment does not require the state to do anything additional.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be zero because the amendment does not require the state to do anything additional.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be zero because the amendment does not require the state to do anything additional.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be that the rule be easier to understand and will be clearer about federally required documentation.

The probable economic cost to persons required to comply with the amendment will be zero because the amendment

only changes the types of documentation required, it does not increase the requirement for documentation.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

The Board requests comments on the substance and effect of the proposed amendment from any interested person. Comments must be received at the Board no later than noon on Monday, December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment only changes the types of documentation required, it does not increase the requirement for documentation.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small business; if the amendment is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendment is to be adopted; and if the amendment is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the amendment under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act, §901.302 which authorizes applications of intent, and the Federal Responsibility and Work Opportunity Reconciliation Act of 1996 and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by this proposed amendment.

*§511.22. Initial Filing of the Application of Intent.*

(a) The initial filing of the application of intent shall be made on forms prescribed by the board and shall also be in compliance with board rules and with all applicable laws. The application of intent may be submitted at any time and will be used to determine compliance and eligibility for the applicant to take the Uniform CPA Examination. The application of intent will remain active until:

(1) the applicant takes [~~writes~~] the Uniform CPA Examination within two years from the date of submission of the application; or

(2) (No change.)

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

(g) In compliance with the Federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 FPRWOR, the board must verify proof of legal status in the United States. The applicant shall provide evidence of legal status by submitting a notarized copy [~~certified copy~~] of a document from either paragraph (1) or (2) of this subsection.

(1) (No change.)

(2) An acceptable document from list A or list B, and an acceptable document from list C.

(A) List A:

*(i) - (iv)* (No change.)

*(v)* other document in compliance with FPRWOR [~~Alien Registration Receipt Card With photograph (INS Form I-151 or I-551)~~];

~~*[(vi)* Unexpired Temporary Resident Card (INS Form I-688);]~~

~~*[(vii)* Unexpired Employment Authorization Card (INS Form I-688A);]~~

~~*[(viii)* Unexpired Reentry Permit (INS Form I-327);]~~

~~*[(ix)* Unexpired Refugee Travel Document (INS Form I-571); or]~~

~~*[(x)* Unexpired Employment Authorization Document issued by the INS which contains a photograph (INS Form I-688B).]~~

(B) List B:

*(i) - (iii)* (No change.)

*(iv)* other document in compliance with the FPRWOR [~~Voter's registration card~~];

~~*[(v)* U.S. Military card or draft record;]~~

~~*[(vi)* Military dependent's ID card;]~~

~~*[(vii)* U.S. Coast Guard Merchant Mariner card;]~~

~~*[(viii)* Native American tribal document; or]~~

~~*[(ix)* Driver's license issued by a Canadian government authority]~~

(C) List C:

*(i) - (iii)* (No change.)

*(iv)* other document in compliance with the FPRWOR. [~~Native American tribal document; or~~]

~~*[(v)* U.S. Citizen ID Card (INS Form I-197);]~~

~~*[(vi)* ID Card for use of Resident Citizen in the United States (INS Form I-179); or]~~

~~*[(vii)* Unexpired employment authorization document issued by the INS (other than those listed under List A)]~~

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.

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Rande Herrell
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For further information, please call: (512) 305-7848

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**22 TAC §511.29**

The Texas State Board of Public Accountancy (Board) proposes new §511.29, concerning Examination Candidate Data.

The new §511.29 will assist in implementing the computer based Uniform CPA Examination. With exam candidates' authorization, the board will provide candidate data to NASBA so it may maintain a national database of eligible exam candidates. This new rule is the result of rule review conducted pursuant to §2001.039 of the Government Code. Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The Board published a Notice of Intention to Review Texas Administrative Code, Title 22, Part 22, Chapter 511 in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rule will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the new rule will be insignificant and minimal because the data will be transmitted electronically.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the new rule will be zero.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the new rule will be zero.

Mr. Treacy has determined that for the first five-year period the new rule is in effect the public benefits expected as a result of adoption of the proposed new rule will be that exam candidates will have been vetted through a national database and eligible exam candidates will be able to take the Uniform CPA Examination at any approved testing center in the United States.

The probable economic cost to persons required to comply with the new rule will be zero.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rule will not affect a local economy.

The Board requests comments on the substance and effect of the proposed new rule from any interested person. Comments must be received at the Board no later than noon on Monday, December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed new rule will not have an adverse economic effect on small businesses because the data will be transmitted electronically.

The Board specifically invites comments from the public on the issues of whether or not the proposed new rule will have an adverse economic effect on small business; if the new rule is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the new rule is to be adopted; and if the new rule is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the new rule under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The new rule is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act, §901.301 which authorizes the board to contract with another entity to conduct the Uniform CPA Examination and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by this proposed new rule.

*§511.29. Examination Candidate Data.*

(a) The board shall provide candidate data to the National Association of State Boards (NASBA) of Accountancy for the sole and specific purpose of maintaining the national candidate database of individuals eligible for the Uniform CPA Examination.

(b) In compliance with §901.160(c)(1) of the Public Accountancy Act (Chapter 901 of the Occupations Code--Vernon's 2003), the Board shall obtain authorization from the candidate for the sharing of data with NASBA.

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 November 13, 2003.

TRD-200307832
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 305-7848

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## SUBCHAPTER C. EDUCATIONAL REQUIREMENTS

**22 TAC §511.52, §511.56**

The Texas State Board of Public Accountancy (Board) proposes an amendment to §511.52, concerning Recognized Colleges and Universities and §511.56, concerning Educational Qualifications under the Act.

The amendments delete associate degree as one of the criteria from §511.52 and increase the accounting courses requirement from 20 semester hours to 30 semester hours in §511.56. These amendments are the result of rule review conducted pursuant to §2001.039 of the Government Code. Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The Board has reviewed §511.52 and §511.56 and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Texas Administrative Code, Title 22, Part 22, Chapter 511 in the February

7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendments will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendments will be zero because the amendments do not require any additional work.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendments will be zero.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendments will be zero.

Mr. Treacy has determined that for the first five-year period the amendments are in effect the public benefits expected as a result of adoption of the proposed amendment to §511.52 will be that this rule is clearer as to which categories of colleges or universities are eligible for consideration and for §511.56 will be that CPA examination candidates will have completed an additional 10 hours of accounting courses as part of their educational preparation.

The probable economic cost to persons required to comply with the amendments will be zero because the amendment to §511.52 has no effect at all and the amendment to §511.56 does not increase the total number of semester hours that is required.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendments will not affect a local economy.

The Board requests comments on the substance and effect of the proposed amendments from any interested person. Comments must be received at the Board no later than noon on Monday, December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed amendments will not have an adverse economic effect on small businesses because the amendment to §511.52 has no effect at all and the amendment to §511.56 does not increase the total number of semester hours that is required.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendments will have an adverse economic effect on small business; if the amendments are believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendments are to be adopted; and if the amendments are believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the amendments under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The amendments are proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act, §901.254 which authorizes the board to determine accounting concentration by board rule and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by this proposed amendments.

*§511.52. Recognized Colleges and Universities.*

In passing upon the qualifications of an applicant, the board shall generally accept colleges or universities which offer a [~~an associate,~~] baccalaureate[~~,~~] or higher degree, and which are recognized by one of the following accrediting associations:

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

*§511.56. Educational Qualifications under the Act.*

(a) (No change.)

(b) An applicant for the Uniform CPA Examination under the current Act shall meet the following educational requirements at the time of filing the initial application to take the examination and in order to qualify to write the examination:

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

(3) complete not fewer than 30 semester hours or quarter-hour equivalents of accounting courses [~~with 20 semester hours or quarter-hour equivalents of accounting core courses, as defined by board rule~~]; and

(4) (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.

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Rande Herrell
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## SUBCHAPTER D. CPA EXAMINATION

### 22 TAC §§511.70, 511.72, 511.83, 511.84, 511.87, 511.91, 511.93

The Texas State Board of Public Accountancy (Board) proposes amendments to §511.70, concerning Grounds for Disciplinary Action of Candidates, §511.72, concerning Uniform Examination, §511.83, concerning Granting of Credit by Transfer of Credit, §511.84, concerning Partial Examination after Transfer of Credit, §511.87, concerning Loss of Credit, §511.91, concerning Board Responsibilities Regarding Requested Accommodations for Disabilities, and §511.93, concerning Applicant's Responsibility for Requesting Accommodations for Disabilities in Subchapter D, regarding CPA Examination.

The amendments to §511.70 and §511.72 (except for one clarification statement in §511.70 regarding using devices, materials or documents), are non-substantive editorial changes necessary to recognize and implement the change from a written Uniform CPA Examination conducted at a few board selected, controlled

and supervised examination centers to a computer-based Uniform CPA Examination conducted at several testing centers under the supervision and control of testing center vendors that were selected by and are under contract to NASBA, which has contracted with the board to administer the examination.

The amendment to §511.83 creates a pre-January 1, 2004 window of time in which an exam candidate may earn partial credit that may be transferred with a grade of at least 50, creates a post-January 1, 2004 opportunity to transfer credit earned with a grade of at least 75 and creates in both instances the requirements that the other jurisdiction awarded credit to their candidate and that the credit has not expired.

The amendment to §511.84 creates deadlines by which a candidate allowed conditional credit for transfer of credit must pass the remaining subjects or forfeit the conditional credit. Credit earned between September 1, 1989 and November 2, 2000 has the next six consecutive examinations. Credit earned between November 2, 2000 and January 1, 2004 has the next six written or computer examinations. Credit earned after January 1, 2004 has the next 18 months.

The amendment to §511.87 has several editorial changes for clarification.

The amendment to §511.91 eliminates the statement that all examination facilities will be physically accessible to disabled applicants because the computer-based examination testing centers will not be selected by or under the control of the board and because new §511.104 states that all testing centers will conform to the standards of the Americans with Disabilities Act of 1990.

The amendment to §511.93 shifts the deadline for applying for accommodation from the application for examination deadline to the time of filing an Application of Intent or an Examination Application.

These amendments are the result of rule review conducted pursuant to §2001.039 of the Government Code. Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The Board has reviewed §§511.70, 511.72, 511.83, 511.84, 511.87, 511.91, and 511.93 and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Texas Administrative Code, Title 22, Part 22, Chapter 511 in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendments will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendments will be zero.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendments will be zero.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendments will be zero.

Mr. Treacy has determined that for the first five-year period the amendments are in effect the public benefits expected as a result of adoption of the proposed amendments will be that the board's rules will be updated to incorporate computer-based examination.

The probable economic cost to persons required to comply with the amendments will be zero.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendments will not affect a local economy.

The Board requests comments on the substance and effect of the proposed amendments from any interested person. Comments must be received at the Board no later than noon on Monday, December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed amendments will not have an adverse economic effect on small businesses because the amendments do not cause the expenditure of funds or assets by small businesses.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendments will have an adverse economic effect on small business; if the amendments are believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendments are to be adopted; and if the amendments are believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the amendments under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The amendments are proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act, §901.301 which authorizes the board to contract with an entity to conduct uniform CPA examinations, §901.306 which authorizes the board to use the services of NASBA, §901.310 which authorizes the board to promulgate rules regarding conditional credit, §901.312 which authorizes the board to accept partial examination credit from another state and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by this proposed amendments.

*§511.70. Grounds for Disciplinary Action of Candidates.*

(a) The board may discipline a candidate for any grounds specified in Section 901.503 of the Public Accountancy Act. Such grounds include but are not limited to the conduct described in subsections (b) - (e) [~~(d)~~] of this rule.

(b) (No change.)

(c) The board may discipline any candidate for failing to comply with written guidelines of conduct to be adhered to by candidates during the examination or oral guidance by a testing center administrator [~~representatives of the board~~] at any examination location.

(d) (No change.)

(e) Cheating, subverting, attempting to subvert, aiding, abetting or conspiring to cheat on the CPA Examination includes, but is not limited to, engaging in, solicitation, or procuring any of the following:

(1) any communication between the examinee [~~one or more examinees~~] and any person, other than a proctor or exam administrator while the examination is in progress;[~~.~~]

(2) any communication between the examinee [~~one or more examinees~~] and any person at any time concerning the content of the examination including, but not limited to, any exam question or answer, unless the examination has been publicly released by the preparer of the examination; [~~except for communication with a proctor or exam administrator while the examination is in progress.~~]

(3) taking by another of all or any part of the examination for the examination candidate;[~~.~~]

(4) possession or use at any time during the examination or while the examinee is in the examination testing center [~~site~~] of any device, material, or document that is not expressly authorized for use by examinees during the examination including but not limited to, notes, crib sheets, books, and electronic devices; or[~~.~~]

(5) using or referring at any time after the commencement of the examination and prior to the conclusion of the examination, to include all breaks during the examination, to any device, material, or document that is not expressly authorized for use by examinees.

*§511.72. Uniform Examination.*

(a) The board shall [~~administer or may~~] contract with the National Association of State Boards of Accountancy [~~a testing vendor~~] for the administration of the examination, in conjunction with the American Institute of Certified Public Accountants and a test vendor, for a certificate as a certified public accountant within the board's jurisdiction. The examination may be offered at the board's office and at testing facilities within the state that are approved and monitored by the board or its designee. The examination shall be offered during scheduled months as determined by the American Institute of Certified Public Accountants, the National Association of State Boards of Accountancy, and the testing vendor.

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

*§511.83. Granting of Credit by Transfer of Credit.*

(a) In order for the board to grant credit to a candidate for partial completion of the Uniform CPA Examination given by the licensing authority of another jurisdiction taken after September 1, 1991 and prior to January 1, 2004, the candidate must have met the following requirements:[~~.~~]

(1) the [~~The~~] candidate sat for all subjects for which the candidate was eligible; [ ~~on examinations taken after September 1, 1991.~~]

(2) the [~~The~~] candidate earned a grade of 75 or higher on any two subjects of the examination;[~~.~~]

(3) the [~~The~~] candidate scored a minimum grade of 50 on each subject not passed; [~~on the examinations taken after September 1, 1991.~~]

(4) the candidate was awarded credit by the licensing authority of another jurisdiction for the subject(s) taken while a candidate of that board; and

(5) the credit awarded by the licensing authority of another jurisdiction has not expired.

(b) In order for the board to grant credit to a candidate for partial completion of the Uniform CPA Examination given by the licensing authority of another jurisdiction taken after January 1, 2004, the candidate must have met the following requirements:

(1) the candidate earned a grade of 75 or higher on any subject of the examination;

(2) the candidate was awarded credit by the licensing authority of another jurisdiction for the subject(s) taken while a candidate of that board; and

(3) the credit awarded by the licensing authority of another jurisdiction has not expired.

(c) [~~(b)~~] If the board accepts transfers of credit [~~for two or more subjects~~], it will also accept transfers of credit for subjects passed at subsequent examinations.

(d) [~~(c)~~] The grades made by the candidate on subjects under consideration must be the ones reported to the licensing authority of another jurisdiction [~~examining board~~] by the American Institute of Certified Public Accountants through the National Association of State Boards of Accountancy.

*§511.84. Partial Examination after Transfer of Credit.*

(a) Any candidate allowed conditional credit for subjects passed after September 1, 1989 and prior to November 2, 2000, must pass the remaining subjects within the next six consecutive examinations or forfeit credits received.

(b) Any candidate allowed conditional credit for subjects passed after November 2, 2000 and prior to January 1, 2004, must pass the remaining subjects within the next six consecutive examinations, which may be offered in a paper or computer format, or forfeit credits received.

(c) Any candidate allowed conditional credit for subject(s) passed after January 1, 2004, must pass the remaining subject(s) within the next eighteen (18) months from the date conditional credit was awarded or forfeit credit received for the subject.

(d) [~~(b)~~] Any candidate who has earned the right to partial reexamination and who fails to pass the remaining subjects of the examination within the applicable time limits shall lose the right to partial reexamination and must take the entire examination upon later application.

*§511.87. Loss of Credit.*

(a) Any candidate having earned [~~conditioning~~] credit under this Act or a prior Act and who has two [~~three~~] examinations remaining before the expiration [~~forfeiture~~] of credits earned shall be notified prior to each examination of these facts.

(b) Any candidate failing to receive credit for all subjects within the time limitation of this Act shall be notified that credits have expired [~~been forfeited~~], and this action shall be ratified by the board.

(c) The expiration [~~forfeiture~~] of credits shall not hinder an examination candidate from reapplying for the examination.

*§511.91. Board Responsibilities Regarding Requested [~~Examination Applicants Requesting~~] Accommodations for Disabilities.*

(a) (No change.)

(b) [~~All examination facilities will be physically accessible to disabled applicants.~~] The Board recognizes its responsibility to accommodate the identified needs of qualified individuals with disabilities by making reasonable modifications and/or providing auxiliary aids. This

does not mean that all requests for accommodation, and/or auxiliary aids will be granted, or that the applicant will receive the particular accommodations or services sought at every testing center. The Board is not required to grant the request if doing so would fundamentally alter the measurement of the skills or knowledge the examination is intended to test, or would create an undue financial or administrative burden.

*§511.93. Applicant's Responsibility for Requesting [~~Application for~~] Accommodations for Disabilities.*

An applicant seeking an accommodation is responsible for making a request for accommodation and providing documentation of the need with the Application of Intent or the Examination Application submitted to the board [ ~~by the application deadline established for all applicants~~]. This information shall be kept confidential to the extent provided by law. The board will evaluate each request individually, in accordance with the guidelines set forth herein, to provide an appropriate and effective accommodation. All requests to the board for accommodation shall be submitted on the prescribed form.

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.

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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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**22 TAC §511.97**

The Texas State Board of Public Accountancy (Board) proposes new §511.97, concerning Examination of Applicant Approved with Accommodation in Subchapter D, regarding CPA Examination.

New §511.97 lists a dozen types of accommodations that the board may authorize, establishes procedures and a deadline for applicant's notifying the board of two possible testing dates and for the board to notify the applicant's testing center of the accommodations required, clarifies the applicant may not make additional accommodation requests of the testing center, and requires the board to absorb the additional costs for the approved accommodations. This new rule is the result of rule review conducted pursuant to §2001.039 of the Government Code. Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The Board published a Notice of Intention to Review Texas Administrative Code, Title 22, Part 22, Chapter 511 in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rule will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the new rule will occur in §511.97 where the board will absorb the cost of the approved accommodations. The board is unable to estimate the total cost because it is affected by the number of applicants whose accommodations are approved, the types of accommodations that are approved, the cost of the particular approved accommodation, whether the applicant possesses their own accommodation, and whether any of the testing centers already have any of the approved accommodations.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the new rule will be zero.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the new rule will be zero.

Mr. Treacy has determined that for the first five-year period the new rule is in effect the public benefits expected as a result of adoption of the proposed new rule will be that there is a rule explaining accommodations.

The probable economic cost to persons required to comply with the new rule will be zero.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rule will not affect a local economy.

The Board requests comments on the substance and effect of the proposed new rule from any interested person. Comments must be received at the Board no later than noon on Monday, December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed new rule will not have an adverse economic effect on small businesses because the new rule does not require small businesses to expend any funds or assets.

The Board specifically invites comments from the public on the issues of whether or not the proposed new rule will have an adverse economic effect on small business; if the new rule is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the new rule is to be adopted; and if the new rule is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the new rule under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The new rule is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act, §901.301 which authorizes the board to promulgate rules regarding the manner in which the examination is conducted and the Americans with Disabilities Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by this proposed new rule.

*§511.97. Examination of Applicant Approved with Accommodation.*

(a) The board may authorize one or more of the following accommodations for an applicant for the CPA examination.

(1) Additional testing time--typically time and a half or double time.

(2) Separate room--must be monitored throughout test administration.

(3) Reader--a board approved individual to read information verbatim from the screen for examinees, separate room required.

(4) Amanuensis--a board approved individual to operate mouse and/or keyboard for examinee, separate room required.

(5) Sign Language Interpreter--a board approved individual to sign instructions and serve as interpreter between the test center administrator and examinee. Sign language interpreters are normally not allowed to accompany examinees into the testing room.

(6) Intelikeys keyboard--allows examinee with limited use of hands to operate the keyboard.

(7) Intelikeys keyboard with magic arm and super clamp--swivel arm that allows precise placement of the keyboard.

(8) Kensington expert mouse--trackball mouse.

(9) Headmaster plus mouse unit--mouse operated by head movements.

(10) Selectable background and foreground colors--allows selection of text and background colors for ease of reading on screen.

(11) Screen magnifier--attaches to monitor and enlarges the screen.

(12) Zoomtext software--screen magnification.

(b) If the board approves the applicant's request for accommodation, the board will contact the testing center not less than 30 days prior to the date that the applicant may test. It is the applicant's responsibility to advise the board of a primary and secondary date for testing.

(c) Upon arrival at the testing center the applicant may not request other accommodations or accommodations in addition to those the board has authorized.

(d) There will be no additional fee charged to any candidate for an accommodation approved by the board under this rule.

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.

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Rande Herrell
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Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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## SUBCHAPTER E. VENDOR REQUIREMENTS

### 22 TAC §§511.102 - 511.107

The Texas State Board of Public Accountancy (Board) proposes new rules §§511.102, 511.103, 511.104, 511.105, 511.106 and 511.107 concerning CPA Examination Availability; Examination Scheduling; Test Center Locations; Test Center Check-In; Compliance with Test Center Rules.; and No-Show, Late Arrival and Late Cancellation in new Subchapter E regarding Vendor Requirements.

New §511.102 identifies the months in 2004 and 2005 during which the examination will be available on designated days and times.

New §511.103 defines the method and availability; of access by candidates to schedule the Uniform CPA Examination.

New §511.104 identifies where a list of test center locations may be obtained by anyone and that the test centers will conform to the standards of the Americans with Disabilities Act of 1990.

New §511.105 makes the test vendor and the exam candidate aware of the test center check-in policies.

New §511.106 makes exam candidates aware that they must comply with test center rules and procedures or face possible future exclusion from examinations.

New §511.107 contains the policy to be applied to candidates that do not appear at the exam, that arrive late at the exam or that cancel the examination too near the exam date.

These new rule are the result of rule review conducted pursuant to §2001.039 of the Government Code. Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 511 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rules will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the new rules will be zero.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the new rules will be zero.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the new rules will be zero.

Mr. Treacy has determined that for the first five-year period the new rules are in effect the public benefits expected as a result of adoption of the proposed new rules will be that exam candidates and others will have rules regarding the computer-based examination.

The probable economic cost to persons required to comply with the new rules will be zero for all rules except §511.107. The cost associated with §511.107 ranges from $35 for cancellation during a period from 29 days to 5 days before the exam to the full test fee for cancellation less than 5 days before the exam. The full test fee ranges from $100.50 to $134.50, depending on the number of subjects to be covered in the candidate's exam.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rules will not affect a local economy.

The Board requests comments on the substance and effect of the proposed new rules from any interested person. Comments must be received at the Board no later than noon on Monday,

December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed new rules §§511.102, 511.103, 511.104, 511.105 and 511.106 will not have an adverse economic effect on small businesses because the new rules do not cause the expenditure of any funds or assets. Mr. Treacy has determined that the proposed new rule §511.107 will not have an adverse economic effect on small businesses because the cost, in the situations where there is a cost, ranges from a low of $35.00 to a high of $134.50 and this amount is not large enough to be an adverse amount.

The Board specifically invites comments from the public on the issues of whether or not the proposed new rules will have an adverse economic effect on small business; if the new rules are believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the new rules are to be adopted; and if the new rules are believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the new rules under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The new rules are proposed under the Public Accountancy Act ("Act"), Tex. Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act, §901.301 which authorizes the Board to contract with another entity and to promulgate rules regarding application for the exam and conduct of the exam and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by this proposed new rules.

*§511.102. CPA Examination Availability.*

(a) The examination will be available at test centers on designated days and at designated times during the months of April, May, July, August, October and November during 2004.

(b) Beginning in 2005, the examination will be available at test centers on designated days and at designated times during the months of January, February, April, May, July, August, October and November.

*§511.103. Examination Scheduling.*

(a) Candidates shall schedule the CPA Examination through a call center maintained for that purpose, through the internet at a website maintained for that purpose or at a designated test center. Contact information for the call centers, websites and test centers is available at the board's office and through its website.

(b) A candidate who schedules at least 45 days in advance of their requested exam session will be offered a seat on a specific date if requested and at a test center within 60 miles of the requested test center. If the candidate does not request a specific exam date, the candidate will be offered the first available exam date at the requested test center or at a test center within 60 miles of the requested test center.

*§511.104. Test Center Locations.*

(a) A list of test center locations is available at the board's office and on the board's website.

(b) All test center locations will conform to the standards established by the Americans with Disabilities Act of 1990.

*§511.105. Test Center Check-In.*

(a) A candidate for the CPA examination must present two forms of identification to the test center administrator at the time of check-in to take a section of the exam. One form of identification must be a government issued document, and contain the photograph and signature of the candidate. The candidate's name on the form of identification must match the record in the vendor's database of the candidate scheduled to take the exam.

(b) The candidate is required to have his photograph taken by the test center administrator during check-in.

(c) The candidate is permitted to take into the testing room only items authorized by the board, examined by the test center administrator, and not in violation of the vendor's security policy and procedures.

*§511.106. Compliance with Test Center Rules.*

(a) A candidate who fails to follow reasonable test center rules and procedures or who fails to operate the test center equipment with reasonable care may be removed from the test center and excluded from future examinations for up to five years.

(b) The board shall be informed of the removal and exclusion of a candidate.

*§511.107. No-Show, Late Arrival and Late Cancellation.*

(a) A candidate is not eligible for a refund of the hourly testing fee if the candidate:

(1) fails to appear for a scheduled section of the CPA exam;

(2) arrives more than 15 minutes after the scheduled start time for taking the section of the CPA exam and is refused admission to the exam; or

(3) changes or cancels a section of the CPA exam after the applicable Test Cancellation/Change Deadline.

(b) The candidate may be charged a reasonable fee for a rescheduled exam or cancellation.

(1) A candidate that requests a change in scheduling or cancellation 30 or more days prior to the original day of testing will not be charged an additional fee.

(2) A candidate that requests a change in scheduling or cancellation 29 to 5 days prior to the original day of testing will be charged an additional fee of $35.00. The candidate must make direct contact by noon of the fifth business day before the day of the exam with personnel at the call center or at a local testing center. Leaving a message on a recorder or a voice mail is not sufficient to confirm a change or cancellation.

(3) A candidate that requests a change in scheduling or cancellation less than 5 days prior to the original day of testing will be charged an additional fee equal to the amount of the full test fee.

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.

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TRD-200307836

Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 305-7848

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## SUBCHAPTER F. EXPERIENCE REQUIREMENTS

**22 TAC §511.123**

The Texas State Board of Public Accountancy (Board) proposes an amendment to §511.123 concerning Reporting Work Experience in Subchapter F regarding Experience Requirements.

The amendment to §511.123 will identify the full time and part time work experience requirements and describe the contents of the statement that is required from the supervising CPA. The amendment is the result of rule review conducted pursuant to §2001.039 of the Government Code. Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The Board has reviewed §511.123 and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 511 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be zero.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be zero.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be zero.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be that this rule will be clearer.

The probable economic cost to persons required to comply with the amendment will be zero.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

The Board requests comments on the substance and effect of the proposed amendment from any interested person. Comments must be received at the Board no later than noon on Monday, December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not require the expenditure of any funds or assets.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small business; if the amendment is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendment is to be adopted; and if the amendment is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the amendment under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Tex. Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act, §901.256 which authorizes the board to promulgate rules defining work experience and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by this proposed amendment.

*§511.123. Reporting Work Experience.*

(a) Work experience must be reported in years and months.

(b) The board requires full time work experience of 40 hours per week, but may consider work experience earned on a part-time basis, provided at least 20 hours per week are worked.

(c) All work experience presented to the board for consideration shall be accompanied by the following items:

(1) the candidate's detailed job description; [~~and~~]

(2) a statement from the supervising CPA describing the non-routine work performed by the candidate and a description of the important accounting matters requiring the candidate's independent thought and judgment; and[~~,~~]

(3) a statement from the supervising CPA describing the type of experience that the CPA possesses which qualifies the CPA to supervise the candidate.

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.

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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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## SUBCHAPTER H. CERTIFICATION

**22 TAC §§511.161, 511.165, 511.168, 511.173, 511.176**

The Texas State Board of Public Accountancy (Board) proposes amendments to §511.161 concerning Qualifications for Issuance of a Certificate, §511.165 regarding Certificate, §511.168 concerning Reinstatement of a Certificate or of a Registration, §511.173 regarding Filing Complaints and §511.176 concerning Certification Hearings in Subchapter H regarding Certification.

The amendment to §511.161 contains minor editorial changes. The amendment to §511.165 deletes the timing of the issuance of certificates twice a year to allow the board flexibility to accommodate computer-based testing which if scheduled to commence in April 2004. The amendment to §511.168 deletes references to complying with continuing professional education requirements and payment of all fees and penalties, inserts a reference to compliance with §901.405 of the Act and renumbers the remaining subsections. The amendment to §511.173 added criminal convictions involving fraud, moral turpitude, alcohol abuse and controlled substances to the list of reasons justifying a hearing on a candidate's eligibility. The amendment to §511.176 made some editorial changes and added crimes involving alcohol abuse and controlled substances to the list of crimes that directly relate to the practice of public accountancy. These amendments are the result of rule review conducted pursuant to §2001.039 of the Government Code. Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The Board has reviewed §§511.161, 511.165, 511.168, 511.173 and 511.176 and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 511 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendments will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendments to §§511.161, 511.165, 511.168, 511.173 and 511.176 will be zero.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendments to §§511.161, 511.165, 511.168, 511.173 and 511.176 will be zero.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendments to §§511.161, 511.165, 511.168, 511.173 and 511.176 will be zero.

Mr. Treacy has determined that for the first five-year period the amendments are in effect the public benefits expected as a result of adoption of the proposed amendment to §511.161 will be that the rule will be easier to understand, for §511.165 will be that the board has the flexibility to issue certificates at times it considers appropriate, for §511.168 will be that the rule will be free of unnecessary language and will be easier to read, for §511.173 will be that candidates convicted of these types of crimes will be investigated for eligibility by the board and for §511.176 will be that a statutory citation is correct, the rule is easier to read, and crimes involving alcohol abuse and controlled substances were added to the list of crimes that directly relate to the practice of public accountancy.

The probable economic cost to persons required to comply with the amendments to §§511.161, 511.165, 511.168, 511.173 and 511.176 will be zero because the amendments do not require anyone to do anything new or additional.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendments will not affect a local economy.

The Board requests comments on the substance and effect of the proposed amendments from any interested person. Comments must be received at the Board no later than noon on Monday, December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed amendment to §§511.161, 511.165, and 511.168 will not have an adverse economic effect on small businesses because the amendments do not impact on small business. The amendment to §511.173 will have an economic effect but probably not an adverse economic effect because there will already have been costs incurred in connection with the conviction for these crimes. The board's inquiry will cause an incremental cost for photocopying documents generated by the arrest and conviction, correspondence and possibly an appearance before a committee of the Board. The amendment to §511.176 will have an economic effect but probably not an adverse economic effect because there will already have been costs incurred in connection with the conviction for these crimes. The board's inquiry will cause an incremental cost for photocopying documents generated by the arrest and conviction, correspondence and possibly an appearance before a committee of the Board.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendments will have an adverse economic effect on small business; if the amendments are believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendments are to be adopted; and if the amendments are believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the amendments under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The amendments are proposed under the Public Accountancy Act ("Act"), Tex. Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by these proposed amendments.

*§511.161. Qualifications for Issuance of a Certificate.*

The certificate of a certified public accountant shall be granted by the board to any individual who qualifies under the current Act and has met the following qualifications:

(1) [~~must~~ have] successfully completed the Uniform CPA Examination;

(2) [~~must~~ have] met the education requirements;

(3) submitted[~~must submit~~] an application prescribed by the board;

(4) submitted[~~must submit~~] the requisite fee for issuance of the certificate set by the board;

(5) provided[~~must provide~~] evidence of good moral character;

(6) submitted[~~must submit~~], on a form prescribed by the board, evidence of completion of the work experience requirements commensurate with the education requirements;

(7) executed[~~must execute~~] an oath of office stating support of the Constitution of the United States and of this state and the laws thereof, and compliance[~~will comply~~] with the Rules of Professional Conduct promulgated by the board;

(8) completed[~~must complete~~] a board-approved four-hour ethics course of comprehensive study on the Rules of Professional Conduct of the board;

(9) [~~must~~] successfully completed[~~complete~~] the [~~written~~] examination on the Rules of Professional Conduct promulgated by the board; and

(10) provided[~~must provide~~] any other information requested by the board.

*§511.165. Certificate.*

[~~(a)~~] All certificates shall be issued in the name of the board and may bear the signature of all board members and the seal of the Texas State Board of Public Accountancy.

[~~(b) Certificates will be awarded twice a year at sites to be determined by the board.~~]

*§511.168. Reinstatement of a Certificate or of a Registration.*

(a) An individual seeking reinstatement of a certificate as a certified public accountant or of a registration as a public accountant (PA) must comply with §901.405 of the Act and §515.5 of this title (relating to Reinstatement of a License).[~~, unless otherwise provided by board order, show satisfactory evidence of completion of a minimum of 120 hours of qualifying continuing professional education courses within the three most recent reporting periods.~~]

[~~(b) Prior to reinstatement of the certificate all fees and penalties, if any, must be paid in full.~~]

(b) [~~(c)~~] An individual who has practiced and resided outside of Texas for three consecutive years and who meets all the following requirements may be reinstated.

(1) The primary state of certification is a state other than Texas. Certification in Texas was obtained by reciprocity or under §901.355 of the Act (relating to Registration for Certain Out-of-State or Foreign Applicants).

(2) No certificate or registration held by an individual was revoked either voluntarily or involuntarily as a result of a disciplinary investigation or proceeding, except for nonpayment of license fees while the individual was a nonresident of Texas.

(3) The individual presents to the board satisfactory documentation of the status of certificate and residency and practice requirements stated in this subsection.

(4) The individual pays the current year's fees and provides the board satisfactory evidence of successful completion of 120 hours of continuing professional education in technical courses obtained within the three-year period of the application for reinstatement.

*§511.173. Filing Complaints.*

The board may, on its own motion, or on the complaint of any person, initiate proceedings to determine the eligibility of any candidate for the issuance of a certificate. Chapter 519 of this title (relating to Practice and Procedure) provides for the notice and hearing. Sufficient cause for this action includes, but is not limited to, any of the following instances:

(1) fraud or deceit by a candidate on the certification application;

(2) final conviction of a felony or of any crime, involving[~~where an element is~~] dishonesty, fraud, moral turpitude, alcohol abuse or controlled substances,[~~or fraud,~~] under the laws of any state or of the United States, or the imposition of deferred adjudication in connection with the criminal prosecution of such an offense; or

(3) conduct indicating a lack of fitness to serve the public as a professional accountant.

*§511.176. Certification Hearings.*

Unless otherwise determined by the board, the following are reasons why a person is not authorized to be certified as a CPA.

(1) The individual has been convicted of a felony offense, which results in incarceration, probation, parole, mandatory supervision or deferred adjudication.

(2) The individual has been convicted of a felony or misdemeanor offense, or granted a deferred adjudication which directly relates to the practice of public accountancy.

(3) A person applying for the issuance of a certificate who can be identified in paragraphs (1) or (2) of this section has the right to a hearing before the board to present evidence relative to the conviction. As a part of the hearing, the board shall consider the following issues before reaching a verdict:

(A) the nature and seriousness of the crime;

(B) the relationship of the crime to the board's statutory responsibility to ensure that a person, at some point in the future, professing to practice public accountancy, maintains high standards of competence and integrity in light of the reliance of the public, and the business community in particular, on the report or other services provided by accountants;

(C) the extent to which the person might have an opportunity to engage in future criminal activity of the same type as that in which the individual was previously involved;

(D) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of a certified public accountant, once the person passes the examination and is licensed by the board; and

(E) the additional factors provided in section 53.023 of the Texas Occupations Code.[~~Article 6252-13c (Texas Civil Statutes).~~]

(4) Because a licensee [~~an accountant~~] is often placed in a position of trust with respect to client funds, and the public in general, and the business community in particular, rely on the reports and other services of licensees[~~accountants~~], the board considers that the following crimes directly relate to the practice of public accountancy:

(A) any felony offense or misdemeanor offense of which dishonesty or fraud [~~or deceit~~] is an [~~essential~~] element;

(B) any felony offense or misdemeanor offense which results in the suspension or revocation of the right to practice before any state or federal agency for a cause which in the opinion of the board warrants its action; and

(C) any crime involving moral turpitude, alcohol abuse or controlled substances.

(5) The following procedures shall apply in the processing of the application for certification.

(A) The candidate shall respond, under penalty of perjury, to the question, "Have you ever been convicted of a felony or a misdemeanor, placed on probation, or granted deferred adjudication in any state or by the federal government?"

(B) The board shall obtain criminal history record information as stipulated in this chapter on any candidate about whom the executive director finds evidence to warrant a record search.

(C) The board shall review the application, statements made by the candidate relating to criminal activity, criminal history record information, and shall approve or disapprove the application as the evidence warrants. All applications disapproved under these conditions shall be scheduled for a hearing upon written request of the applicant.

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 November 13, 2003.

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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 305-7848

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**22 TAC §511.171**

*(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 Public Accountancy or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The Texas State Board of Public Accountancy (Board) proposes the repeal of §511.171 concerning Consent Revocation.

The proposed repeal of §511.171 will repeal a rule that allowed certificate holders to voluntary surrender their certificates but required reexamination for reinstatement of their certificate. This repeal is the result of rule review conducted pursuant to §2001.039 of the Government Code. Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 511 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed repeal will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the repeal will be zero because the repeal does not require anyone to do anything.

B. the estimated reductions in costs to the state and to local governments as a result of enforcing or administering the repeal will be zero because the repeal does not require anyone to do anything.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the repeal will be zero because the repeal does not require anyone to do anything.

Mr. Treacy has determined that for the first five-year period the repeal is in effect the public benefits expected as a result of adoption of the proposed repeal will be that this rule will be repealed and replaced with another rule that does not require reexamination for reinstatement of certificate.

The probable economic cost to persons required to comply with the repeal will be zero because the repeal does not require anyone to do anything.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed repeal will not affect a local economy.

The Board requests comments on the substance and effect of the proposed repeal from any interested person. Comments must be received at the Board no later than noon on Monday, December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed repeal will not have an adverse economic effect on small businesses because the repeal does not require anyone to do anything.

The Board specifically invites comments from the public on the issues of whether or not the proposed repeal will have an adverse economic effect on small business; if the repeal is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the repeal is to be adopted; and if the repeal is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the repeal under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The repeal is proposed under the Public Accountancy Act ("Act"), Tex. Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by this proposed repeal.

*§511.171. Consent Revocation.*

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 November 13, 2003.

TRD-200307839

Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 305-7848

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**22 TAC §§511.171**

The Texas State Board of Public Accountancy (Board) proposes new rule §511.171 concerning Voluntary Surrender of Certificate.

The new rule §511.171 will allow certificate holders who are not under investigation by the Board to voluntarily surrender their certificates and avoid annual CPE reporting requirements until and unless they want their certificates reinstated. The rule allows reinstatement of certificate without re-application and re-examination if certain requirements are satisfied. This new rule is the result of rule review conducted pursuant to §2001.039 of the Government Code. Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 511 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rule will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the new rule will be zero because the new rule merely replaces an old rule that was based on a different section of the Act.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the new rule will be zero because the new rule merely replaces an old rule that was based on a different section of the Act.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the new rule will be zero because the new rule merely replaces an old rule that was based on a different section of the Act.

Mr. Treacy has determined that for the first five-year period the new rule is in effect the public benefits expected as a result of adoption of the proposed new rule will be that this rule will allow CPAs to voluntary revoke their certificates with the possibility of having their certificate reinstated without retaking the examination.

The probable economic cost to persons required to comply with the new rule will be zero because the new rule merely replaces an old rule that was based on a different section of the Act.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rule will not affect a local economy.

The Board requests comments on the substance and effect of the proposed new rule from any interested person. Comments must be received at the Board no later than noon on Monday, December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed new rule will not have an adverse economic effect on small businesses because the new rule merely replaces an old rule that was based on a different section of the Act.

The Board specifically invites comments from the public on the issues of whether or not the proposed new rule will have an adverse economic effect on small business; if the new rule is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendment is to be adopted; and if the new rule is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the new rule under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The new rule is proposed under the Public Accountancy Act ("Act"), Tex. Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by this proposed new rule.

*§511.171. Voluntary Surrender of Certificate.*

(a) A certificate holder who is not under investigation by the board may voluntarily surrender his certificate by delivering the certificate to the board along with a written statement of intent to voluntarily surrender the certificate. Once a certificate holder has surrendered his certificate, he is no longer eligible to hold a license under §901.402 of the Act and licensing exemptions will no longer apply.

(b) A former certificate holder who has voluntarily surrendered his certificate under subsection (a) of this section may apply for a new certificate upon completion of the examination requirement for a new certificate. The board may waive the examination requirement for a former certificate holder upon submission of the following to the board:

(1) a completed application in the form provided by the board, together with an application fee that is equal to the examination fee set by the board;

(2) evidence of completion of all CPE that would have been required to be completed up to a maximum of 200 hours over the five years immediately preceding application;

(3) a sworn affidavit in the form provided by the board stating that the former certificate holder has not been convicted of, placed on community supervision or accepted deferred adjudication for any felony crime or for any misdemeanor crime involving fraud, dishonesty or moral turpitude under the laws of any state or the United States and that the former certificate holder did not surrender the certificate to avoid disciplinary action by the board or to avoid administrative revocation under board rules adopted pursuant to §§901.159, 901.411 or 901.502 of the Act; and

(4) payment of all license fees that would have been paid if the former certificate holder's license had been active since the date of surrender and all applicable late fees.

(c) A new certificate issued to a former certificate holder will bear the same certificate number as the original certificate.

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.

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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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## CHAPTER 515. LICENSES

**22 TAC §§515.1 - 515.4, 515.9**

The Texas State Board of Public Accountancy (Board) proposes amendments to §§515.1, 515.2, 515.3, 515.4 and 515.9 concerning License; Initial License; License Renewal for Individuals and Firm Offices; License Cancellation; and Collection of License Fees Following Disciplinary Action.

The amendment to §515.1 and §515.2 replaces "practice unit" with "office". The amendment to §515.3 replaces "Practice Units" with "Firm Offices", replaces "practice unit's" with "firm's office license", replaces "practice unit's" with "firm's office" in three locations, and replaces "quality review" with "peer review" in two locations. The amendment to §515.4 replaces "practice units'" with "firm office's" and "practice unit's" with "office". The amendment to §515.9 deletes the term "temporary permit" in several places because temporary practice is now addressed in another section. These amendments are the result of rule review conducted pursuant to §2001.039 of the Government Code. Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The Board has reviewed §§515.1, 515.2, 515.3, 515.4 and 515.9 and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 515 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendments will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendments will be zero because none of the amendments are substantive and do not require anyone to do anything additional.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendments will be zero because none of the amendments are substantive and do not require anyone to do anything additional.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendments will be zero because none of the amendments are substantive and do not require anyone to do anything additional.

Mr. Treacy has determined that for the first five-year period the amendments are in effect the public benefits expected as a result of adoption of the proposed amendments will be that the rules are clearer and easier to read.

The probable economic cost to persons required to comply with the amendments will be zero because none of the amendments are substantive and do not require anyone to do anything additional.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendments will not affect a local economy.

The Board requests comments on the substance and effect of the proposed amendments from any interested person. Comments must be received at the Board no later than noon on Monday, December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed amendments will not have an adverse economic effect on small businesses because none of the amendments are substantive and do not require anyone to do anything additional.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendments will have an adverse economic effect on small business; if the amendments are believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendments are to be adopted; and if the amendments are believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the amendments under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The amendments are proposed under the Public Accountancy Act ("Act"), Tex. Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by these proposed amendments.

*§515.1. License.*

(a) Individuals certified or registered by this board must obtain a license for each 12-month interval.

(b) Firms registered with this board must obtain an annual license for each office[~~practice unit~~] associated with the firm.

(c) A license shall not be issued or renewed unless all required fees, continuing professional education and a completed application have been received by the board.

*§515.2. Initial License.*

(a) An initial license is the first license issued to an individual who has been certified or registered under the Act. The board will prorate the initial license fee for an individual who is licensed for less than a full year.

(b) The board will not prorate the initial license fee for a firm's office[ ~~practice unit~~] whose license is for less than one year. The firm's initial and subsequent office[~~practice unit~~] license shall not be issued until such time as the sole proprietor, all partners, officers, directors, members, or shareholders of the firm who reside in Texas and who are certified or registered under the Act have obtained a license.

*§515.3. License Renewal for Individuals and Firm Offices[~~Practice Units~~].*

(a) Licenses for individuals will have staggered expiration dates based on the last day of the individuals' birth months. The license will be issued for a 12-month period.

(b) At least 30 days before the expiration of an individual's license, the board shall send written notice of the impending license expiration to the individual at the last known address according to board records.

(c) The expiration date of a firm's office[~~practice unit's~~] license is December 31. The license will be issued for a 12-month period.

(d) At least 30 days before the expiration of a firm's office[~~practice unit's~~] license, the board shall send written notice of the impending license expiration to the main office of the firm at the last known address according to the records of the board.

(e) A firm's office[~~practice unit's~~] license shall not be renewed unless the sole proprietor, each partner, officer, director, or shareholder of the firm who is listed as a member of the firm and who is certified or registered under the Act has a current individual license.

(f) If a firm is subject to peer[~~quality~~] review, then a firm's office[~~practice unit's~~] license shall not be renewed unless the office[~~practice unit~~] has notified the board of the peer[~~quality~~] review date assigned by a board approved sponsoring organization.

*§515.4. License Cancellation.*

Failure to submit to the board a completed renewal notice, the renewal fee and any other required documents before the license expiration date will result in the cancellation of the individual's or the firm office's[~~practice units'~~] license. A firm will not be considered in good standing until all of its office[~~practice unit's~~] licenses have been issued.

*§515.9. Collection of License Fees Following Disciplinary Action.*

(a) A certificateor[~~,~~] registration [~~or temporary permit~~] holder whose certificate, licenseor[~~,~~] registration, [~~or temporary permit~~] has been suspended or revoked by the board for failure to comply with the Board's Rules of Professional Conduct, exclusive of §501.94 of this title (relating to Mandatory Continuing Professional Education), will not be assessed license fees and penalties for the license years during which the certificate, licenseor [~~,~~] registration [~~, or temporary permit~~] was suspended or revoked but the individual must pay prorated license year fees for that portion of the license period for which reinstatement of the certificate, licenseor [~~,~~] registration[~~, or temporary permit~~] is granted.

(b) The board will not refund any fees paid for the license year in which the suspension or revocation occurs.

(c) If the certificate, license, orregistration [~~or temporary permit~~] was suspended or revoked for non-payment of annual license fees or failure to comply with §501.94 of this title (relating to Mandatory Continuing Professional Education), upon written application the executive director will decide on an individual basis whether the fees and penalties must be paid for the license years of suspension or revocation and whether any fee exemption is applicable.

(d) It is the responsibility of the certificate, license,or registration [~~or temporary permit~~] holder whose certificate, license, registration or temporary permit is suspended to apply to the board for the issuance of a certificate, license,or registration [~~or temporary permit~~] upon termination of suspension.

(e) Continuing professional education requirements are addressed in Chapter 523 of this title (relating to Continuing Professional 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 November 13, 2003.

TRD-200307841
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 305-7848

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**22 TAC §515.5**

*(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 Public Accountancy or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The Texas State Board of Public Accountancy (Board) proposes the repeal of §515.5 concerning Reinstatement of a License.

The proposed repeal of §515.5 will repeal a rule that is being substantially re-written. This repeal is the result of rule review conducted pursuant to §2001.039 of the Government Code. Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 515 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed repeal will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the repeal will be zero because the proposed repeal does not require anyone to do anything new or additional.

B. the estimated reductions in costs to the state and to local governments as a result of enforcing or administering the repeal will be zero because the proposed repeal does not require anyone to do anything new or additional.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the repeal will be zero because the proposed repeal does not require anyone to do anything new or additional.

Mr. Treacy has determined that for the first five-year period the repeal is in effect the public benefits expected as a result of adoption of the proposed repeal will be that this repealed rule has been rewritten and improved in a new rule.

The probable economic cost to persons required to comply with the repeal will be zero because the proposed repeal does not require anyone to do anything new or additional.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed repeal will not affect a local economy.

The Board requests comments on the substance and effect of the proposed repeal from any interested person. Comments must be received at the Board no later than noon on Monday, December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed repeal will not have an adverse economic effect on small businesses because the proposed repeal does not require small businesses to do anything new or additional.

The Board specifically invites comments from the public on the issues of whether or not the proposed repeal will have an adverse economic effect on small business; if the repeal is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the repeal is to be adopted; and if the repeal is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the repeal under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The repeal is proposed under the Public Accountancy Act ("Act"), Tex. Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act, §901.405 of the Act which changes the renewal fees and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by this proposed repeal.

*§515.5. Reinstatement of 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 November 13, 2003.

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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 305-7848

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**22 TAC §515.5**

The Texas State Board of Public Accountancy (Board) proposes new rule §515.5 concerning Reinstatement of a License.

The new rule §515.5 will rewrite this rule to comply with recently amended §901.405 of the Act. The Act and the new rule create different license renewal fees for licenses that have been expired 90 days or less, expired for more than 90 days but less than one year, for licenses expired more than one year but less than two years, for licenses expired more than two years, and for expired licenses of persons who have been residing and practicing in another state for two years. This new rule is the result of rule review conducted pursuant to §2001.039 of the Government Code. Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 515 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rule will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the new rule will be zero because the board was already enforcing a rule regarding a charge for reinstatement of license and, while the new rule replaces the old rule and changes the fee mounts, it does not alter the board's enforcement of a license reinstatement fee.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the new rule will be zero because the board was already enforcing a rule regarding a charge for reinstatement of license and, while the new rule replaces the old rule and changes the fee amounts, it does not alter the board's enforcement of a license reinstatement fee.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the new rule is difficult to estimate because the board has no control over many variables, such as licensees electing to allow their annual licenses to lapse, whether to renew their licenses, when to renew their licenses, and whether and when to return to Texas.

Mr. Treacy has determined that for the first five-year period the new rule is in effect the public benefits expected as a result of adoption of the proposed new rule will be that the rule will comply with recently amended §901.405 of the Act regarding license reinstatement fees.

The probable economic cost to persons required to comply with the new rule is as stated in the rule. For persons whose licenses have been expired 90 days or less, the cost is 11/2 times the normal license renewal fee. For persons whose licenses have been expired more than 90 days but less than one year and for persons who have been residing and practicing in another state for two years, the cost is twice the normal license renewal fee. For persons whose license has been expired more than one year but less than two years, the cost is three times the normal license renewal fee. Persons whose licenses have been expired more than two years may not renew their licenses and must apply for recertification.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rule will not affect a local economy.

The Board requests comments on the substance and effect of the proposed new rule from any interested person. Comments must be received at the Board no later than noon on Monday,

December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed new rule will not have an adverse economic effect on small businesses because the board was already enforcing a rule regarding a charge for reinstatement of license and, while the new rule replaces the old rule and changes the fee amounts, it does not alter the board's enforcement of a license reinstatement fee, because the benefit of possessing a license to practice accountancy in Texas far outweighs the license renewal fee, and because the license renewal fee is not an adverse amount.

The Board specifically invites comments from the public on the issues of whether or not the proposed new rule will have an adverse economic effect on small business; if the new rule is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendment is to be adopted; and if the new rule is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the new rule under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The new rule is proposed under the Public Accountancy Act ("Act"), Tex. Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act, §901.405 of the Act which amends the license renewal fees and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by this proposed new rule.

*§515.5. Reinstatement of a License.*

(a) A person whose license has been expired for 90 days or less may renew the license by paying to the board a renewal fee that is equal to $1\frac{1}{2}$ times the normally required renewal fee.

(b) A person whose license has been expired for more than 90 days but less than one year may renew the license by paying to the board a renewal fee that is equal to two times the normally required renewal fee.

(c) A person whose license has been expired for at least one year but less than two years may renew the license by paying to the board a renewal fee that is equal to three times the normally required renewal fee.

(d) A person whose license has been expired for two years or more may not renew the license. The person may obtain a new license by complying with the requirements and procedures, including the examination requirements, for obtaining an original license.

(e) A person who was licensed in this state, moved to another state, and is currently licensed and has been in practice in the other state for the two years preceding the date of application may obtain a new license without reexamination. The person must pay to the board a fee that is equal to two times the normally required renewal fee for the 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 November 13, 2003.

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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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## CHAPTER 519. PRACTICE AND PROCEDURE

### 22 TAC §519.16

The Texas State Board of Public Accountancy (Board) proposes new rule §519.16 concerning Misdemeanors that Subject a Certificate or Registration Holder to Discipline by the Board.

The new rule §519.16 will implement §901.1565 of the Act by listing all misdemeanors that may subject a certificate or registration holder to discipline by the Board.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rule will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the new rule will be negligible because the Board already disciplines certificate or registration holders for criminal convictions related to the accounting profession.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the new rule will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the new rule will be none.

Mr. Treacy has determined that for the first five-year period the new rule is in effect the public benefits expected as a result of adoption of the proposed new rule will be education of certificate or registration holders and the public regarding criminal conduct that subjects certificate or registration holders to discipline by the Board.

The probable economic cost to persons required to comply with the new rule will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rule will not affect a local economy.

The Board requests comments on the substance and effect of the proposed new rule from any interested person. Comments must be received at the Board no later than noon on Monday, December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed new rule will not have an adverse economic effect on small businesses because

the Board already disciplines certificate or registration holders for criminal convictions related to the accounting profession.

The Board specifically invites comments from the public on the issues of whether or not the proposed new rule will have an adverse economic effect on small business; if the new rule is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendment is to be adopted; and if the new rule is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the new rule under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The new rule is proposed under the Public Accountancy Act ("Act"), Tex. Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and under HB 1218.

No other article, statute or code is affected by this proposed new rule.

*§519.16. Misdemeanors that Subject a Certificate or Registration Holder to Discipline by the Board.*

(a) Because a licensee is often placed in a position of trust with respect to client funds, and the public in general, and the business community in particular, rely on the veracity, integrity and honesty of licensees in the preparation of reports and provision of other accounting services, the board considers conviction or placement on deferred adjudication or community supervision for any crime involving dishonesty or fraud to relate directly to the practice of public accountancy and may subject the licensee to discipline by the board. The board has determined that misdemeanor offenses that involve dishonesty or fraud directly relate to the practice of accounting pursuant to Sections 53.021, 53.022, 53.023 and 53.025 of the Occupations Code. The following non-exclusive list of misdemeanor offenses may involve dishonesty or fraud:

(1) Theft;

(2) Theft of Service;

(3) Tampering with Identification Numbers;

(4) Theft of or Tampering with Multichannel Video or Information Services;

(5) Manufacture, Distribution, or Advertisement of Multichannel Video or Information Services Device;

(6) Sale or Lease of Multichannel Video or Information Services Device;

(7) Possession, Manufacture, or Distribution of Certain Instruments Used to Commit Retail Theft;

(8) Forgery;

(9) Criminal Simulation;

(10) Trademark Counterfeiting;

(11) Stealing or Receiving Stolen Check or Similar Sight Order;

(12) False Statement to Obtain Property or Credit;

(13) Hindering Secured Creditors;

(14) Credit Card Transaction Record Laundering;

(15) Issuance of Bad Check;

(16) Deceptive Business Practices;

(17) Rigging Publicly Exhibited Contest;

(18) Misapplication of Fiduciary Property or Property of Financial Institution;

(19) Securing Execution of Document by Deception;

(20) Fraudulent Destruction, Removal, or Concealment of Writing;

(21) Simulating Legal Process;

(22) Refusal to Execute Release of Fraudulent Lien or Claim;

(23) Breach of Computer Security;

(24) Unauthorized Use of Telecommunications Service;

(25) Theft of Telecommunications Service;

(26) Publication of Telecommunications Access Device;

(27) Insurance Fraud;

(28) False Alarm or Report;

(29) Engaging in Organized Criminal Activity;

(30) Violation of Court Order Enjoining Organized Criminal Activity;

(31) Unlawful Use of Criminal Instrument;

(32) Unlawful Access to Stored Communications;

(33) Burglary of Vehicles;

(34) Burglary of Coin-Operated or Coin Collection Machines;

(35) Coercion of Public Servant or Voter;

(36) Improper Influence;

(37) Gift to Public Servant by Person Subject to His Jurisdiction;

(38) Offering Gift to Public Servant;

(39) Perjury;

(40) False Report to Peace Officer or Law Enforcement Employee;

(41) Tampering With or Fabricating Physical Evidence;

(42) Tampering With Governmental Record;

(43) Fraudulent Filing of Financing Statement;

(44) False Identification as Peace Officer;

(45) Misrepresentation of Property;

(46) Record of a Fraudulent Court; and

(47) Bail Jumping and Failure to Appear.

(b) Because a licensee is often placed in a position of trust with respect to client funds, and the public in general, and the business community in particular, rely on the veracity, integrity and honesty of licensees in the preparation of reports and provision of other accounting services, the board considers conviction or placement on deferred adjudication or community supervision for any crime involving moral turpitude to relate directly to the practice of public accountancy and

may subject the licensee to discipline by the board. The board has determined that misdemeanor offenses that involve moral turpitude directly relate to the practice of accounting pursuant to Sections 53.021, 53.022, 53.023 and 53.025 of the Occupations Code. The following non-exclusive list of misdemeanors offenses may involve moral turpitude:

(1) Prostitution;

(2) Promotion of Prostitution;

(3) Indecent Exposure;

(4) Public Lewdness;

(5) Obscenity;

(6) Obscene Display or Distribution;

(7) Sale, Distribution, or Display of Harmful Material to Minor;

(8) Employment Harmful to Children; and

(9) Abuse of a Corpse.

(c) Because a licensee is often placed in a position of trust with respect to client funds, and the public in general, and the business community in particular, rely on the veracity, integrity and honesty of licensees in the preparation of reports and provision of other accounting services, the board considers conviction or placement on deferred adjudication or community supervision for any crime involving alcohol abuse or controlled substances to relate directly to the practice of public accountancy and may subject a licensee to discipline by the board. The board has determined that misdemeanor offenses that involve alcohol abuse or controlled substances directly relate to the practice of accounting pursuant to Sections 53.021, 53.022, 53.023 and 53.025 of the Occupations Code. The following non-exclusive list of misdemeanors offenses may involve alcohol abuse or controlled substances:

(1) Possession of less than 28 grams of a controlled substance listed in penalty group 3 under the Texas Penal Code;

(2) Possession of less than 28 grams of a controlled substance listed in penalty group 4 under the Texas Penal Code;

(3) Manufacture, delivery or possession of a controlled substance listed in a schedule of controlled substances, but not listed in a penalty group under the Texas Penal Code;

(4) Manufacture, delivery or possession of a controlled substance analogue;

(5) Possession or delivery of marihuana;

(6) Possession or delivery of drug paraphernalia;

(7) Possession or transport of chemicals with the intent to manufacture a controlled substance; and

(8) Any misdemeanor involving intoxication under the influence of alcohol or a controlled substance.

(d) Because an licensee is often placed in a position of trust with respect to client funds, and the public in general, and the business community in particular, rely on the veracity, integrity and honesty of licensees in the preparation of reports and provision of other accounting services, the board considers repeated violations of any criminal law to relate directly to the practice of public accountancy.

(e) A conviction or placement on deferred adjudication or community supervision for a violation of any state or federal law that is equivalent to an offense listed in subsections (a) through (d) of this section is considered to directly relate to the practice of accounting and may subject a licensee to discipline by the board.

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.

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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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**22 TAC §519.17**

The Texas State Board of Public Accountancy (Board) proposes new rule §519.17 concerning Administrative Penalty Guidelines.

The new rule §519.17 will implement §901.522(c) of the Act by providing administrative penalty guidelines.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rule will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the new rule will be none because the guidelines reflect current Board policy.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the new rule will be none because the guidelines reflect current Board policy.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the new rule will be none because the guidelines reflect current Board policy.

Mr. Treacy has determined that for the first five-year period the new rule is in effect the public benefits expected as a result of adoption of the proposed new rule will be education of certificate or registration holders and the public regarding imposition of administrative penalties against certificate or registration holders by the Board.

The probable economic cost to persons required to comply with the new rule will be none because the guidelines reflect current Board policy.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rule will not affect a local economy.

The Board requests comments on the substance and effect of the proposed new rule from any interested person. Comments must be received at the Board no later than noon on Monday, December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed new rule will not have an adverse economic effect on small businesses because the guidelines reflect current Board policy.

The Board specifically invites comments from the public on the issues of whether or not the proposed new rule will have an adverse economic effect on small business; if the new rule is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendment is to be adopted; and if the new rule is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the new rule under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The new rule is proposed under the Public Accountancy Act ("Act"), Tex. Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and under HB1218.

No other article, statute or code is affected by this proposed new rule.

*§519.17. Administrative Penalty Guidelines.*

(a) The following table contains guidelines for the assessment of administrative penalties in disciplinary matters. In determining whether a violation is minor, moderate or major, the board will apply the factors to be considered set forth in §901.552(b) of the Public Accountancy Act. In all cases where the board has determined a violation has occurred, administrative costs will be assessed, regardless of any other sanction imposed by the board.
Figure: 22 TAC §519.17(a)

(b) The amounts specified in subsection (a) of this section are guidelines only. The board retains the right to increase or decrease the amount of an administrative penalty based on the circumstances of each case it considers.

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.

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TRD-200307845
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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## CHAPTER 521. FEE SCHEDULE

**22 TAC §521.2, §521.14**

The Texas State Board of Public Accountancy (Board) proposes an amendment to §521.2 concerning Examination Fees and §521.14 concerning Eligibility Fee.

The amendments to §521.2 and §521.14 will correct the name of the exam subject.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendments will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendments will be zero because the amendments do not require anyone to do anything new or additional.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendments will be zero because the amendments do not require anyone to do anything new or additional.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendments will be zero because the amendments do not require anyone to do anything new or additional.

Mr. Treacy has determined that for the first five-year period the amendments are in effect the public benefits expected as a result of adoption of the proposed amendments will be that the name of the exam subject will be correct.

The probable economic cost to persons required to comply with the amendments will be zero because the amendments do not require anyone to do anything new or additional.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendments will not affect a local economy.

The Board requests comments on the substance and effect of the proposed amendments from any interested person. Comments must be received at the Board no later than noon on Monday, December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed amendments will not have an adverse economic effect on small businesses because the amendments do not require anyone to do anything new or additional.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendments will have an adverse economic effect on small business; if the amendments are believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendments are to be adopted; and if the amendments are believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the amendments under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The amendments are proposed under the Public Accountancy Act ("Act"), Tex. Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendments.

*§521.2. Examination Fees.*

(a) The following fees shall be effective for the Uniform CPA Examination, and do not include the fee for the Application of Intent.

(b) Until the implementation of the computer-based CPA examination, the fee for the initial examination conducted pursuant to the Act shall be $234.00. The fee for any examination shall be apportioned as follows:

(1) eligible for one subject--$73.50;

(2) eligible for two subjects--$117.00; and

(3) eligible for four subjects--$234.00.

(c) Upon implementation of the computer-based CPA examination, the following fees shall become effective, and do not include the eligibility fee.

(1) eligible for Auditing and Attestation--$134.50;

(2) eligible for Financial Accounting and Reporting--$126.00;

(3) eligible for Regulation--$109.00; and

(4) eligible for Business Environment and [~~Economic~~] Concepts--$100.50.

(d) All examination fees shall be paid to the National Association of State Boards of Accountancy.

*§521.14. Eligibility Fee.*

(a) Upon implementation of the computer-based CPA examination an eligibility fee shall become effective for each section for which an applicant is eligible and applies.

(1) Auditing and Attestation--$70.00.

(2) Financial Accounting and Reporting--$70.00.

(3) Regulation--$70.00.

(4) Business Environment and [~~Economic~~] Concepts--$70.00.

(b) The eligibility fee shall be paid to the Texas State Board of Public Accountancy. This is a non-refundable fee.

(c) The fee paid shall be valid for 90 days after the board determines that an applicant is eligible for a section of the CPA examination. The board may extend the 90 day eligibility to accommodate the psychometric evaluation and performance of test questions by the test provider.

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 November 14, 2003.

TRD-200307869
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 305-7848

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**22 TAC §521.5, §521.11**

The Texas State Board of Public Accountancy (Board) proposes amendments to §521.5 concerning Temporary Firm Practice Permit Fee and §521.11 concerning Fee for a Replacement Certificate.

The amendment to §521.5 will add "firm practice" to the rule caption and to the rule text. Section 521.11 raises the fee for a replacement certificate to $50.00. These amendments are the result of rule review conducted pursuant to §2001.039 of the Government Code. Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The Board has reviewed §§521.5 and 521.11 and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 521 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendments will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment to §521.5 will be zero because the amendment does not require anyone to do anything new or additional. The additional estimated cost to the state expected as a result of enforcing or administering the amendment to §521.11 will be zero because the amendment does not affect costs.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendments will be zero because the proposed amendments do not require anyone in state or local governments to do anything new or additional.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment to §521.5 will be zero because the amendment does not require anyone to do anything new or additional. The estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment to §521.11 will be an increase in revenue of $10,000 (approximately 200 certificates were replaced last year).

Mr. Treacy has determined that for the first five-year period the amendments are in effect the public benefits expected as a result of adoption of the proposed amendment to §521.5 will be that the rule caption and text will be more descriptive and clearer and for §521.11 will be that the state will recoup its costs to replace lost certificates.

The probable economic cost to persons required to comply with the amendment to §521.5 will be zero because the amendment does not require anyone to do anything new or additional. The probable economic cost to persons required to comply with the amendment to §521.11 will be $50.00 for every person who requests a replacement certificate.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendments will not affect a local economy.

The Board requests comments on the substance and effect of the proposed amendments from any interested person. Comments must be received at the Board no later than noon on Monday, December 29, 2003. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed amendment to §521.5 will not have an adverse economic effect on small businesses because the amendment does not require anyone to do anything new or additional. He has also determined that the proposed amendment to §521.11 will not have an adverse economic effect on small businesses because a one time charge of $50.00

to replace a lost certificate is not significant enough to be adverse.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendments will have an adverse economic effect on small business; if the amendments are believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendments are to be adopted; and if the amendments are believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the amendments under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The amendments are proposed under the Public Accountancy Act ("Act"), Tex. Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by these proposed amendments.

*§521.5. Temporary Firm Practice Permit Fee.*
The fee for the issuance of a temporary firm practice permit shall be $100.

*§521.11. Fee for a Replacement Certificate.*
The fee for the replacement of a certificate shall not exceed $50.[ ~~be $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 November 13, 2003.

TRD-200307846
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 305-7848

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# TITLE 37. PUBLIC SAFETY AND CORRECTIONS

## PART 13. TEXAS COMMISSION ON FIRE PROTECTION

### CHAPTER 463. APPLICATION CRITERIA

**37 TAC §463.1, §463.6**

The Texas Commission on Fire Protection (the Commission) proposes amendments to §463.1, concerning the application process, and §463.6, concerning contract information, in Chapter 463, concerning application criteria for the Commission's Fire Department Emergency Program. The amendments to §463.1 and §463.6 add to the types of assistance it is possible to request (currently, a scholarship, grant, or loan) another more general category ("other financial assistance"). This is being done in order to offer greater latitude in providing assistance to fire departments with needs which do not fall into the current assistance categories. The amendments to both rules also clarify language and/or correct typographical errors.

In addition, the amendment to §463.6 expands on the language in subsection (b) regarding violations, by more clearly referencing statutory violations, breach of contract, and rule violations as categories of violations that can result in disqualification from further participation in the FDEP. This proposed action gives the commission greater latitude in dealing with program recipient violations, by more clearly defining the nature of different potential violations, and their respective penalties.

Mr. David Rogers, Program Administrator for the Fire Department Emergency Program, has determined that for the first five year period the proposed amendments are in effect, there will be no significant fiscal impact on state or local governments.

Mr. Rogers has also determined that for each of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be that potential and current recipients of program funds will have a more clear understanding of their responsibilities with regard to contracts with the commission. Another benefit will be that the commission's Fire Department Emergency Program will be able to allocate funds in the most efficient and equitable manner possible, resulting in an increased ability by fire department recipients to provide service to their communities.

There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendments.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us.

The amendments are proposed under Texas Government Code, §419.008, which provides the Commission with the authority to propose rules for the administration of its powers and duties; Texas Government Code, §419.053, which provides the Commission with the authority to administer the Fire Department Emergency Program; Texas Government Code, §419.062, which provides the Commission with the authority to execute any documents necessary to make a legally binding agreement as to the transfer and expenditure of the amount to be loaned or awarded and the repayment of any amount loaned; and Texas Government Code, §419.064, which provides the Commission with the authority, in the event of a default, to attempt to collect amounts loaned or awarded; Texas Government Code, §419.056(b), which provides the Commission with the authority to establish guidelines for determining eligibility for a loan or other financial assistance under the Fire Department Emergency Program; Texas Government Code, §419.058, which provides the Commission with the authority to establish guidelines for determining eligibility for a grant or scholarship under the Fire Department Emergency Program; and Texas Government Code, §419.059(c), which provides the Commission with the authority to prescribe the form of the application and the procedure for submitting and processing the application for assistance under the Fire Department Education Program.

Texas Government Code, §§419.008, 419.053, 419.056, 419.058, 419.059, 419.062, and 419.064 are implemented by the proposed amendments.

*§463.1. Application Process.*

(a) The process of requesting a scholarship, grant, loan, or other financial assistance [~~grant, or scholarship~~] is initiated upon submission of a written application to the commission. An incomplete application shall be returned to the applicant.

(b) - (h) (No change.)

*§463.6. Contract Information.*

(a) A [~~loan, grant, or~~] scholarship, grant, loan, or other financial assistance awarded by the commission shall be issued upon the condition that the applicant observes and complies with all Fire Department Emergency Program (FDEP) rules and regulations. If FDEP rules and regulations are amended, the scholarship, grant, loan, or other financial assistance shall be conditioned upon compliance with the rules and regulations in effect at the time of award of the scholarship, grant, loan or other financial assistance.

(b) [~~If FDEP rules and regulations are amended, the loan, grant, or scholarship shall be conditioned upon compliance with the rules and regulations in effect at the time of award or loan.~~] Any violation of statutory provisions, commission rules or contract provisions may be considered by the commission as a default, breach of contract, statutory violation, or rule violation by a recipient of a scholarship, grant, loan, or other financial assistance [~~a default by a recipient~~]. Cases involving default, breach of contract, statutory violation, or rule violation, in the judgment of the commission, will be referred to the executive director of the commission for appropriate action, including, but not limited to, disqualification from any further awards until the default, breach of contract, statutory violation, or rule violation is cured.

(c) All contracts with the commission for assistance under the FDEP will contain the following minimum provisions;

(1) parties to the contract [~~contact~~];

(2) - (16) (No change.)

(d) (No change.)

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

Filed with the Office of the Secretary of State on November 14, 2003.

TRD-200307870
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 239-4921

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# TITLE 40. SOCIAL SERVICES AND ASSISTANCE

## PART 4. TEXAS COMMISSION FOR THE BLIND

## CHAPTER 171. MEMORANDA OF UNDERSTANDING

**40 TAC §171.3**

*(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 Texas Commission for the Blind proposes the repeal of §171.3, pertaining to transition planning for students receiving special education. The chapter is being repealed because H.B. 2823 (78th Regular Session) eliminated Texas Education Code §29.011(b)-(e), which was the basis on which the memorandum of agreement was originally required and adopted by rule.

Alvin Miller, Chief Financial Officer, has determined that there will be no implications relating to cost or revenues of the state or local governments as a result of enforcing or administering the repeal.

Mr. Miller has also determined that for each year of the first five years the repeal is in effect the anticipated public benefits will be the elimination of unnecessary rules. There will be no economic cost to small businesses or individuals as a result of the repeal.

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*.

The repeal is proposed under Human Resources Code, §91.011, which authorizes the Commission to adopt rules prescribing the policies and procedures followed by the commission in the administration of its programs, and §91.021, which authorizes the Commission to negotiate interagency agreements with other state agencies to provide services for individuals who have both a visual disability and another disabling condition.

The repeal of §171.3 also affects Texas Education Code, §29.011.

*§171.3. Transition Planning for Students Receiving Special 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 November 12, 2003.

TRD-200307750
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: December 28, 2003
For further information, please call: (512) 377-0611

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# WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

## TITLE 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**

The Texas Department of Housing and Community Affairs has withdrawn from consideration the emergency repeals to §§33.1 - 33.13 which appeared in the August 29, 2003, issue of the *Texas Register* (28 TexReg 7011).

Filed with the Office of the Secretary of State on November 17, 2003.

TRD-200307882
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 7, 2003
For further information, please call: (512) 475-4595

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#### CHAPTER 33. MULTIFAMILY HOUSING REVENUE BOND RULES

**10 TAC §§33.1 - 33.10**

The Texas Department of Housing and Community Affairs has withdrawn from consideration the emergency new §§33.1 - 33.10 which appeared in the August 29, 2003, issue of the *Texas Register* (28 TexReg 7011).

Filed with the Office of the Secretary of State on November 17, 2003.

TRD-200307884
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 7, 2003
For further information, please call: (512) 475-4595

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## TITLE 22. EXAMINING BOARDS

### PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

#### CHAPTER 501. RULES OF PROFESSIONAL CONDUCT

#### SUBCHAPTER A. GENERAL PROVISIONS

**22 TAC §§501.1 - 501.4**

The Texas State Board of Public Accountancy has withdrawn from consideration the proposed new rules to §§501.1 - 501.4 which appeared in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8775).

Filed with the Office of the Secretary of State on November 13, 2003.

TRD-200307782
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Effective date: November 13, 2003
For further information, please call: (512) 305-7848

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#### SUBCHAPTER B. PROFESSIONAL STANDARDS

**22 TAC §§501.10 - 501.12**

The Texas State Board of Public Accountancy has withdrawn from consideration the proposed new rules to §§501.10 - 501.12 which appeared in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8778).

Filed with the Office of the Secretary of State on November 13, 2003.

TRD-200307783
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Effective date: November 13, 2003
For further information, please call: (512) 305-7848

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#### SUBCHAPTER C. RESPONSIBILITIES TO CLIENTS

**22 TAC §§501.20 - 501.27**

The Texas State Board of Public Accountancy has withdrawn from consideration the proposed new rules to §§501.20 - 501.27 which appeared in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8779).

Filed with the Office of the Secretary of State on November 13, 2003.

TRD-200307784
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Effective date: November 13, 2003
For further information, please call: (512) 305-7848

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## SUBCHAPTER D. RESPONSIBILITIES TO THE PUBLIC

**22 TAC §§501.40 - 501.45**

The Texas State Board of Public Accountancy has withdrawn from consideration the proposed new rules to §§501.40 - 501.45 which appeared in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8783).

Filed with the Office of the Secretary of State on November 13, 2003.

TRD-200307785
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Effective date: November 13, 2003
For further information, please call: (512) 305-7848

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## SUBCHAPTER E. RESPONSIBILITIES TO THE BOARD/PROFESSION

**22 TAC §§501.50 - 501.54**

The Texas State Board of Public Accountancy has withdrawn from consideration the proposed new rules to §§501.50 - 501.54 which appeared in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8785).

Filed with the Office of the Secretary of State on November 13, 2003.

TRD-200307786
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Effective date: November 13, 2003
For further information, please call: (512) 305-7848

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# CHAPTER 501. RULES OF PROFESSIONAL CONDUCT

## SUBCHAPTER A. GENERAL PROVISIONS

**22 TAC §§501.51 - 501.54**

The Texas State Board of Public Accountancy has withdrawn from consideration the proposed repeals to §§501.51 - 501.54 which appeared in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8788).

Filed with the Office of the Secretary of State on November 13, 2003.

TRD-200307777
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Effective date: November 13, 2003
For further information, please call: (512) 305-7848

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## SUBCHAPTER B. PROFESSIONAL STANDARDS

**22 TAC §§501.60 - 501.62**

The Texas State Board of Public Accountancy has withdrawn from consideration the proposed repeals to §§501.60 - 501.62 which appeared in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8788).

Filed with the Office of the Secretary of State on November 13, 2003.

TRD-200307778
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Effective date: November 13, 2003
For further information, please call: (512) 305-7848

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## SUBCHAPTER C. RESPONSIBILITIES TO CLIENTS

**22 TAC §§501.70 - 501.77**

The Texas State Board of Public Accountancy has withdrawn from consideration the proposed repeals to §§501.70 - 501.77 which appeared in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8788).

Filed with the Office of the Secretary of State on November 13, 2003.

TRD-200307779
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Effective date: November 13, 2003
For further information, please call: (512) 305-7848

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## SUBCHAPTER D. RESPONSIBILITIES TO THE PUBLIC

**22 TAC §§501.80 - 501.85**

The Texas State Board of Public Accountancy has withdrawn from consideration the proposed repeals to §§501.80 - 501.85 which appeared in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8788).

Filed with the Office of the Secretary of State on November 13, 2003.

TRD-200307780
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Effective date: November 13, 2003
For further information, please call: (512) 305-7848

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## SUBCHAPTER E. RESPONSIBILITIES TO THE BOARD/PROFESSION

**22 TAC §§501.90 - 501.94**

The Texas State Board of Public Accountancy has withdrawn from consideration the proposed repeals to §§501.90 - 501.94 which appeared in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8788).

Filed with the Office of the Secretary of State on November 13, 2003.

TRD-200307781
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Effective date: November 13, 2003
For further information, please call: (512) 305-7848

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# CHAPTER 523. CONTINUING PROFESSIONAL EDUCATION

## SUBCHAPTER B. CONTINUING PROFESSIONAL EDUCATION RULES FOR INDIVIDUALS

**22 TAC §523.34**

The Texas State Board of Public Accountancy has withdrawn from consideration the proposed repeal to §523.34 which appeared in the August 8, 2003, issue of the *Texas Register* (28 TexReg 6193).

Filed with the Office of the Secretary of State on November 13, 2003.

TRD-200307787
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Effective date: November 13, 2003
For further information, please call: (512) 305-7848

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## SUBCHAPTER C. ETHICS RULES: INDIVIDUALS AND SPONSORS

**22 TAC §523.42**

The Texas State Board of Public Accountancy has withdrawn from consideration the proposed new rule to §523.42 which appeared in the August 8, 2003, issue of the *Texas Register* (28 TexReg 6198).

Filed with the Office of the Secretary of State on November 13, 2003.

TRD-200307788
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Effective date: November 13, 2003
For further information, please call: (512) 305-7848

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# ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

## TITLE 1. ADMINISTRATION

## PART 2. TEXAS ETHICS COMMISSION

### CHAPTER 34. REGULATION OF LOBBYISTS

The Texas Ethics Commission adopts the repeal of §34.23, relating to the contents of a lobbyist conflict of interest statement filed with the commission, and §34.25, relating to the definition of "client" for purposes of the lobbyist conflict of interest law, and new §34.62, relating to lobby registration fees. The rules are adopted without changes to the proposed text as published in the October 3, 2003, issue of the *Texas Register* (28 TexReg 8467).

The repeal of §34.23 repeals the rule providing the contents of a lobbyist conflict of interest statement filed with the commission. Those requirements were recently codified in Government Code, Section 305.028, and thus the rule is unnecessary because it duplicates state law.

The repeal of §34.25 repeals the rule defining "client" for purposes of the lobbyist conflict of interest law. That definition was recently codified in Government Code, Section 305.028, and thus the rule is unnecessary because it duplicates state law.

The new §34.62 increases lobby registration fees by $200 for a registration covering any part of calendar year 2004 as authorized by new Government Code, Section 305.0064. The law requires those fees to be used to develop and implement the electronic filing system for lobbyists. H.B. 29, Acts of the 78th Legislature, Third Called Session, 2003, appropriated the additional revenue generated by the increase in lobby registration fees to the Ethics Commission in an amount not to exceed $267,400, which is the amount the Ethics Commission estimated would be necessary to develop and implement the system. Based on past filing information, the Ethics Commission estimates that 1,340 persons will file lobby registrations in calendar year 2004. In order to generate $267,400, the registration fee for each registrant must be increased by $200.

No comments were received regarding the adoption of the repeals.

The Texas Ethics Commission received the following comment concerning §34.62. Senator Gonzalo Barrientos expressed his desire that the Ethics Commission consider imposing a smaller fee increase for non-profit organizations than for other types of registrants. The Ethics Commission determined that it would be more equitable to raise the registration fee equally for all registrants.

### SUBCHAPTER A. GENERAL PROVISIONS

**1 TAC §34.23, §34.25**

The repeals are adopted under Government Code, Chapter 571, Section 571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced 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 November 14, 2003.

TRD-200307866
Karen Lundquist
Executive Director
Texas Ethics Commission
Effective date: December 4, 2003
Proposal publication date: October 3, 2003
For further information, please call: (512) 463-5800

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### SUBCHAPTER C. COMPLETING THE REGISTRATION FORM

**1 TAC §34.62**

The new section is adopted under Government Code, Chapter 571, Section 571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission, and under Government Code, Section 305.0064, which authorizes the commission to increase lobby registration fees in amounts sufficient to develop and implement an electronic filing system for lobbyists.

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 November 14, 2003.

TRD-200307867
Karen Lundquist
Executive Director
Texas Ethics Commission
Effective date: December 4, 2003
Proposal publication date: October 3, 2003
For further information, please call: (512) 463-5800

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## TITLE 10. COMMUNITY DEVELOPMENT

# PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

## CHAPTER 1. ADMINISTRATION

## SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

**10 TAC §1.15**

The Texas Department of Housing and Community Affairs (the Department) adopts new §1.15, concerning the Integrated Housing Rule with changes to the text as published in the September 26, 2003, issue of the *Texas Register* (28 TexReg 8228-8229).

These sections are adopted, with changes, in order to meet public comment.

SUMMARY OF COMMENTS RECEIVED UPON PUBLICATION OF THE PROPOSED RULE IN THE *TEXAS REGISTER* AND COMMENTS PROVIDED AT PUBLIC HEARINGS HELD BY THE DEPARTMENT ON ITEMS THAT RELATE DIRECTLY TO INTEGRATED HOUSING RULE.

Comment: §1.15 (b) (6): For clarity, the phrase "assisted living arrangements" should be defined.

Department Response: The Department concurs and has added the following definition of assisted living facility:

§1.15 (b) (6): Assisted living facility -- An establishment that furnishes food and shelter to four or more persons who are unrelated to the owner of the establishment and provides personal care services (Texas Revised Health and Safety Statutes Annotated §247.001 et. seq.; Texas Administrative Code Title 25, §146.321 et seq.). These facilities are not considered to be an integrated setting.

Board Response: Department's response accepted.

Comment: §1.15 (b) (9): As noted in the above comments on the proposed Housing Tax Credit Program Qualified Allocation Plan and Rules in §50.3 Definitions (54)(A)(iii), there is a discrepancy between the definitions of persons with disabilities in various Department rules. The Council urges the Department to refer to the HUD definition found in 24 CFR 5.403 for more precise wording.

Department Response: The Department concurs and will ensure that the definitions are consistent within all Department rules. (The definition used in the Integrated Housing Rule will remain as proposed.)

Board Response: Department's response accepted.

General Comments regarding the Integrated Housing Rule.

Comment: I'd like to have it in the rules that the integrated housing project can use HOME funds, not just the board can make modifications.

Department Response: All funding sources that can be appropriately leveraged to produce an integrated housing development are eligible to be used in conjunction with TDHCA funds. The Department believes that specifying the eligibility of a particular funding source gives the impression that those that are not listed are not allowable. No change proposed.

Board Response: Department's response accepted.

Comment: The Council (Texas Council for Developmental Disabilities) greatly appreciates the Department's move toward adopting in rule the integrated housing policy. This policy is in alignment with a primary goal of the Council which is to ensure that all people with disabilities are fully included in their communities. Moreover, the rule reflects the desire of people with disabilities to be a part of their communities.

Department Response: No response required.

Board Response: Department's response accepted.

The new section is adopted pursuant to the authority of the Texas Government Code, Chapter 2306.

*§1.15. Integrated Housing Rule.*

(a) Purpose. It is the purpose of this section to outline the guidelines related to the provision of integrated housing as it relates to the Department's programs.

(b) Definitions. The following words and terms, when used in this subsection, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Board--means the governing board of the department.

(2) 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.

(3) Department--the Texas Department of Housing and Community Affairs

(4) General population--Not segregated by type of disability or special needs status.

(5) Housing development--Property or work or a project, 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 and that is financed under the provisions of this chapter for the primary purpose of providing sanitary, decent, and safe dwelling accommodations for rent, lease, use, or purchase by individuals and families of low 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) single and multifamily dwellings in rural and urban areas.

(6) Integrated housing--Normal, ordinary living arrangements typical of the general population. Integration is achieved when individuals with disabilities choose ordinary, typical housing *units* that are located among individuals who do not have disabilities or other special needs. Regular, integrated housing is distinctly different from assisted living facilities/arrangements.

(7) Large housing development--Single or multifamily housing development that has 50 or more units.

(8) Multifamily housing development--A project that contains five or more housing units.

(9) Persons with Disabilities--A household composed of one or more persons, at least one of whom is an individual who is determined to:

(A) Have a physical, mental, or emotional impairment that:

*(i)* Is expected to be of 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) Have a developmental disability, as defined in §102(7) of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6001-6007); or

(C) Be the surviving member or members of any family that had been living in an assisted unit with the deceased member of the family who had a disability at the time of his or her death; or

(D) Be legally responsible for caring for an individual described by subparagraphs (A) or (B) of this paragraph.

(10) Scattered Site--One to four family dwellings located on sites that are on non-adjacent lots, with no more than four units on any one site.

(11) Small housing development--a single or multifamily housing development that has less than 50 units.

(12) Special Needs Populations--Persons who:

(A) are considered to be disabled under 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 (these include: persons with alcohol and/or drug addictions, colonia residents, persons with disabilities, victims of domestic violence, persons with HIV/AIDS, homeless populations, and migrant farmworkers), or

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

(13) Tenant-Based Rental Assistance--A form of rental assistance in which the assisted tenant may move from a dwelling unit with a right to continued assistance. The assistance is provided for the tenant, not for the project.

(14) Tenant Services--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. Tenant participation in services cannot be required.

(15) Transitional housing--A project that has as its purpose facilitating the movement of homeless individuals and families to permanent housing within a reasonable amount of time (usually 24 months). Transitional housing includes but is not limited to housing primarily designed to serve deinstitutionalized homeless individuals and other homeless individuals with mental or physical disabilities, homeless families with children, and victims of domestic violence.

(16) Unit--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.

(c) Procedures.

(1) A housing development may not restrict occupancy solely to people with disabilities or people with disabilities in combination with other special needs populations.

(A) Large housing developments shall provide no more than 18 percent of the units of the development set-aside exclusively for people with disabilities. The units must be dispersed throughout the development.

(B) Small housing developments shall provide no more than 36 percent of the units of the development set-aside exclusively for people with disabilities. These units must be dispersed throughout the development.

(2) Set aside percentages outlined in subparagraphs (A) and (B) of paragraph (1) of this subsection refer only to the units that are to be solely restricted for person with disabilities. This section does not prohibit a property from having a higher percentage of occupants that are disabled.

(3) Property owners may not market a housing development entirely, nor limit occupancy to, persons with disabilities.

(d) Exceptions.

(1) Scattered site development and tenant based rental assistance is exempt from the requirements of this section.

(2) Transitional housing is exempt from the requirements of this section, but must be time limited, with a clear and convincing plan for permanent integrated housing upon exit from the transitional situation.

(3) This section does not apply to housing developments designed exclusively for the elderly.

(4) This section does not apply to housing developments designed for other special needs populations.

(e) Board Waiver. The Board may waive the requirements of this rule to further the purposes or policies of Chapter 2306, Texas Government Code, or for other good cause.

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 November 17, 2003.

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## 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" or "TDHCA") adopts amended and new Subchapter B, Underwriting, Market Analysis, Appraisal, Environmental Site Assessment, Property Condition Assessment Rules and Guidelines, §§1.31 - 1.33, 1.35, and 1.36, with changes to the proposed text as published in the August 29, 2003, issue of the *Texas Register* (28 TexReg 7076).

This subchapter is adopted in order to maintain and establish stand alone guidelines for underwriting, market analysis, appraisal, environmental site assessment, and property condition assessment performed for requests submitted to the Department for review.

On August 29, 2003, the Draft 2004 Underwriting, Market Analysis, Appraisal, Environmental Site Assessment, and Property Condition Assessment Rules and Guidelines were published in the *Texas Register*. Upon publication a public comment period commenced, ending on October 10, 2003. In addition to publishing the document in the *Texas Register*, a copy was published on the Department's web site and made available to the public upon request. The Department held public hearings in Longview, Dallas, Wichita Falls, Lubbock, San Angelo, El Paso, Austin, San Antonio, Harlingen, Corpus Christi, Waco, Lufkin, and Houston. In addition to comments received at the public hearings, the Department received written comments.

The scope of the public comment concerning the Underwriting, Market Analysis, Appraisal, Environmental Site Assessment, and Property Condition Assessment Rules and Guidelines pertains to the following sections:

SUMMARY OF COMMENTS RECEIVED UPON PUBLICATION OF THE PROPOSED RULES IN THE *TEXAS REGISTER* AND COMMENTS PROVIDED AT PUBLIC HEARINGS HELD BY THE DEPARTMENT ON ITEMS THAT RELATE DIRECTLY TO THE UNDERWRITING, MARKET ANALYSIS, APPRAISAL, ENVIRONMENTAL SITE ASSESSMENT, AND PROPERTY CONDITION ASSESSMENT RULES AND GUIDELINES

§1.31 General Provisions.

Comment: As enacted by the 78th Legislature in SB 264, Section 2306.082, Texas Government Code, requires the Department to develop and implement a policy to encourage the use of appropriate alternative dispute resolution procedures to assist in the resolution of disputes under the Department's jurisdiction. Also, during public comment on the Department's proposed 2004 Qualified Allocation Plan and Rules, the Texas Affordable Housing Congress suggested that ADR procedures be added at several points in the QAP.

Department Response: As one step in implementing the ADR policy called for by Section 2306.082, staff recommends the addition of §1.31(b), as follows:

§1.31(b) Alternative Dispute Resolution Policy. In accordance with Section 2306.082, Texas Government Code, it is the Department's policy to encourage the use of appropriate alternative dispute resolution procedures ("ADR") under the Governmental Dispute Resolution Act, Chapter 2009, Texas Government Code, to assist in resolving disputes under the Department's jurisdiction. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation and nonbinding arbitration. Except as prohibited by the Department's ex parte communications policy, the Department encourages informal communications between Department staff and Applicants, and other interested Persons, to exchange information and informally resolve disputes. The Department also has administrative appeals processes to fairly and expeditiously resolve disputes. If at anytime an Applicant or other Person would like to engage the Department in an ADR process, the Person may send a proposal to the Department's General Counsel and Dispute Resolution Coordinator. The proposal should describe the dispute and the details of the process proposed (including proposed participants, Third Party, when, where, procedure, and cost). The Department will evaluate whether the proposed process would fairly, expeditiously, and efficiently assist in resolving the dispute and promptly respond to the proposal.

Board Response: Staff response accepted.

§1.31(b)(5) Definition of Comparable Unit.

Comment: Novogradac & Company representatives have indicated the term should be changed from "Comparable Unit" to "Comparable Property" and the definition should be expanded to include additional characteristics of the property to be compared.

Department Response: Staff does not believe it would be appropriate to change the term from "Comparable Unit" to "Comparable Property." The rules and guidelines encompass not only multifamily properties, but also single family properties. In addition, the unit mix of a proposed property may never exactly correspond to that of existing properties. However, staff agrees that the definition should be expanded to include additional characteristics.

§1.31(b)(5) Comparable Unit-A unit of housing that is of similar type, design, quality of construction, age, size, location, utility structure, and other discernable characteristics that can be used to compare and contrast from a proposed or existing unit. Other considerations may include access to amenities and supportive services on and off the property.

Board Response: Staff response accepted.

§1.31(b)(17) Definition of Primary Market.

Comment: Novogradac & Company representatives have indicated a desire to add specifics, such as the actual percentage of demand to be drawn from the primary market area with the remaining percentage to be drawn from the secondary market area, to the definition of Primary Market to provide greater standardization.

Department Response: Staff does not recommend a change. Indicating a specific percentage of demand to be drawn from market areas in the rules and guidelines may result in less analysis performed to justify the source of the demand. Currently, market analysts may include additional sources of demand from outside the defined primary market area, but documentation of the data used and an explanation of the analysis must be included to support the additional demand conclusion.

Board Response: Staff response accepted.

§1.31(b)(23) Definition of Transitional Housing.

Comment: Public comment from New Hope Housing indicates the term "Transitional Housing" should be changed to "Supportive Housing" to allow for a broader meaning. She also suggested that the definition should not allude to a time limit for occupancy by tenants.

Department Response: Staff agrees the term "Supportive Housing" is more appropriate for the intended purpose and also agrees that an alluded time limit for occupancy may be too restrictive based on the proposed broader term. Staff recommends the following changes:

§1.31(b)(20) Supportive Housing- Rental housing intended solely for occupancy by individuals or households transitioning from homelessness or abusive situations to permanent housing and typically consisting primarily of efficiency units.

Board Response: Staff response accepted.

§1.32(d)(5) Expenses.

Comment: Ability Resources Incorporated stated, "The TDHCA rules need to be structured to fit small integrated projects containing [Section] 811 units that are simply too unique to be covered by the established guidelines."

Department Response: Staff does not recommend a change. Section 1.32(d)(5) outlines parameters used in estimating operating expenses. Sources used include the TDHCA Operating Expense Database, the Institute of Real Estate Management's most recent Conventional Apartments-Income/Expense Analysis book, and other well-documented sources. In the case of unique Developments, Applicants can and should provide historic operating expenses for similar developments or other documentation supporting abnormal costs or savings as they will be given considerable weight if they can be verified.

Board Response: Staff response accepted.

§1.32(d)(6) Net Operating Income and Debt Service.

Comment: Ability Resources Incorporated stated, "TDHCA should consider that HUD will allow no excess revenue to be retained by ARI after the operating expenses of [Section] 811 units are paid."

Department Response: Staff does not recommend a change. Currently, the United States Department of Housing and Urban Development (HUD) regulations on the distribution of income after operating expenses and debt service are considered in TDHCA's underwriting analysis. However, a copy of the regulation or a source for obtaining such documents should be provided at the time of application to facilitate the Department's understanding of any such program-specific regulation.

Board Response: Staff response accepted.

§1.32(e) Development Costs.

Comment: Ability Resources Incorporated stated, "TDHCA currently includes the developer's fee in the loan, but these fees should not be required to be repaid. They are supposed to be retained by the developer."

Department Response: Staff does not recommend a change. Developer fees are considered to be a part of total development costs. If it is necessary to defer fees, they must be repayable out of future cashflow. If the intent is to not pay a developer fee, such fees should not be included in the Development's costs as they would not be real costs of the development.

Board Response: Staff response accepted.

§1.32(e) Development Costs.

Comment: Ability Resources Incorporated stated, "Why does TDHCA require us to obtain independent estimates, at considerable expense, if they do not plan to use them?"

Department Response: Staff does not recommend a change. Section 1.32(e) outlines parameters used in estimating total development costs and specifically requires the Department to use the Applicant's development costs to the extent they can be verified. Sources used in estimating specifically direct construction costs include the Marshall & Swift Residential Cost Handbook, historic costs based on submitted cost certifications, and other well-documented Third Party sources. The Underwriting Rules and Guidelines require Third Party estimates for rehabilitation developments, but do not require the same for new construction. It is assumed that the developer will use past experience to estimate total development costs for new construction, which will be verified by one or more of the sources listed above.

Board Response: Staff response accepted.

§1.32(g)(2) Inclusive Capture Rate.

Comment: Trammell Crow Residential submitted the following written comment, "Senate Bill 264, which becomes effective on September 1, 2003, contains new language in Section 18, paragraph (3) of the bill, amending Chapter 2306.6703. HB2308 by Jones containing the same language was signed by the Governor on 6/20/03.

In summary, the amendment makes a tax credit application ineligible if the proposed LIHTC property is located one linear mile or less from an existing LIHTC development that received a tax credit allocation during the preceding three years. This language was proposed by Representative Jones and Senator West to deal with the concentration of LIHTC properties in certain areas of the state because the existing 25% capture rate limitation was not adequately addressing the concentration issue. The one-mile rule was supported by the industry through TAAHP, TALHFA, and by other organizations.

Because the one-mile rule is factually easier to determine and does not rely on subjective market area delineations that are subject to criticism, I propose removal of the existing concentration policy found in the Underwriting Rules in its entirety. I believe many contradictory conclusions will result if both the law and current rule are used to evaluate concentration."

The comment also stated, "I would recommend leaving the capture rate calculation in the market study pursuant to §1.33(d)(15)(D). I agree that it is an informative indicator to help evaluate the lease-up risk. Like any indicator, however, it cannot be viewed as a stand-alone benchmark. As we have discussed, an extremely high capture rate may be perfectly acceptable in some markets depending upon population growth rates, employment growth rates and other sub-market dynamics (such as found in rural areas) that are not part of the current calculation methodology."

Department Response: While staff agrees with the change, it will not be made in the 2004 rules and guidelines. The nature of the change may require additional public comment. Therefore, it will be considered during revisions of the 2005 rules and guidelines to allow for the public comment.

Board Response: Staff response accepted.

§1.33(d)(12) Primary Market Information.

Comment: Novogradac & Company representatives have indicated a specific percentage of demand to be drawn from the primary market area should be identified and the population limit (without detailed support) of the primary market area should be changed from 250,000 to 100,000.

Department Response: Staff does not recommend a change at this time. The reason for not including a specific percentage of demand to be drawn from market areas is explained above in the response to the comment on §1.31(b)(17) Definition of Primary Market. While a reduction in the maximum population from 250,000 to 100,000 may be appropriate, the current standard had a significant amount of discussion when it was adopted and staff feels such a large reduction requires further discussion and consideration. The proposed change should be revisited in drafting the 2005 rules and guidelines prior to the public comment period. The Department does not encourage market analysts to define primary market areas with the goal of reaching a maximum population of 250,000 people. As stated in the rules and guidelines, "The Department encourages a conservative Primary Market Area delineation with use of natural political/geographic boundaries whenever possible.

Board Response: Staff response accepted.

§1.33(d)(13)(A) Comparable Property Analysis.

Comment: Novogradac & Company representatives have indicated an alternative to use of properties which are not truly comparable (adjustments made are in excess of 15%) within the Primary Market Area should be provided. The suggestion is to allow properties outside the Primary Market Area to be used with a location adjustment factor applied.

Department Response: Staff agrees and has included the suggested language.

§1.33(d)(13)(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. In Primary Market Areas lacking sufficient rental comparables, it may be necessary for the Market Analyst to collect data from comparable properties in markets with similar characteristics and make quantifiable location adjustments. The Department also encourages close examination of the overall use of concessions in the Primary Market Area and the effect on effective Market Rents.

Board Response: Staff response accepted.

§1.33(d)(13)(C) Comparable Property Analysis.

Comment: Novogradac & Company representatives have indicated occupancy rates should be broken down by bedroom type and income restrictions.

Department Response: Staff agrees and has included the suggested language.

§1.33(d)(13)(C) Analyze occupancy rates of each of the comparable properties and occupancy trends by bedroom type and income restricted level (percentage of AMI). Physical occupancy should be compared to economic occupancy.

Board Response: Staff response accepted.

§1.33(d)(13)(F) Comparable Property Analysis.

Comment: Novogradac & Company representatives have indicated the requirements for the individual datasheets for comparable properties should be expanded. In addition, TDHCA should provide a copy of the recommended format.

Department Response: Staff does not recommend a change. However, a sample form for individual datasheets will be developed and posted to the Department's website for use by Market Analysts who do not already have their own format.

Board Response: Staff response accepted.

§1.33(d)(14) Demand Analysis.

Comment: Novogradac & Company representatives have indicated demand should be presented by unit type (number of bedrooms) and the inclusive capture rate should be adjusted to reflect different thresholds for different unit types. Also, household size to be considered in calculating demand for each unit type should be the HUD standard of 1.5 persons per bedroom. Finally, income each household is assumed to pay for housing costs should be set at 35% for families and 40% for the elderly.

Department Response: Staff does not recommend a change at this time. Though staff supports the proposed changes, they are significantly more prescriptive than the current proposed rules and guidelines. It is likely additional public comment would be needed before implementation. It is staff's opinion that the comment should be held over for consideration during the public comment period for the 2005 rules and guidelines.

Board Response: Staff response accepted.

§1.33(d)(14)(B) Demand Analysis.

Comment: Novogradac & Company representatives have indicated that a statement should be included indicating TDHCA does not consider household turnover to be a reliable source of market demand for rent/income restricted developments.

Department Response: Staff does not recommend a change at this time. The suggested changes would need additional public comment before implementation. Previous discussions with groups of market analysts have indicated there is not a unified opinion on the validity of demand from turnover or a more accurate demand determinant.

Board Response: Staff response accepted.

§1.33(d)(14) Demand Analysis.

Comment: At the public hearing located in Austin on October 2, 2003, the Texas Low Income Housing Information Service indicated housing demand should be presented based on income brackets such as 0-30% of AMGI, 30-50%, 50-60% and 60-80%. Also, market studies should include demand figures based on disabilities and race/ethnicity.

Department Response: Staff does not recommend a change to §1.33(d)(14) at this time. Currently, the Department requires Market Analysts to calculate targeted income eligible household demand specific to the subject Development. The term "targeted" is meant to encompass specific household types including, but not limited to the homeless, seniors, and the disabled. It may be more costly to developers to require Market Analysts to collect and analyze the demographic information in the suggested format for each Market Study commissioned when it is only a relevant concern in a few proposed developments. It is

suggested that the subject be explored in more detail over the coming year to assess the effect on the cost to developers.

Board Response: Staff response accepted.

§1.36 Property Condition Assessment.

Comment: Fountainhead Management, Inc. indicated it appears the Department is targeting rehabilitation developments although some of the requirements under §1.36 would apply to new construction developments as well. In particular, the Property Condition Assessment (PCA) "should note all repairs expected to be incurred during the regulatory period. For projects with a 30 year regulatory period, almost every system of the property will be required to be replaced..." Fountainhead Management suggests the requirement of a PCA will cause developers to incur an extremely high cost for no useful purpose.

Department Response: Staff does not recommend a change to §1.36 at this time. Staff believes that a PCA for rehabilitation developments is necessary to evaluate long term feasibility. Rehabilitation developments are very different from new construction since they include used components with varying life expectancies. New developments are inspected to assure compliance with today's construction quality standards and expected to be able to operate without the need for major rehabilitation for 10 to 30 years. As a result of SB 264 (78th Legislative Regular Session), the Department is required to develop rules for a property assessment in association with monitoring reserve for replacements for all new developments by the 11th year of operation. Through these rules, new developments will also be required to provide a physical need assessment in order to properly size the reserve account for its needs throughout the long term feasibility period.

Board Response: Staff response accepted.

§1.36(b)(1) Fannie Mae's criteria for Physical Needs Assessments.

Comment: ON-SITE INSIGHT requests that recognition of his firm's copyright for forms used by Fannie Mae be included in §1.36(b)(1).

Department Response: Staff will comply with the request if it can be shown that the phrase "Physical Needs Assessment" is copyright protected. Currently, a change is not recommended.

Board Response: Staff response accepted.

STAFF-RECOMMENDED MINOR TECHNICAL CHANGES FOR CONSISTENCY

§§1.32, 1.33, 1.34, 1.35, 1.36 Incorrect Spelling. Reason: A number of misspellings occur throughout the sections, which are corrected.

Board Response: Staff change accepted.

§§1.32, 1.33, 1.34, 1.35, 1.36 Defined Terms.

Reason: A number of terms are capitalized and defined in §1.31(b). Once they are defined, they should be used as capitalized, defined terms consistently throughout the rules and guidelines. Consistency in the use of defined terms ensures uniform interpretation of the rules and guidelines.

Board Response: Staff change accepted.

§1.31(a) Purpose.

Reason: This section should also encompass proposed Section 1.36. Property Condition Assessment Rules and Guidelines.

§1.31 General Provisions.

§1.31 (a) Purpose. The Rules in this subchapter apply to the underwriting, market analysis, appraisal, environmental site assessment, and property condition assessment standards employed by the Texas Department of Housing and Community Affairs (the "Department" or "TDHCA").

Board Response: Staff change accepted.

§1.31(b)(6) Definition of DCR-Debt Coverage Ratio.

Reason: The definition refers to net after tax income which is defined as Net Operating Income later in the paragraph.

§1.31(b) (6) DCR--Debt Coverage Ratio. Sometimes referred to as the "Debt Coverage" or "Debt Service Coverage." A measure of the number of times loan principal and interest are covered by Net Operating Income.

Board Response: Staff change accepted.

§1.31(b)(7) Definition of Development.

Reason: The term, as used throughout the sections, refers to both multi-unit residential housing requesting funding and those that have received funding in the past. Therefore, the definition of the term should be adjusted.

§1.31(b)(7) Development-Multi-unit residential housing that meets the affordability requirements for and requests or has received funds from one or more of the Department's sources of funds.

Board Response: Staff change accepted.

§1.31(b)(17) Definition of Primary Market.

Reason: The definition as written is unclear. The proposed change does not affect the meaning of the term, but offers a clearer definition.

§1.31(b)(17) Primary Market-Sometimes referred to as "Primary Market Area" or "Submarket." The area defined by political/geographical boundaries from which a proposed or existing Development is most likely to draw the bulk of its prospective tenants or homebuyers.

Board Response: Staff change accepted.

§1.31(b)(26) Definition of Utility Allowance(s).

Reason: The definition seems to indicate that only local Public Housing Authorities administer and maintain utility allowances for the HUD Section 8 program. This is not always the case, especially in rural areas. Therefore, "Public Housing Authority" should be replaced with "entity responsible for administering the HUD Section 8 program" to encompass all administrators that may maintain utility allowance sheets for the HUD Section 8 program.

§1.31(b)(26) 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 local entity responsible for administering the HUD Section 8 program with most direct jurisdiction over the majority of the buildings existing 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.

Board Response: Staff change accepted.

§1.32(b)(15)-(18) Report Contents.

Reason: With the addition of (17) and (18), the "and" should be moved from the end of (15) to the end of (17).

§1.31(b)(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;

§1.31(b)(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.

§1.31(b)(17) Review of the appraisal, if required, for conformance with the Department's Appraisal Rules and Guidelines in §1.34 of this subchapter; and,

§1.31(b)(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.

Board Response: Staff change accepted.

§1.32(d)(1)(B) Program Rents.

Reason: As the Department continues to make adjustments to the responsibilities of its divisions, it is suggested a more generic descriptor should be used in place of actual division names.

§1.32(d)(1)(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 division responsible for compliance 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.

Board Response: Staff change accepted.

§1.32(d)(6)(A) Interest Rate.

Reason: As the Department continues to make adjustments to the responsibilities of its divisions, it is suggested a more generic descriptor should be used in place of actual division names.

§1.32(d)(6)(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 the Department's division responsible for Credit Underwriting Analysis Reports 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.

Board Response: Staff change accepted.

§1.32(g)(2) Inclusive Capture Rate.

Reason: In Section 50.5(a)(8) of the QAP, the Department sets forth its policy on the ineligibility of applications based on 2306.6703 as amended by SB264 and HB2308 (78th Legislative Regular Session). The Underwriting Rules and Guidelines should be consistent with program rules.

§1.32(g) (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 Inclusive Capture Rate 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 and that no other Developments within one linear mile have been funded in the past twelve months as provided in Section 2306.6711 of the 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.

Board Response: Staff change accepted.

§1.33(d)(4) Summary Form.

Reason: The Department's TDHCA Primary Market Analysis Summary form is updated at regular intervals based on comments by users. It is important to maintain consistency in the forms submitted as exhibits in an application. By indicating the "most current" form should be used, staff hopes to avoid receiving older versions of the form.

§1.33(d)(4) Summary Form. Complete and include the most current 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.

Board Response: Staff change accepted.

§1.35(a) General Provisions.

Reason: An error occurred during cutting and pasting of language from one section of the rules and guidelines to Section 1.35. The language incorrectly refers to the PCA (Property Condition Assessment) rather than the ESA (Environmental Site Assessment).

§1.35(a) General Provisions. The Environmental Site Assessments (ESA) prepared for the Department 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 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 environmental professional 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 ESA report will not materially benefit from the Development in any other way than receiving a fee for performing the Environmental Site Assessment.

Board Response: Staff change accepted.

The amended and new sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306; and Chapter 2001 and 2002, Texas Government Code, V.T.C.A., which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

*§1.31. General Provisions.*

(a) Purpose. The Rules in this subchapter apply to the underwriting, market analysis, appraisal, environmental site assessment, and property condition 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 this subchapter is subject to the discretion of the Department and final determination by the Board.

(b) Alternative Dispute Resolution Policy. In accordance with Section 2306.082, Texas Government Code, it is the Department's policy to encourage the use of appropriate alternative dispute resolution procedures ("ADR") under the Governmental Dispute Resolution Act, Chapter 2009, Texas Government Code, to assist in resolving disputes under the Department's jurisdiction. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation and nonbinding arbitration. Except as prohibited by the Department's ex parte communications policy, the Department encourages informal communications between Department staff and Applicants, and other interested Persons, to exchange information and informally resolve disputes. The Department also has administrative appeals processes to fairly and expeditiously resolve disputes. If at anytime an Applicant or other Person would like to engage the Department in an ADR process, the Person may send a proposal to the Department's General Counsel and Dispute Resolution Coordinator. The proposal should describe the dispute and the details of the process proposed (including proposed participants, Third Party, when, where, procedure, and cost). The Department will evaluate whether the proposed process would fairly, expeditiously, and efficiently assist in resolving the dispute and promptly respond to the proposal.

(c) Definitions. Many of the terms used in this subchapter are defined in Chapter 50 of this title (the Department's 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 has 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, design, quality of construction, age, size, location, utility structure, and other discernable characteristics that can be used to compare and contrast from a proposed or existing unit. Other considerations may include access to amenities and supportive services on and off the property.

(6) DCR--Debt Coverage Ratio. Sometimes referred to as the "Debt Coverage" or "Debt Service Coverage." A measure of the number of times loan principal and interest are covered by Net Operating Income.

(7) Development--Multi-unit residential housing that meets the affordability requirements for and requests or has received 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--Include, but are not limited to police and fire protection, transportation, healthcare, retail, grocers, educational institutions, employment centers, parks, public libraries, entertainment centers, etc.

(12) 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 by political/geographical boundaries from which 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) 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) Supportive Housing--Rental housing intended solely for occupancy by individuals or households transitioning from homelessness or abusive situations to permanent housing and typically consisting primarily of efficiency units.

(21) 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.

(22) 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.

(23) 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.

(24) Underwriter--the author(s), as evidenced by signature, of the Credit Underwriting Analysis Report.

(25) Unstabilized Development--A Development that has not maintained a 90% occupancy level for at least 12 consecutive months.

(26) 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 local entity responsible for administering the HUD Section 8 program with most direct jurisdiction over the majority of the buildings existing 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 pro-forma 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;

(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; and,

(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 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 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 (6) 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 division responsible for compliance 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 market area 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 area. 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) through (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. 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 TDHCA Database is used with a minimum $0.25 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%.

(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, evidence of the CHDO designation from the State or local participating jurisdiction and a letter from the local taxing authority recognizing that the Applicant is or will be considered eligible for the property 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)(5)(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. NOI is the difference between the EGI and total operating expenses. If the NOI figure provided by the Applicant is within five percent of the NOI figure calculated by the Underwriter, the Applicant's figure is characterized as acceptable or reasonable in the Report, however, for purposes of calculating the DCR the Underwriter will maintain and use its independent calculation of NOI regardless of the characterization of the Applicant's figure. Only if 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 will the Applicant's estimate of NOI be used to determine the acceptable debt service amount. In all other cases the Underwriter's estimates are used. In addition to the 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 the Department's division responsible for Credit Underwriting Analysis Reports 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 is 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 priority or foreclosable lien financing 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 subparagraphs (A) and (B) of this 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 subparagraphs (A) and (B) of this 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, 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 costs of development up to the site itself 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%).

(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 50 of this title, as proposed (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 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 Applicants project cost schedule if it is within the range of two 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 stabilized 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 and floodplain map and 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 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 Inclusive Capture Rate 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 and that no other Developments within one linear mile have been funded in the past twelve months as provided in Section 2306.6711 of the 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) Supportive Housing. The unique development and operating characteristics of Supportive 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 Supportive 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 proposed 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 Supportive Housing Development.

(B) Operating Expenses: A Supportive 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 Supportive Housing Developments provided the Applicant or otherwise available to the Underwriter., The Applicant should provide substantiation from existing Supportive 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: Supportive Housing Developments may be exempted from the DCR requirements of §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 Supportive 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 Supportive 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 that has already been commissioned not more than 90 days before the Department's due date for submission as of the date the change in status of the Market Analyst is posted to the web.

(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. A Market Analysis for a multifamily 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 most current 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 described 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. In Primary Market Areas lacking sufficient rental comparables, it may be necessary for the Market Analyst to collect data from comparable properties in markets with similar characteristics and make quantifiable location adjustments. 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 bedroom type and income restricted level (percentage of AMI). 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 rental households OR confirmed targeted income-eligible rental household growth due to new employment growth.

(B) Quantify existing household demand due to documented turnover of existing targeted income-eligible rental households OR documented rent over-burdened targeted income-eligible rental households that would not be rent over-burdened in the proposed Development and documented targeted income-eligible rental 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 subsidized 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 previously approved but unstabilized new Comparable Units 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 capture rate for the subject Development's proposed affordable units and market rate units as well as 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) Single Family Developments.

(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. The Environmental Site Assessments (ESA) prepared for the Department 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 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 environmental professional 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 ESA report will not materially benefit from the Development in any other way than receiving a fee for performing the Environmental Site Assessment.

(b) The report must include, but is not limited to:

(1) A review of records, interviews with people knowledgeable about the property;

(2) 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) A copy of a current survey, if available, 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) 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;

(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) 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) 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) For Developments in programs that allow a waiver of the Phase I ESA such as a TxRD funded Development the Development Owners 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) 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 subsections (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 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 November 17, 2003.

TRD-200307892
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 7, 2003
Proposal publication date: August 29, 2003
For further information, please call: (512) 475-4595

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## CHAPTER 33. GUIDELINES FOR MULTIFAMILY HOUSING REVENUE BOND

**10 TAC §§33.1 - 33.13**

The Texas Department of Housing and Community Affairs (the Department) adopts, without changes, the repeal of §§33.1-33.13, concerning the Guidelines for Multifamily Housing Revenue Bond, as published in the August 29, 2003 issue of the *Texas Register* (28 TexReg 7088-7089).

These sections are repealed 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.

No comments were received regarding adoption of the repeal.

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

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 November 17, 2003.

TRD-200307881
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 7, 2003
Proposal publication date: August 29, 2003
For further information, please call: (512) 475-4595

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## CHAPTER 33. MULTIFAMILY HOUSING REVENUE BOND RULES

**10 TAC §§33.1 - 33.10**

The Texas Department of Housing and Community Affairs (the Department) adopts new §§33.1 - 33.10, concerning the Multifamily Housing Revenue Bond Rules with changes to the text as published in the August 29, 2003, issue of the *Texas Register* (28 TexReg 7089-7096).

These sections are adopted 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 scope of the public comment concerning the Multifamily Housing Revenue Bond Rules pertains to the following sections:

SUMMARY OF COMMENT RECEIVED UPON PUBLICATION OF THE PROPOSED RULES IN THE *TEXAS REGISTER* AND COMMENTS PROVIDED AT PUBLIC HEARINGS HELD BY THE DEPARTMENT ON ITEMS THAT RELATE DIRECTLY TO THE MULTFAMILY HOUSING REVENUE BOND RULES.

§33.6(g)(10) - Public Hearing; Board Decisions

Comment:

Comments from Elizabeth K. Julian and from the Texas Low Income Housing Information Service suggested that, while recognizing the scoring constraints in legislation and the Department's sensitivity and efforts to support fair housing, the Department should include an "affirmatively furthering fair housing" factor in scoring.

Department Response:

The Department currently includes fair housing law as a specific discretionary factor that the Board may apply in making decisions. The Board is authorized to not rely solely on points, but may consider this and other named discretionary factors. To clarify the scope of fair housing law, staff recommends amending the rule to add, "...including affirmatively furthering fair housing".

(g)(10) - Fair housing law, including affirmatively furthering fair housing;

Board Response: Department Response Accepted.

§33.6(h)(2) - Alternative Dispute Resolution

Comment:

Comment from the Texas Affordable Housing Congress recommended that the rules be revised to provide for alternative dispute resolution as required by SB 264. Department Response:

As one step in implementing a policy to encourage the use of appropriate ADR procedures pursuant to §2306.082, the Department is recommending that a policy regarding ADR be added to this section of the Bond Rule.

"(h)(2)-Alternative Dispute Resolution Policy. In accordance with Section 2306.082, Texas Government Code, it is the Department's policy to encourage the use of appropriate alternative dispute resolution procedures ("ADR") under the Governmental Dispute Resolution Act, Chapter 2009, Texas Government Code, to assist in resolving disputes under the Department's jurisdiction. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation and nonbinding arbitration. Except as prohibited by the Department's ex parte communications policy, the Department encourages informal communications between Department staff and applicants, and other interested persons, to exchange information and informally resolve disputes. The Department also has administrative appeals processes to fairly and expeditiously resolve disputes. If at anytime an applicant or other person would like to engage the Department in an ADR process, the person may send a proposal to the Department's General Counsel and Dispute Resolution Coordinator. The proposal should describe the dispute and the

details of the process proposed (including proposed participants, third party, when, where, procedure, and cost). The Department will evaluate whether the proposed process would fairly, expeditiously, and efficiently assist in resolving the dispute and promptly respond to the proposal."

Board Response: Department Response Accepted.

The new sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306.

*§33.1. Introduction.*

The purpose of this Chapter 33 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 Chapter 33, of this title 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 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 the chapter, shall have the following meaning, unless 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 subparagraph (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 Sec. 230.501(a)), but excluding any natural person or any director or executive officer of the Department (17 CFR §§230.501(a)(4) through (6)) or

(B) a qualified institutional buyer as defined by Rule 144A promulgated under the Securities Act of 1933, as amended (17 CFR Sec. 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 Section 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 above 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) through (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) through (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);

(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);

(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;

(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) through (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). 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).

(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, including affirmatively furthering fair housing;

(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.

(1) 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.

(2) Alternative Dispute Resolution Policy. In accordance with Section 2306.082, Texas Government Code, it is the Department's policy to encourage the use of appropriate alternative dispute resolution procedures ("ADR") under the Governmental Dispute Resolution Act, Chapter 2009, Texas Government Code, to assist in resolving disputes under the Department's jurisdiction. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation and nonbinding arbitration. Except as prohibited by the Department's ex parte communications policy, the Department encourages informal communications between Department staff and applicants, and other interested persons, to exchange information and informally resolve disputes. The Department also has administrative appeals processes to fairly and expeditiously resolve disputes. If at anytime an applicant or other person would like to engage the Department in an ADR process, the person may send a proposal to the Department's General Counsel and Dispute Resolution Coordinator. The proposal should describe the dispute and the details of the process proposed (including proposed participants, third party, when, where, procedure, and cost). The Department will evaluate whether the proposed process would fairly, expeditiously, and efficiently assist in resolving the dispute and promptly respond to the proposal."

(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 through 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 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 November 17, 2003.

TRD-200307883
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 7, 2003
Proposal publication date: August 29, 2003
For further information, please call: (512) 475-4595

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## CHAPTER 35. TAXABLE MULTIFAMILY MORTGAGE REVENUE BOND PROGRAM

**10 TAC §§35.1 - 35.15**

The Texas Department of Housing and Community Affairs (the Department) adopts, without changes, the repeal of §§35.1-35.15, concerning the Taxable Multifamily Mortgage Revenue Bond Program, as published in the August 29, 2003 issue of the *Texas Register* (28 TexReg 7096-7097).

The sections are repealed 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.

No comments were received regarding adoption of the repeal.

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

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.

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Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-4595

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## CHAPTER 39. TAX-EXEMPT MULTIFAMILY MORTGAGE REVENUE BOND PROGRAM

**10 TAC §§39.1 - 39.17**

The Texas Department of Housing and Community Affairs (the Department) adopts, without changes, the repeal of §§39.1-39.17, concerning the Tax-Exempt Multifamily Mortgage Revenue Bond Program, as published in the August 29, 2003 issue of the *Texas Register* (28 TexReg 7097).

The sections are repealed 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.

No comments were received regarding adoption of the repeal.

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

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.

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Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-4595

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## CHAPTER 51. HOUSING TRUST FUND RULES

### 10 TAC §§51.1 - 51.3, 51.5 - 51.14, 51.17, 51.18

The Texas Department of Housing and Community Affairs (the Department) adopts, without changes, the repeal of §§51.1-51.3, 51.5-51.14, 51.17 and 51.18, concerning Housing Trust Fund Rules, as published in the September 26, 2003 issue of the *Texas Register* (28 TexReg 8229-8230).

These sections are repealed in order to implement new legislation enacted by the 78th legislative session.

No comments were received regarding adoption of the repeal.

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

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.

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Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
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Proposal publication date: September 26, 2003
For further information, please call: (512) 475-4595

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### 10 TAC §§51.1 - 51.11, 51.13

The Texas Department of Housing and Community Affairs (the Department) adopts, with changes, the new §§51.1-51.11, and 51.13, concerning Housing Trust Fund Rules, as published in the September 26, 2003 issue of the *Texas Register* (28 TexReg 8230-8235).

These sections are adopted, with technical changes, in order to implement new legislation enacted by the 78th Legislative Session.

The scope of the public comment concerning the Housing Trust Fund (HTF) Rules pertains to the following sections:

SUMMARY OF COMMENT RECEIVED UPON PUBLICATION OF THE PROPOSED RULES IN THE TEXAS REGISTER AND COMMENTS PROVIDED AT PUBLIC HEARINGS HELD BY THE DEPARTMENT ON ITEMS THAT RELATE DIRECTLY TO Housing Trust Fund Rules.

On September 26, 2003, the proposed 2004 Housing Trust Fund Rules (HTF) were published in the *Texas Register*. The comment period commenced on September 26, 2003, and ended on October 10, 2003. In addition to publishing the document in the *Texas Register*, a copy of the HTF Rules was published on the Department's web site in August and was made available to the public upon request. The Department held thirteen public hearings across the state to gather feedback on the draft HTF Rules. The public was generally pleased with the draft HTF Rules and with the Department's efforts. The Department received the majority of comments in writing by email, fax and mail. This memorandum provides the Department's response to all comments received. The comments and responses are divided into the following two sections.

I. Substantive comments on the HTF Rules and Departmental response. (Comments and responses are presented in the order they appear in the HTF Rules).

II.Technical administrative changes to the HTF Rules.

I. SUBSTANTIVE COMMENTS ON THE HTF RULES AND DEPARTMENTAL RESPONSE

§51.3(2). Definitions.

Comment:

One comment from New Hope Housing, Inc., suggests that the definition of affordable housing be modified to restrict the rent that can be charged to the equivalent of 30% of an area's median income, rather than restricting the percentage of income that can be paid for housing.

Department Response:

Staff concurs with this change to the definition of Affordable Housing.

§51.3(2) Definitions Affordable Housing-- Housing for which low, very low and extremely low income families are not required to pay more than 30% of an area's median income. monthly adjusted income for the mortgage payment and utilities, or rent and utilities, computed in accordance with the federal regulations for the Section 8 Existing Housing Program set forth in the Code of Federal Regulations, Title 24, Part 5, Subpart F.

Board Response: Department's response accepted.

§51.4. Allocation of Housing Trust Funds.

Comment:

Texas Association of Community Development Corporations (TACDC) requests that the Department re-evaluate the rule changes that remove the 10% limit on funds and asked that use of the funds for the Predevelopment Loan and Capacity Building Programs be reinstated.

Department Response:

The Department believes that the Predevelopment Loan and Capacity Building Programs are needed programs to foster the development of affordable housing. As currently proposed, the Predevelopment Loan Program and Capacity Building Program are still permitted activities, but merely not identified specifically. The 10% limit is utilized to ensure ample distribution of funds among recipients. No changes are recommended.

Board Response: Department's response accepted.

§51.6(g)(2)(G). Ineligible Activities and Restrictions

Comment:

United Cerebral Palsy of Texas (UCP) suggests that the limitation on a development with the same number of bedrooms is too restrictive and conflicts with the needs of people with disabilities and the consumer control movement. The comment further suggests that the market should drive the unit mix in a target area.

Department Response:

Staff concurs that market dynamics in a particular submarket should be paramount consideration in determining the appropriate unit mix for a Development and recommends that the section be removed entirely for Housing Trust Fund developments.

§51.6(g)(2)(G) 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.

Board Response: Department's response accepted.

§51.6(g)(3)(A). Ineligible Activities and Restrictions

Comment:

United Cerebral Palsy of Texas (UCP) suggests that the 16 unit minimum development size is too restrictive and conflicts with the needs of people with disabilities and the consumer control movement.

Department Response:

Staff concurs that the restriction may limit HTF and recommends that the 16 unit restriction be removed entirely. However, if HTF funds are used in conjunction with Housing Tax Credits the development will be limited to the Housing Tax Credit restrictions for development size.

§51.6(g)(3) Limitations on the Size of Developments. 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.

Board Response: Department's response accepted.

§51.7(g). Application Procedure and Requirements

Comment:

It was recommended that the Department provide for alternative dispute resolution as required by SB 264, 78th Legislature, Regular Session.

Department Response:

As enacted by the 78th Legislature in SB 264, Section 2306.082, Texas Government Code, requires the Department to develop and implement a policy to encourage the use of appropriate alternative dispute resolution procedures to assist in the resolution of disputes under the Department's jurisdiction. Also, during public comment on the Department's proposed Rules, the Texas Affordable Housing Congress suggested that ADR procedures be added to the Department's rules. As one step in implementing the ADR policy called for by Section 2306.082, staff recommends the addition of the following paragraph to the proposed rule.

§51.7 (g) Application Procedure and Requirements Alternative Dispute Resolution Policy. In accordance with Section 2306.082, Texas Government Code, it is the Department's policy to encourage the use of appropriate alternative dispute resolution procedures ("ADR") under the Governmental Dispute Resolution Act, Chapter 2009, Texas Government Code, to assist in resolving disputes under the Department's jurisdiction. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation and non-binding arbitration. Except as prohibited by the Department's ex parte communications policy, the Department encourages informal communications between Department staff and applicants, and other interested persons, to exchange information and informally resolve disputes. The Department also has administrative appeals processes to fairly and expeditiously resolve disputes. If at anytime an applicant or other person would like to engage the Department in an ADR process, the person may send a proposal to the Department's General Counsel and Dispute Resolution Coordinator. The proposal should describe the dispute and the details of the process proposed (including proposed participants, third party, when, where, procedure, and cost). The Department will evaluate whether the proposed process would fairly, expeditiously, and efficiently assist in resolving the dispute and promptly respond to the proposal.

Board Response: Department's response accepted.

II. TECHNICAL ADMINISTRATIVE CHANGES TO HTF RULE

§51.3(22).Definitions- Staff proposes to change the definition of Rural Area to correspond to the definition in the Housing Tax Credit and HOME programs.

§51.3(22) Rural Project Area-- An project area that is 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 area, if it has a the statistical area has a population of not more than 20,000 and does not share boundaries with an urbanized area; or

(C) has received financing or has received a commitment for financing from the United States Department of Agricultural Rural Housing Services. in an area that is eligible for new construction or rehabilitation funding by TX-USDA-RHS.

Board Response: Department's response accepted.

§51.12. Funding Cap. Staff proposes to delete section 51.12 Funding Cap to avoid limiting the amount of HTF funds that can be awarded to a single project because some of the HTF funds for 2004 will be utilized by the Bootstrap Program may exceed this cap.

§51.12. Funding Cap

No more than 10% of the housing trust funds may be allocated to any single project for each fiscal year.

Board Response: Department's response accepted.

§51.7(c). Application Procedure and Requirements The Department received comment on the QAP that Administrative Deficiencies should allow for a 10 day response period and that the procedure be revised to provide for alternative dispute resolution as required by SB 264. Staff proposes to amend the Administrative Deficiency procedure in the HTF Rules to be consistent with the QAP Administrative Deficiency procedure.

§51.7(c) 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 eight 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 ten 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.

Board Response: Department's response accepted.

The new section is adopted pursuant to the authority of the Texas Government Code, Chapter 2306.

*§51.1. Purpose.*

This Chapter clarifies the use and administration of the Housing Trust Fund. The fund is created pursuant to Texas Government Code 2306.201.

*§51.2. Program Goals and Objectives.*

Use of the Housing Trust Fund is limited to providing:

(1) assistance for individuals and families of low, very low income and extremely low income;

(2) technical assistance and capacity building to nonprofit organizations engaged in developing housing for individuals and families of low, very low income and extremely low income; and

(3) security for repayment of revenue bonds issued to finance housing for individuals and families of low, very low income and extremely low income.

*§51.3. Definitions.*

The following words and terms, when used in this part, 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 as required in this rule.

(2) Affordable Housing--Housing for which low, very low, and extremely low income families are not required to pay more than 30% of an area's median income.

(3) Applicant--An eligible entity which is preparing to submit or has submitted an application for Housing Trust Fund assistance and is assuming contractual liability and legal responsibility by executing the written agreement with the Department.

(4) Board--The governing board of the Department.

(5) Capacity Building--Educational and organizational support assistance to promote the ability of community housing development organizations and nonprofit organizations to maintain, rehabilitate and construct housing for low, very low, and extremely low income persons and families. This activity may include but is not limited to:

(A) organizational support to cover expenses for training, technical and other assistance to the board of directors, staff, and members of the nonprofit organizations or community housing development organizations;

(B) technical assistance and training related to housing development, housing management, or other subjects related to the provision of housing or housing services; or

(C) studies and analyses of housing needs.

(6) Community Housing Development Organizations--A nonprofit organization that satisfies the requirements of Section 53.63 of this title.

(7) Department--The Texas Department of Housing and Community Affairs.

(8) Eligible Applicants--Local units of government, public housing authorities, community housing development organizations, nonprofit organizations, for profit entities, and persons and families of low, very low, and extremely low income.

(9) Extremely Low Income--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.

(10) Housing Development Costs--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 Applicant's application. Such costs include reserves and any expenses attributable to commercial areas.

(11) Housing Development--Any real or personal property, project, building, structure, facilities, work, or undertaking, whether existing, new construction, remodeling, improvement, or rehabilitation, which meets or is designed to meet minimum property standards consistent with those prescribed in the Housing Trust Fund Property Standards, found in the Program Guidelines, for the primary purpose of providing sanitary, decent, and safe dwelling accommodations for rent, lease, use, or purchase by persons and families of low, very low, and extremely low income, and persons with special needs. The term may include buildings, structures, land, equipment, facilities, or other real or personal properties which are necessary, convenient, or desirable appurtenances, such as but not limited to 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.

(12) HUD--The United States Department of Housing and Urban Development, or its successor.

(13) Local Units of Government--A county; an incorporated municipality; a special district; a council of governments; any

other legally constituted political subdivision of the state; a public, nonprofit housing finance corporation created under the Local Government Code, Chapter 394; or a combination of any of the entities described here.

(14) Low Income Persons and 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.

(15) Nonprofit Organization--Any public or private, 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; and

(C) has a tax exemption ruling from the Internal Revenue Service under the Internal Revenue Code of 1986, Section 501(c), as amended.

(16) NOFA--Notice of Funding Availability, published in the Texas Register.

(17) Person with Special Needs--

(A) persons with disabilities, persons with alcohol or other drug addictions, persons with HIV/AIDS and their families, the elderly, victims of domestic violence, persons living in colonias, and migrant farm workers; and

(B) any persons legally responsible for caring for an individual described by subparagraph (A) and meets the income guidelines of a person of low, very low or extremely low income.

(18) Public Agency--A branch of National, State or Local Government.

(19) Public Housing Authority--A housing authority established under the Texas Local Government Code, Chapter 392.

(20) Recipient--Community housing development organization, nonprofit organization, for profit entity, local unit of government, or public housing authority that is approved by the Department to receive and administer housing trust funds in accordance with these rules.

(21) Rental Housing Development--A project for the acquisition, new construction, reconstruction or rehabilitation of multifamily or single family rental housing, or conversion of commercial property to rental housing.

(22) Rural Project--An area that is located:

(A) outside the boundaries of a PMSA or MSA; or

(B) within the boundaries of a PMSA or MSA area, if the statistical area has a population of not more than 20,000, and does not share boundaries with an urbanized area; or

(C) in an area that is eligible for new construction or rehabilitation funding by TX-USDA-RHS.

(23) State--The State of Texas.

(24) Statute--Texas Government Code 2306.

(25) Very low Income Persons and Families--Families whose annual incomes do not exceed 60% of the median income of the area, as determined by HUD and published by the Department, with adjustments for family size.

*§51.4. Allocation of Housing Trust Funds.*

(a) Funds shall be allocated to achieve broad geographic dispersion by awarding funds in accordance with Section 2306.111(d) through (g), Texas Government Code.

(b) The Department shall utilize its best efforts to target housing trust funds allocated each fiscal year to housing assistance for individuals and families earning less than 60% of median family income.

(c) Bond indenture requirements governing expenditure of bond proceeds deposited in the housing trust fund shall govern and prevail over all other allocation requirements established in this section. However, the Department shall distribute these funds in accordance with the requirements of this section to the extent possible.

*§51.5. Basic Eligible Activities.*

The Department shall make grants and loans from the Housing Trust Fund to Eligible Applicants for purposes consistent with Section 51.2 of this title and Section 2306.202 of Texas Government Code.

*§51.6. Ineligible Activities and Restrictions.*

(a) Displacement of Existing Affordable Housing. Housing Trust Funds shall not be utilized on a development that has the effect of permanently displacing low, very low, and extremely low income persons and families. Residents of a development to be rehabilitated by Housing Trust Funds must be provided the opportunity to lease and occupy a comparable affordable dwelling unit in the development upon completion of the development. The landlord must provide all persons and families affected by the rehabilitation with:

(1) Notice in writing within a reasonable time indicating the right to remain in the dwelling unit or the need to relocate; and

(2) payment of the costs of temporary relocation, including moving costs and any increase in rent.

(b) If a Housing Trust Fund recipient violates the permanent dislocation provision of this subsection, that recipient risks loss of Housing Trust Funds and the landlord/developer must pay the affected tenant's costs and all moving expenses.

(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 this subsection. The Applicant or other person 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 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;

(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) Ineligible Applicants: The following violations will cause an Applicant, and any applications they have submitted, to be ineligible:

(1) Previously funded recipient(s) whose Housing Trust 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 threshold requirements described in this title, and the NOFA to which they are responding, and for which Administrative Deficiencies were unresolved;

(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.

(e) The Department will not recommend an application for funding if it includes a principal who is or has been:

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

(2) The subject of enforcement action under state or federal securities law, or is the subject of an enforcement proceeding with a state or federal agency or another governmental entity; or

(3) If the applicant has unresolved compliance or audit findings related to previous or current funding agreements with the Department.

(4) Has breached a contract with a public agency.

(f) Material Noncompliance. Each Application will be reviewed for its compliance history by the Department, consistent with Chapter 60 of this title. Applications found to be in Material Noncompliance, or otherwise violating the compliance rules of the Department, will be terminated.

(g) Rental Housing Development Site and Development Restrictions. The following restrictions apply to Rental Housing Developments only.

(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 above 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.

(3) Limitations on the Size of Developments. 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.

*§51.7. Application Procedure and Requirements.*

(a) In distributing funds, the Department will release a NOFA and/or request for proposals that identifies the uses of the available funds and the specific criteria that will be utilized in evaluating applicants.

(b) Applications containing false information and Applications not received by the deadline will be disqualified. Disqualified 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.

(c) 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 eight 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 ten 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.

(d) Rental Housing Developments will undergo a review as follows:

(1) Threshold Evaluation. Applications submitted for Rental Housing Developments will be required to comply with the threshold criteria required under Section 50.9(f) of this title, which are those required for the Housing Tax Credit Program.

(2) 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.

(3) 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. 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, Section 1.32 of this title.

(4) A site visit will be conducted. Applicants must receive recommendation for approval from the Department to be considered for funding by the Board.

(5) Each Rental Housing Development Application will be notified of their score in writing no later than seven 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 days prior to the Board meeting where the awards will be approved.

(6) Board approval for the award of Development activity funds is conditional upon a completed loan closing and any other conditions deemed necessary by the Department.

(e) Applications other that Rental Housing Developments will be reviewed and evaluated in accordance with the NOFA for that activity.

(f) Applicants may appeal staff's decisions regarding their applications consistent with Section 1.7 of this title.

(g) Alternative Dispute Resolution Policy. In accordance with Section 2306.082, Texas Government Code, it is the Department's policy to encourage the use of appropriate alternative dispute resolution procedures ("ADR") under the Governmental Dispute Resolution Act, Chapter 2009, Texas Government Code, to assist in resolving disputes under the Department's jurisdiction. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation and non-binding arbitration. Except as prohibited by the Department's ex parte communications policy, the Department encourages informal communications between Department staff and applicants, and other interested persons, to exchange information and informally resolve disputes. The Department also has administrative appeals processes to fairly and expeditiously resolve disputes. If at anytime an applicant or other person would like to engage the Department in an ADR process, the person may send a proposal to the Department's General Counsel and Dispute Resolution Coordinator. The proposal should describe the dispute and the details of the process proposed (including proposed participants, third party, when, where, procedure, and cost). The Department will evaluate whether the proposed process would fairly, expeditiously, and efficiently assist in resolving the dispute and promptly respond to the proposal.

*§51.8. Criteria for Funding.*

(a) In considering applications for funding, the Department considers the following requirements under Section 2306.203(c), Texas Government Code, and such others as may be enumerated during the funding cycle:

(1) Minimum Eligibility Criteria. To be considered for funding, an Applicant must first demonstrate that it meets each of the following threshold criteria:

(A) The application is consistent with the requirements established in this rule.

(B) The applicant provides evidence of its ability to carry out the proposal in the areas of financing, acquiring, rehabilitating, developing or managing affordable housing development.

(C) The proposal addresses and identifies a housing need. This assessment will be based on statistical data, surveys and other indicators of need as appropriate.

(2) Evaluation Factors. The criteria used to rank applications, as more fully reflected in the NOFA, will include at a minimum the:

(A) leveraging of federal funds including the extent to which the project will leverage State funds with other resources, including federal resources, and private sector funds;

(B) cost-effectiveness of a proposed development; and

(C) extent to which individuals and families of very low income and extremely low income are served by the development.

(b) The Board has final approval on all recommendations for funding.

(c) Eligible Applicants that have been approved for funding and that require a material change in the project description must provide a written request for the material change to the Department prior to implementing the change.

(1) A material change may include, but is not limited to, the following:

(A) Change in project site;

(B) Change in the number of units or set asides; and

(C) Increase in funding.

(2) Failure to comply with this subsection may result in the termination of funding to the applicant.

(d) The Executive Director of the Department may approve nonmaterial changes in the project description and in the scope of work to be performed for clarification and necessary administrative adjustments, provided that any such change does not increase the dollar amount of the original award of funds.

*§51.9. Other Program Requirements.*

(a) Employment opportunities. In connection with the planning and carrying out of any project assisted under the Act, to the greatest extent feasible, opportunities for training and employment shall be given to low, very low, and extremely low income persons residing within the area in which the project is located.

(b) Conflict of Interest.

(1) Conflict Prohibited. No person described in paragraph (2) of this subsection who exercises or has exercised any functions or responsibilities with respect to Housing Trust Fund activities under the Statute or who is in a position to participate in a decision making process or gain inside information with regard to such activities, may obtain a personal or financial interest or benefit from a Housing Trust Fund assisted activity, or have an interest in any Housing Trust Fund contract, subcontract or agreement or the proceeds hereunder, either for themselves or those with whom they have family or business ties, during their tenure or for one year thereafter.

(2) Persons Covered. The conflict of interest provisions of paragraph (1) of this subsection apply to any person who is an employee, agent, consultant, officer, elected official or appointed official of the Recipient.

(c) Right to Inspect and Monitor.

(1) The Department may, at any time, inspect and monitor the records and the work of the project so as to ascertain the level of project completion, quality of work performed, inventory levels of stored material, compliance with the approval plans and specifications, property standards, and program rules and requirements.

(2) Any unsatisfactory findings in the inspection may result in a reduction in the amount of funds requested or termination of funding.

(3) Within 45 days of completion of any construction, and before the release of any retainage funds, Recipients are required to notify the Department of the completion by submitting a certificate of completion and any other documents required by program guidelines, including, but not limited to, the following:

(A) Architect's Certification of Substantial Compliance;

(B) Recipient's Certificate of Substantial Completion; and

(C) Recipient's and supplier's Release of Lien and warrantee.

(4) The Department performs a final close-out visit and assists owners in preparing for long-term compliance requirements upon completion of project development.

(d) Compliance.

(1) Recipient must maintain compliance with each of its written agreements with the Department.

(2) Restrictions are stated and enforced through a regulatory agreement.

(3) These restrictions include, but are not limited to the following:

(A) Rent restrictions;

(B) Record keeping and reporting; and

(C) Income targeting of tenants.

(4) The Department monitors compliance with project restrictions and any other covenants by Recipient in any Housing Trust Fund agreement. An annual per unit compliance fee is charge for this review.

(5) Prior to the leasing of any units, project owners are provided guidance and training by the Department to assist project owners in adhering to restriction and reporting requirements.

(e) For funds being used for multifamily rental properties, the recipient must establish a reserve account consistent with Section 2306.186, Texas Government Code, and as further described in Chapter 60 of this title.

*§51.10. Citizen Participation.*

(a) The Department holds at least one public hearing annually, and additional public hearings prior to consideration of any proposed significant changes to these rules, to solicit comments from the public, eligible applicants, and Recipients on the Department's rule, guidelines, and procedures for the Housing Trust Fund.

(b) The Department considers the comments it receives at public hearings. The Board annually reviews the performance, administration, and implementation of the Housing Trust Fund in light of the comments it receives. The Board also reviews funding goals and set-asides relating to Allocation of Housing Trust Funds.

(c) Applications for Housing Trust Funds are public information and the Department shall afford the public an opportunity to comment on proposed housing applications prior to making awards.

(d) Complaints will be handled in accordance with the Department's complaint procedures of Section 1.2 of this title.

*§51.11. Records to be Maintained.*

(a) Recipients are required, at least on an annual basis, to submit to the Department information including, but not limited to:

(1) such information as may be necessary to determine whether a project is benefiting low, very low, and extremely low income persons and families;

(2) the monthly rent or mortgage payment for each dwelling unit in each structure assisted;

(3) such information as may be necessary to determine whether Recipients have carried out their housing activities in accordance with the requirements and primary objectives of the Housing Trust Fund and implementing regulations;

(4) The size and income of the household for each unit occupied by a low, very low, or extremely low income person or family;

(5) Data on the extent to which each racial and ethnic group and households have applied for and benefited from any project or activity funded in whole or in part with funds made available under the Statute. This data shall be updated annually; and

(6) A final statement of accounting upon completion of the project.

(b) Recipients shall maintain records pertinent to the tenant's files for a period of at least three years.

(c) Recipients shall maintain records pertinent to funding awards including but not limited to project costs and certification work papers for a period of at least five years.

(d) Recipient shall maintain records in an accessible location.

*§51.13. Waiver.*

The Board may, in its discretion, waive any one or more of the rules set forth in this chapter to accomplish its legislative mandates or for other compelling circumstances.

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 November 17, 2003.

TRD-200307890
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 7, 2003
Proposal publication date: September 26, 2003
For further information, please call: (512) 475-4595

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# CHAPTER 53. HOME INVESTMENT PARTNERSHIPS PROGRAM

**10 TAC §§53.50 - 53.56, 53.58, 53.60 - 53.63**

The Texas Department of Housing and Community Affairs (the Department) adopts, with changes, the amendment of §§53.50-53.56, 53.58, 53.60-53.63, concerning the HOME Investment Partnerships Program, as published in the August 29, 2003 issue of the *Texas Register* (28 TexReg 7138-7148).

These sections are adopted, with technical changes, in order to implement new legislation enacted by the 78th Legislative Session and to provide clarification.

On August 29, 2003, the proposed 2004 HOME Investment Partnerships (HOME) Program Rules were published in the Texas Register. The comment period commenced on August 29, 2003, and ended on October 10, 2003. In addition to publishing the document in the *Texas Register*, a copy of the HOME Rules was published on the Department's web site and was made available to the public upon request. The Department held thirteen public hearings across the state to gather feedback on the draft HOME Rules. The public was genuinely pleased with the draft HOME Rules and with the Department's efforts.

The Department received the majority of comments in writing by email, fax and mail. This memorandum provides the Department's response to all comments received. The comments and responses are divided into the following sections.

I. Substantive comments on the HOME Rules and Departmental response. (Comments and responses are presented in the order they appear in the HOME Rules.)

II. Non-substantive changes to the HOME Rules.

III. General HOME comments not related specifically to the HOME Rules and Departmental response.

IV. Technical Administrative Changes to HOME Rules.

I. SUBSTANTIVE COMMENTS ON THE HOME AND DEPARTMENTAL RESPONSE

§53.50- Scope

Comment: One comment requests that the scope of the HOME Rules be amended to conform to legislatively mandated purposes, with primary attention to rental housing. Comment proposed two additional clauses be added to the scope: "expand the supply of decent, safe, sanitary, and affordable housing with primary attention to rental housing, for very low-income and low-income households; and support the preservation of affordable housing by prioritizing available funding and financing resources for affordable housing preservation activities."

Department Response: The Department feels it important to support as many avenues of affordable housing available through HOME Program funds; the preservation, rehabilitation and construction of rental housing included. It is in the Department's best interest to support as many of these avenues as possible, and feels it inappropriate to single out any one Activity over another. No changes are recommended.

Board Response: Department's response accepted.

§53.51(1)-Proposed Definition of Activity

Comment: One comment suggests that under the definition for Activity, language be incorporated to include tenant-based rental assistance and pre-development loans as viable forms of an Activity. It is felt that this would further support the inclusion of these Activities as eligible under the HOME Program.

Department Response: The Department concurs that tenant-based rental assistance and pre-development loans are eligible Activities under the HOME Program. Staff interrupts the language "to provide incentives to develop and support affordable housing" to include rental subsidies and deposits and pre-development loans. Staff recommends no changes to the proposed definition, as eligible Activities, including Tenant-Based Rental Assistance and CHDO Pre-development Loans, are further outlined in §53.54.

Board Response: Department's response accepted.

§53.51-Proposed Definition of Activity Consultant

Comment: Comment was received to add a definition for Activity Consultant, meaning any person (whether natural or organization) with or without ownership interest in the Applicant, who provides services relating to the filing of the application or the fulfillment of the Activity.

Department Response: The Department feels the addition of the definition of Activity Consultant is not appropriate, as the term is not referred to in the rules. No changes are recommended.

Board Response: Department's response accepted.

§53.51(6)- Proposed Definition of Colonia

Comment: One comment suggests the definition of colonia be consistent with all other affordable housing programs administered by TDHCA.

Department Response: Staff agrees definitions should be consistent with all programs administered by the Department when possible. Staff concurs with the proposed language noted below.

§53.51(6) Colonia-A geographic area located in a county some part of which is within 150 miles of the international border of this state 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.

Board Response: Department's response accepted.

§53.51(9) - Proposed Definition of Demonstration Fund

Comment: Comment provided requests the language deleted from the definition of demonstration fund regarding the use of the Housing Tax Credit Program with HOME funds be reinstated. In the past, coupling HOME funds with the tax credit program has

been one of the best avenues for the Department to preserve existing affordable housing.

Department Response: The Department agrees that coupling HOME funds with other program funding, including the Housing Tax Credit Program, is always encouraged. Although the specific language stating the use of the Housing Tax Credit Program has been deleted, the use of such funding in conjunction with HOME funds is not ineligible. Staff feels it is not necessary to list every program eligible to be used in combination with HOME funds, and proposes no changes.

Board Response: Department's response accepted.

§53.51(21) - Proposed Definition of NOFA

Comment: Comment provided proposes the definition of NOFA be expanded to require the NOFA to be posted on the Department website in addition to publication in the *Texas Register*. (4) Comment was also received requesting that NOFAs be published 90 to 120 days before application deadlines.

Department Response: The Department does currently post all Notices of Funding Availability on the Department website, and does not feel it necessary to incorporate into the definition. The Department realizes that application preparation requires extensive time, thought and planning. Developing a viable project can begin well before applications, or even NOFAs, are released. It is up to each program area to insure that ample time is given to Applicants to successfully develop and complete applications. No changes are recommended.

Board Response: Department's response accepted.

§53.51-Proposed Definition of CHDO Pre-Development Loans

Comment: Several comments propose including a definition for CHDO Pre-Development Loans. In accordance with 24 CFR 92.301(a)(1), funds may be used to provide technical assistance and site control loans to Community Housing Development Organizations in the early stages of the site development for an eligible project. In accordance with 24 CFR 92.301(a)(2), a loan may cover project costs necessary to determine project feasibility (including costs of an initial feasibility study), consulting fees, costs of preliminary financial applications, legal fees, architectural fees, engineering fees, engagement of a development team, option to acquire property, site control and title clearance. In accordance with 24 CFR 92.301(b)(1), loans may cover preconstruction project costs that a participating jurisdiction determines to be customary and reasonable, including but not limited to the costs of obtaining firm construction loan commitments, architectural plans and specifications, zoning approvals, engineering studies, and legal fees.

Department Response: The Department is in agreement that a definition for CHDO Pre-Development Loans should be included and is noted below.

§53.51(8) Community Housing Development Organization Pre-Development Loan-A form of assistance in which funds are made available as loans to cover those costs outlined in 24 CFR 92.301.

Board Response: Department's response accepted.

§53.51(35) - Proposed Definition of Tenant-Based Rental Assistance

Comment: Comment was received that the last sentence of the definition for tenant-based rental assistance read "Tenant-based rental assistance also includes security deposits for the rental of dwelling units, and utility deposits for electric, gas, water, and trash services." (1) It was also suggested that language be included stating the Department may not implement a tenant-based rental assistance program unless compliance with 42 USC 12742(3) and 24 CFR 92.209(b) are met.

Department Response: Staff agrees the definition for tenant based rental assistance should be expanded to include the use of funds for utility deposits. The proposed language is recommended below. In regard to 42 USC 12742(3) and 24 CFR 92.209(b), the Department has included the required certification in the proposed Consolidated Plan to be submitted to the U.S. Department of Housing and Urban Development (HUD). Tenant-based rental assistance is an essential element of Texas' annual housing strategy for expanding the supply, affordability, and availability of decent, safe, sanitary, and affordable housing. Those funds allocated for tenant based rental assistance in recent program years have been awarded, responding to this need. No other changes are recommended other than those outlined below.

§53.51(35) Tenant-Based Rental Assistance (TBRA)-A form of rental assistance 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 and utility deposits and allowances for rental of dwelling units.

Board Response: Department's response accepted.

§53.52(c) (1)- Restrictions on Communication

Comment: One comment requests including person(s) or a business organization authorized by the Applicant to prepare an application on behalf of the Applicant as parties restricted from communicating with a Board member during the period of time starting with the time an application is submitted until the Board makes a final decision with respect to any approval of applications.

Department Response: Any person or business organization authorized by the Applicant to prepare an application on behalf of the Applicant is restricted from communicating with a Board member during the period of time an application is submitted until final Board approval given the proposed language per this section. Staff feels that no further clarification is necessary with respect to communication with the Board. To offer clarification and consistency among all Department Rules, Staff proposes new language in regard to communication with Department staff.

§53.52(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 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 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 application so long as that communication satisfies the conditions established under subparagraphs (A) through (E) of this paragraph. Communications 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.

Board Response: Department's response accepted.

§53.52(e)(2)(F)- Rental Housing Development Site and Development Restrictions

Comment: Comments received suggest that the restriction on developments in which more than 40% of the total units have the same number of bedrooms severely impacts the ability of the development community to preserve existing multifamily developments in Texas.

Department Response: Staff concurs that the restriction may impact the ability to preserve multifamily developments and recommends that the section be removed entirely.

Board Response: Department's response accepted.

§53.52(e)(3)(A)(B)- Rental Housing Development Site and Development Restrictions

Comment: Comments suggest that the 16 unit limit requirement is too restrictive for the disability community and consumer control movement and that the 250 unit maximum should be reduced to 76 units to be consistent with the QAP. Comments also request the explicit ability to develop scattered site developments.

Department Response: The HOME rule does not prohibit scattered site developments therefore there are no revisions necessary. Staff concurs that the 16 unit restriction may limit HOME and recommends that the section be removed entirely, however, if HOME funds are used in conjunction with Housing Tax Credits the development will be limited to the Housing Tax Credit restrictions for development size. The Department does not concur with the comment to reduce the 250 unit maximum to 76 units because it limits the utilization of HOME funds in participating jurisdictions.

§53.52(e)(3) Limitations on the Size of Developments.

Developments involving new construction will be limited to 250 Units. These maximum Unit limitations also apply to those Developments that consist solely of acquisition/rehabilitation or rehabilitation only may exceed the maximum Unit restrictions.

Board Response: Department's response accepted.

§53.52(h)- Rental Housing Development Site and Development Restrictions

Comment: One comment suggests that staff revise the language in this section to reflect the compromise that was drafted by the Legislature to create and fund reserve accounts for multifamily housing when the Department is the first lien holder and when a reserve account is not required.

Department Response: The proposed rule is consistent with §2306.186 as revised by SB264, 78th Legislature, Regular Session. No change is recommended.

Board Response: Department's response accepted.

§53.53- Application Limitations

Comment: Several comments were received requesting a new language be included stating the award amount for CHDO Pre-Development Loans not exceed $50,000.00, except as may otherwise allowed by the Board.

Department Response: The Department does not currently have the policies and procedures for awarding CHDO Pre-Development funds. It is the Department's desire for such an initiative to be introduced in future funding years. No funds will be awarded for CHDO Pre-Development Loans given that the proposed 2004 State of Texas Consolidated Plan One-Year Action Plan does not allocate funding for this Activity, and thus no maximum award necessary. No changes are recommended.

Board Response: Department's response accepted.

§53.53(1)- Application Limitations

Comment: Comment suggested amending to provide that the Department shall not award more than $3.0 million to applications employing or using the same consultant or affiliate of such a consultant.

Department Response: The Department feels that Applicants should not be penalized for utilizing consulting services if they so desire. Regardless, no one application may be awarded more than $500,000 per activity under this section. The maximum that any one Applicant can be awarded in project dollars, even if awarded funds for all three activities, is $1.5 million. No changes are recommended.

Board Response: Department's response accepted.

§53.53(2) Application Limitations

Comment: Comment suggests the Department increase the maximum award amount of HOME funds to $3.0 million in order to adequately serve small towns and rural areas with projects that can support the private debt and HOME loan.

Department Response: Staff does not agree with the proposed change to increase the maximum award amount to $3.0 million to encourage dispersion of funds and leveraging. Staff is already proposing to increase the maximum amount to $1.5 million as recommended by the HOME roundtable group. No additional change is necessary.

Board Response: Department's response accepted.

§53.54(d) -Tenant-Based Rental Assistance

Comment: Comment proposed including the following sentence, "Tenants must participate in a self-sufficiency program as a condition for receipt of rental assistance."

Department Response: A self-sufficiency plan is not required by either State or Federal rules. It is at the Department's discretion as to make this a mandatory requirement. All requirements, other than those required of by State or Federal rules, are clearly outlined in Notices of Funding Availability and in application materials. No changes are recommended.

Board Response: Department's response accepted.

§53.54(f)-CHDO Pre-Development Loans

Comment: Comment was received by several entities requesting the Department to award Pre-Development Loans to CHDOs in a separate funding cycle, and at least four months prior to the beginning of the Rental Housing Development funding cycle. It is believed that this will enable CHDOs to obtain the necessary financing and time required to complete the market analysis report and the Environmental Site Assessment. (1, 2, 3) One comment received recommends that the waiver of CHDO Pre-Development Loans be contingent not only on factors being beyond the control of the CHDO but also not reasonably foreseen at the time of application. It was expressed that the Department should not waive repayment if the event that caused the inability to repay was reasonably foreseeable at the time the application was submitted.

Department Response: The Department does not currently award CHDO Pre-Development Loans, but have incorporated language allowing the flexibility to initiate such an Activity in future funding years. The Department will consider the comment received when doing so. Given the possibility of initiating open funding rounds, it would not be prudent to establish fixed parameters for such a funding round. Regarding the repayment waiver, the Department will only waive repayment if it is determined that the impediments were beyond the control of the CHDO per 24 CFR 92.301(b)(3). No changes are recommended.

Board Response: Department's response accepted.

§53.56- Distribution of Funds

Comment: One comment proposes modifying the last sentence of the first paragraph of this section to read, "All funds not set-aside under this subsection may be used for the benefit of persons with Special Needs who live in areas other than nonparticipating jurisdictions."(1) Another comment provided requests that 100% of HOME funds be allocated to nonparticipating jurisdictions, given that §2306.111(c) requires that the Department allocate at least 95% of funds to nonparticipating jurisdictions.

Department Response: §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. It specifically states that 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. It is important to note that persons with disabilities are part of the Special Needs population, but not all Special Needs populations are disabled. The Department would not be in compliance with this legislative mandate if the language were to reflect Special Needs as proposed. Regarding giving 100% of HOME Program funds to nonparticipating jurisdictions, the Department's decision to allow up to 5% of funds to be awarded in participating jurisdictions where projects will be serving persons with disabilities will be retained. It has been shown that much of the disabled population and those services necessary to aid this population are located in the areas with participating jurisdiction status. No changes are recommended.

Board Response: Department's response accepted.

§53.56(5) - CHDO Operating Expenses

Comment: Comments were received requesting applicants be allowed to receive CHDO Operating Funds even if the Applicant has not been awarded HOME awards for Development Activities.

Department Response: The proposed 2004 State of Texas Consolidated Plan One-Year Action Plan does not allocate CHDO Operating Funds for those Applicants that do not receive HOME awards for specific Activities. No changes are recommended.

Board Response: Department's response accepted.

§53.58(b) - Administrative Deficiencies

Comment: One comment proposes modifying the first sentence to state if an application contains deficiencies in a non-threshold or non-scoring section of the application, rather than including both threshold and/or scoring documentation, then the Department may request clarification or correction of such Administrative Deficiencies. (1) Comment suggests that, while it is understandable that administrative deficiencies need to be corrected quickly, it is burdensome to require the developer to wait up to 2 months for a deficiency letter and then have a very limited turn-around time. It is requested that the Department allow 10 days rather than 5 to correct a deficiency, which will allow a prompt response to any deficiencies while not expecting the developer to wait for the deficiency letter for extended periods.

Department Response: The Department feels the language proposed needs no alteration in regard to including threshold and/or scoring documentation clarification. The Administrative Deficiencies' subsection has been proposed to offer equality among the review process, and insures that every Applicant receives fair and equitable consideration. However, Staff recommends the suggested extension of the deficiency time period up to ten days in an effort to decrease the burden on the Applicant during the application process. See new language proposed.

§53.58(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. 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 eight 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 ten 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.

Board Response: Department's response accepted.

§53.58 Application Process to add subsection on Alternative Dispute Resolution Policy

Comment: During public comment on the Department's proposed 2004 Qualified Allocation Plan and Rules, the Texas Affordable Housing Congress suggested that ADR procedures be added at several points in all Department Rules.

Department Response: As enacted by the 78th Legislature in SB 264, §2306.082, Texas Government Code, requires the Department to develop and implement a policy to encourage the use of appropriate alternative dispute resolution procedures to assist in the resolution of disputes under the Department's jurisdiction. As one step in implementing the ADR policy called for by §2306.082, staff recommends the addition of the following new language to §53.58 of the proposed rule.

§53.58(c) Alternative Dispute Resolution Policy: In accordance with §2306.082, Texas Government Code, it is the Department's policy to encourage the use of appropriate alternative dispute resolution procedures ("ADR") under the Governmental Dispute Resolution Act, Chapter 2009, Texas Government Code, to assist in resolving disputes under the Department's jurisdiction. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation and nonbinding arbitration. Except as prohibited by the Department's ex parte communications policy, the Department encourages informal communications between Department staff and applicants, and other interested persons, to exchange information and informally resolve disputes. The Department also has administrative appeals processes to fairly and expeditiously resolve disputes. If at anytime an applicant or other person would like to engage the Department in an ADR process, the person may send a proposal to the Department's General Counsel and Dispute Resolution Coordinator. The proposal should describe the dispute and the details of the process proposed (including proposed participants, third party, when, where, procedure, and cost). The Department will evaluate whether the proposed process would fairly, expeditiously, and efficiently assist in resolving the dispute and promptly respond to the proposal.

Board Response: Department's response accepted.

II: NON-SUBSTANTIVE COMMENTS ON THE HOME RULES AND DEPARTMENTAL RESPONSE

From public comment, and staff review, grammatical and typographical errors were identified. Corrections of these items were made to ensure that the document is as complete and accurate as possible. These corrections appear in the revised HOME Rules that accompanies this memorandum.

§53.51(30) - Proposed Definition of Rural Area

Comment: One comment urges the Department to offer clarification on the acronyms PMSA and MSA.

Department Response: The Department is in agreement that the acronyms PMSA and MSA should be clarified. Note that in addition to the language change below, additional clarification has been supplied for Rural Housing Services:

§53.51(30) Rural Area--A project located within an area which:

(A) is situated outside the boundaries of a primary metropolitan statistical area (PMSA) or a metropolitan statistical area (MSA);

(B) within the boundaries of a primary metropolitan statistical area (PMSA) or a metropolitan statistical area (MSA), 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 funding by the Texas-United States Department of Agriculture-Rural Housing Services (TX-USDA-RHS).

Board Response: Department's response accepted.

III. GENERAL HOME COMMENTS NOT RELATED SPECIFICALLY TO THE HOME RULES AND DEPARTMENTAL RESPONSE

Conflict of Interest

Comment: Comment received requested incorporating Policy Issuance No. 03-01 pertaining to Conflict of Interest into the rules. The inclusion of this issuance would further clarify the prohibited conflicts, person covered, and exceptions to the conflict of interest provisions.

Department Response: The Department issued this issuance to update the HOME Policy and Procedures Manual. The Department does not feel it necessary to incorporate in the Rules, as it is covered in all funding agreements between the Applicant and Department.

Board Response: Department's response accepted.

Capacity Building

Comment: Comment was received suggesting that the Department consider using HOME funds to establish a capacity building program. Comment encourages the Department to structure this program to target organizations that might reasonably be expected to develop as successful Applicants for HOME Investment Partnerships Program funds.

Department Response: The Department realizes the need for capacity building assistance, especially for those nonprofits beginning efforts to supply affordable housing in their respective communities. Although no funding will be awarded for such a program in the proposed 2004 State of Texas Consolidated Plan One Year Action Plan, the Department is working diligently to establish the possibility of such a program in future funding years.

Board Response: Department's response accepted.

Administrative Funds

Comment: Comment urges the Department to closely observe the Set-Aside of Tenant-Based Rental Assistance for individuals affected by the *Olmstead* decision and other set-asides that benefit people with disabilities. It is asked that the Department seek innovative processes that will broaden the scope of people with disabilities who will request access to assistance. It has been expressed that the funding involves a meager administrative fee, coupled with a reimbursement process. As a result, many community based organizations cannot compete for contracts.

Department Response: The Department appreciates all input in regard to program administration. It is the Department's desire to serve all citizens of Texas, including those of the disability population. The Department is awarding applications for Tenant-Based Rental Assistance for those persons affected by the *Olmstead* decision for the first time. Staff has worked closely with advocates of this population to ensure proper execution of this set-aside. Realizing the higher expenses incurred by taking on a program of this nature, the amount of administrative funds

awarded was increased from 4% of the project request, to 6% of the project request. Staff will continue to carefully review and monitor this set-aside, however, and look for inadequacies and areas of possible improvement.

Board Response: Department's response accepted.

IV. TECHNICAL ADMINISTRATIVE CHANGES TO THE HOME RULES

§53.54(c) Rental Housing Development Based on frequent requests for such a funding source, Staff proposes to add language to §53.54(c) Rental Housing Development, to allow new construction as an eligible activity for non-CHDO applicants in the HOME program:

§53.54(c) Rental Housing Development: All eligible applicants that satisfy the requirements of §53.52 of this title may develop affordable rental housing. Eligible activities include acquisition, new construction, and rehabilitation. Owners of rental units assisted with HOME funds must comply with income and rent restrictions pursuant to 24 CFR 92.252 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 codes and standards, as specified in the application guide. 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).

Board Response: Department's response accepted.

§53.60(b)(2) Selection Procedures for Non-Development Activities In an effort to more efficiently award funds, the Department anticipates open funding cycles. Staff requests language be stricken and new proposed language added to §53.60 (b)(2).

§53.60(b)(2) Applications are ranked from highest scores to lowest scores in their respective regions or Activity according to HOME Program scores. All funds not subject to the Regional Allocation Formula may be awarded on a first-come, first-serve basis.

Board Response: Department's response accepted.

The amendment is adopted pursuant to the authority of the Texas Government Code, Chapter 2306.

*§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) 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) and HUD regulations at 24 Code of Federal Regulations (CFR) Part 92. 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) focus on the areas with the greatest housing need described in the State Consolidated Plan;

(3) provide funds for home ownership and rental housing through acquisition, new construction, rehabilitation, reconstruction, tenant-based rental assistance, and pre-development loans;

(4) promote partnerships among all levels of government and the private sector, including non-profit and for-profit organizations; and

(5) 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) Board--The governing board of the Texas Department of Housing and Community Affairs.

(5) CFR--Code of Federal Regulations.

(6) Colonia--A geographic area located in a county some part of which is within 150 miles of the international border of this state 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.

(7) Community Housing Development Organization (CHDO)--A private nonprofit organization that satisfies the requirements of 24 CFR 92.2 and is certified as such by the Department.

(8) Community Housing Development Organization Pre-Development Loan-A form of assistance in which funds are made available as loans to cover those costs outlined in 24 CFR 92.301.

(9) Consolidated Plan--The State Consolidated Plan prepared in accordance with 24 CFR Part 91, 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.

(10) 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, as approved by the Board.

(11) Department--The Texas Department of Housing and Community Affairs.

(12) 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.

(13) Expenditure--Approved expense evidenced by documentation submitted by the Recipient to the Department for purposes

of drawing funds from HUD's IDIS for work completed, inspected and certified as complete, and as otherwise required by the Department.

(14) 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.

(15) Homebuyer Assistance--Down payment and closing costs assistance provided to eligible homebuyers.

(16) HOME--The HOME Investment Partnerships Program at 42 United States Code §§12701-12839 and the regulations promulgated thereafter at 24 CFR Part 92.

(17) Household--One or more persons occupying a housing unit.

(18) HUD--The United States Department of Housing and Urban Development, or its successor.

(19) IDIS--Integrated Disbursement and Information System established by HUD.

(20) 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.

(21) Match--Eligible forms of non-federal contributions to a program or project in the forms specified in 24 CFR 92.220.

(22) NOFA--Notice of Funding Availability, published in the *Texas Register*.

(23) 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.

(24) Owner-Occupied Housing Assistance--A form of assistance for the purpose of rehabilitating or reconstructing existing owner-occupied housing.

(25) Participating Jurisdiction (PJ)--Any state or unit of general local government, including consortia as specified in 24 CFR 92.101, designated by HUD in accordance with 24 CFR 92.105.

(26) Program--Funds provided in the form of a contract to an eligible Applicant for the purpose of administering more than one Project or assisting more than one household.

(27) 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 92.2.

(28) 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 92.2.

(29) 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.

(30) Rental Housing Development--A project for the acquisition, new construction, reconstruction or rehabilitation of multifamily or single family rental housing, or conversion of commercial property to rental housing.

(31) Rural Area--A project located within an area which:

(A) is situated outside the boundaries of a primary metropolitan statistical area (PMSA) or a metropolitan statistical area (MSA);

(B) within the boundaries of a primary metropolitan statistical area (PMSA) or a metropolitan statistical area (MSA), 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 funding by the Texas-United States Department of Agriculture-Rural Housing Service (TX-USDA-RHS).

(32) 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.

(33) Special Needs--Those individuals or categories of individuals determined by the Department to have unmet housing needs consistent with 42 USC §12701 et seq. and as provided in the Consolidated Plan.

(34) State Recipient--A unit of general local government designated by the Department to receive HOME funds.

(35) 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.

(36) Tenant--Based Rental Assistance (TBRA)--A form of rental assistance 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 and utility deposits and allowances for rental of dwelling units.

(37) 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 92.101 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.

*§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 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:

(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 title 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 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 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 application 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. 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 paragraph 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.

(3) Limitations on the Size of Developments. 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) Eligibility requirements. An 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/or 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 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.

*§53.53. Application Limitations*

An eligible 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 feasibility, underwriting analysis, or availability of funds:

(1) Award amount for Owner-Occupied Housing Assistance, Homebuyer Assistance, and Tenant-Based Rental Assistance shall not exceed $500,000 per Activity, except as may be otherwise allowed by the Board.

(2) Award amount for Development activities shall not exceed $1.5 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) 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*

(a) Owner-Occupied Housing Assistance: Assisted homeowners must be income eligible and must occupy the property as their principal residence. Housing assisted with HOME funds must meet all applicable codes and standards, as specified in the application guide. 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).

(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 allowed by the Board.

(c) Rental Housing Development: All eligible applicants that satisfy the requirements of §53.52 of this title may develop affordable rental housing. Eligible Activities include acquisition, new construction, and rehabilitation. Owners of rental units assisted with HOME funds must comply with income and rent restrictions pursuant to 24 CFR 92.252 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 codes and standards, as specified in the application guide. 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).

(d) Tenant-Based Rental Assistance: Recipients must comply with 24 CFR 92.209 and 92.216.

(e) Single Family Housing Development: Newly constructed housing must meet all applicable codes and standards, as specified in the application guide. 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 that applies for Single Family Housing Development 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). Funds for pre-development loans are available only when provided in conjunction with a 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, 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, 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;

(7) provide assistance to a project previously assisted with HOME funds during the period of affordability;

(8) provide funds to reimburse an Applicant for acquisition costs for a property already owned by the 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), the Department makes 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 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.

(1) CHDO Set-Aside. In accordance with 24 CFR 92.300, not less than 15% of the HOME allocation will be set aside by the Department for CHDO eligible activities. 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. . 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, 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. 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 subsection regarding Redistribution.

(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) 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 its own discretion, to other regions or activities if:

(A) the Department fails to receive a sufficient number of applications from a particular region or Activity;

(B) no applications are submitted for a region; or

(C) applications for a region or Activity do not meet eligibility requirements or minimum threshold scores (when applicable), or are financially infeasible as applicable.

(7) Marginal Applications. When the remainder of the allocation within a region is insufficient to completely fund the next ranked application in the region or 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;

(B) make necessary adjustments to fully fund the application; or

(C) transfer the remaining funds to other regions or activities.

(8) 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. Applications containing false information and applications not received by the deadline will be disqualified. Disqualified 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 eight 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 ten 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.

(c) Alternative Dispute Resolution Policy. In accordance with §2306.082, Texas Government Code, it is the Department's policy to encourage the use of appropriate alternative dispute resolution procedures ("ADR") under the Governmental Dispute Resolution Act, Chapter 2009, Texas Government Code, to assist in resolving disputes under the Department's jurisdiction. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation and nonbinding arbitration. Except as prohibited by the Department's ex parte communications policy, the Department encourages informal communications between Department staff and applicants, and other interested persons, to exchange information and informally resolve disputes. The Department also has administrative appeals processes to fairly and expeditiously resolve disputes. If at anytime an applicant or other person would like to engage the Department in an ADR process, the person may send a proposal to the Department's General Counsel and Dispute Resolution Coordinator. The proposal should describe the dispute and the details of the process proposed (including proposed participants, third party, when, where, procedure, and cost). The Department will evaluate whether the proposed process would fairly, expeditiously, and efficiently assist in resolving the dispute and promptly respond to the proposal.

*§53.60. Process for Awards.*

(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 must comply with all applicable HOME requirements or regulations established in 24 CFR Part 92 and in these rules. Applications that do not comply with such requirements are disqualified. Disqualified Applicants are notified in writing.

(2) Applications are ranked from highest scores to lowest in their respective regions or Activity according to HOME Program scores. All funds not subject to the Regional Allocation Formula may be awarded on a first-come, first-serve 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.

(5) Applicants will be notified at least 7 calendar days prior to the date of the Board meeting of the status of their application.

(6) Applications receiving a favorable staff recommendation are then presented to the Board for approval, pending the availability of HOME funds for each Activity.

(c) Selection Procedures for Development activities, such as, Single Family Housing Development and Rental Housing Development.

(1) Applications must comply with all applicable HOME requirements or regulations established in 24 CFR Part 92, and in these rules. Applications that do not comply with HOME requirements are disqualified. Disqualified 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, 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.

(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 the subparagraph of this paragraph 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) Applications meeting the HOME Program requirements established in subparagraph (A) of this paragraph must receive an underwriting analysis by the Department.

(4) A site visit will be conducted as part of the HOME Program Development feasibility. Applicants must receive recommendation for approval from the Department to be considered for HOME funding by the Board.

(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) Applications receiving a favorable staff recommendation are then presented to the Board for approval, pending the availability of HOME funds for such Activity.

(8) Board approval for the award of HOME 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 following criteria are utilized in evaluating the applications for HOME funds. The applicable criteria are 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 has the capacity to administer and manage the proposed program/project, demonstrated through previous experience either by the 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 has the capability to manage financial resources, as evidenced by previous experience, documentation of the 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.

*§53.62. Program Administration.*

(a) Agreement. Upon approval by the Board, 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 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, or these rules.

(G) Recipient declines funds.

(H) Recipient fails to expend all funds awarded.

(2) 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:

(A) Successful appeals (as allowable under program rules and regulations), or

(B) Disaster Relief (disaster declarations or documented extenuating circumstances such as imminent threat to health and safety), or

(C) Special Needs, or

(D) Colonias, or

(E) Other projects/uses as determined by the Executive Director and/or Board including the next year's funding cycle for each respective program.

(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 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/nonprofit 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 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 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 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 November 17, 2003.

TRD-200307877
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 7, 2003
Proposal publication date: August 29, 2003
For further information, please call: (512) 475-4595

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**10 TAC §53.59**

The Texas Department of Housing and Community Affairs (the Department) adopts the repeal of §53.59, concerning Process for Direct Awards without changes to the proposal as published in the August 29, 2003, issue of the *Texas Register* (28 TexReg 7148-7149).

This section is repealed in order for the Department to implement legislation enacted by the 78th Legislative Session and to provide clarification.

No comments were received regarding adoption of the repeal.

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

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 November 14, 2003.

TRD-200307868
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 4, 2003
Proposal publication date: August 29, 2003
For further information, please call: (512) 475-4595

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## CHAPTER 60. COMPLIANCE ADMINISTRATION

## SUBCHAPTER A. COMPLIANCE MONITORING AND ASSET MANAGEMENT

**10 TAC §60.1**

The Texas Department of Housing and Community Affairs (the Department) adopts, with changes, the proposed new §60.1, concerning Compliance Administration, as published in the September 26, 2003, issue of the *Texas Register* (28 TexReg 8235).

The section is adopted, with technical changes, in order to implement new legislation enacted by the 78th Legislative Session.

The scope of the public comment concerning the Compliance Monitoring Policies and Procedures pertains to the following section:

SUMMARY OF COMMENTS RECEIVED UPON PUBLICATION OF THE PROPOSED RULE IN THE *TEXAS REGISTER* AND COMMENTS PROVIDED AT PUBLIC HEARINGS HELD BY THE DEPARTMENT ON ITEMS THAT RELATE DIRECTLY TO COMPLIANCE MONITORING POLICIES AND PROCEDURES.

§60.1. Compliance Monitoring Policies and Procedures.

Comment concerning §60.1(f): Comment was received that the rule should comply with §2306.186, Government Code, to exempt from the reserve account requirement those developments required to maintain a reserve account under any other provision of federal or state law.

Department Response: The rule does comply with the §2306.186 exemption (see §60.1(f)(11)). No change is recommended.

Board Response: Board accepts Department's response.

Comment concerning §60.1(v): As enacted by the 78th Legislature in Senate Bill 264, §2306.082, Texas Government Code, requires the Department to develop and implement a policy to encourage the use of appropriate alternative dispute resolution procedures to assist in the resolution of disputes under the Department's jurisdiction. Also, during public comment on the Deparment's proposed 2004 Qualified Allocation Plan and Rules, the

Texas Affordable Housing Congress suggested that ADR procedures be added at several points in the QAP. As one step in implementing the ADR policy called for by §2306.082, staff recommends the addition of the following paragraph to the proposed rule.

Department Response: Staff concurs with this recommendation.

"Alternative Dispute Resolution Policy. In accordance with §2306.082, Texas Government Code, it is the Department's policy to encourage the use of appropriate alternative dispute resolution procedures ("ADR") under the Governmental Dispute Resolution Act, Chapter 2009, Texas Government Code, to assist in resolving disputes under the Department's jurisdiction. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation and nonbinding arbitration. Except as prohibited by the Department's ex parte communications policy, the Department encourages informal communications between Department staff and applicants, and other interested persons, to exchange information and expeditiously resolve disputes. If at anytime an applicant or other person would like to engage the Department in an ADR process, the person may send a proposal to the Department's Counsel and Dispute Resolution Coordinator. The proposal should describe the dispute and the details of the process proposed (including proposed participants, third party, when, where, procedure, and cost). The Department will evaluate whether the proposed process would fairly, expeditiously, and efficiently assist in resolving the dispute and promptly respond to the proposal."

Board Response: Board accepts Department's response.

Comment: The Department should infuse information relating to the legal requirements for accessibility throughout appropriate compliance monitoring documents, trainings and procedures.

Department Response: Compliance with civil rights protections, program rules and building standards that ensure accessibility of housing to people with disabilities is monitored by the Department. The Department will continue to include information relating to the legal requirements for accessibility throughout appropriate compliance monitoring documents, trainings, and procedures.

Board Response: Board accepts Department's response.

The new section is adopted pursuant to the authority of the Texas Government Code, Chapter 2306.

*§60.1. Compliance Monitoring Policies and Procedures.*

(a) Purpose. The Department monitors rental developments receiving assistance from the Department, including Low Income Tax Credits, during the construction period and continuing to the end of the long term Affordability Period. The compliance division monitors to ensure owners comply with the program rules and regulations, §2306, the LURA requirements and any conditions and representations imposed by the application or award of funds. Compliance processes, eligibility procedures, forms, and further programmatic details are set out in the individual program regulations and Owner's Compliance Manuals prepared by the Department's Compliance Division, as amended from time to time. The rules under this section address processes, reports and records that may be required by the Department to enable the Department to monitor a Development for violations of the program's federal and state rules and regulations. These rules do not address forms and other records that may be required of Development Owners by the IRS or other governmental entities more generally, whether for purposes of filing annual returns or supporting Development Owner tax positions during an IRS or other governmental audit.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Affordability Period. The affordability period commences on the effective date of the Land Use Restriction Agreement or the first day of the compliance period as defined by §42 and continues though the appropriate program's affordability requirements or termination of LURA which ever is later. The term of the affordability period shall be imposed by deed restriction and may be terminated upon foreclosure. During this period the Department shall monitor to ensure compliance with programmatic rules, regulations and application representations.

(2) Board means the governing board of the Texas Department of Housing and Community Affairs.

(3) Department means the Texas Department of Housing and Community Affairs.

(4) Low Income Unit means a unit that complies with the income restrictions or occupancy requirements of the housing programs administered by the Department.

(5) Material Non-Compliance. A property located within the state of Texas and monitored by the Department 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 material non-compliance provisions and methodology and point system of this title. The Low Income Housing Tax Credit compliance status score prevails for developments layered with more than one Department program.

(c) Construction inspections. 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 funded by the Department including Low Income Tax Credits. 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 the reports. The Department may provide those inspectors for the lenders and/or syndicator with required documentation to be completed that will confirm satisfaction of the requirements of this rule. The Applicant 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. In addition, if necessary, the Department may inspect or obtain a Third-Party inspection for purposes of monitoring during the construction phase. 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. 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. (§2306.081)

(d) On-going monitoring. During the Affordability Period, the Department will monitor compliance with all representations made by the Development Owner in the Application and in the LURA, whether required by the applicable program rules, regulations, including HOME Final Rule, §42 of the Internal Revenue Code, Treasury Regulations or other rulings of the IRS, Community Planning and Development (CPD) Notices, Chapter 51 of this title or undertaken by the Development Owner in response to Department requirements or criteria.

(e) Compliance history. Prior to Board approval of any project application, the compliance division shall assess the compliance history of the applicant and any affiliate of the applicant with respect to all applicable requirements pursuant to §2306.057 of Texas Government Code. The compliance division will provide the Board:

(1) the compliance history of the applicant and any affiliate of the applicant with respect to all applicable requirements;

(2) the compliance issues associated with the proposed project;

(3) a written report regarding the results of the assessments; and

(4) the board shall fully document and disclose any instances in which the board approves a project application despite any non-compliance associated with the project, applicant, or affiliate.

(f) Reserve deposits. The Department will ensure that, for multifamily rental housing developments funded through loans, grants, or tax credit, the owner keeps the rents affordable for low income residents for the longest period that is economically feasible and provides regular maintenance to keep the development sanitary, safe and decent and otherwise complies with the requirements of §2306.186. The Department shall monitor to ensure compliance with this subsection.

(1) Rental developments that receive financial assistance including low income housing tax credits from the Texas Department of Housing and Community Affairs on or after January 1, 2004, are required to comply with this subsection. Only those rental developments that receive financial assistance including tax credits or where the Department is the first lien lender that contains 25 or more rental units shall deposit annually into a reserve account:

(A) for year 2004 and each subsequent year not less than $150 per unit for units one to five years old; and

(B) not less than $200 per unit for units six or more years old.

(2) With respect to multifamily rental developments, if the reserve fund has not been established by the first lien lender, the Development Owner shall set aside the repair reserves amount as a reserve for capital improvements. The reserve must be established for each unit in the development, regardless of the amount of rent charged for the unit.

(3) The Land Use Restriction Agreement or restrictive covenant between the owner and the Department shall require the owner to begin making annual deposits in the reserve account on the date that occupancy of the multifamily rental housing development stabilizes or the date that permanent financing for the development is completely in place, whichever occurs later, and shall continue until the earliest of the following dates:

(A) the date of any involuntary change in ownership of the development;

(B) the date on which the owner suffers a total casualty loss with respect to the Development or the date on which the Development becomes functionally obsolete, if the Development cannot be or is not restored;

(C) the date on which the Development is demolished;

(D) the date on which the Development ceases to be used as multifamily rental property; or

(E) the end of the affordability period specified in the land use restriction agreement or restrictive covenant.

(4) Beginning with the 11th year after the awarding of any financial assistance including tax credits, the Development Owner of a multifamily rental housing development shall contract for a third-party physical needs assessment at appropriate intervals that are consistent with lender requirements with respect to the Development. If the first lien lender does not require a third-party physical needs assessment or if the Department is the first lien lender, the Development Owner shall contract with a third-party to conduct a physical needs assessment at least once during each five-year period beginning with the 11th year after the awarding of any financial assistance including tax credits. The Development Owner shall submit to the Department copies of the most recent third-party physical needs assessment, any response by the Development Owner to the assessment, information on any repairs made in response to the assessment, and information on any necessary changes to the required reserve based on the assessment.

(5) The Department may complete necessary repairs if the Development Owner fails to complete the repairs as required by the third-party physical needs assessment. Payment of the repairs must be made directly by the Development Owner or through the reserve account established for the Development.

(6) If notified of the Development Owner's failure to comply with a local health, safety, or building code, the Department may enter on the property and complete any repairs necessary to correct a violation of that code, as identified in the applicable violation report, and may pay for those repairs through the reserve account established for the Development.

(7) The duties of the Development Owner of a multifamily rental development cease on the date of a voluntary change in ownership of the Development, but the subsequent owner is subject to the deposit, inspection and notification requirements of paragraphs (1) - (4) of this subsection.

(8) The first lien lender shall maintain the reserve account. In the event there is no longer a first lien lender, then paragraphs (1) and (2) of this subsection no longer apply.

(9) The Department shall adopt rules:

(A) to establish requirement and standards regarding:

*(i)* for first lien lenders and bank trustees:

*(I)* maintenance of reserve accounts and reasonable cost of the maintenance;

*(II)* asset management;

*(III)* transfer of money in reserve accounts to the Department to fund necessary repairs; and

*(IV)* oversight of reserve accounts and the provision of financial data and other information to the Department; and

*(ii)* for Development Owners, inspections of the multifamily rental housing developments and identification of necessary repairs, including requirements and standards regarding

construction, rehabilitation, and occupancy that may enable quicker identification of those repairs; and

(B) to identify circumstances in which money in the reserve accounts may:

*(i)* be used for expense other than necessary repairs, including property taxes or insurance;

*(ii)* fall below mandatory deposit levels without resulting in Department action;

*(iii)* define the scope of Department oversight of reserve accounts and the repair process;

*(iv)* provide the consequences of any failure to make a required deposit, including a definition of good cause, if any, for a failure to make a required deposit;

*(v)* specify or create processes and standards to be used by the Department to obtain repair for developments;

*(vi)* define for purposes of paragraph (3) of this subsection the date on which occupancy of a Development is consider to have stabilized and the date on which permanent financing is considered to be completely in place; and

*(vii)* provide for appointment of a bond trustee as necessary under this subsection.

(10) The Department shall assess an administrative penalty on Development Owners who fail to contract for the third-part physical needs assessment and make the identified repairs as required by this section. The Department may assess the administrative penalty in the same manner as allowed pursuant to §2306.6023. The penalty is computed by multiplying $200 by the number of dwelling units in the Development and must be paid to the Department.

(11) This section does not apply to a Development for which an owner is required to maintain a reserve account under any other provision of federal or state law.

(g) Section 8 voucher holders. The Department will monitor to ensure development owners comply with §1.14 of this title regarding residents receiving rental assistance under Section 8, United States Housing Act of 1937 (42 U.S. C. §143F). (§2306.269 and §2306.6728)

(h) Monitoring of compliance. The Department may contract with an independent external party to monitor a Development during its construction or rehabilitation and during its operation for compliance with any conditions imposed by the Department in connection with funding including housing tax credits to the Development and appropriate state and federal laws, as required by other state law or by the Board. (§2306.6719)

(i) Recordkeeping. Development Owners must comply with program recordkeeping requirements. In addition records including items listed in paragraphs (1) - (12) of this subsection must be kept for each qualified low income rental unit in the Development, commencing with lease up activities and continuing on an annual basis until the end of the affordability period. (§2306.072) Records must include:

(1) the total number of residential rental units in the Development including the number of bedrooms;

(2) the move in and move out date of each residential rental unit in the Development;

(3) which residential rental units are low income units and the income level of the residents broken into 30, 40, 50, 60 or 80 percent the area median income;

(4) the rent charged for each residential rental unit including, with respect to low income units, documentation to support the utility allowance applicable to such unit and any rental assistance received;

(5) the number of occupants in each low income unit;

(6) the low income rental unit vacancies and information that shows when, and to whom, all available units were rented;

(7) the annual income certification of each tenant of a low income unit, in the form designated by the Department in the Compliance Manual, as may be modified from time to time;

(8) documentation to support each low income tenant's income certification, consistent with the determination of annual income and verification procedures under Section 8 of the United States Housing Act of 1937 ("Section 8");

(9) the total number of units, reported by bedroom size, designed for individuals who are physically challenged or who have special needs and the number of these individuals served annually;

(10) the race and ethnic makeup of each Development;

(11) the number of units occupied by individuals receiving government-supported housing assistance and the type of assistance received; and

(12) any additional information as required by the Department.

(j) Reporting. Each Development shall submit reports as required by the Department. Each Development that receives financial assistance including Low Income Housing Tax Credits from the Department shall submit the information required under subsection (i) of this section in the annual Fair Housing Sponsor Report pursuant to §2306.072 and §2306.0724 of Texas Government Code. This information shall be electronically reported in the format prescribed by the Department. Section 1.11 of this title contains procedures regarding filing and penalties for failure to file reports.

(1) Part A, the "Owner's Certification of Program Compliance"; Part B, the "Unit Status Report"; and Part C, "Tenant Services Provided Report" of the Fair Housing Sponsor Report, must be provided to the Department no later than March 1st of each year, reporting data current as of January 1 of each reporting year. Part D, "Owner's Financial Certification", shall be delivered to the Department no later than the last day in April each year, which includes the current audited financial statements, and income and expenses of the Development for the prior year. Full description of the Fair Housing Sponsor Report is contained in subsection (m) of this section.

(2) The Department maintains a summary of the information reported by the Fair Housing Sponsor Report pursuant to §2306.072(6) in electronic and hard-copy formats available at no charge to the public.

(3) Rental developments funded by HOME, Housing Trust Fund or any other rental programs funded by the Department shall provide tenant information provided on Part B, "Unit Status Report," at least quarterly during lease up and until occupancy requirements are achieved. Once all occupancy requirements are satisfied the Development shall submit tenant information at least annually and as required by this subsection.

(4) Developments financed by tax exempt bonds issued by the Department shall report quarterly throughout the Qualified Project Period or until released by the Department.

(5) 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) Database. The Department shall create an easily accessible database that contains all Development compliance information developed under this section including Development compliance information provided to the Department by The Texas State Affordable Housing Corporation. (§2306.081)

(l) Information regarding housing for persons with disabilities. The Department shall establish as system that requires owners of state or federally assisted housing developments with 20 or more housing units to report information regarding housing units designed for persons with disabilities pursuant to §2306.078. The system will allow an owner of a development with at least one housing unit designed for a person with a disability to enter the following information on the Department's Internet site:

(1) the name, if any of the Development;

(2) the street address of the Development;

(3) the number of housing units in the Development that are designed for persons with disabilities and that are available for lease;

(4) the number of bedrooms in each housing unit designed for a person with a disability;

(5) the special features that characterize each housing unit's suitability for a person with a disability;

(6) the rent for each housing unit designed for a person with a disability; and

(7) the telephone number and name of the Development manager or agent to whom inquiries by prospective tenants may be made. The Department shall solicit the owner's voluntary provision of updated information.

(m) Fair Housing Sponsor Report Certification and Review.

(1) On or before February 1st of each year, the Department will send each rental Development Owner the Fair Housing Sponsor Report (forms provided by the Department) to be completed by the Owner and returned to the Department on or before the first day of March of each year during the Affordability Period. The Fair Housing Sponsor Report shall consist of:

(A) Part A, "Owner's Certification of Program Compliance";

(B) Part B, "Unit Status Report";

(C) Part C, "Tenant Services Provided Report"; and

(D) Part D, "Owner's Financial Certification".

(2) Penalties and sanctions are assessed in accordance to §1.11(d) of this title for failure to provide the Fair Housing Sponsor Report in part or entirety, including administrative penalties and denial of future requests for Department funding.

(3) Any development for which the Fair Housing Sponsor Report Part A, "Owner Certification of Program Compliance," is not received, is received past due, or is incomplete, improperly completed or not signed by the Development Owner, will be considered not received and is considered not in compliance with these rules. Tax credit Developments will be considered not in compliance with the provisions of §42 of the Code and will be reported to the IRS on Form 8823, Low Income Housing Credit Agencies Report of Non Compliance. The Fair Housing Sponsor Report Part A shall include at a minimum the following statements of the Development Owner:

(A) the Development met the minimum set aside test which was applicable to the Development;

(B) there was no change in the Applicable Fraction or low income set aside of any building, or if there was such a change, the actual Applicable Fraction is reported to the Department (LIHTC only);

(C) the Development Owner has received an annual income certification from each low income resident and documentation to support that certification, in the process and form designated by the Department's Compliance Manual, as may be modified from time to time;

(D) documentation to support each low income tenant's income certification, consistent with the determination of annual income and verification procedures under Section 8 of the United States Housing Act of 1937 ("Section 8"), notwithstanding any rules to the contrary for the determination of gross income for federal income tax purposes. In the case of a tenant receiving housing assistance payments under Section 8, the documentation requirement is satisfied if the public housing authority provides a statement to the Development Owner declaring that the tenant's income does not exceed the applicable income limit under the Code, §42(g) as described in the Compliance Manual;

(E) each low income unit in the Development was rent-restricted under the Land Use Restriction Agreements and applicable program regulations, including IRC Code, §42(g) (2), 24 CFR Part 92, and documentation to support the utility allowance applicable to such unit;

(F) All low income units in the Development are and have been for use by the general public and used on a non-transient basis (except for transitional housing for the homeless provided under §42(i)(3)(B) (iii) of the Code) (LIHTC and Bond only);

(G) No finding of discrimination under the Fair Housing Act, 42 U.S.C. 3601 - 3619, has occurred for this Development. A finding of discrimination includes an adverse final decision by the Secretary of HUD, 24 CFR 180.680, an adverse final decision by a substantially equivalent state or local fair housing agency, 42 U.S.C. 3616a(a)(1), or an adverse judgment from a federal court. In addition a statement as to whether the Development has been notified of a violation of the fair housing law that has been filed with the United States Department of Housing and Urban Development, the Commission on Human Rights (or equivalent agency) or with the United States Department of Justice;

(H) each unit or building in the Development is, and has been, suitable for occupancy, taking into account local health, safety, and building codes, and the state or local government unit responsible for making building code inspections did not issue a report of a violation for any building or low income unit in the Development. If a violation report or notice was issued by the governmental unit, the Development Owner must provide the Department with a copy of the violation report or notice. In addition, the Development Owner must state whether the violation has been corrected;

(I) each unit meets conditions set by Housing Quality Standards and an annual inspection to confirm the condition has been preformed if applicable;

(J) there has been no change in the Eligible Basis (as defined by §42(d) of the Code) for any building in the Development since the last certification or, if changes, the nature of the change;

(K) all tenant facilities included in the original application, such as swimming pools, other recreational facilities, washer/dryer hook ups, appliances and parking areas, were provided on a comparable basis without charge to any tenants in the Development. For tax credit Developments, certification that the character and use of the nonresidential portion of the building are included in the building's Eligible Basis under the Code, §42(d), (e.g. whether tenant facilities are available on a comparable basis to all tenants; whether any fee is charged for use of the facilities; whether facilities are reasonably required by the Development) (LIHTC only);

(L) if a low income unit in the Development became vacant during the year, reasonable attempts were made, or are made, to rent that unit or the next available unit of comparable or smaller size to a qualifying low income household before any other units in the Development were, or will be, rented to non low income households;

(M) if the income of tenants of a low income unit in the Development increased above the appropriate limit allowed, the next available unit of comparable or smaller size was, or will be, rented to residents having a qualifying income;

(N) a LURA including an Extended Low Income Housing Commitment as described in the Code, §42(h)(6), was in effect for buildings subject to §7108(c)(1) of the Omnibus Budget Reconciliation Act of 1989, 103 Stat. 2106, 2308 - 2311, including the requirement under the Code, §42(h)(6)(B)(iv), that a Development Owner cannot refuse to lease a unit in the Development to an applicant because the applicant holds a voucher or certificate of eligibility under Section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f (for buildings subject to §1314c(b)(4) of the Omnibus Budget Reconciliation Act of 1993, 107 Stat. 312, 438 - 439 (LIHTC only);

(O) the Development Owner has not been notified by IRS that the Development is no longer "a qualified low income housing Development" within the meaning of the Code, §42;

(P) if the Development Owner received its Housing Credit Allocation from the portion of the state ceiling set aside for developments involving Qualified Nonprofit Organizations under the Code, §42(h)(5), a Qualified Nonprofit Organization owned an interest in and materially participated in the operation of the Development within the meaning of the Code, §469(h), (LIHTC only);

(Q) no low income units in the Development were occupied by ineligible full time student households;

(R) no change in the ownership of a Development has occurred during the reporting period or changes and transfers were or are reported;

(S) the Development met all representations of the Development Owner in the Application and complied with all terms and conditions which were recorded in the LURA;

(T) the Development has made all required lender deposits including annual reserve deposits;

(U) the street address and municipality or county in which the Development is located;

(V) the telephone number of the property management or leasing agent;

(W) a statement as to whether the Development has any instance of material non-compliance with bond indentures or deed restrictions including meeting occupancy requirements or rent restrictions imposed by deed restriction or financing agreements; and

(X) any additional information as required by the Department.

(4) Review. Department staff will review Part A of the Fair Housing Sponsor Report for compliance with the requirements of the appropriate program including the Code §42.

(n) Record retention provisions. Each Development that received assistance from the Department including Low Income Housing Tax Credits is required to retain the records as required by the specific funding program rules and regulations. In general retention schedules include but are not limited to the provision of paragraphs (1) - (4) of this subsection;

(1) Low Income Housing Tax Credits records, as described in subsection (i) of this section, must be retained for at least six years after the due date (with extensions) for filing the federal income tax return for that year; however, the records for the first year of the Credit Period must be retained for at least six years beyond the due date (with extensions) for filing the federal income tax return for the last year of the Compliance Period of the building.

(2) Retention of records for HOME rental developments must comply with the provisions of 24 CFR 92.508 (c), which generally requires retention of rental housing records for five years after the affordability period terminates.

(3) Retention of records for Housing Trust Fund rental developments pertaining to tenant files must be retained for at least three years beyond the date the tenant moves from the development. Records pertinent to the funding of the award, including but not limited to the application, project costs and documentation, must be retained for at least five years after affordability period terminates.

(4) Other rental Developments funded in whole or in part by the Department must comply with record retention requirements as required by rule or deed restriction.

(o) 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.

(1) The Department will perform on-site inspections and file reviews of each low income Development. The Department will conduct a review of Low Income Housing Tax Credit Developments by the end of the second calendar year following the year the last building in the Development is placed in service. The Department will schedule a review of all other Developments as leasing commences. The Department will monitor 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.

(2) During the affordability period, at least once every three years, the Department will conduct on-site inspections and file reviews of each Development and, for at least 15% or more of the development's low income units, inspect the units and review the low income certifications, the documentation supporting the certifications, the rent records for the tenants in those units and any additional information that the Department deems necessary.

(3) The Department may, at the time and in the form designated by the Department, require the Development Owners to submit, for compliance review, information on tenant income and rent for each low income unit and may require a Development Owner to submit, for compliance review, copies of the tenant files, including copies of the income certification, the documentation the Development Owner has

received to support that certification, and the rent record for any low income tenant.

(4) The Department will randomly select which low income units and tenant records are to be inspected and reviewed. The review of the tenant records may be undertaken wherever the Development owner maintains or stores the records if located within the state of Texas. Original records are required for review. Units and tenant records to be inspected and reviewed will be selected in a manner that will not give Development Owners advance notice that a particular unit and tenant records for a particular year will or will not be inspected or reviewed. However, the Department will give reasonable notice to the Development Owner that an on-site inspection or a tenant record review will occur, so that the Development Owner may notify tenants of the inspection or assemble original tenant records for review.

(5) The Department will conduct a limited inspection to determine compliance with accessibility requirements under the Fair Housing Act or Section 504, Rehabilitation Act of 1973. If determined necessary the Department may order third-party inspections and make referrals to appropriate federal and state agencies.

(6) 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 exempted from the inspection provisions, 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 are met, the Development Owner must provide the Department with additional information or the Department will inspect according to the provisions contained herein. 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.

(p) Inspection Standard. For the on-site inspections of developments and low income units, the Department shall review any local health, safety, or building code violations reported to, or notices of such violations retained by, the Development Owner, under subsection (m)(3)(H) of this section, 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) or Housing Quality Standards. The HUD physical condition standards do not supersede or preempt local health, safety and building codes. In the absence of local health, safety and building code violation reports or if deemed necessary by the Department, inspections by third-party inspectors or local government entities will be requested. In addition to the review of any local health, safety or building code violation reports, the Department may conduct inspections of the units using the Housing Quality Standards. Developments must continue to satisfy these codes and maintain property condition throughout the affordability period. Tax Credit Developments that fail to copy with local codes or the uniform physical condition standards must be reported to the IRS.

(q) Notices to Owner. The Department will provide prompt written notice to the Development Owner if the Department does not receive the Fair Housing Sponsor Report or discovers through audit, inspection, review or any other manner that the Development is not in compliance with the provisions of the deed restrictions, conditions imposed by the Department, or program rules and regulations including §42. 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 documentation or certifications. The Department may extend the correction period for up to six months from the date of the 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. The Development Owner is responsible to provide the Department with current contact information including address and phone number.

(r) Notice to the IRS. (Low Income Housing Tax Credit Developments only)

(1) Regardless of whether the non-compliance 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 non-compliance and will indicate whether the Development Owner has corrected the non-compliance.

(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 non-compliance 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 reports for three years from the end of the calendar year the Department receives the certifications and records.

(4) The Department will send the Owner of Record copies of any 8823s submitted to the IRS. Copies of 8823s will be submitted to the syndicator for Developments awarded tax credits after January 1, 2004.

(s) Notices to the Department. A Development Owner must provide information to the Department for events listed in paragraphs (1) - (5) of this subsection and must notify the division responsible for compliance in writing:

(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. Any transfers of ownership must follow procedures as required by Department (§2306.852);

(2) of any change of address to which subsequent notices or communications shall be sent;

(3) within thirty days of the placement in service of each building, the Department must be provided the in service date of each building (LIHTC only);

(4) if the Development in whole or part has suffered a casualty loss and when the loss occurs; and

(5) within thirty days of commencement of leasing activity.

(t) Utility allowances. The Department will monitor to determine whether rents comply with the published rent limits using the utility allowances established by the local housing authority or approved by the Department. 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.

(u) Material Non-Compliance. In accordance with the Low Income Tax Credit QAP and Department Notices of Funding Availability (NOFAs), 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 the property is located outside the state of Texas, non-compliance is reported to the Department that would equal or exceed a non-compliance score of 30 points if measured in accordance with the methodology and point system set forth in this subsection.

(1) Each property that has received an allocation from the Department will be scored according to the type and number of non-compliance events as it relates to the Low Income Housing Tax Credit Program or other Department programs. All Developments regardless of status that have received an allocation are scored even if the project no longer actively participates in the program. Under the Low Income Housing Tax Credit program, non-compliance events issued on Form 8823 are assigned point values. For other programs monitored by the Department, non-compliance events identified during on-site monitoring reviews are assigned point values.

(2) Uncorrected non-compliance will carry the maximum number of points until the non-compliance event has been reported corrected by the Department. Once reported corrected by the Department the score will reduce to the "corrected value." Corrected non-compliance will no longer be included in the Development score three years after the date the non-compliance was reported corrected by the Department.

(A) Under the Low Income Tax Credit Program, non-compliance events that occurred and were identified by the Department through the issuance of the IRS Form 8823 prior to January 1, 1998, are assigned corrected point values to each non-compliance event. The score for these events will no longer be included in the Development's score three years after the date the Form 8823 was executed.

(B) For applications submitted for funding, a non-compliance report will be run by the Department's Compliance Division, for any rental developments disclosed on the Previous Participation Forms, on the date the Low Income Housing Tax Credit Program Application Round closes.

(C) Any corrective action documentation affecting this compliance status score must be received by the Department two weeks prior to the date the Low Income Tax Credit Program Application Round closes.

(3) Events of non-compliance are categorized as either "development events" or "unit/building events." Development events of non-compliance affect some or all the buildings in the property; however, the property will receive only one score for the event rather than a score for each building. Other types of non-compliance are identified individually by unit. This type of non-compliance will receive the appropriate score for each unit cited with an event. The unit scores accumulate towards the total score of the Development. Violations on Low Income Tax Credit Developments are identified by unit; however, the building is scored rather than the unit, and the building will receive the non-compliance score if one or all the units are in non-compliance. Development and unit events affect applications of Development Team Members participating in a subsequent year allocation.

(4) Each type of non-compliance is assigned a point value. The point value for non-compliance is reduced upon correction of the non-compliance. The scoring point system and values are as described in subparagraphs (A) and (B) of this paragraph. The point system weighs certain types of non-compliance more heavily than others; therefore certain non-compliance events carry a sufficient number of points to automatically place the property in Material Non-Compliance. However other types of non-compliance by themselves do not warrant the classification of Material Non-Compliance. Multiple occurrences of these types of non-compliance events may produce enough points to cause the property to be in Material Non-Compliance. For purposes of these scores, the terms "uncorrected" and "corrected" refer to actions taken subsequent to notification of non-compliance by the Department.

(A) Development Non-Compliance items are identified in clauses (i) - (xxiv) of this subparagraph.

*(i)* Major property condition violations. As determined by the Department, the project displays major violations of health, safety and building code, or the property does not satisfy the uniform physical condition standards. Uncorrected is 30 points. Corrected is 20 points.

*(ii)* Owner refused to lease to a holder of rental assistance certificate/voucher because of the status of the prospective tenant as such a holder. Uncorrected is 30 points. Corrected is 10 points.

*(iii)* Development is not available to general public. Determination of violation under the Fair Housing Act. Uncorrected is 30 points. Corrected is 10 points.

*(iv)* Development is out of compliance and never expected to comply. Uncorrected is 30 points.

*(v)* Development is completed without a threshold amenity or an amenity for which points were received without seeking and receiving consent for an acceptable substitution from the Department. Uncorrected is 30 points. Acceptable substitution after violation is 10 points.

*(vi)* Development is not completed by due date of the cost certification documentation. 25 points.

*(vii)* Developments awarded tax credits January 1, 2004, or later, that are foreclosed by a lender, or the General Partner is removed by a syndicator due to reasons other than market conditions. 25 points.

*(viii)* Development failed to meet minimum low-income occupancy levels. Development failed to meet required minimum low-income occupancy levels of 20/50 (20% of the units occupied by tenants with household incomes of less than or equal to 50% of Area Median Gross Income) or 40/60. Uncorrected is 20 points. Corrected is 10 points. (LIHTC and BOND only)

*(ix)* No evidence of, or failure to certify to, non-profit material participation for Owner having received an allocation from the Nonprofit Set-Aside. Uncorrected is 10 points. Corrected is 3 points.

*(x)* The Development failed to meet additional State required rent and occupancy restrictions. Development has failed to meet state restrictions, if any, that exist in addition to the federal requirements. Uncorrected is 10 points. Corrected is 3 points.

*(xi)* The Development failed to provide required supportive services as promised at Application. Uncorrected is 10 points. Corrected is 3 points.

*(xii)* The Development failed to provide housing to the elderly as promised at Application. Uncorrected is 10 points. Corrected is 3 points.

*(xiii)* Failure to provide special needs housing. Development has failed to provide housing for tenants with special needs as promised at Application. Uncorrected is 10 points. Corrected is 3 points.

*(xiv)* The Development Owner failed to provide required annual notification to local administering agency for the Section 8 program. Uncorrected is 5 points. Corrected is 2 points.

*(xv)* Changes in Eligible Basis. Changes occur when common areas become commercial, fees are charged for facilities, etc. Uncorrected is 10 points. Corrected is 3 points. (LIHTC Development only and scored by project)

*(xvi)* Owner failed to post Fair Housing Logo and/or poster in leasing offices. Uncorrected is 3 points. Corrected is 1 point.

*(xvii)* LURA not in effect. The LURA was not executed within the required time period. Uncorrected is 10 points. Corrected is 3 points. (LIHTC only)

*(xviii)* Owner failed to pay fees or allow on-site monitoring review. Uncorrected is 3 points. Corrected is 1 point.

*(xix)* Failure to submit part or all of the Fair Housing Sponsor Report or failure to submit any other annual, monthly, or quarterly report required by the Department. Uncorrected is 10 points. Corrected is 3 points.

*(xx)* Owner failed to make available or maintain management plan with required language as required under §1.14 of this title. Uncorrected is 3 points. Corrected is 1 point.

*(xxi)* Owner failed to approve and distribute Affirmative Marketing Plan as required under §1.14 of this title. Uncorrected is 3 points. Corrected is 1 point.

*(xxii)* Pattern of minor property condition violations. Development displays a pattern of property violations; however, those violations do not impair essential services and safeguards for tenants. Uncorrected is 5 points. Corrected is 2 points.

*(xxiii)* Development failed to comply with requirements limiting minimum income standards for Section 8 residents. Complaints verified by the Department regarding violations of the income standard which cause exclusion from admission of Section 8 resident(s) results in a violation. Uncorrected score 10 points. Corrected 3 points.

*(xxiv)* Owner defaults on payments of Department loans for a period exceeding 90 days. One point for each succeeding month of default up to 20 points.

(B) Unit Non-Compliance items are identified in clauses (i) - (x) of this subparagraph.

*(i)* Unit not leased to Low Income Household. Development has units that are leased to households whose income was above the income limit upon initial occupancy. Uncorrected is 3 points. Corrected is 1 point.

*(ii)* Low-income units occupied by nonqualified full-time students. Uncorrected is 3 points. Corrected is 1 point. (LIHTC and Bond only)

*(iii)* Low income units used on transient basis. Uncorrected is 3 points. Corrected is 1 point. (LIHTC and Bond only)

*(iv)* Household income increased above the re-certification limit and available Unit was rented to market tenant. Uncorrected is 3 points. Corrected is 1 point.

*(v)* Gross rent exceeds rent limit. Uncorrected is 3 points. Corrected is 1 point.

*(vi)* Utility allowance not calculated properly. Uncorrected is 3 points. Corrected is 1 point.

*(vii)* Failure to maintain or provide tenant income certification and documentation. Uncorrected is 3 points. Corrected is 1 point.

*(viii)* Casualty loss. Units not available for occupancy due to natural disaster or hazard due to no fault of the Owner. This carries no point value. Casualty losses are reported to the IRS on LIHTC Developments.

*(ix)* When a low income Unit became vacant, owner failed to lease (or make reasonable efforts to lease) to a low income household before any units were rented to tenants not having a qualifying income. Uncorrected 3 points. Corrected 1 point.

*(x)* Unit not available for rent. Unit is used for non-residential purposes excluding unavailable Units due to casualty and manager-occupied Units. Uncorrected is 3 points. Corrected is 1 point.

(v) Liability. Compliance with the program requirements including compliance with the Code, §42 is the sole responsibility of the Development owner. 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 non-compliance with the Code, §42.

(w) Applicability to all programs. These provisions apply to all Developments for which the Department has provided funding including low income housing tax credits.

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 November 17, 2003.

TRD-200307895
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 7, 2003
Proposal publication date: September 26, 2003
For further information, please call: (512) 475-4595

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# TITLE 16. ECONOMIC REGULATION

## PART 1. RAILROAD COMMISSION OF TEXAS

### CHAPTER 3. OIL AND GAS DIVISION

**16 TAC §3.14**

The Railroad Commission of Texas adopts amendments to §3.14, relating to Plugging, without changes to the proposal

published in the August 22, 2003, issue of the *Texas Register* (28 TexReg 6658).

The adopted amendments to §3.14(a)(1) eliminate former subparagraph (G) defining "individual well bond" and re-letter former subparagraphs (H) - (O).

The adopted amendments to §3.14(b)(2) reorganize and re-letter the former provisions of subparagraph (A) and make such provisions applicable to extension of the deadline for plugging inactive wells operated by unbonded operators regardless of the period of well inactivity. The adopted amendments to §3.14(b)(2) also eliminate former subparagraph (B) relating to plugging extensions for wells operated by unbonded operators that have been inactive for 36 months or longer, including the former requirement of §3.14(b)(2)(B)(i)(II) that an unbonded operator file an individual well bond in order to obtain an extension of the deadline for plugging a well that has been inactive for a period of 36 months or longer and the former provisions of §3.14(b)(2)(B)(ii) pertaining to standards and procedure to rebut presumed estimated plugging costs for the purpose of setting the amount of individual well bonds.

The adopted amendments to former §3.14(b)(2)(D)(i), now re-lettered as adopted §3.14(b)(2)(C)(i), eliminate the former provision that the Commission or its delegate may revoke a plugging extension if the operator of the well that is the subject of the extension fails to obtain or maintain a valid individual well bond and provide instead that a plugging extension may be revoked if the operator fails to obtain or maintain financial security as required by §3.78 of this title (relating to Fees, Performance Bonds, and Alternate Forms of Financial Security Required to be Filed).

The adopted amendments to former §3.14(b)(2)(E), now re-lettered as adopted §3.14(b)(2)(D), clarify that the test required by adopted §3.14(b)(2)(D) for wells more than 25 years old and wells for which a plugging extension is sought must be a successful fluid level or hydraulic pressure test establishing that the well does not pose a potential threat of harm to natural resources, including surface and subsurface water, oil, and gas.

The adopted amendments also change clause (v) of former §3.14(b)(2)(E), now re-lettered as §3.14(b)(2)(D), to provide that wells subject to the testing requirements of adopted §3.14(b)(2)(D) may not be returned to active operation unless a fluid level test of the well has been performed within 12 months prior to the return to activity or a mechanical integrity test of the well has been performed within 60 months prior to the return to activity. The adopted amendments eliminate the former provision of clause (v) that wells that are returned to continuous production, as evidenced by three consecutive months of reported production of at least 10 barrels of oil or 100 mcf of gas per month, need not be tested.

The adopted amendments to §3.14 eliminate references to individual well bonds and, in this respect, conform §3.14 to amendments to §3.78 which were adopted, effective October 2, 2003, and which eliminated the requirement that unbonded operators file individual well bonds in order to obtain plugging extensions for wells that have been inactive for 36 months or more. The individual well bond requirements in former §3.14(b)(2)(B)(i)(II) were invalidated by Final Judgment of the 126th District Court of Travis County, Texas, signed July 15, 2003, in No. GN202946, *Ross H. Hardwick Oil Company Et Al. v. Railroad Commission of Texas*, based on the Court's determination that in adopting these requirements, the Commission failed to comply with Texas Government Code, §2006.002.

The amendments to §3.14 eliminating individual well bonds are adopted based on the Commission's determination that some operators have had difficulty in obtaining individual well bonds, and because the individual well bond requirement has made it impractical for some operators to file one of the alternate forms of financial security authorized by §3.78(d) of this title and Texas Natural Resources Code, §91.104. In some cases, the total amount of individual well bonds required under former provisions of §3.14 in order for an unbonded operator to obtain plugging extensions for wells that have been inactive for 36 months or more has exceeded the amount of individual or blanket performance bonds, letters of credit, or cash deposits required as financial security under §3.78 of this title.

Inability to file an individual or blanket performance bond, letter of credit, or cash deposit as financial security, coupled with the inability to file an alternate form of financial security because of the individual well bond requirement, has prevented some operators, even those with an acceptable record of compliance, from renewing their organization reports.

The Commission has determined that the individual well bond requirements of §3.14 can be eliminated without posing a significant risk to the Oil Field Clean Up Fund (OFCUF), particularly because under Texas Natural Resources Code, §91.104, effective September 1, 2004, all operators will be required to file an individual or blanket performance bond, letter of credit, or cash deposit as financial security covering all operations, and the former individual well bond requirements for unbonded operators will be moot.

In the interim period prior to September 1, 2004, elimination of the individual well bond requirement will enable some operators that have had difficulty in filing financial security to elect one of the alternate forms of financial security permitted by §3.78(d) of this title and renew their organization reports. This will have the beneficial effect of allowing these operators to continue operations while preparing to meet the more stringent financial security requirements which will take effect September 1, 2004.

The Commission has determined that elimination of the individual well bond requirement of §3.14 for the short time that remains prior to September 1, 2004, will not pose a significant threat to the OFCUF or to surface or subsurface usable quality water because under §3.14, the Commission will not grant a plugging extension for an inactive well operated by an unbonded operator unless the well and associated facilities are in compliance with all laws and Commission rules; the operator's organization report is current and active; the operator has, and upon request provides evidence of, a good faith claim to a continuing right to operate the well; the operator has paid the proper fee provided by §3.78 of this title for obtaining the plugging extension; and the operator has tested the well in accordance with §3.14(b)(2)(D) and files with the application for the plugging extension a fluid level test conducted within 90 days prior to the application demonstrating that any fluid in the wellbore is at least 250 feet below the base of the deepest usable quality water stratum, or a hydraulic pressure test conducted during the period the well has been inactive and not more than four years prior to the date of the application demonstrating the mechanical integrity of the well.

The adopted amendment to former §3.14(b)(2)(E), now re-lettered as §3.14(b)(2)(D), is simply a clarifying amendment and does not change current Commission policy and practice.

The adopted amendment eliminating clause (v) of former §3.14(b)(2)(E), now re-lettered as §3.14(b)(2)(D), is necessary in the interest of ensuring that wells more than 25 years old that become inactive or wells for which a plugging extension is sought do not pose a threat of harm to natural resources, including surface and subsurface water, oil, and gas. The Commission has determined that once the testing requirements of §3.14(b)(2)(D) have attached, a well should not be returned to active operation unless a fluid level test has been performed within 12 months prior to the return to activity or a mechanical integrity test has been performed within 60 months prior to the return to activity.

The Commission received one comment regarding the proposed amendments to §3.14, which supported elimination of the individual well bond requirement, based on difficulty experienced in placing this type of bond with surety companies, particularly on behalf of small operators.

The Commission adopts the amendments to §3.14 pursuant to Texas Natural Resources Code, §§81.051, 81.052, 85.042, 85.201, 85.202, 86.041, 86.042, 91.101, 141.011, and 141.012 which provide the Commission with jurisdiction over all persons owning or engaged in drilling or operating oil, gas, or geothermal wells and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission.

Texas Natural Resources Code, §§81.051, 81.052, 85.042, 85.201, 85.202, 86.041, 86.042, 91.101, 91.103, 91.104, 91.111, 91.112, 91.113, 141.011, and 141.012 are affected by the adopted amendments.

Statutory authority: Texas Natural Resources Code, §§81.051, 81.052, 85.042, 85.201, 85.202, 86.041, 86.042, 91.101, 141.011, and 141.012.

Cross-reference to statute: Texas Natural Resources Code, Chapters 81, 85, 86, 91, and 141.

Issued in Austin, Texas, on November 13, 2003.

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 November 13, 2003.

TRD-200307789
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Effective date: December 3, 2003
Proposal publication date: August 22, 2003
For further information, please call: (512) 475-1295

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## CHAPTER 8. PIPELINE SAFETY REGULATIONS

## SUBCHAPTER D. REQUIREMENTS FOR HAZARDOUS LIQUIDS PIPELINES ONLY

**16 TAC §8.315**

The Railroad Commission of Texas adopts new §8.315, relating to Hazardous Liquids and Carbon Dioxide Pipelines or Pipeline Facilities Located Within 1,000 Feet of a Public School Building or Facility, with changes to the version published in the July 25, 2003, issue of the *Texas Register* (28 TexReg 5720).

The Commission adopts new §8.315 to implement Texas Natural Resources Code, §117.012, as amended by House Bill (HB) 1931, 78th Legislature, Regular Session (2003). The Commission had previously published proposed new §8.310, relating to hazardous liquids and carbon dioxide pipelines public education and liaison, in the March 14, 2003, issue of the *Texas Register* (28 TexReg 2170), based on the version of Texas Natural Resources Code, §117.012, enacted by Senate Bill (SB) 310, 77th Legislature, 2001. As originally enacted, that provision set forth specific requirements for the Commission's rules under which owners and operators of hazardous liquids and carbon dioxide pipelines and pipeline facilities located within 1,000 feet of a public school building or facility were to interact with public school officials regarding emergency response plans. Those requirements were changed significantly by HB 1931; therefore, the Commission did not adopt the provisions in new §8.310, which was adopted effective July 28, 2003 (28 TexReg 5864), and instead proposed this new rule.

New §8.315(a) requires owners or operators of each intrastate hazardous liquids pipeline or pipeline facility and each intrastate carbon dioxide pipeline or pipeline facility to comply with this section, in addition to complying with the requirements of new §8.310, relating to hazardous liquids and carbon dioxide pipelines public education and liaison.

New §8.315(b) provides that this section applies to each owner or operator of a hazardous liquid or carbon dioxide pipeline or pipeline facility any part of which is located within 1,000 feet of a public school building containing classrooms, or within 1,000 feet of any other public school facility where students congregate.

New §8.315(c) requires each pipeline owner and operator to which this section applies to identify, for each pipeline or pipeline facility, any part of which is located within 1,000 feet of a public school building containing classrooms, or within 1,000 feet of any other public school facility where students congregate, the name of the school, the street address of the public school building or other public school facility, and the identification (system name) of the pipeline. This information must be filed with the Commission's Pipeline/Rail/LP-Gas Safety Division. In a change from the proposed version, the Commission has added an initial filing deadline of January 15, 2005, and a requirement that updated information be filed every two years thereafter. This change is explained more fully in the paragraphs addressing the comments the Commission received.

New §8.315(d) requires each pipeline owner and operator to which this section applies to take certain actions. Upon written request from a school district, the pipeline owner or operator must provide in writing the following parts of a pipeline emergency response plan that are relevant to the school: a description and map of the pipeline facilities that are within 1,000 feet of the school building or facility; a list of any product transported in the segment of the pipeline that is within 1,000 feet of the school facility; the designated emergency number for the pipeline facility operator; information on the state's excavation one-call system; and information on how to recognize, report, and respond to a product release. The owner or operator must also mail a copy of the requested items by certified mail, return receipt requested,

to the superintendent of the school district in which the school building or facility is located.

New §8.315(e) requires a pipeline operator or the operator's representative to appear at a regularly scheduled meeting of the school board to explain the items listed in subsection (c) if requested by the school board or school district.

Finally, new §8.315(f) requires each owner or operator to maintain records documenting compliance with the requirements of the section. Records of attendance and acknowledgment of receipt by the school board or school district superintendent must be retained for five years from the date of the event commemorated by the record. Records of certified mail transmissions undertaken in compliance with this section satisfy the record-keeping requirements of this subsection.

The Commission received four comments on the proposed new section, two of which were from associations. The associations neither supported nor opposed the proposed rule in its entirety, but disagreed with and suggested changes to specific provisions in the rule.

Koch Pipeline Company, L.P. (Koch) commented in support of the legislative intent of HB 1931 to facilitate the communication of emergency response plans with public school districts whose facilities are located within 1,000 feet of an intrastate hazardous liquid or carbon dioxide pipeline, but expressed concern about the practicality of implementing the identification of some public school facilities. Koch stated that it has a defined, on-going program to provide pipeline safety information to the general public, to excavators, and to public response government agencies. The program includes the annual distribution of pipeline safety brochures, including mailings to schools located near Koch liquid pipelines and pipeline facilities; the delivery of pipeline maps to emergency responders; the development and delivery of an emergency response guidebook; periodic face-to-face contacts with key public liaison officials; and the participation in public meetings regarding pipeline awareness and pipeline safety.

In particular, Koch commented that the requirement in §8.315(c) for operators to identify any public school facility other than classrooms where students congregate could prove problematic for public school districts and operators since no accurate identification methods exist today. Therefore Koch suggested that, in order to ensure more accurate identification and notifications, the rule be amended to allow pipeline operators to notify the affected district superintendent of the probability that the operator has pipelines or pipeline facilities near other public school facilities where students congregate.

The Commission declines to include the suggested language, for two reasons. First, Texas Natural Resources Code, §117.012(k), as amended by HB 1931, does not give the Commission specific authority to prescribe the method by which pipeline operators identify the location of other school facilities where students congregate, nor is there an explicit requirement that pipeline operators engage in any specific effort to do so. There is, however, an implicit requirement that pipeline operators undertake such an effort, because to comply with a school district's written request for information, the operator must know where the school building or other facility is located vis-a-vis the pipeline or pipeline facilities.

The Commission disagrees with Koch that as an alternative to subsection (c), the rule should be amended to allow a pipeline operator to notify the affected school district superintendent of the probability that the operator has a pipeline or pipeline facilities near other public school facilities where students congregate because this appears to be inconsistent with the statutory amendments enacted by HB 1931, specifically, the requirement in Texas Natural Resources Code, §117.012(k)(1)(A), which reads:

*(k) The commission by rule shall require the owner or operator of each intrastate hazardous liquid or carbon dioxide pipeline facility any part of which is located within 1,000 feet of a public school building containing classrooms, or within 1,000 feet of another public school facility where students congregate, to:*

*(1) on written request from the school district, provide in writing the following parts of a pipeline emergency response plan that are relevant to the school:*

*(A) a description and map of the pipeline facilities that are within 1,000 feet of the school building or facility;*

*(B) a list of any product transported in the segment of the pipeline that is within 1,000 feet of the school facility; . . . [and]*

*(E) information on how to recognize, report, and respond to a product release; . . .*

The legislature has directed the Commission to require, by rule, that pipeline operators provide certain specific information to a school district. Giving notice of only a probability of such pipeline proximity deprives school districts of their ability to assess the risks associated with the specific product transported in the segment of the pipeline that is within 1,000 feet of the school facility and to effectively utilize information, required to be provided by the pipeline operator, about how to recognize, report, and respond to a product release. For example, procedures for reporting and handling leak situations may be different for a school building than for a football stadium.

Second, because there is more than one way by which pipeline operators can identify other school facilities where students congregate, the Commission declines to include language in new §8.315 that would appear either to mandate or express preference for any particular methodology or to imply that if a pipeline operator has used a method suggested by the rule that it has necessarily met its obligation under the statute.

The Commission appreciates but disagrees with Koch's concern about the practicality of implementing the identification of some public school facilities within 1,000 feet of its intrastate liquid pipeline and pipeline facilities. Koch's comments describe the method--notifying affected school district superintendent that it is likely that Koch has pipelines and/or pipeline facilities near other school facilities where students congregate--that it believes will provide the most accurate information. Other pipeline operators may or may not agree with or use Koch's approach. For example, in many communities, the locations of other school facilities where students congregate are commonly known by the general public, are often available on school districts' web sites or on an individual school's web site, and are certainly available in other public records. The pipeline companies know where their pipelines and pipeline facilities are located. Using the general information about school facilities' locations and its own pipeline maps, some operators might be able to determine whether any school facilities might be within 1,000 feet of that operator's pipelines or pipeline facilities. If, upon closer review, the pipeline operator determines that its pipelines or pipeline facilities are within the specified distance, then the address of that school building or facility is reportable to the Commission and, upon written request from that school district, the operator

would be obliged to provide the specific information required by the statute and listed in §8.315(d).

By not including any reference to the methodology by which pipeline operators identify other school facilities where students congregate, pipeline operators are free to pursue any approach that is reasonable, cost-effective, and accurate with respect to the particularities of the location and operating characteristics of its pipeline and or pipeline facilities. In addition, as Koch's comments state, these efforts are necessarily continuing. As the population of the state increases and more school facilities are built, pipeline operators will be under a continuing obligation to identify school buildings containing classrooms and other school facilities where students congregate that are within 1,000 feet of the operators' pipelines and/or pipeline facilities. Reporting to the Commission the information listed in subsection (c) makes it possible for a school district to determine the system name of any pipeline within 1,000 feet of a school building or facility simply by calling the Commission. School districts are familiar with the Commission's Pipeline Safety Program because of the school piping inspection requirements. Without the reporting requirement in subsection (c), school districts would have the right to obtain specific information from the pipeline operator, but might not know which pipeline to contact. The Commission receives similar information about natural gas pipelines pursuant to Commission rule §8.235, and it serves the public interest for the Commission to be a repository of information about both natural gas and hazardous liquids pipelines that are within 1,000 feet of public school buildings or other public school facilities where students congregate.

Koch also commented that §8.315 does not specify the frequency by which operators must provide school identifications to the Commission and suggested that this information should be provided once every two years. Koch cited API Recommended Practice 1162, Public Awareness Programs for Pipeline Operators, dated August 23, 2003, as recommending a two-year baseline frequency of communications with the Affected Public--Places of Congregation audience for both transmission and gathering pipelines.

The Commission agrees with Koch's comment that the rule should specify an initial filing deadline as well as an interval for providing updated information. Consistent with Koch's suggestion, the Commission has added language to §8.315(c) to require the submission of school facility location data every two years beginning January 2005. This additional time should allow all pipeline operators to adequately conduct any inquiries or surveys necessary to identify all school facilities located within 1,000 feet of their pipelines and will be consistent with current recommended safety practices.

The Commission has clarified subsection (c)(2) by adding language that specifically requires providing the address of school buildings containing classrooms and other public school facilities where students congregate that are within 1,000 feet of an intrastate hazardous liquids or carbon dioxide pipeline or pipeline facilities. For instance, a school district facility where students congregate, other than a building containing classrooms, might not be adjacent to a school building. In that circumstance, the address of the school district facility would be reported in addition to that of any school building or buildings within the specified distance.

TXU Fuel Company (TXU Fuel) commented that it agrees with the proposed rule as it addresses the requirement of HB 1931 and agreed with adoption of the rule as it was proposed. The Commission agrees with TXU Fuel.

The Texas Pipeline Association (TPA) filed a comment concerning §8.315(c). Similar to the Koch comments, TPA stated that some pipeline operators might need to create a new database for identification of school facilities within 1,000 feet of pipelines. TPA stated that pipeline operators might have to walk or drive each pipeline right-of-way to locate and identify the facilities, which would take a substantial amount of time, especially in large metropolitan areas. TPA suggested the addition of the following language to subsection (c): "The information will be supplied to the Pipeline Safety Section within 60 days of the adoption of this rule if that information is in the possession of the pipeline operator. If the pipeline operator does not have the data on hand but must obtain it and compile the report, that report must be filed with the Pipeline Safety Section within 12 months of the date of the adoption of this rule."

For the reasons given following the Koch comments, the Commission has made changes to §8.315(c) to allow additional time, more than requested, to prepare the initial identification of school buildings or facilities within 1,000 feet of pipelines.

The Texas Oil & Gas Association (TXOGA) filed comments similar to those of Koch and TPA. TXOGA requested 180 days to comply with the initial identification of school facilities within 1,000 feet of pipelines. As stated, the Commission has modified §8.315(c) to require the first data submission in January 2005 and updates every two years thereafter.

TXOGA also opposed the requirement that pipelines submit emergency response plans to the Commission's Pipeline Safety Section. The rule does not require the submission of emergency response plans to the Commission; rather the rule requires that an operator, if requested to do so in writing by the school district, provide to a school superintendent a copy of the specific elements of the emergency response plan that are relevant to a school.

TXOGA also commented regarding the need for the schools and the pipeline operators to work together to get the most effective message regarding recognizing, reporting, and responding to a pipeline emergency to the schools identified by this rule. The Commission agrees with TXOGA's comment. The Commission's record of schools located within 1,000 feet of hazardous liquids pipelines will aide in the education and awareness programs required by HB 1931 and will allow school districts to efficiently obtain and effectively use the information they are statutorily entitled to receive.

The Commission adopts one other change in subsection (c). Since the publication of the proposed rule, the Commission has undergone a reorganization and there is no longer a Pipeline Safety Section of the Gas Services Division. Therefore, the Commission adopts the wording in subsection (c) to refer to the Safety Division, which reflects the new organizational structure.

The Commission adopts new §8.315 pursuant to Texas Natural Resources Code, §117.011, which gives the Commission jurisdiction over all pipeline transportation of hazardous liquids or carbon dioxide and over all hazardous liquid or carbon dioxide pipeline facilities as provided by 49 U.S.C. §60101, *et seq*.; §117.012(a), which requires the Commission to adopt rules that include safety standards for and practices applicable to the intrastate transportation of hazardous liquids or carbon dioxide by pipeline and intrastate hazardous liquid or carbon dioxide pipeline facilities; §117.012(k), as amended by HB 1931, 78th

Legislature, Regular Session (2003), which directs the Commission to adopt rules regarding public education and awareness concerning hazardous liquid or carbon dioxide pipeline facilities and community liaison for the purpose of responding to an emergency concerning a hazardous liquid or carbon dioxide pipeline facility and mandates that the Commission require operators of hazardous liquids or carbon dioxide pipelines or pipeline facilities to conduct liaison activities with fire, police, and other appropriate public emergency response officials by meetings in person except as otherwise provided by §117.012, and requires that the Commission adopt rules that require the owner or operator of each intrastate hazardous liquid or carbon dioxide pipeline facility any part of which is located within 1,000 feet of a public school building containing classrooms, or within 1,000 feet of another public school facility where students congregate, to provide specified emergency response information to school officials upon request; and §117.013, which requires each owner or operator of a pipeline engaged in the transportation of hazardous liquids or carbon dioxide within this state to make reports and provide any information the commission may require under the jurisdiction granted by the Hazardous Liquid Pipeline Safety Act of 1979 (Pub. L. No. 96-129) and Texas Natural Resources Code, Chapter 117.

Statutory authority: Texas Natural Resources Code, §§117.011 - 117.013.

Cross-reference to statute: Texas Natural Resources Code, §§117.011 - 117.013.

Issued in Austin, Texas, on November 13, 2003.

*§8.315. Hazardous Liquids and Carbon Dioxide Pipelines or Pipeline Facilities Located Within 1,000 Feet of a Public School Building or Facility.*

(a) In addition to the requirements of §8.310 of this title (relating to Hazardous Liquids and Carbon Dioxide Pipelines Public Education and Liaison), each owner or operator of each intrastate hazardous liquids pipeline or pipeline facility and each intrastate carbon dioxide pipeline or pipeline facility shall comply with this section.

(b) This section applies to each owner or operator of a hazardous liquid or carbon dioxide pipeline or pipeline facility any part of which is located within 1,000 feet of a public school building containing classrooms, or within 1,000 feet of any other public school facility where students congregate.

(c) Each pipeline owner and operator to which this section applies shall, for each pipeline or pipeline facility any part of which is located within 1,000 feet of a public school building containing classrooms, or within 1,000 feet of any other public school facility where students congregate, file with the Commission's Safety Division, no later than January 15, 2005, and every two years thereafter, the following information:

(1) the name of the school;

(2) the street address of the public school building or other public school facility; and

(3) the identification (system name) of the pipeline.

(d) Each pipeline owner and operator to which this section applies shall:

(1) upon written request from a school district, provide in writing the following parts of a pipeline emergency response plan that are relevant to the school:

(A) a description and map of the pipeline facilities that are within 1,000 feet of the school building or facility;

(B) a list of any product transported in the segment of the pipeline that is within 1,000 feet of the school facility;

(C) the designated emergency number for the pipeline facility operator;

(D) information on the state's excavation one-call system; and

(E) information on how to recognize, report, and respond to a product release; and

(2) mail a copy of the requested items by certified mail, return receipt requested, to the superintendent of the school district in which the school building or facility is located.

(e) A pipeline operator or the operator's representative shall appear at a regularly scheduled meeting of the school board to explain the items listed in subsection (c) of this section if requested by the school board or school district.

(f) Records. Each owner or operator shall maintain records documenting compliance with the requirements of this section. Records of attendance and acknowledgment of receipt by the school board or school district superintendent shall be retained for five years from the date of the event that is commemorated by the record. Records of certified mail transmissions undertaken in compliance with this section satisfy the record-keeping requirements of this subsection.

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 November 13, 2003.

TRD-200307791
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
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For further information, please call: (512) 475-1295

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# TITLE 19. EDUCATION

## PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

### CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

### SUBCHAPTER C. TESTING AND DEVELOPMENTAL EDUCATION

**19 TAC §§4.51 - 4.59**

The Texas Higher Education Coordinating Board adopts the repeal of §§4.51 - 4.59, concerning Testing and Developmental Education, without changes to the proposed text as published in the August 15, 2003, issue of the *Texas Register* (28 TexReg 6473). Specifically, the repeal of these sections will implement

the change from the Texas Academic Skills Program (TASP) to the Success Initiative.

There were no comments regarding the repeal of these sections.

The repeal is adopted under the Texas Education Code, §51.3062, which gives the Coordinating Board the authority to adopt rules concerning the Success Initiative.

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 November 13, 2003.

TRD-200307763
Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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## SUBCHAPTER C. TEXAS SUCCESS INITIATIVE

### 19 TAC §§4.51 - 4.60

The Texas Higher Education Coordinating Board adopts new §§4.51 - 4.60 of Board rules, concerning implementation of the Texas Success Initiative, without changes to the proposed text as published in the August 15, 2003, issue of the *Texas Register* (28 TexReg 6473). Specifically, the new sections will implement the change from the Texas Academic Skills Program (TASP) to the Success Initiative.

The following comments were received regarding §§4.51 - 4.60 of the rules:

Comment: Staff at Trinity Valley College, Navarro College, Tyler Junior College, Kilgore College, El Paso Community College, Angelina College, Panola College, The University of North Texas and The University of Texas at El Paso requested that the mandatory retest requirement for students who scored below certain standards be eliminated.

Response: Texas Education Code (TEC) §51.3062(k)(1) requires students to retake a board approved assessment if they did not initially perform within a deviation established by the board. No changes were made as a result of this comment.

Comment: One commenter asked to have the standards set by the board on the retest changed so most students would fall into one category and fewer would have to retest.

Response: The Texas Success Initiative Advisory Committee set standards for the retest that should accomplish what the commenter is asking. No changes were made as a result of this comment.

Comment: One commenter asked to replace the retest requirement with a requirement to complete remediation.

Response: TEC §51.3062(k)(1) requires students to retake a board approved assessment if they did not initially perform within a deviation established by the board. No changes were made as a result of this comment.

Comment: One commenter asked to change "minimum passing standard" to "minimum assessment standard."

Response: Staff believes "minimum passing standard" is the appropriate wording for these rules. No changes were made as a result of this comment.

Comment: Two commenters asked the board to align the standards on the four assessment instruments approved by the board.

Response: An agenda item to this effect was brought to the Board in October 2002. The item was withdrawn from consideration at the January 2003 Board meeting in response to negative comments received. No changes were made as a result of this comment.

Comment: Staff at Panola College, Angelina College, Kilgore College, Navarro College and Trinity Valley College requested that the CBM 002 reporting requirements be simplified.

Response: The Coordinating Board's Data Collection committee, in conjunction with the Texas Success Initiative Advisory Committee's Work Group on Reporting and Evaluation, is working to simplify the CBM 002 while still retaining the elements essential for the evaluation of the Texas Success Initiative. No changes were made as a result of this comment.

Comment: One commenter asked to have ACT and SAT assessments added to the list of board-approved tests.

Response: The ACT and the SAT are not basic skills assessments. No changes were made as a result of this comment.

Comment: Two commenters asked to have English as a Second Language (ESL) versions of two of the currently approved assessment instruments added to the list for non-native speakers.

Response: TEC §51.3062 does not provide for different tests or different routes of completion for certain groups of students. The legislation only requires students to be assessed and advised. Institutions decide the best strategy for preparing students for college-level work. ESL students could be placement tested using the ESL version of the assessment, enrolled in appropriate ESL and/or developmental classes, and, after completion of those classes, be assessed using one of the board-approved instruments to determine readiness for college-level work. No changes were made as a result of this comment.

The amendments are adopted under the Texas Education Code, §51.3062, which gives the Coordinating Board the authority to adopt rules concerning the Success Initiative.

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.

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Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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## SUBCHAPTER D. DUAL CREDIT PARTNERSHIPS BETWEEN SECONDARY SCHOOLS AND TEXAS PUBLIC COLLEGES

**19 TAC §4.85**

The Texas Higher Education Coordinating Board adopts amendments to §4.85(b) and §4.85(i) concerning the commissioners' funding agreement for dual credit courses and the waiver of all or part of tuition and fees for dual credit students by public institutions of higher education without changes to the proposed text as published in the August 15, 2003, issue of the *Texas Register* (28 TexReg 6476). Texas Education Code, §130.008(d) was amended by House Bill 415 of the 78th Texas Legislature, and the requirement for the current funding agreement between the Commissioner of Education and the Commissioner of Higher Education was eliminated. Therefore, public high schools and institutions of higher education are eligible to receive funding for dual credit courses under the general rules concerning funding of high school courses and college credit courses. Texas Education Code, §54.216 was amended by Senate Bill 258, and public technical and state colleges, universities, and health-related institutions are now eligible to waive all or part of the tuition and fees for students enrolled in dual credit courses. Until passage of this legislation, only public community/junior colleges were allowed to waive these charges. Texas Education Code, §130.008 was amended by House Bill 1621 to align language in §130.008 with §54.216 as passed under Senate Bill 258. Under House Bill 1621 public community/junior colleges may waive all or part of the tuition and fees for students enrolled in dual credit courses beginning fall 2003. Under current statute, all tuition and fees may be waived but no portion of those charges could be waived. Texas Education Code, §51.306 and §51.3061 was amended by Senate Bill 286, repealing the Texas Academic Skills Program (TASP) and providing for the assessment of college-readiness under the new Success Initiative. Board rules have required students enrolling in dual credit courses to satisfy the requirements under TASP. With repeal of TASP and the enactment of the Success Initiative, students will be required to satisfy similar success initiative requirements prior to enrolling in dual credit courses.

No comments were received regarding the proposed amendments.

The amendments are adopted under the Texas Education Code, §§29.182, 29.184, 54.216, 61.027, 61.076(j), 130.001(b)(3)-(4), 130.008, 130.090, and 135.06(d), which provide the Coordinating Board with the authority to regulate dual credit partnerships between public two-year associate degree granting institutions and public universities with secondary schools.

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.

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Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
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## CHAPTER 6. HEALTH EDUCATION, TRAINING, AND RESEARCH FUNDS
## SUBCHAPTER C. TOBACCO LAWSUIT SETTLEMENT FUNDS

**19 TAC §6.73**

The Texas Higher Education Coordinating Board adopts amendments to §6.73, concerning the Permanent Fund for Nursing, Allied Health, and Other Health-Related Education Grant Program in accordance with recent legislation (House Bill 3126) and Texas Education Code, §§63.201 - 63.203, without changes to the proposed text as published in the August 15, 2003 issue of the *Texas Register* (28 TexReg 6400). Specifically, this amendment provides legislation that directs the Texas Higher Education Coordinating Board to give grant funds to eligible institutions with nursing programs.

No comments were received regarding the amendments to §6.73.

The amendments are adopted under the Texas Education Code, §63.202, which gives the Coordinating Board the authority to adopt rules for the award of grants from investment returns of the Permanent 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.

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Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
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## CHAPTER 12. CAREER SCHOOLS AND COLLEGES
## SUBCHAPTER A. PURPOSE, AUTHORITY, AND DEFINITIONS

**19 TAC §§12.1 - 12.3**

The Texas Higher Education Coordinating Board adopts amendments to §§12.1 - 12.3, concerning the Success Initiative assessment requirements and the replacement of references to proprietary schools or institutions with references to career schools or colleges, without changes to the proposed text as published in the August 15, 2003, issue of the *Texas Register* (28 TexReg 6478). Specifically, the proposed amendments replace the term "proprietary school" with the term "career schools or colleges", to correspond with the change in terms mandated by amendments to Texas Education Code, Chapter 132 in Senate Bill 1343 of the 78th Texas Legislature. The amendment to §12.3 deletes the provision regarding the Texas Academic Skills Program (TASP), and replaces that provision

with the requirements of the Success Initiative. Senate Bill 286 of the 78th Texas Legislature repealed Texas Education Code, §§51.306 and 51.3061 regarding TASP, and added new Texas Education Code, §51.3062, regarding the Success Initiative. The amendment to §12.3 requires the career schools or colleges to assess, advise, and develop a plan for each student to assure college-readiness.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §132.063, which provide the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules to enforce minimum standards for the approval and on-going assessment of programs of study leading to associate degrees offered by career schools and colleges.

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.

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Jan Greenberg
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## SUBCHAPTER B. GENERAL PROVISIONS

### 19 TAC §§12.22 - 12.33, 12.35 - 12.39

The Texas Higher Education Coordinating Board adopts amendments to §§12.22 - 12.33 and 12.35 - 12.39, concerning the Success Initiative assessment requirements and the replacement of references to proprietary schools or institutions with references to career schools or colleges, without changes to the proposed text as published in the August 15, 2003, issue of the *Texas Register* (28 TexReg 6480). Specifically, the proposed amendments replace the term "proprietary school" with the term "career schools or colleges", to correspond with the change in terms mandated by amendments to Texas Education Code, Chapter 132 in Senate Bill 1343 of the 78th Texas Legislature. The amendment to §12.3 deletes the provision regarding the Texas Academic Skills Program (TASP), and replaces that provision with the requirements of the Success Initiative. Senate Bill 286 of the 78th Texas Legislature repealed Texas Education Code, §§51.306 and 51.3061 regarding TASP, and added new Texas Education Code, §51.3062, regarding the Success Initiative. The amendment to §12.3 requires the career schools or colleges to assess, advise, and develop a plan for each student to assure college-readiness.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §132.063, which provide the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules to enforce minimum standards for the approval and on-going assessment of programs of study leading to associate degrees offered by career schools and colleges.

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.

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Jan Greenberg
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## SUBCHAPTER C. ASSOCIATE DEGREE PROGRAMS

### 19 TAC §§12.41- 12.44

The Texas Higher Education Coordinating Board adopts amendments to §§12.41 - 12.44 concerning the Success Initiative assessment requirements and the replacement of references to proprietary schools or institutions with references to career schools or colleges, without changes to the proposed text as published in the August 15, 2003, issue of the *Texas Register* (28 TexReg 6482). Specifically, the proposed amendments replace the term "proprietary school" with the term "career schools or colleges", to correspond with the change in terms mandated by amendments to Texas Education Code, Chapter 132 in Senate Bill 1343 of the 78th Texas Legislature. The amendment to §12.3 deletes the provision regarding the Texas Academic Skills Program (TASP), and replaces that provision with the requirements of the Success Initiative. Senate Bill 286 of the 78th Texas Legislature repealed Texas Education Code, §§51.306 and 51.3061 regarding TASP, and added new Texas Education Code, §51.3062, regarding the Success Initiative. The amendment to §12.3 requires the career schools or colleges to assess, advise, and develop a plan for each student to assure college-readiness.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §132.063, which provide the Coordinating Board with the authority to adopt policies, enact regulations, and establish rules to enforce minimum standards for the approval and on-going assessment of programs of study leading to associate degrees offered by career schools and colleges.

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.

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Jan Greenberg
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## CHAPTER 13. FINANCIAL PLANNING
## SUBCHAPTER E. TUITION REBATES FOR CERTAIN UNDERGRADUATES

**19 TAC §13.82**

The Texas Higher Education Coordinating Board adopts amendments to §13.82, concerning the $1,000 tuition rebate for certain undergraduates, without changes to the proposed text as published in the August 15, 2003 issue of the *Texas Register* (28 TexReg 6483). Specifically, the amendment implements a change mandated by House Bill 1890 of the 78th Texas Legislature. The amendment excludes up to nine hours of credit earned exclusively by examination from the total of hours attempted that is used to determine eligibility for the rebate.

The following comment was received regarding the section:

Comment: The University of North Texas wanted clarification that the rebates are financed from the university's E&G budget, not from some other source that the Legislature may have set aside as special funding for the initiative.

Response: Staff verified that the Legislature has not provided separate funding for this initiative, so general revenue or other funds available to the institution must be used for the rebate. No changes were made as a result of this comment.

The amendment is adopted under the Texas Education Code, §54.0065, which requires the Board to adopt rules for the administration of the tuition rebate program for certain undergraduates. The amendment also implements required changes to the program that result from House Bill 1890 of the 78th Texas Legislature.

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.

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Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (5612) 427-6114

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## CHAPTER 21. STUDENT SERVICES
## SUBCHAPTER B. DETERMINING RESIDENCE STATUS

**19 TAC §21.26**

The Texas Higher Education Coordinating Board adopts amendments to §21.26, concerning tuition waivers for members of the U.S. Armed Forces, Army National Guard, Air National Guard, and Commissioned Officers of the Public Health Service, without changes to the proposed text as published in the August 15, 2003, issue of the *Texas Register* (28 TexReg 6484). Specifically, amendments to §21.26 implement statutory changes to §54.058 of the Texas Education Code, passed in H.B. 261 by the 78th Texas Legislature, Regular Session, and provide that either the spouse or the child of a member of the Armed Forces may be considered a resident for tuition purposes in certain instances involving the relocation or death of the member of the Armed Forces. The amendments will allow the member of the Armed Forces or the member's child or spouse to continue paying the resident tuition rate even if the person is no longer a member of the Armed Forces or a child or spouse of the member of the Armed Forces and will allow the resident tuition rate to be paid if a person is continuously enrolled in the same degree or certificate program. A person is not required to enroll in a summer term to remain continuously enrolled.

No comments were received regarding the amendments.

The amended section is adopted under the Texas Education Code, §54.053, which states that the governing board of each institution is subject to the residency rules and interpretations issued by the Coordinating Board, and §54.058.

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.

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Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
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## SUBCHAPTER C. HINSON-HAZLEWOOD COLLEGE STUDENT LOAN PROGRAM

**19 TAC §21.53, §21.55**

The Texas Higher Education Coordinating Board adopts amendments to §21.53 and §21.55, concerning a change in the definitions and the eligibility of students for a Hinson-Hazlewood College Student Loan, without changes to the proposed text as published in the August 15, 2003, issue of the *Texas Register* (28 TexReg 6485). Specifically, the amendment to §21.53 implements the statutory change to §132.001 of the Texas Education Code, passed in S.B. 1343 by the 78th Texas Legislature, Regular Session, and changes the definition of an educational institution that is not public or private nonprofit from "proprietary institution of higher education" to "career college." The amendment to 21.55 implements new §52.41 of the Texas Education Code, passed in S. B. 286 of the 78th Texas Legislature, Regular Session, and restricts the issuance of loans under the Federal Stafford Student Loan Program to borrowers who have been or will be issued a student loan under any other also loan program administered by the Board.

No comments were received regarding the amendments.

The amendments are adopted under §61.027 of the Texas Education Code, which provides the Coordinating Board with general rule-making authority; under §52.01 of the Texas Education

Code, which provides the Board with the authority to administer the student loan program; §132.001 of the Texas Education Code; and new §52.41 of the Texas Education 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.

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Jan Greenberg
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## SUBCHAPTER E. TEXAS B-ON-TIME LOAN PROGRAM

**19 TAC §§21.121 - 21.133**

The Texas Higher Education Coordinating Board adopts new §§21.121-21.133, regarding the Texas B-On-Time Student Loan Program, without changes to the proposed text as published in the August 15, 2003, issue of the *Texas Register* (28 TexReg 6486). Specifically, the new sections implement §§56.451-56.464 of the Texas Education Code, passed in S.B. 4 by the 78th Texas Legislature, Regular Session, define eligible institutions, and provide eligibility requirements for students receiving initial loans, as well as conditions whereby a student may remain eligible to receive a loan. The new sections provide for conditions whereby students who fail to meet eligibility requirements may later restore their eligibility, and provide conditions for making disbursements to students and for waiving the course load requirement. The new sections make provisions for loan amounts, the forgiveness of loans, loan interest, the repayment of loans, for discharging loans in the event of death or total disability of the borrower, and for methods of enforcing the collection of payments.

No comments were received regarding the new sections:

The new sections are adopted under the Texas Education Code, §§56.451-56.464.

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.

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## SUBCHAPTER G. TEACH FOR TEXAS LOAN REPAYMENT ASSISTANCE PROGRAM

**19 TAC §§21.171 - 21.176**

The Texas Higher Education Coordinating Board adopts new §§21.171-21.176, concerning the Teach for Texas Loan Repayment Assistance Program, without changes to the proposed text as published in the August 15, 2003, issue of the *Texas Register* (28 TexReg 6488). Specifically, the new sections implement statutory changes to §§56.351 through 56.355 and §§56.3575 and 56.359 of the Texas Education Code, passed in S.B. 286 by the 78th Texas Legislature, Regular Session, and state the Board's authority for the administration of the program, the purpose of the program, the priority of distribution of funds in case of competing applications, the eligibility requirements for teachers and for types of education loans that will be repaid by the program, and the conditions for repayment of education loans. The new program implemented under these sections will replace the Teach for Texas Conditional Grant program.

No comments were received regarding the new sections.

The new sections are adopted under the Texas Education Code, §56.3575, which authorizes the Coordinating Board to adopt rules necessary for the administration of this subchapter.

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.

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Jan Greenberg
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## SUBCHAPTER J. PHYSICIAN EDUCATION LOAN REPAYMENT PROGRAM

**19 TAC §§21.251, 21.255, 21.262, 21.263**

The Texas Higher Education Coordinating Board adopts amendments to §§21.251, 21.255, 21.262, and 21.263, concerning the Physician Education Loan Repayment Program, without changes to the proposed text as published in the August 15, 2003, issue of the *Texas Register* (28 TexReg 6490). Specifically, amendments to §21.251 clarify the authority for the administration of the Physician Education Loan Repayment Program and the purpose of the program. Amendments to §21.251 and §21.262 update the name of the office that handles the program. The amendment to §21.255 merely updates the statutory authority for the Medically Underserved Community-State Matching Incentive Program. Amendments to §21.262 and §21.263 implement statutory changes to §61.532 of the Texas Education Code, passed in S.B. 286 by the 78th Texas Legislature, Regular Session, and eliminate the program for family practice residents and clinical faculty members who

completed training in an approved family practice residency training program.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §61.531, and §61.532.

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.

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Jan Greenberg
General Counsel
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## SUBCHAPTER CC. EARLY HIGH SCHOOL GRADUATION SCHOLARSHIP PROGRAM

### 19 TAC §§21.950, 21.954 - 21.958

The Texas Higher Education Coordinating Board adopts amendments to §§21.950, 21.954 - 21.958, concerning the Early High School Graduation Scholarship Program, without changes to the proposed text as published in the August 15, 2003, issue of the *Texas Register* (28 TexReg 6491).

Specifically, the amendments to 21.950 clarify the authority for the administration of the program and implement statutory changes to §56.202 of the Texas Education Code, passed in H.B. 1882 by the 78th Texas Legislature, Regular Session, by clarifying that the purpose of the program is to provide financial assistance beyond the cost of tuition. Amendments to §21.954 implement statutory changes to §56.203 of the Texas Education Code, passed in H.B. 1882 by the 78th Texas Legislature, Regular Session. Students who graduate from high school after September 1, 2003, must successfully complete the Recommended or Advanced High School Program in order to be eligible for the Early High School Graduation Scholarship Program unless the required courses were unavailable due to course scheduling, lack of enrollment capacity, or another cause not within the person's control. The amendments lengthen the time within which a student must graduate from high school in order to be eligible from 36 to 41 consecutive months or, if the person graduated with at least 30 hours of college credit, to not more than 45 consecutive months. Further amendments to §21.954 clarify that a person's eligibility for the scholarship program ends on the sixth anniversary of the date the person first becomes eligible to receive funding through the program unless the person is granted an extension for hardship or other good cause. A student may not initially use a state credit for enrollment during any term of a summer session immediately following the person's graduation from high school. Amendments to §21.956 implement statutory changes to §56.204 of the Texas Education Code, passed in H.B. 1882 by the 78th Texas Legislature, Regular Session, and clarify that an eligible person is entitled to apply a state credit to pay mandatory fees in addition to tuition. For students whose graduation date is after September 1, 2003, the specific amount that an eligible person may receive will be based on how many months the student took to successfully complete the Recommended or Advanced High School Program, and the amount of college credit the student had earned at the time of graduation from high school. Amendments to §21.957 clarify the process for awarding scholarships, and amendments to §21.958 clarify the process by which an institution must make refunds to the Early High School Graduation Scholarship Program if an award recipient withdraws from or drops a class during the first four weeks of class.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §56.209, which provides the Coordinating Board with the authority to adopt rules to administer the Early High School Graduation Scholarship Program and §§56.202, 56.203, and 56.204.

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.

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Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
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### 19 TAC §21.960

The Texas Higher Education Coordinating Board adopts new §21.960, concerning the Early High School Graduation Scholarship Program, without changes to the proposed text as published in the August 15, 2003, issue of the *Texas Register* (28 TexReg 6491).

Specifically, new §21.960 implements subsection (c) of §56.203 of the Texas Education Code, passed in H.B. 1882 by the 78th Texas Legislature, Regular Session, and allows an otherwise eligible student who graduated from high school on or after September 1, 2003, an extension of one year to use a state credit under the program if the student demonstrates hardship or other good cause to grant the extension.

No comments were received regarding the new section.

The new section is adopted under the Texas Education Code, §56.209, which provides the Coordinating Board with the authority to adopt rules to administer the Early High School Graduation Scholarship Program and §§56.202, 56.203, and 56.204.

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.

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Jan Greenberg
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Texas Higher Education Coordinating Board
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## SUBCHAPTER LL. EARLY CHILDHOOD CARE PROVIDER STUDENT LOAN REPAYMENT PROGRAM

**19 TAC §§21.2050 - 21.2056**

The Texas Higher Education Coordinating Board adopts new §§21.2050 through 21.2056, concerning the Early Childhood Care Provider Student Loan Repayment Program, without changes to the proposed text as published in the August 15, 2003, issue of the *Texas Register* (28 TexReg 6493). Specifically, the new sections implement §§61.873 and 61.876 of the Texas Education Code, passed in S.B. 286 by the 78th Texas Legislature, Regular Session, and provide for the authority, scope and purpose of the program, applicable definitions, priorities of application acceptance and selection criteria, eligibility requirements for types of loans that may be repaid through the program, qualifications for participation in the program, amounts of repayment and limitations on repayment, and regarding the dissemination of information about the program. The new sections replace a previous program for Early Childhood Care Providers that was a combination of a loan forgiveness and loan repayment program, with a loan repayment program.

No comments were received regarding the new sections.

The new sections are adopted under the Texas Education Code, §61.872, which authorizes the Coordinating Board to provide assistance in the repayment of eligible student loans for persons who apply and qualify for the assistance, §61.873 and §61.876.

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.

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Jan Greenberg
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## CHAPTER 22. GRANT AND SCHOLARSHIP PROGRAMS
## SUBCHAPTER L. TOWARD EXCELLENCE, ACCESS AND SUCCESS (TEXAS) GRANT PROGRAM

**19 TAC §§22.225, 22.226, 22.228 - 22.230, 22.232**

The Texas Higher Education Coordinating Board adopts amendments to §§22.225, 22.226, 22.228 - 22.230 and 22.232, concerning the Toward EXcellence, Access & Success (TEXAS) Grant Program, without changes to the proposed text as published in the August 15, 2003, issue of the *Texas Register* (28 TexReg 6494).

Specifically, amendments to §22.225 clarify the authority for the administration of the program, amendments to §22.226 clarify the definition of an initial disbursement, and amendments to §22.228 implement new §56.0341 of the Texas Education Code, passed in Senate Bill 1007 by the 78th Texas Legislature, Regular Session, allowing students who are on track to graduate from high school with the Recommended or Advanced High School Program (based on the student's available high school transcript) to receive an initial TEXAS Grant award. Eligibility for a TEXAS Grant ends in one year if the student fails to complete the Recommended or Advanced High School Program, but the student would have an additional four years of eligibility if the student later receives an associate's degree. This section has also been changed to reflect the statute by requiring that an overall grade point average be calculated for students who attend more than one institution of higher education. Amendments to §22.229 implement statutory changes to §56.305 of the Texas Education Code, passed in Senate Bill 1007 by the 78th Texas Legislature, Regular Session, and add a hardship provision for students whose grade point average or completion rate falls below the requirements for satisfactory academic progress, and eliminate the requirement that recipients must be enrolled at least half-time in order to receive a TEXAS Grant. The amendment to §22.230 establishes priority among eligible students. Amendments to §22.232 implement new §56.0341 of the Texas Education Code, passed in Senate Bill 1007 by the 78th Texas Legislature, Regular Session, and add a requirement that a student who received an award based on expected high school graduation under the Recommended or Advanced High School Program may have to forgo or repay the amount of the initial award if the program is not completed. The amendments also implement statutory changes to §56.307 of the Texas Education Code and clarify that the amount of a TEXAS Grant may not be reduced by any gift aid unless the total amount of a person's gift aid exceeds the student's financial need.

The following comments were received regarding the amendments:

Comments: Forty-five comments were received concerning the amendment to §22.228(b)(6)(B), which would require that all courses attempted at all institutions attended would have to be considered in figuring a student's grade point average.

Hill College, Texas A&M International, The University of Texas at San Antonio, Stephen F. Austin State University, and Tyler Junior College all responded favorably. They agreed that all work should be used to determine eligibility. Texas A&M International already uses all course grades (internal and transferred) to calculate overall GPA. The University of Texas at San Antonio commented that satisfactory academic performance is supposed to be based on a cumulative grade point average as well, and the amendment to the rules would not be a change for them. Stephen F. Austin State University said they could make the modifications to accommodate the change.

Other institutions of higher education raised concerns about the amendment: The concern mentioned most often was that requiring the grade point average for transfer students to be based on all coursework taken at all institutions attended would make

manual calculations necessary, causing the program to be more labor intensive and time-consuming. It was commented that the TEXAS Grant program is more time-consuming to administer than other programs as it is. The institutions expressing this concern were: Angelina Community College, The University of Texas at Dallas, Midwestern State University, El Paso Community College, the University of Mary Hardin Baylor, Dallas Baptist University, Weatherford College, Howard College, The University of Texas at Arlington, McMurry University, Austin Community College, Midland College, Houston Baptist University, Lubbock Christian University, The University of Texas at Tyler, Vernon College, Hardin-Simmons University, the Texas State Technical Colleges, and the University of Texas at Arlington. Blinn College, Houston Baptist University, the Texas State Technical Colleges, and Sam Houston State University commented that using hand calculations would increase the chance of human error. Midwestern State University, El Paso Community College, the University of Houston, Vernon College, Weatherford College, Howard College, Northeast Texas Community College, Blinn College, North Central Texas College, and Dallas County Community College District commented that they did not have enough manpower to hand calculate grade point averages for transfer students and cited cuts in state funding as the reason it would be impossible to hire enough staff to handle manual calculations. The University of Texas at Dallas, The University of Texas at Austin, The University of Texas of the Permian Basin, Northeast Texas Community College, The University of Texas at Arlington, Austin Community College, Blinn College, Dallas County Community College District, Baylor University, and The University of Texas at Arlington said the amendment would delay the awarding of TEXAS Grants. Western Texas College, the University of Houston, and the University of North Texas commented that the TEXAS Grant program is more time-consuming (labor intensive, highly manual) to administer than other programs as it is. El Paso Community College, The University of Texas at El Paso, McMurray University, Houston Baptist University, Lubbock Christian University, The University of Texas at Tyler, the Texas State Technical Colleges, and The University of Texas at Tyler commented that their institutions record only the credit hours earned, not the grade point average, from other institutions. Western Texas College, the University of Houston, the University of North Texas, Vernon College, Dallas Baptist University, Dallas County Community College District, Houston Baptist University, Baylor University, McLennan Community College, The University of Texas at Tyler, and Hardin-Simmons University commented that their computer systems were not set up to handle calculating a grade point average based on coursework taken at all institutions. In addition, Dallas County Community College District said that doing so would require a lot of work and programming time to change computer systems for only a small portion of students. Southwestern University and Texas Christian University commented that questions would arise about whether to count all transfer work reported, transfer work that is accepted, or only transfer work that is applicable toward a degree. Howard College, Blinn College, Dallas County Community College District, Texas Tech University, and McLennan Community College commented on the delay in receiving transcripts and the difficulty involved in getting students to turn in all college transcripts. McLennan Community College commented that changes in calculating the grade point average for TEXAS Grant continuing students would pose difficulties for students taking dual credit in high school. West Texas A&M University, El Paso Community College, the Texas State Technical Colleges, and The University of Texas at Tyler commented that the satisfactory academic performance standard for the TEXAS Grant is stricter than the standards for other programs and the standards approved by the U. S. Department of Education.

Response: Coordinating Board staff decided the amendment must be incorporated into the rules because the procedure is required by statute. The Coordinating Board respects the opinions of the institutions; and in response to their issues, questions, and concerns, staff have already met with the Financial Aid Advisory Committee to begin the work of developing processes that will address the concerns expressed. Staff hopes to propose other amendments soon that will clarify the process and the people and circumstances to whom the process will apply.

The amendments are adopted under the Texas Education Code, §56.303, which provides the Coordinating Board the authority to administer the TEXAS Grant program and to adopt any rules necessary to implement the program, and under §§56.305, 56.307, and new §56.3041.

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.

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Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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## SUBCHAPTER N. INDIVIDUAL DEVELOPMENT ACCOUNT INFORMATION PROGRAM

### 19 TAC §§22.280 - 22.282

The Texas Higher Education Coordinating Board adopts new §§22.280 through 22.282, concerning the Individual Development Account Information Program, without changes to the proposed text as published in the August 15, 2003, issue of the *Texas Register* (28 TexReg 6498). Specifically, the new sections implement §61.0816 of the Texas Education Code, passed in S.B. 968 by the 78th Texas Legislature, Regular Session. The new sections state the authority, scope and purpose of the program, applicable definitions, and new reporting requirements for eligible institutions that participate in the Individual Development Account Information Program. The new sections provide rules for the Individual Development Account (IDA) Information Program to increase awareness of the existence of the program and the benefits of participating, in the hope that students at community colleges and their families will use IDAs to finance a bachelor's degree.

No comments were received regarding the new sections.

The new sections are adopted under the Texas Education Code, §61.0816, which authorizes the Board to establish and administer a program to provide student financial aid offices at public community colleges with information and other assistance to

enable those offices to provide appropriate students of those colleges with information and referrals regarding the availability of and services offered by individual development account programs.

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.

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Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
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# TITLE 22. EXAMINING BOARDS

## PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

### CHAPTER 507. EMPLOYEES OF THE BOARD

**22 TAC §507.4**

The Texas State Board of Public Accountancy adopts an amendment to §507.4 concerning Confidentiality without changes to the proposed text as published in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8790). The text of the rule will not be republished.

The amendment adds a new subsection that allows the board to share confidential investigative information with certain described state and federal agencies under specific conditions.

The amendment will function by allowing the Board to share its confidential information with other state and federal investigative bodies.

No comments were received regarding adoption of the rule.

The amendment is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and by the recent amendment to §901.160 which authorizes the board to adopt guidelines regarding sharing of information with state and federal agencies.

No other article, statute or code is affected by the adoption.

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.

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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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### CHAPTER 513. REGISTRATION

#### SUBCHAPTER A. REGISTRATION OF CPAS OF OTHER STATES AND PERSONS HOLDING SIMILAR TITLES IN FOREIGN COUNTRIES

**22 TAC §513.6**

The Texas State Board of Public Accountancy adopts new rule §513.6 concerning Non-Resident Substantially Equivalent without changes to the proposed text as published in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8791). The text of the rule will not be republished.

The new rule will create the procedure for registering non-resident substantially equivalent individuals.

The new rule will function by making the registration process for non-resident individuals much easier.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §901.412(b) that authorizes the board to prescribe the requirements by board rule.

No other article, statute or code is affected by the adoption.

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.

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Rande Herrell
General Counsel
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### CHAPTER 517. TEMPORARY PRACTICE IN TEXAS

**22 TAC §517.3**

The Texas State Board of Public Accountancy adopts new rule §517.3 concerning Individuals Practicing Under a Temporary Permit Holder without changes to the proposed text as published in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8792). The text of the rule will not be republished.

The new rule will require individuals who are practicing under a temporary firm permit to become individually licensed either through reciprocity or substantial equivalency within 30 days of commencing work under a temporary firm permit or the temporary permit will be revoked.

The new rule will function by requiring individuals practicing under temporary permits to become licensed within 30 days and this should help assure a certain level of professional quality.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

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.

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Rande Herrell
General Counsel
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For further information, please call: (512) 305-7848

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## CHAPTER 518. UNAUTHORIZED PRACTICE OF PUBLIC ACCOUNTANCY

### 22 TAC §518.1

The Texas State Board of Public Accountancy adopts new rule §518.1 concerning Cease and Desist Orders in new Chapter 518 regarding Unauthorized Practice of Public Accountancy without changes to the proposed text as published in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8793). Chapter 518 will implement the cease and desist orders dictated by recently amended §901.601 of the Act. The text of the rule will not be republished.

The new rule §518.1 authorizes the Executive Committee, after notice and an opportunity for a hearing, to issue a cease and desist order prohibiting the unlicensed practice of accountancy. The Committee's action must be ratified by the board at its next regularly scheduled meeting. Section 518.1 provides for the issuance of cease and desist orders as authorized by recently amended §901.601 of the Act.

The new rule will function by giving the board the power to act quickly to stop the unlicensed practice of accountancy.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

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.

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For further information, please call: (512) 305-7848

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### 22 TAC §518.2

The Texas State Board of Public Accountancy adopts new rule §518.2 concerning Administrative Penalty Guidelines for Violations of Cease and Desist Orders in new Chapter 518 regarding Unauthorized Practice of Public Accountancy without changes to the proposed text as published in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8794). Chapter 518 will implement the cease and desist orders dictated by recently amended §901.601 of the Act. The text of the rule will not be republished.

The new rule §518.2 will authorize the board, after notice and hearing, to assess an administrative penalty for violating a cease and desist order in amounts ranging from $1,000 to $25,000, depending upon certain listed factual criteria.

The new rule will function by giving the board the ability to act quickly to stop the unlicensed practice of accountancy and to assess administrative penalties when appropriate.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §901.601 which authorizes the Board to adopt by rule a schedule that prescribes ranges in the amounts of administrative penalties for violations of a cease and desist order.

No other article, statute or code is affected by the adoption.

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.

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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Effective date: December 3, 2003
Proposal publication date: October 10, 2003
For further information, please call: (512) 305-7848

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## CHAPTER 519. PRACTICE AND PROCEDURE

**22 TAC §519.3**

The Texas State Board of Public Accountancy adopts an amendment to §519.3 concerning Rulemaking Proceedings without changes to the proposed text as published in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8795). The text of the rule will not be republished.

The amendment to §519.3 will provide for negotiated rule making as required by Section 901.167 of the Act.

The amendment will function by allowing the board to have negotiated rule-making available.

No comments were received regarding adoption of the rule.

The amendment is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §901.167 which authorizes the board to utilize the negotiated rule making procedures of Chapter 2008, Government Code.

No other article, statute or code is affected by the adoption.

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 November 13, 2003.

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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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**22 TAC §519.8**

The Texas State Board of Public Accountancy adopts an amendment to §519.8 concerning Subpoenas without changes to the proposed text as published in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8796). The text of the rule will not be republished.

The amendment to §519.8 will provide authority for the board to subpoena witnesses and documents in the course of an investigation, as well as in a contested case.

The amendment will function by enabling the board to subpoena persons and documents that were previously not subject to board subpoenas.

No comments were received regarding adoption of the rule.

The amendment is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §901.166 which authorizes the Board to issue subpoenas.

No other article, statute or code is affected by the adoption.

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.

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**22 TAC §519.13**

The Texas State Board of Public Accountancy adopts the repeal of §519.13 concerning Mediation and Alternative Dispute Resolution without changes to the proposed text as published in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8797).

The repeal of §519.13 will remove this rule so it can be replaced by another rule that complies with §901.167 of the Act.

The repeal will function by repealing and replacing this rule with one that complies with §901.167 of the Act.

No comments were received regarding adoption of the repeal.

The repeal is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

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.

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**22 TAC §519.13**

The Texas State Board of Public Accountancy adopts new rule §519.13 concerning Mediation and Alternative Dispute Resolution without changes to the proposed text as published in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8797). The text of the rule will not be republished.

The new rule §519.13 will provide for alternative dispute resolution as required by §901.167 of the Act.

The new rule will function by making available alternative dispute resolution to the board as required by §901.167 of the Act.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal

rules deemed necessary or advisable to effectuate the Act and §901.167 which authorizes the Board to utilize alternative dispute resolution procedures of Chapter 2009, Government Code.

No other article, statute or code is affected by the adoption.

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.

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Rande Herrell
General Counsel
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**22 TAC §519.14**

The Texas State Board of Public Accountancy adopts new rule §519.14 concerning Emergency Suspension without changes to the proposed text as published in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8799). The text of the rule will not be republished.

The new rule §519.14 will implement §901.5045 of the Act regarding emergency suspensions of certificate or registration holders.

The new rule will function by establishing the creation of assurances to the public that egregious and immediate misconduct by certificate or registration holders can be stopped quickly.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §901.5045 which authorizes the Board to issue emergency suspension orders.

No other article, statute or code is affected by the adoption.

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.

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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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## CHAPTER 525. CRIMINAL BACKGROUND INVESTIGATIONS

**22 TAC §525.1**

The Texas State Board of Public Accountancy adopts an amendment to §525.1 concerning Applications for the Uniform CPA Examination, Issuance of the CPA Certificate, a License, or Renewal of a License for Individuals with Criminal Backgrounds with a non-substantive change to the proposed text as published in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8800). The change is in subsection (c) where Article 6252-13c (Texas Civil Statutes) was deleted and replaced with the correct citation to Section 53.023 (Texas Occupations Code).

The amendment to §525.1 will implement §901.503(c) of the Act by permitting a refund of the examination eligibility fee if an application to sit for examination is denied.

The amendment will function by refunding fees regarding examination eligibility to applicants who are refused permission to sit for the examination.

No comments were received regarding adoption of the rule.

The amendment is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §901.503(c) of the Act which requires the Board to provide for this refund.

No other article, statute or code is affected by the adoption.

*§525.1. Applications for the Uniform CPA Examination, Issuance of the CPA Certificate, a License, or Renewal of a License for Individuals with Criminal Backgrounds.*

(a) The board shall not examine a CPA candidate, issue the CPA certificate, issue an initial license, or renew a license, and shall revoke a current license if the board finds that the applicant or licensee has been convicted of a felony offense which results in incarceration or upon revocation of applicant's or licensee's felony probation, parole, or mandatory supervision.

(b) The board may not examine a CPA candidate, issue the CPA certificate, issue an initial license, or renew a license if the board finds that the individual applying has been convicted of a felony or misdemeanor offense which directly relates to the practice of public accountancy. In determining whether the felony or misdemeanor conviction directly relates to such duties and responsibilities, the board shall consider:

(1) the nature and seriousness of the crime;

(2) the relationship of the crime to the board's statutory responsibility to ensure that persons professing to practice public accountancy maintain high standards of competence and integrity in light of the reliance of the public, and the business community in particular, on the reports and other services provided by accountants;

(3) the extent to which a license to practice public accountancy might offer an opportunity to engage in further criminal activity of the same type as that in which the individual was previously involved; and

(4) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of a certified public accountant or public accountant.

(c) In addition to the factors stated in subsection (b) of this section, the board shall consider Section 53.023 (Texas Occupations

Code) in determining the present fitness of a candidate who has been convicted of a crime.

(d) Because an accountant is often placed in a position of trust with respect to client funds, and the public in general, and the business community in particular, rely on the reports and other services of accountants, the Texas State Board of Public Accountancy considers that the following crimes directly relate to the practice of public accountancy:

(1) any felony or misdemeanor of which fraud or deceit is an essential element;

(2) any felony or misdemeanor conviction which results in the suspension or revocation of the right to practice before any state or federal agency for a cause which in the opinion of the board warrants its action; and

(3) any crime involving moral turpitude.

(e) The following procedures shall apply in the processing of an application to sit for the uniform CPA examination.

(1) The candidate will be asked to respond, under penalty of perjury, to the question if he or she has ever been convicted of a felony or misdemeanor.

(2) The board may submit identifying information to the Texas Department of Public Safety and or other appropriate agencies on board letterhead requesting conviction records on all initial examination candidates and on those reexamination candidates about whom the executive director finds evidence to warrant a record search.

(3) The board will review the conviction records of candidates and will approve or disapprove applications as the evidence warrants. If the requested information is not provided by the Texas Department of Public Safety and or other appropriate agencies at least 10 days prior to the examination, a candidate may be permitted to sit for the uniform CPA examination, with his or her grades subject to being voided. A candidate may have his or her grades voided or may be denied the opportunity to sit for the uniform CPA examination on the basis of a prior conviction pursuant to a hearing as provided for in the Act.

(4) The examination eligibility fee of a candidate whose application to take the CPA examination has been denied under this section or §511.70 of this title (relating to Grounds for Disciplinary Action of Candidates) and who has not taken any portion of the examination will be refunded.

(f) The following procedure shall apply in the processing of an application for issuance of the CPA certificate.

(1) The individual will be asked to respond, under penalty of perjury, to the question if he or she has ever been convicted of a felony or misdemeanor.

(2) The board may submit identifying information to the Texas Department of Public Safety and or other appropriate agencies on board letterhead requesting conviction records on individuals requesting issuance of the CPA certificate.

(3) The board will review the individual applications and the conviction records of applicants and will approve or disapprove applications as the evidence warrants. No CPA certificate or initial license may be issued to an individual whose application for a CPA certificate has been denied. The board may disqualify a person from receiving a CPA certificate or initial license on the basis of a prior conviction pursuant to a hearing as provided for in the Act.

(g) The following procedure shall apply when renewing a license annually.

(1) Each licensee will be asked to respond, under penalty of perjury, to the question if he or she has ever been convicted of a felony or misdemeanor of which the board has not previously been informed. If the licensee responds in the negative and pays the required license fee, a renewal license will be issued in accordance with established procedures. If the licensee responds affirmatively and pays the required license fee, the board may submit identifying information on board letterhead to the Texas Department of Public Safety and other appropriate agencies requesting conviction records on the individual.

(2) The board will review the conviction records and either approve or deny the application for a renewal license as the evidence warrants. The board will refund any renewal fee submitted if the application is denied. The board may suspend or revoke or refuse to renew an annual license on the basis of a prior conviction pursuant to a hearing as provided for in the Act.

(h) In the event the board suspends or revokes a valid license or denies a person a license or certificate or the opportunity to sit for the uniform CPA examination or voids the grades of a candidate because of a person's prior conviction of a crime and the relationship of the crime to the license and certificate pursuant to a hearing as provided for in the Act the board shall notify the person in writing:

(1) of the reasons for the suspension, revocation, denial, or disqualification;

(2) that the person, after exhausting administrative appeals, may file an action in district court in Travis County, for review of the evidence presented to the board and its decision in accordance with the Act;

(3) that a person must begin the judicial review within 30 days after the board's decision is final and appealable; and

(4) that the earliest date a person may appeal is when a motion for rehearing is denied, or when the time for filing a motion for rehearing has expired and no motion has been filed.

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.

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Rande Herrell
General Counsel
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# TITLE 28. INSURANCE

## PART 1. TEXAS DEPARTMENT OF INSURANCE

### CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

## SUBCHAPTER U. USE OF CREDIT INFORMATION OR CREDIT SCORES

**28 TAC §5.9940, §5.9941**

The Commissioner of Insurance adopts new Subchapter U, §5.9940 and §5.9941, concerning the use of credit information or credit scoring in certain personal lines of insurance, as provided in Insurance Code Article 21.49-2U, (as enacted by the Regular Session of the 78th Legislature in Senate Bill 14, effective June 11, 2003). The subchapter is adopted with changes to the proposed text as published in the September 19, 2003, issue of the *Texas Register* (28 TexReg 8116).

The subchapter is necessary to implement Article 3, Use of Credit Scoring, of Senate Bill 14 (SB 14) enacted by the Regular Session of the 78th Legislature. Article 3 amends Chapter 21 of the Insurance Code by adding Article 21.49-2U. The adopted sections require disclosure by an insurer or its agents to its customers concerning whether credit information will be obtained and used as part of an insurance credit scoring process and specify how an insurer may vary its rates due solely to credit scoring. In general, Article 21.49-2U provides certain requirements pertaining to the use of credit information and credit scoring by insurers in Texas for underwriting or rating certain personal insurance policies. Article 21.49-2U applies to all insurers authorized to write property and casualty insurance in this state that write certain types of personal insurance coverage and use credit information or credit reports for the underwriting or rating of that coverage. However, Article 21.49-2U does not apply to farm mutual insurance companies or eligible surplus lines insurers. Section 7(d) of Article 21.49-2U requires an insurer or its agents to disclose to its customers on a form promulgated by the commissioner whether or not credit information will be obtained on an applicant or insured or any other member of the applicant's or insured's household and used as part of the insurance credit scoring process. If credit information is obtained or used, subsection (d) also requires an insurer to further disclose the name of each person on whom credit information was obtained or used and how each person's credit information was used to underwrite or rate a policy. The requirements for the promulgated disclosure form are set forth in §5.9940.

Article 21.49-2U, Section 13(b) requires the commissioner to adopt rules regarding the allowable differences in rates charged by insurers due solely to the differences in credit scores. Adopted §5.9941 will ensure that consumers are charged premiums that are reasonable, fair and related to their risk profile and will promote a competitive environment and minimize market disruption. The section will promote stability in the market and promote an increase in consumer choices.

Changes have been made to §§5.9940 and 5.9941 as published; however, none of the changes introduce a new subject matter or affect additional persons other than those subject to the proposal as originally published. Changes have been made to clarify the requirements of the rules and in response to comments. Some of the changes include the moving of subsections for readability purposes. Section 5.9940 requires insurers to use Form CD-1, which is adopted by reference by the Commissioner. Adopted §5.9940 will enable consumers to be more informed regarding the use of credit information in the underwriting and rating in some lines of personal insurance. The department has made changes to the allowance of the use of a different disclosure form to provide that an insurer may use a different disclosure form only if it is allowed or approved for use in another state and complies with all the requirements of §5.9940 and Form CD-1. The alternative form must be filed with the Texas Department of Insurance prior to use. Section 5.9940 was changed to identify the name of the adopted disclosure form and clarify the conditions that must be met to use a form different from the form adopted by the Commissioner. Based on comments, the section was changed to delete language that is not necessary to be included in the form adopted by the Commissioner, such as identifying the name of the applicant, insured or the name(s) of other household member(s). The section was also changed, based on comments, to reflect that the disclosure form must be provided in Spanish when requested. The disclosure form was also changed to include a summary of the consumer protections set forth in SB 14. Subsection (h) was also added to clarify that insurers are still subject to all disclosure requirements in Article 21.49-2U. Adopted §5.9941 provides for differences in rates an insurer may charge due solely to credit scoring if the differences in rates are based on sound actuarial principles and supported by data filed with the department. The department deleted the language related to percentage amounts in subsection (a). This change will allow the rule to accommodate a broader spectrum of possible ways an insurer may incorporate credit information or credit scoring into its rating structure. The adopted section will ensure that consumers are charged premiums that are reasonable, fair and related to their risk profile and will promote a competitive environment and minimize market disruption. Based on written comments and other comments received at the October 22, 2003 hearing, TDI will be proposing amendments to §5.9941. In the rule proposal, which will be filed in the near future, TDI will set amounts for the allowable differences in credit scores and provide means to address rate increases due to the imposition of amounts for the allowable differences.

General comments

Comment: Some commenters expressed support for the proposed rules and believe the rules provide for market stability and consumer safeguards. One commenter believes that staff took a pragmatic approach to the proposed rules and that the approach may be fairer for consumers in a particular insurance company. A few commenters appreciate the hard work and good job that TDI staff did on the proposal.

Response: TDI appreciates the comments.

Comment: One commenter believes that no relationship exists between homeowner's insurance and credit scores.

Response: Studies to date show a relationship between homeowner insurance losses and credit scores; however, the department will be conducting its own study to verify this relationship.

Comment: Several commenters stated the proposed rules should require insurers to notify applicants or policyholders each time the use of their credit score keeps them from being charged the best rate.

Response: TDI believes that a rule that requires notice to applicants or policyholders each time the use of a credit score does not result in the best rate is not necessary. Article 21.49-2U §8 requires insurers to give notice of an action resulting in an adverse effect. TDI believes that the notice requirement in subsection (g)(8) is satisfactory to accomplish the commenters' objectives. The federal Fair Credit Reporting Act (FCRA), which can be found at 15 U.S.C. §§1681-1681u and Chapter 20 of the Texas Business & Commerce Code require insurers to give notice of an "adverse action" to applicants or insureds. Insurers have been

required to follow the notice of adverse action requirements in FCRA and the Texas Business & Commerce Code long before Article 21.49-2U was enacted.

Comment: Several commenters stated the proposed rule should allow the department to capture additional, relevant data from companies so the department can better analyze the use of credit scoring.

Response: TDI believes that a rule regarding collection of data from insurers regarding the use of credit scoring is unnecessary at this time. The department will conduct a study to better analyze the use of credit scoring. Additionally, Article 21.49-2U §15 requires the commissioner to file a report, by January 1, 2005, regarding insurers' use of credit scoring, and the results will be provided in reports which will be public information.

Comment: One commenter stated the proposed rule should require insurance companies to disclose credit scores and score components so that consumers can identify the exact source of incorrect information in their credit file. One commenter is concerned about flaws in credit reports and that it is a "Herculean" task to get credit reports corrected.

Response: Article 21.49-2U, §10 makes insurance credit scoring models filed with TDI open for public disclosure upon written request. Credit reports, which are available to consumers, allow a consumer to discover the identity of the source of incorrect information in their credit file. If incorrect information is included in a credit report, Article 21.49-2U, Section 6 provides for dispute resolution and error correction. TDI understands that the error correction process can be frustrating, but encourages consumers to correct any errors in their credit reports.

Comment: One commenter stated that the proposed rule should require insurance companies to disclose rate variations caused by credit score categories and surcharges. The commenter states that for years, the credit reporting industry refused to disclose the factors used to compute credit scores, making it difficult for consumers to sue and recover damages against insurers. The commenter further states that if credit scoring is allowed, insurance companies should be required to disclose the increments of surcharges for each item that decreases a consumer's credit score, thus allowing consumers to determine damages for incorrect entries to their credit files.

Response: TDI has been reviewing credit scoring models filed by insurers in accordance with SB 14 to determine if they are in compliance with SB 14 and based on sound actuarial principles. Article 21.49-2U §10 makes credit models filed with TDI open for public disclosure upon written request.

Comment: Some commenters opposed both §5.9940 and §5.9941 and explained about personal experiences with credit scoring being used in the insurance industry. One commenter believes that many more protections need to be placed on the use of credit scoring in insurance to protect consumers. The commenter stated that the credit score restrictions in SB 14 were based on the NCOIL Model Act. The commenter also stated that the portion of the NCOIL Model Act about not being able to use credit scoring as a sole factor is missing.

Response: TDI recognizes that numerous consumers have experienced frustrations and problems with the use of credit scoring in the insurance industry. TDI believes that SB 14 and rules adopted by TDI will help limit some of the problems. Many consumer protections are in SB 14 and not in the proposed rules. TDI has changed §5.9940 and the disclosure form to reflect the consumer protections that are included in Article 3 of SB 14. TDI agrees that Article 3 of 21.49-2U was based to a certain extent on the NCOIL Model Act. Although the portion about not being able to use credit scoring as a sole factor is not necessary in the disclosure form since the language regarding this issue appears in Article 3 of 21.49-2U, §3(2), TDI is including this information in the disclosure form to alleviate confusion expressed by some commenters.

Comment: Several commenters are concerned with the effective date of the proposal.

Response: The effective date of the statute is January 1, 2004. Insurers must comply with the statute as of that date. Insurers can use the promulgated disclosure form and be in compliance with the disclosure requirements of the rule. To allow insurers some time to make the necessary filings to comply with §5.9941, the department is permitting filings to be made no later than March 1, 2004. The adopted sections provide ample time for insurers to comply with the rule.

Comment: Some commenters are not happy with SB 14 and believe that the use of credit scoring in insurance is discriminatory against some minorities.

Response: While there have been some claims that credit scoring may disproportionately affect those with low or fixed incomes or those in some minority groups, this has not been conclusively established in scientific studies. TDI will be looking at these questions as part of its studies in the coming year.

Comment: One commenter believes that both of the proposed sections fail to fulfill the benefits and promises that many legislators and the Governor went around the state publicizing after the adoption of SB 14. The commenter believes that the proposed rules give insurers what they were unable to obtain during the 78th Regular Session of the legislature.

Response: TDI disagrees. TDI believes that it fulfilled the intent of the legislation requirements set forth in Article 21.49-2U of SB 14 in its proposal. However, based on written comments and other comments received at the October 22, 2003 hearing, TDI is changing §5.9940 and will be proposing amendments to §5.9941. In the rule proposal, which will be filed in the near future, TDI will set amounts for the allowable differences in credit scores and provide a means to address rate increases due to the imposition of amounts for the allowable differences. §5.9940

Comment: Some commenters stated that Texas Insurance Code Article 21.49-2U §7 provides for three different types of disclosure, and set out an explanation of each one, but the commenter feel that the proposal does not adequately distinguish between the different types. A commenter feels that the proposal makes no provision for oral disclosures and suggested adding language amending the proposal to reflect that only an oral disclosure is required.

Response: TDI agrees with the commenters that Texas Insurance Code Article 21.49-2U §7 provides for three different types of disclosure. Subsection 7(b) provides that an insurer shall disclose to each applicant that the applicant's credit report may be used in underwriting or rating the applicant's policy and that a disclosure must be provided at the same time of application orally, in writing or electronically. Subsection 7(d) provides for disclosure on a form promulgated by the Commissioner whether or not credit information will be used as part of the insurance credit scoring process. TDI does not believe an oral disclosure meets the statutory requirements contained in Subsection 7(d). For

purposes of clarification of the application of the rule, TDI has changed the rule to distinguish between the disclosures by making changes to subsection (d) and adding subsection (g).

Comment: One commenter stated that no form is required by subsection 7(d) of Article 21.49-2U for disclosing to the applicant the name of each person on whom credit information was obtained and how such information was used to underwrite or rate the policy.

Response: TDI agrees that this disclosure is not subject to a promulgated form. Section 5.9940 regarding the disclosure form now reflects the statutory language contained in subsection 7(d) of Article 21.49-2U, which will eliminate listing the name of each person in the promulgated form.

Comment: One commenter suggests amending subsection (e)(7) of the proposed rule to allow insurers to generate the required disclosure as long as the disclosure is provided in accordance with the time lines set forth in subsection (g)(5) of the adopted rule insurers. The commenter provided suggested language, which would allow an insurer 15 days after receipt of a complete application to issue disclosure.

Response: TDI does not object to the disclosure being provided with the declarations page, which is done automatically by many insurers, because the department believes that this would comply with the requirement in subsection (g)(5) of the adopted rule. The section now specifies that the disclosure form must be provided no later than 10 days after receipt of a complete application. TDI does not believe that 10 days is unreasonable as long as an insurer has a complete application.

Comment: One commenter recommends amending subsection (e)(4) to clarify that the language in (e)(4) is not required to be contained in the disclosure if both disclosures mandated in Article 21.49-2U §7(d) are provided in one form.

Response: TDI deleted subsection (e)(4) and added subsection (g)(2) to clarify that the disclosure must contain a statement that if credit information is obtained or used, the insurer shall provide more detailed information concerning how the credit information was used to underwrite or rate the policy. Subsection (g) also provides that the detailed information may be provided in the disclosure form itself.

Comment: One commenter stated that some insurers are concerned with the specificity of the disclosure form. The commenter believes that a generic notice should be allowed and that using a generic notice would be more cost effective for insurers.

Response: The department has promulgated a generic form which has sufficient specificity so that the consumer may be adequately informed. Changes made to the rule only require insurers to check a box indicating whether the insurer will or will not obtain and use credit information on the applicant or insured or any other member(s) of the household, as part of the insurance credit scoring process.

Comment: One commenter believes that only the insurance group name should be required on the disclosure form.

Response: TDI does not object to the group name being provided on the disclosure form but believes it is important for an insured to have the address and telephone number of a particular company or county mutual in which the insured will be placed.

Comment: One commenter disagrees with the part of subsection (e)(7) that gives insurers 10 days to send an applicant the disclosure form. The commenter wants the name of the credit reporting agency in the disclosure form. The commenter believes that the disclosure form should be supplied to an insured 90 days prior to approval.

Response: TDI believes 10 days is reasonable. An insurer now has to provide the disclosure form with the application or immediately upon receipt of a complete application, but no later than 10 days after receipt of the application. TDI does not believe it is necessary to include the name of the credit reporting agency in the disclosure form because the insurer is required by SB 14, Article 21.49-2U, to notify an applicant or insured of the name of the credit reporting agency. TDI assumes the commenter is referring to renewals since TDI believes that the 90 days prior to approval is not practical for new applications. For renewals, companies typically provide adequate notice to allow insureds ample time to research other options. §5.9941

Comment: One commenter agrees with staff that it may be premature to set a limitation on the allowable differences in rates charged due solely to credit scoring. The commenter cannot support a 15% limitation of the allowable differences and explains why a 15% limitation is not appropriate at this time.

Response: TDI appreciates the comments. Based on written comments and other comments received at the October 22, 2003 hearing, TDI will be proposing amendments to §5.9941. In the rule proposal, which will be filed in the near future, TDI will set amounts for the allowable differences in credit scores and provide a means to address rate increases due to the imposition of amounts for the allowable differences.

Comment: Several commenters expressed disappointment that the proposed rule fails to comply with a clear legislative mandate to set a cap on the unfair use of insurance credit scoring. These commenters urge the department to limit the variation in rates charged to policyholders based on their credit score to between 0% and 40%. One commenter stated that the legislators wanted a limitation placed on the differences that can be charged based on public policy and believes that there should be a limitation of 0% with no exceptions. Several commenters suggested that TDI limit the variation in rates charged to policyholders based on their credit score. The commenters stated that TDI could always change the variation amount later. One commenter urged TDI to promulgate a limit whether it is a percentage amount or a dollar amount. Several commenters stated that the language in Article 3 of SB 14 did not give the commissioner the option to delay setting a limitation.

Response: In order to promote fairness while avoiding destabilization in the personal lines insurance market, staff proposed §5.9941 that requires any differences in rates charged due solely to credit scoring to be based on sound actuarial principles supported by data filed with the department. Pursuant to SB 14, insurers may not use rates that are excessive, inadequate, unreasonable, or unfairly discriminatory for the risks to which they apply. Although the department believes the approach it has taken is reasonable and appropriate, TDI will be proposing amendments to §5.9941. In the rule proposal, which will be filed in the near future, TDI will set amounts for the allowable differences in credit scores and provide a means to address rate increases due to the imposition of amounts for the allowable differences.

For: Farmers Insurance Group, Republic Group of Insurance Companies, and Trinity Universal Insurance Companies.

For, with changes: Independent Insurance Agents of Texas (IIAT), Office of Public Insurance Counsel (OPIC), Progressive

County Mutual Insurance Company and Texas County Mutual Association.

Against: Center for Economic Justice (CEJ), American Association of Retired Persons (AARP), League of the United Latin American Citizens (LULAC), Texas Public Interest Research Group (Tex PIRG), Texas Watch, Texas Association of Realtors, Consumers Union and individual consumers.

The new sections are adopted under Insurance Code Article 21.49-2U and §36.001. The 78th Legislature enacted Senate Bill 14, which added Article 21.49-2U. Article 21.49-2U, Section 13(a) authorizes the commissioner to adopt rules as necessary to implement the article. Article 21.49-2U, Section 7(d) requires the commissioner to promulgate a disclosure form. Article 21.49-2U, Section 13(b) requires the commissioner to adopt rules regarding the allowable differences in rates charged by insurers due solely to the difference in credit scores. 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.

*§5.9940. Disclosure Form Required Concerning Use of Credit Information.*

(a) This subchapter applies to an insurer that writes personal insurance coverage and uses credit information or credit reports for the underwriting or rating of that coverage.

(b) The definitions adopted under Insurance Code Article 21.49-2U apply to this subchapter.

(c) The commissioner adopts by reference disclosure form, Form CD-1, which may be obtained from the department's website at www.tdi.state.tx.us or from the Automobile/Homeowners Section, Mail Code 104-1A, Texas Department of Insurance 333 Guadalupe, P.O. Box 149104 Austin, Texas 78714-9104.

(d) In accordance with Section 7(d) of Article 21.49-2U, Insurance Code, an insurer subject to this subchapter or its agents shall issue Form CD-1 indicating whether or not credit information pertaining to the applicant or the insured or other household member(s) will be obtained and used as part of the insurance credit scoring process.

(e) An insurer may use a disclosure form that:

(1) is allowed or approved for use in another state, and

(2) complies with all requirements of this section and Form CD-1.

(f) The disclosure form, unless identical to Form CD-1, must be filed prior to use with the Texas Department of Insurance, Property & Casualty Intake Unit, Mail Code 104-3B, P.O. Box 149104, Austin, Texas 78714-9104 or with the Texas Department of Insurance, Property & Casualty Intake Unit, 333 Guadalupe, Austin, Texas 78701.

(g) The written disclosure shall:

(1) contain the name, address and telephone number (toll-free if available) of the insurer;

(2) contain a statement indicating that if credit information is obtained or used, the insurer shall provide more detailed information concerning how the credit information was used to underwrite or rate the policy. This detailed information may be provided in the disclosure form itself;

(3) be printed in reasonably conspicuous type;

(4) be provided by the insurer or the agent electronically, by U.S. mail or by hand delivery;

(5) be provided to the applicant with the application or immediately upon receipt of a complete application, but no later than ten days after receipt of the complete application;

(6) be provided to insureds at renewal if credit information will be obtained and used as part of the insurance credit scoring process;

(7) be written in English and be provided to the applicant or insured in Spanish, if requested; and

(8) contain the summary of consumer protections set forth in Insurance Code Article 21.42-2U as provided in Form CD-1, including information on prohibited use of credit information, negative factors, effect of extraordinary events, dispute resolution, error correction and notice of action resulting in adverse effect.

(h) Insurers are subject to all other disclosure requirements in Insurance Code Article 21.49-2U.

*§5.9941. Differences in Rates Charged Due Solely to Difference in Credit Scores.*

(a) An insurer may vary its rates charged to applicants or insureds for personal insurance policies due solely to credit scoring. The differences in rates charged due solely to credit scoring shall be based on sound actuarial principles and supported by data filed with the department.

(b) Filings under this section must be submitted to the Texas Department of Insurance no later than March 1, 2004 to the Property & Casualty Intake Unit, Mail Code 104-3B, P.O. Box 149104, Austin, Texas 78714-9104 or to the Texas Department of Insurance, Property & Casualty Intake Unit, 333 Guadalupe, Austin, Texas 78701.

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 November 10, 2003.

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Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: November 30, 2003
Proposal publication date: September 19, 2003
For further information, please call: (512) 463-6327

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## SUBCHAPTER V. TERRITORY RATING REQUIREMENTS

### 28 TAC §5.9960

The Commissioner of Insurance adopts new Subchapter V, §5.9960, concerning residential property insurance and personal automobile insurance and allowable rate differences for rating territories that subdivide a county, as provided in Insurance Code, Subchapter U, Article 5.171 (as enacted by the Regular Session of the 78th Legislature in Senate Bill 14, effective June 11, 2003). The subchapter is adopted with changes to the proposed text as published in the September 19, 2003, issue of the *Texas Register* (28 TexReg 8116).

New Subchapter V, §5.9960, is being adopted to permit insurers to use the rating territory exceptions for residential and personal automobile insurance allowed by Insurance Code, Article 5.171,

as enacted by the Regular Session of the 78th Legislature. Article 5.171 provides that an insurer may not use rating territories that subdivide a county unless the county is subdivided and the rate for any subdivision within that county is not greater than 15% higher than the rate used in any other subdivisions in the county by that insurer. Article 5.171 further provides that the commissioner may by rule allow a greater rate difference for residential property insurance or personal automobile insurance. The new section allows an insurer to use territorial rate differences that are reflective of higher exposure to loss if the territorial rate differences are based on sound actuarial principles, are supported by data filed with the department, and are in compliance with all statutory and regulatory requirements. As a consequence, the new section will ensure greater availability of residential property and personal automobile insurance, ensure fairness in rates for territorial subdivisions within counties, and minimize market rate disruptions. Diversity of risk factors within individual counties is taken into account in the new section which will assure greater fairness and flexibility in rates. Because of the diversity of risk factors, the new section does not specify a percentage or amount of rate difference limitation or limit allowable rate differences. The new section is necessary to allow insurers to use territorial rate differences that are reflective of higher exposure to losses, including losses caused by catastrophic weather events in coastal subdivisions of a county relative to inland subdivisions of the same county, if the territorial rate differences are based on sound actuarial principles, supported with data filed with the department, and are in compliance with all statutory and regulatory requirements. In the case of coastal counties, insureds located in inland areas of a county would not pay higher rates in order to subsidize the catastrophic wind exposure of insureds located in coastal areas of the same county. In addition, this new section would encourage insurers to retain their wind exposure, in lieu of transferring the exposure to the Texas Windstorm Insurance Association, a residual market. This new section is also necessary to allow personal automobile insurers to recognize territorial rate differences in counties, such as counties that include both highly urban areas with congested traffic and rural areas with very little traffic.

Changes have been made to the proposed section as published; however, none of the changes introduce a new subject matter or affect additional persons other than those subject to the proposal as originally published. In response to comments, the following changes have been made to the proposed section: new wording in subsection (b) clarifies that the section applies to a county mutual insurance company, a Lloyd's plan, or a reciprocal or interinsurance exchange effective January 1, 2004. At the end of subsection (d), additional wording clarifies that the 15% rate difference limitation for subdivisions within counties applies "for identical coverage for insureds having, aside from rating territory, identical risk characteristics." This change is made in response to a comment that the proposed rule relies on the definition of "rate" and allows no variation for the differences between personal automobile insurance and residential property insurance, the type of coverage within a line, or other differences. Subsection (e) clarifies that the exception to Article 5.171 requires that the rate be in compliance with all statutory and regulatory requirements. This change was made in response to comments that the proposed rule would permit territorial factors based on race, creed, color, ethnicity, and national origin in violation of several provisions of the Insurance Code. Changes to subsection (f) clarify that exceptions to filing requirements that would otherwise apply cannot be used to avoid filing rates and supporting data when an insurer proposes to subdivide a county and charge any subdivision a rate that exceeds the rate for any other subdivision of that county by more than 15%. New subsection (h) responds in part to concerns from commenters that insurers such as county mutuals, which were non-rate regulated insurers prior to Senate Bill 14, be allowed 180 days to capture county information from their current insureds. New subsection (h) allows county mutuals, Lloyd's plans, reciprocals and interinsurance exchanges until March 1, 2004 to file their data in support of greater rate differentials with the department.

Section 5.9960(a) provides that the purpose of the section is to provide an exception to Insurance Code Article 5.171 for an insurer that writes residential property insurance or personal automobile insurance in the State of Texas. Section 5.9960(b) clarifies that the section applies to an insurer that writes residential property insurance or personal automobile insurance and to a county mutual insurance company, a Lloyd's plan, or a reciprocal or interinsurance exchange effective January 1, 2004. Section 5.9960(c) defines county, insurer, personal automobile insurance, rate, and residential property insurance. Section 5.9960(d) provides that except as provided by subsection (e), an insurer may not use rating territories that subdivide a county unless the county is subdivided and the rate for any subdivisions within that county is not greater than 15% higher than the rate used in any other subdivisions in the county by that insurer for identical coverage for insureds having, aside from rating territory, identical risk characteristics.

Section 5.9960(e) prohibits an insurer that writes residential property insurance or personal automobile insurance from using a rate for a subdivision within a county that is greater than 15% higher than the rate used in any other subdivision within that county unless the rate is based on sound actuarial principles, is supported by data filed with the department, and is in compliance with all statutory and regulatory requirements. Section 5.9960(f) clarifies that notwithstanding statutory or regulatory filing exception requirements that would otherwise apply, an insurer must file with the department a rate for a subdivision within that county in accordance with the statutory filing requirements applicable to residential property insurance or personal automobile insurance. For example, until December 1, 2004, residential property insurers are subject to filing requirements under Insurance Code, Article 5.142 and rules promulgated under Article 5.142, and personal automobile insurers are subject to filing requirements under Insurance Code, Article 5.101 and rules promulgated under Article 5.101. As of December 1, 2004, residential property and personal automobile insurers are subject to filing requirements under Insurance Code, Article 5.13-2 and any rules promulgated under Article 5.13-2. Section 5.9960(g) specifies the department addresses to which filings under the section must be submitted. Section 5.9960(h) provides an extension until March 1, 2004 for filing actuarial data with the department in support of a greater rate difference for county mutual insurance companies, Lloyd's plans, reciprocals, or interinsurance exchanges.

General

Comment: One commenter indicated that the department has successfully translated legislative intent, as expressed in Texas Insurance Code Article 5.171; that the section will encourage insurers to retain more wind exposure; and the proposal is fair and equitable to both insurance companies and insureds.

Agency Response: The department agrees and appreciates the comments.

Comment: Some commenters stated that the proposed rule violates Texas Insurance Code Article 5.171 by rendering it meaningless because the requirement that the territorial rating factor be actuarially sound already exists under other statutes. Commenters also stated that the only possible meaning for Article 5.171 is that even if a higher rating differential is actuarially justified, the commissioner shall set a limit on the effect of the territorial rating factor.

Agency Response: The department does not believe the rule violates Article 5.171 nor does the department believe that the rule renders Article 5.171 meaningless. Article 5.171 establishes the requirement that an insurer may not use rating territories that subdivide a county unless the county is subdivided and the rate for any subdivision within that county is not greater than 15% higher than the rate used in any other subdivisions in the county by that insurer. As an exception to this requirement, Article 5.171 permits the commissioner by rule to allow a greater rate difference for residential property insurance or personal automobile insurance. This exception does not require the rule to provide a specific percentage for a greater rate difference that may be allowable.

Comment: Some commenters believe that the proposed rule violates several provisions of the Texas Insurance Code because it would permit territorial factors based on race, creed, color, ethnicity, and national origin, even if the rates are based on sound actuarial principles. Commenters stated that several provisions of the Code prohibit personal automobile and residential property insurers from using rates based on race, creed, color, ethnicity, or national origin even if the rates are based on sound actuarial principles. The proposed rule, according to commenters, would seemingly permit a territorial rating factor that is based in whole or in part on race, creed, color, ethnicity, or national origin, as long as it is actuarially sound. Commenters stated further that the proposed rule completely wipes out the rule of the statute and opens up redlining for the entire State of Texas.

Agency Response: The department does not believe the rule in any way permits territorial factors based on race, creed, color, ethnicity, and national origin, even if the rates are based on sound actuarial principle. Those insurers that seek to use a higher rating differential than 15% within a county must file their experience with the department to assure the department that all statutory and regulatory provisions have been satisfied. Rates are to be based on sound actuarial principles and satisfy all other statutory provisions. To clarify subsection (e), the department has changed the subsection to reinforce the intent that territorial factors must be in compliance with all statutory and regulatory requirements.

Comment: Some commenters cited that auto insurance is required by the State of Texas for every driver and, therefore, the department and state are morally obligated to assure auto insurance is available at fair rates to all consumers. According to some commenters, many county mutuals in the auto industry charge "200, 300, and 400 times" the rate in low income and minority zip codes within the county than the county mutuals do in other zip codes within a county.

Agency Response: Prior to the enactment of Senate Bill 14, there was no regulatory provision that the rates of county mutual insurance companies be based on sound actuarial principles. The rates used by all insurers, including county mutual insurance companies, now must be just, fair, reasonable, adequate, not confiscatory and not excessive for the risks to which they apply, and not unfairly discriminatory. The department is committed, within its statutory authority, to assure auto insurance is available at fair rates to consumers within the State of Texas.

Comment: A commenter is generally opposed to the proposed rule because the commenter believes rates affect the value of the property, and with this rule, some insureds will see a rise in their rates and others will see a decrease in their rates. The commenter believes that the claim history on the property should determine the rates on the property.

Agency Response: A property's claims history will have some effect on the insurance rates, which could possibly affect the property value. However, the department believes that the requirement that the rates be based on sound actuarial principles means that the rates will be cost-based, which should promote insurance availability even though the rates may increase for some risk and may decrease for others.

Comment: Some commenters stated that the proposed rule fails to provide any regulation of territorial rating factors. Commenters also stated that under the proposed rule, an insurer can charge whatever territorial rate differential it desires, without any review or approval by the department.

Agency Response: The department does not believe the rule fails to provide any regulation of territorial rating factors because these factors must be filed in accordance with the statutory filing requirements for residential property insurance or personal automobile insurance. Rating territory filings must contain sufficient information for the department to determine if the proposed rating differentials satisfy all statutory and regulatory requirements. The department may ask for additional information, and if the filing does not comply with all statutory and regulatory requirements, the rating territory differentials will be disapproved.

Comment: One commenter stated that the proposed rule does not provide flexibility for insurers such as county mutuals in addressing renewals for January business, which must be processed in early November. The commenter believes the legislature allowed flexibility to ease market restrictions by requiring only that the territorial restrictions for county mutuals could not be applied to county mutuals before January 1, 2004 and that the restrictions do not have to be applied on that date. A commenter also requested that the county mutuals serving the non-standard market be required by January 1st to initiate the means to capture relevant data for new business and be allowed 180 days to capture county information from current insureds.

Agency Response: The department disagrees. Article 5.172, as enacted in Senate Bill 14, effective June 11, 2003, provides that the provisions of Article 5.171 do not apply to county mutual insurance companies, Lloyd's plans, and reciprocals or interinsurance exchanges before January 1, 2004. The department believes that the language of Article 5.172 clearly intended for Article 5.171 to apply to county mutual insurance companies and the other named insurers and leaves no discretion to the commissioner to extend the applicable effective date of Article 5.171 beyond January 1, 2004 for these insurers. The department believes that the insurers subject to Article 5.172 have had ample time since Senate Bill 14 was enacted to prepare to comply with Article 5.171. By the end of the year, 203 days will have elapsed since the effective date of Senate Bill 14, well in excess of the 180 days stated by the commenter. However, the department recognizes that insurers subject to Article 5.172 have been exempt from rate and other filing requirements and may experience

difficulty in making the necessary filings to support their January 1, 2004 rate differentials. For this reason and in response to comment: (1) subsection (a) has been changed to clarify that the rule is effective January 1, 2004 for county mutual companies, Lloyd's plans, and reciprocal or interinsurance exchanges; and (2) subsection (h) has been added to allow these same companies until March 1, 2004 to file data to support an exception to the territorial rating differential limitation under Article 5.171, more than 90 days after the effective date of this rule.

Comment: One commenter requests that the rule specifically authorize reference filings so insurers can adopt the rating territories of other insurers where the experience of the other insurer provides a sound basis for such a filing.

Agency Response: The department does not believe that the rule needs to specifically authorize reference filings. The department commonly accepts reference filings based upon the experience of another insurer with credible experience if an insurer demonstrates that it has insufficient data of its own to be reasonably credible. The department has received no reasonable justification not to allow reference filings under such circumstances.

§5.9960(d)

Comment: One commenter states that proposed subsection (d) relies on the definition of "rate" and allows no variation for the differences between personal automobile insurance and residential property insurance, the type of coverage within a line, or other possible, perfectly legal differences. The commenter requests that the definition of rate address the concept of rate by line, by coverage, and by mode of payment so that comparisons between the highest and lowest rates within a county can be made on the same terms.

Agency Response: The department agrees with the commenter and has changed subsection (d) by adding "for identical coverage for insureds having, aside from rating territory, identical risk characteristics" at the end of the subsection.

§5.9960(f)

Comment: One commenter states that subsection (f) should be deleted or reworded to clearly indicate that exceptions to filing requirements that would otherwise apply cannot be used to avoid filing rates and supporting data when an insurer intends to subdivide a county and charge any subdivision a rate that exceeds the rate for any other subdivision of that county by more than 15%.

Agency Response: The department agrees with the commenter and has changed subsection (f) to clarify that other statutory or regulatory filing exceptions do not apply to filings subject to the rule.

For: Republic Group of Insurance Companies, Trinity Universal Insurance Companies, and Progressive County Mutual Insurance Company. For, with changes: Texas County Mutual Association, and Office of Public Insurance Counsel (OPIC). Against: Center for Economic Justice (CEJ), American Association of Retired Persons (AARP), League of the United Latin American Citizens (LULAC), Texas Public Interest Research Group (Tex PIRG), Texas Watch, National Organization for Women, Texas Association of Realtors, and Consumers Union.

The new section is adopted under Insurance Code Articles 5.171 and 5.172 and §36.001. Article 5.171 provides that notwithstanding any other provision of the Insurance Code, an insurer may not use rating territories that subdivide a county unless the county is subdivided and the rate for any subdivisions within that county is not greater than 15 percent higher than the rate used in any other subdivisions in the county by that insurer, except that the commissioner may by rule allow a greater rate difference for residential property insurance or personal automobile insurance. Article 5.172 provides that notwithstanding §912.002 (County Mutual Limited Exemption from Insurance Laws; Applicability of Certain Laws), §941.003 (Lloyd's Plan Limited Exemption from Insurance Laws; Applicability of Certain Laws), §942.003 (Reciprocal and Interinsurance Exchange Limited Exemption from Insurance Laws; Applicability of Certain Laws), or any other provision of the Insurance Code, Subchapter U (Rating Territories for Certain Lines) does not apply to a county mutual company, a Lloyd's plan, and a reciprocal or interinsurance exchange, before January 1, 2004. 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.

*§5.9960. Exception to Rating Territory Requirements under Insurance Code Article 5.171.*

(a) The purpose of this section is to provide an exception to Insurance Code Article 5.171 for an insurer that writes residential property insurance or personal automobile insurance in the State of Texas.

(b) This section applies to an insurer that writes residential property insurance or personal automobile insurance in the State of Texas. This section applies to a county mutual insurance company, a Lloyd's plan, or a reciprocal or interinsurance exchange effective January 1, 2004.

(c) The following words and terms, when used in this section have the following meanings, unless the context clearly indicates otherwise.

(1) County--A county in the State of Texas.

(2) Insurer--An insurance company, reciprocal or interinsurance exchange, mutual insurance company, capital stock company, county mutual insurance company, Lloyd's plan, or other legal entity authorized to write residential property insurance or personal automobile insurance in the State of Texas. The term does not include:

(A) the Texas Windstorm Insurance Association under Insurance Code Article 21.49;

(B) the FAIR Plan Association under Insurance Code Article 21.49A; or

(C) the Texas Automobile Insurance Plan Association under Insurance Code Article 21.81.

(3) Personal automobile insurance--Motor vehicle insurance coverage for the ownership, maintenance or use of a private passenger, utility or miscellaneous type motor vehicle, including a motor home, mobile home, trailer or recreational vehicle, that is:

(A) owned or leased by an individual or individuals; and

(B) not primarily used for the delivery of goods, materials, or services, other than for use in farm or ranch operations.

(4) Rate--The cost of insurance per exposure unit, whether expressed as a single number or as a prospective loss cost, with an adjustment to account for the treatment of expenses, profit, and individual insurer variation in loss experience, and before any application of individual risk variations based on loss or expense considerations.

(5) Residential property insurance--Insurance against loss to real property at a fixed location or tangible personal property provided in a homeowners policy, a tenant policy, a condominium owners policy, or a residential fire and allied lines policy.

(d) Except as provided by subsection (e) of this section, an insurer may not use rating territories that subdivide a county unless the county is subdivided and the rate for any subdivisions within that county is not greater than 15% higher than the rate used in any other subdivisions in the county by that insurer for identical coverage for insureds having, aside from rating territory, identical risk characteristics.

(e) For residential property insurance or personal automobile insurance, an insurer may not use a rate for a subdivision within a county that is greater than 15% higher than the rate used in any other subdivision within that county unless the rate is based on sound actuarial principles, is supported by data filed with the department, and is in compliance with all statutory and regulatory requirements.

(f) Notwithstanding statutory or regulatory filing exception requirements that would otherwise apply, an insurer must file with the department a rate for a subdivision within a county that is greater than 15% higher than the rate used in any other subdivision within that county in accordance with the statutory filing requirements applicable to residential property insurance or personal automobile insurance.

(g) Filings under this section must be submitted to the Texas Department of Insurance, Property & Casualty Intake Unit, Mail Code 104-3B, 333 Guadalupe, Austin, Texas 78701 or to the Texas Department of Insurance, Property & Casualty Intake Unit, Mail Code 104-3B, P.O. Box 149104, Austin, Texas 78714-9104.

(h) A county mutual insurance company, a Lloyd's plan, or a reciprocal or interinsurance exchange that seeks to use a rate for a subdivision within a county that is greater than 15% higher than the rate used in any other subdivision within that county must file its data in support of a greater rate difference, as required by subsection (e), no later than March 1, 2004.

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 November 10, 2003.

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Gene C. Jarmon
General Counsel and Chief Clerk
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# TITLE 34. PUBLIC FINANCE

## PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

### CHAPTER 3. TAX ADMINISTRATION

### SUBCHAPTER A. GENERAL RULES

**34 TAC §3.2**

The Comptroller of Public Accounts adopts an amendment to §3.2, concerning the application of payments, unjust enrichment and refunds, with changes to the proposed text as published in the September 12, 2003, issue of the *Texas Register* (28 TexReg 7940).

The adopted amendment adds subsection (d) to implement House Bill 1, 78th Legislative Session, 2003, and establishes administrative and procedural guidelines for the appropriation of refunds.

During the proposed period, the comptroller received two comments and modified subsection (d)(5) to clarify a procedure. Minor grammatical corrections are made in subsections (d)(1)(A), (d)(2)(A)(ii), and (d)(3)(A)(iv).

A national trade association submitted comments suggesting that a specific provision be added to subsection (d)(2) that would exclude estimated tax overpayments from the biennial cap; that the provisions allowing transferability and assignability of net credits and refunds be made mandatory, not subject to regulatory discretion; and that a provision be added to subsection (d)(5) to allow a taxpayer to withdraw its refund claim. The comptroller did not make any changes to the proposed rule based on these comments. First, estimated tax overpayments made prior to the filing of a return are already covered by subsection (d)(2)(C)(ii) relating to claims filed within 120 days of the due and payable date; thus, the addition of another provision was unnecessary. Second, the provisions of subsections (d)(3) and (d)(4) involving transfers of credit and assignment of credits, respectively, already provide sufficient assurance that taxpayers will be able to utilize them. Any restrictions or limitations contained in those subsections reflect the application of existing law; thus, the comptroller is allowing the transfers and assignments to the extent allowed by law. Finally, because a taxpayer has the right to withdraw a refund claim at any time, the comptroller did not deem it necessary to add such a statement in subsection (d)(5). However, the comptroller did modify subsection (d)(5) to eliminate the reference to a list. This change was made in recognition of the possibility that the content and form of the submission may be dictated by the legislature's stated preference.

An out-of-state attorney submitted comments suggesting that subsection (d)(1) be revised to specifically state that subsection (d) applies to the state biennium beginning September 1, 2003 and that a provision be added to subsection (d)(4) granting interest on refunds for periods that do not accrue statutory interest. The comptroller determined that a change to (d)(1) was unnecessary because of immateriality and that the requested change to (d)(4) is beyond the comptroller's authority.

This new rule is promulgated under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new rule implements Tax Code, §111.0045.

*§3.2. Application of Payments; Unjust Enrichment; and Refunds*

(a) Payments received by the comptroller for application against existing liabilities will be credited toward the period designated by the taxpayer under conditions that are not prejudicial to the interest of the State of Texas. A condition that is considered prejudicial is the imminent expiration of the statute of limitations for a period or periods. Nondesignated payments shall be applied in the order of the oldest liability first, until the payment is exhausted. Crediting of a payment toward a specific liability period will be first against the

tax, with any surplus used to pay off penalty and interest unless the comptroller determines that a different order of payment credit should be followed with regard to a particular tax or factual situation.

(b) Under circumstances where multiple type tax liabilities exist, such as city and state sales tax, payments will be divided proportionately between the taxes so that each tax shall share the payment on the basis of the amount due each tax.

(c) Unjust enrichment.

(1) If amounts are collected as tax in transactions on which tax is not due, the comptroller will require, under the doctrine of unjust enrichment, that these amounts be remitted to the state or be refunded to the customers from whom they were collected.

(2) In the case of refunded amounts, documentary evidence must be retained establishing the transaction, the amount collected, the party from whom collected, the amount refunded, and the party to whom refund is made.

(d) Refunds and Appropriation.

(1) Limitation.

(A) During a state biennium, the comptroller cannot issue to any given taxpayer warrants for refunds in excess of $250,000 per tax type. A taxpayer may obtain a refund up to $250,000 per tax type from the comptroller, but any amount in excess of $250,000 must be presented to the legislature for a specific appropriation in order for the payment to be made or the taxpayer may request that the excess amount be applied as a credit as provided by paragraph (3) of this subsection.

(B) The limitation of $250,000 applies to each tax, fee, or other assessment collected or administered by the comptroller.

(C) Unless otherwise provided by this subsection, the limitation of $250,000 applies to all tax refunds that the comptroller determines are due, regardless of whether the refund is verified as a result of an informal refund review, an audit resulting in a credit, a final determination of a contested administrative proceeding, a final judgment of a court case, or a settlement.

(D) In determining whether a refund claim would cause a taxpayer to exceed the $250,000 limitation, the comptroller will consider all refunds, including tax, penalty, all applicable statutory interest on the tax, and any costs or attorney fees awarded by a court order, paid by the comptroller to the taxpayer for a tax type during the biennium.

(2) Exclusions.

(A) The $250,000 limitation does not apply to a payment made for the following:

*(i)* a court case where a judgment order of the trial court was entered prior to June 22, 2003, and no appeal or rehearing, or application therefor, is pending and the time period to file an appeal or rehearing has expired;

*(ii)* a written settlement agreement executed by both parties prior to June 22, 2003; or

*(iii)* a Comptroller's final decision in a contested administrative proceeding issued prior to June 22, 2003, if the time period to file a rehearing or a petition in court has expired.

(B) Credits taken on returns. The limitation of $250,000 does not apply to the total aggregate credits taken on returns filed with the comptroller during a biennium. However, if a credit taken on a given return results in a net overpayment, then the $250,000 limitation applies to any potential refund amount.

(C) Other exclusions. The following categories are excluded from the $250,000 limitation:

*(i)* Refunds of unclaimed property under Title 6 of the Property Code;

*(ii)* Refunds resulting from a claim filed with the comptroller within 120 days of the due and payable date of the tax and verified and granted by the comptroller during the informal review process under Tax Code, §111.1042;

*(iii)* Refunds of inheritance tax under Chapter 211, Tax Code;

*(iv)* Refunds of motor fuel tax paid on motor fuel not used on Texas highways;

*(v)* Refunds resulting from a timely filing of an amended franchise tax report due under Tax Code, §111.206 and §171.212, as a result of an audit or adjustment made by the Internal Revenue Services or as a result of filing an amended federal income tax return or other return that changes net taxable earned surplus

*(vi)* Refunds for enterprise projects under Tax Code §151.429, for defense readjustment projects under Tax Code §151.4291, for job retention under Tax Code §151.431, for enterprise zone under Tax Code §171.501 or any other similar refund incentives based on economic development; and

*(vii)* Refunds made under Tax Code §111.109, pursuant to a voucher issued by the Texas Workforce Commission under Subchapter H, Chapter 301, Labor Code.

(3) Transfer of net credits among a taxpayer's accounts

(A) Informal review, audit or administrative hearing process.

*(i)* If a taxpayer has both a liability and a refund for the same tax type, the taxpayer may request that the comptroller apply the refund as a credit against the liability. If the refund exceeds the liability such that applying the credit results in a net refund of less than $250,000, then the comptroller may issue that net refund, subject to the aggregate $250,000 limitation per tax type for the biennium. For example, assume a taxpayer has a sales tax audit liability of $400,000 and a sales tax refund of $500,000. If the comptroller applies the refund as a credit to the audit liability, then the comptroller may issue a refund of $100,000, as long as the issuance of that refund will not exceed the $250,000 biennial cap for that taxpayer. If the refund would exceed the biennial cap, then the comptroller may issue any portion of the $100,000 that would not exceed the limitation.

*(ii)* If a taxpayer has both a liability and a refund for different tax types, the taxpayer may request that the comptroller apply the refund as a credit against the liability. If the refund exceeds the liability such that applying the credit results in a net refund of less than $250,000, then the comptroller may issue that net refund, subject to the aggregate $250,000 limitation per tax type for the biennium. For example, assume a taxpayer has a sales tax audit liability of $400,000 and a franchise tax refund of $500,000. If the comptroller applies the refund as a credit to the audit liability, then the comptroller may issue a refund of $100,000 in franchise tax, as long as the refund does not exceed the $250,000 limitation for franchise tax refunds.

*(iii)* If after the comptroller applies a taxpayer's refund to the taxpayer's tax liability, the taxpayer has a remaining refund amount for which the comptroller cannot issue a refund warrant because of the $250,000 limitation, the taxpayer may request that the remaining refund be applied as a credit payment toward the taxpayer's future tax liabilities. The request must be in writing and be specific

enough for the comptroller to ascertain to which liability the credit is to be applied.

*(iv)* Interest that is otherwise authorized by statute will accrue until the net credit is applied as a payment to a tax liability.

(B) Court cases

*(i)* In the case of a court judgment or a settlement of a court case, the comptroller will credit any tax liability that the taxpayer may owe at the time of judgment or settlement, and will issue a refund warrant in an amount that would not cause the $250,000 biennial cap for the tax type to be exceeded. The comptroller will not transfer any amount in excess of the $250,000 biennial cap as a credit payment to reduce the taxpayer's tax liabilities that are or will be incurred after the judgment or settlement, and the net amount must be presented to the legislature for a specific appropriation.

*(ii)* Any statutory interest will accrue until such time a specific appropriation is obtained.

(4) Assignments.

(A) A taxpayer may assign its right to receive a refund, but any defense that the comptroller may assert against the assignor applies against the assignee.

(B) Any refund amount that is assigned will be counted toward the assignor's $250,000 biennial cap. For example, an assignor assigns its right to receive a refund of $200,000, but the assignor has previously obtained a refund of $75,000 in the same biennium. The comptroller will issue a warrant in the amount of $175,000 to the assignee, and will allow the assignee to use the remaining $25,000 to apply as a credit against current or future tax liabilities.

(C) When a refund assignment is presented, the comptroller will treat the assigned refund as a payment from the assignee made on the date the assignee submits the assignment to the comptroller.

(5) Appropriation. At the end of the biennium, the comptroller will submit information to the legislature to obtain appropriation for refunds or credits that have not been paid or exhausted through credit transfers or assignment.

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 November 14, 2003.

TRD-200307851
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: December 4, 2003
Proposal publication date: September 12, 2003
For further information, please call: (512) 475-0387

♦ ♦ ♦

## SUBCHAPTER O. STATE SALES AND USE TAX

### 34 TAC §3.320

The Comptroller of Public Accounts adopts an amendment to §3.320, concerning the Texas emissions reduction plan surcharge; off-road, heavy-duty diesel equipment, without changes to the proposed text as published in the July 11, 2003, issue of the *Texas Register* (28 TexReg 5489).

This amendment was submitted as an emergency rule to be effective July 1, 2003.

This section is being amended to implement Tax Code §151.0515 as amended by House Bill 1365 of the 78th Legislature. Effective July 1, 2003, the 1 percent surcharge increased to 2 percent. The 2 percent surcharge is imposed on off-road, heavy-duty diesel equipment, including mining equipment, rather than just construction equipment. The surcharge is due on purchases, leases, and rentals of equipment subject to use tax including equipment brought into Texas for use and purchases by direct payment permit holders.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §151.0515.

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 November 14, 2003.

TRD-200307852
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: December 4, 2003
Proposal publication date: July 11, 2003
For further information, please call: (512) 475-0387

♦ ♦ ♦

## SUBCHAPTER X. PARI-MUTUEL WAGERING RACING REVENUE

### 34 TAC §3.641

The Comptroller of Public Accounts adopts the repeal of §3.641, concerning pari-mutuel wagering, without changes to the proposed text as published in the October 3, 2003, issue of the *Texas Register* (28 TexReg 8575). The content of the existing §3.641 has been restructured and updated as a new §3.641.

No comments were received regarding adoption of the repeal.

This repeal is adopted under Tax Code, §111.002, and §111.0022, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2, and taxes, fees, or other charges which the comptroller administers under other law.

The repeal implements Texas Racing Act, Texas Civil Statutes, Title 6, Article 179e, §4.03.

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 November 14, 2003.

TRD-200307850
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: December 4, 2003
Proposal publication date: October 3, 2003
For further information, please call: (512) 475-0387

♦ ♦ ♦

**34 TAC §3.641**

The Comptroller of Public Accounts adopts a new §3.641, concerning pari-mutuel wagering, without changes to the proposed text as published in the October 3, 2003, issue of the *Texas Register* (28 TexReg 8576).

The new rule incorporates changes made by legislation. The new rule includes definitions, requirements for reporting and depositing the state's share, bonding requirements, and totalisator system requirements. The new §3.641 also includes authorization for the Comptroller of Public Accounts to conduct pari-mutuel audits, allows for an appeal process by the associations, and requires sanctions be certified to the Texas Racing Commission.

No comments were received regarding adoption of the new section.

This new section is adopted under Tax Code, §111.002 and §111.0022, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2, and taxes, fees, or other charges which the comptroller administers under other law.

The new section implements Texas Racing Act, Texas Civil Statutes, Title 6, Article 179e, §4.03.

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 November 14, 2003.

TRD-200307849
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: December 4, 2003
Proposal publication date: October 3, 2003
For further information, please call: (512) 475-0387

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# 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 amendments to §169.4 and §169.52 and the repeal of §169.33 pertaining to the administration of the Blind Children's Vocational Discovery and Development Program. The amendments and repeal are adopted without changes to the text proposed in the August 29, 2003, issue of the *Texas Register* (28 TexReg 7279) and will not be republished.

The agency received no comments about the proposed amendments and repeal.

§169.4 as amended no longer defines respite care because this service is no longer available with the repeal of §169.33. §169.52 contains the Commission's order of selection criteria. As amended, the order now contains eight priority categories rather than five. The amended order of selection provides notice to families where their children fall within the agency's priorities. The Commission's reduced budget for children's services in the new biennium requires the agency to make these adjustments to its current level of services to ensure that children who are blind continue to receive as many direct services as possible.

#### SUBCHAPTER A. GENERAL INFORMATION

**40 TAC §169.4**

The amended rule is adopted under 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.

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 November 12, 2003.

TRD-200307753
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: December 2, 2003
Proposal publication date: August 29, 2003
For further information, please call: (512) 377-0611

♦ ♦ ♦

#### SUBCHAPTER C. SERVICES

**40 TAC §169.33**

The repeal 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.

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 November 12, 2003.

TRD-200307755
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: December 2, 2003
Proposal publication date: August 29, 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.

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 November 12, 2003.

TRD-200307754
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: December 2, 2003
Proposal publication date: August 29, 2003
For further information, please call: (512) 377-0611

♦ ♦ ♦

# TEXAS DEPARTMENT OF INSURANCE

**Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L**

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Department of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the proposal is adopted. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the proposal is adopted. The Administrative Procedure Act, Government Code, Chapters 2001 and 2002, does not apply to department action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

## Texas Department of Insurance

Final Action on Rules

EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96

ADOPTION OF AN AMENDMENT TO THE TEXAS AUTOMOBILE RULES AND RATING MANUAL TO ADD "SECTION L. RATING TIER CLASSIFICATIONS" TO RULE 74 OF THE MANUAL

The Commissioner of Insurance at a public hearing held November 6, 2003, at 9:30 a.m. under Docket No. 2576 in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street, Austin, Texas received comments and heard testimony regarding an amendment proposed by Staff to the Texas Automobile Rules and Rating Manual (the Manual) which would add Section L to Rule 74 of the Manual.

The Commissioner adopts the proposal as noticed in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8965) with clarification changes to Rule 74.L.3.c. The department has clarified both the meaning and the basis of the term "Objective and mutually exclusive" as follows: "Criteria for assignment to rating tier classifications must be objective and mutually exclusive. "Objective and mutually exclusive" means that rules for rating tier classification assignment must be clearly and unambiguously stated so that an applicant can qualify for only one such rating tier classification and the criteria must not result in a rate, or be applied in a manner that would violate Article 21.21 and/or other provisions of the Insurance Code."

The addition of Section L will allow for a further refinement to the rating classifications currently provided in the Manual and will allow insurance groups to utilize underwriting guidelines within the same company. Currently, insurance groups utilize underwriting guidelines to assign insureds among multiple companies based on risk characteristics not recognized as classifications in the Manual. The addition of Section L (attached hereto as Exhibit "A") to the Manual will create equity among insurers that offer insurance to insureds with different risk characteristics in a single company.

The Commissioner of Insurance has jurisdiction over this matter pursuant to the Insurance Code, Articles 5.10, 5.96, 5.98, and 5.101.

The amendments as adopted by the Commissioner of Insurance are on file in the Chief Clerk's Office of the Texas Department of Insurance under Reference No. A-1003-20-I and are incorporated by reference into Commissioner's Order No. 03-1145.

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that amendments to the Texas Automobile Rules and Rating Manual set forth in Exhibit A attached to this Order and incorporated into this Order by reference, be adopted and applicable to be effective on the 15th day after publication of the notification of the Commissioner's action in the *Texas Register*.

TRD-200307970
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: November 19, 2003

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# REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

## Agency Rule Review Plan

Employees Retirement System of Texas

**Title 34, Part 4**

TRD-200307860
Filed: November 14, 2003

♦ ♦ ♦

## Proposed Rule Reviews

Office of Consumer Credit Commissioner

**Title 7, Part 5**

The Office of Consumer Credit Commissioner files this notice of intention to review and consider for readoption, revision, or repeal, Texas Administrative Code, Title 7, Part 5, Chapter 82 (Administration), comprised of §§82.1-82.2, concerning Custody of Criminal History Record Information and Public Information Requests, Charges, pursuant to §201.039, Texas Government Code. The agency will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for adopting this chapter continues to exist. Final consideration of the rule review of this chapter is scheduled for the February 20, 2004, Finance Commission of Texas meeting.

The Office of Consumer Credit Commissioner, which administers this rule, believes that the reasons for adopting the rule contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Leslie L. Pettijohn, Commissioner, Office of Consumer Credit Commissioner, 2601 N. Lamar Blvd., Austin, TX 78705-4207, or by email to leslie.pettijohn@occc.state.tx.us. Any proposed changes to the rule 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 days public comment period prior to final adoption or repeal by the commission.

TRD-200307847
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: November 13, 2003

♦ ♦ ♦

Finance Commission of Texas

**Title 7, Part 1**

The Finance Commission of Texas files this notice of intention to review and consider for readoption, revision, or repeal, Texas Administrative Code, Title 7, Part 1, Chapter 1 (Consumer Credit Regulation), Subchapter D (License), comprised of §§1.402, 1.406-1.407, concerning License Display, Surrender of License, and License Re-issuance; and Subchapter F (Alternate Charges for Consumer Loans) comprised of §§1.603-1.604, concerning Default Charges and Deferment Charges, pursuant to §201.039, Texas Government Code. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reasons for adopting these chapters continue to exist. Final consideration of the rules review of these chapters is scheduled for the commission's meeting on February 20, 2004.

The Office of Consumer Credit Commissioner, which administers these rules, believes that the reasons for adopting the rules contained in these chapters continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Leslie L. Pettijohn, Commissioner, Office of Consumer Credit Commissioner, 2601 N. Lamar Blvd., Austin, TX 78705-4207, or by email to leslie.pettijohn@occc.state.tx.us. Any proposed changes to the 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 days public comment period prior to final adoption or repeal by the commission.

TRD-200307848
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Filed: November 13, 2003

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Texas Department of Mental Health and Mental Retardation

**Title 25, Part 2**

The Texas Department of Mental Health and Mental Retardation (TXMHMR) will review Texas Administrative Code, Title 25, Part 2, Chapter 412, Subchapter G, concerning mental health community services standards, in accordance with the requirements of the Texas Government Code, §2001.039.

TDMHMR believes that the reasons for initially adopting the subchapter continue to exist.

Interested persons are invited to submit written comments concerning the review of this subchapter to Linda Logan, director, Policy Development, Texas Department of Mental Health and Mental Retardation, by mail to P.O. Box 12668, Austin, Texas 78711, or by fax to 512/206-4744, within 30 days of publication of this notice.

TRD-200307861
Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Filed: November 14, 2003

♦ ♦ ♦

Texas Water Development Board

**Title 31, Part 10**

The Texas Water Development Board (the board) files this notice of intent to review 31 TAC, Part 10, Chapter 364, Model Subdivision Rules, in accordance with the Government Code, §2001.039. The board finds that the reason for adopting the chapter continues to exist. The board concurrently proposes amendments to §§364.2, 364.18, 364.32, 364.33, 364.34, 364.36, 364.52, 364.54, 364.55, and 364.91.

As required by §2001.039 of the Texas Government Code, the board will accept comments and make a final assessment regarding whether the reason for adopting each of the rules in Chapter 364 continues to exist. The comment period will last 30 days beginning with the publication of this notice of intention to review.

Comments or questions regarding this rule review may be submitted to Jonathan Steinberg, Deputy Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, by e-mail to jonathan.steinberg@twdb.state.tx.us or by fax @ 512/463-5580.

TRD-200307954
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: November 19, 2003

♦ ♦ ♦

The Texas Water Development Board (the board) files this notice of intent to review 31 TAC, Part 10, Chapter 367, Agricultural Water Conservation Program, in accordance with the Government Code, §2001.039. The board finds that the reason for adopting the chapter continues to exist.

As required by §2001.039 of the Texas Government Code, the board will accept comments and make a final assessment regarding whether the reason for adopting each of the rules in Chapter 367 continues to exist. The comment period will last 30 days beginning with the publication of this notice of intention to review.

Comments or questions regarding this rule review may be submitted to Jonathan Steinberg, Deputy Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, by e-mail to jonathan.steinberg@twdb.state.tx.us or by fax @ 512/463-5580.

TRD-200307953
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: November 19, 2003

♦ ♦ ♦

## Adopted Rule Reviews

Texas Higher Education Coordinating Board

**Title 19, Part 1**

The Texas Higher Education Coordinating Board adopts the rule review of Chapter 1, Agency Administration, in accordance with §2001.039 Texas Government Code. The proposed rule review was filed on September 4, 2003, and published in the September 19, 2003, edition of the *Texas Register* (28 TexReg 8153). No comments were received regarding the adoption of this chapter.

As a result of the rules review, but in separate proposals, the agency is proposing the repeal of this entire chapter, and proposing several new sections, and a reorganization of the remaining sections for the chapter.

This concludes the agency's review of Chapter 1 as required by the Texas Government Code, §2001.039.

TRD-200307770
Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
Filed: November 13, 2003

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the rule review of Chapter 4, Rules Applying to All Public Institutions of Higher Education in Texas, in accordance with §2001.039 Texas Government Code. The proposed rule review was filed on September 4, 2003, and published in the September 19, 2003, edition of the *Texas Register* (28 TexReg 8153). No comments were received and no changes were made regarding the adoption of this chapter.

In a separate but concurrent rulemaking, the agency final adopts the repeal of §§4.51 through 4.59 concerning testing and developmental education and new §§4.51 through 4.60 concerning implementation of the Texas Success Initiative. The agency also final adopts amendments to §4.85 concerning the Texas Success Initiative requirements for dual credit students.

During its review, THECB determined that the initial reasons for adopting §§4.1 through 4.135 continue to exist. The rules are therefore readopted in accordance with the requirements of the Government Code, §2001.039.

As part of the review process but in a separate proposal, the Texas Higher Education Coordinating Board has proposed an amendment to the rules which has been filed simultaneously with this rule review and readoption.

This concludes the agency's review of Chapter 4 as required by the Texas Government Code, §2001.039.

TRD-200307771
Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
Filed: November 13, 2003

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the rule review of Chapter 5, Rules Applying to Public Universities and/or Health-Related Institutions of Higher Education, in accordance with §2001.039 Texas Government Code. The proposed rule review was filed on September 4, 2003, and published in the September 19, 2003, edition of the *Texas Register* (28 TexReg 8153).

The agency's reason for adopting the rules contained within this chapter continues to exist.

No comments were received regarding the adoption of this chapter.

This concludes the agency's review of Chapter 5 as required by the Texas Government Code, §2001.039.

TRD-200307772
Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
Filed: November 13, 2003

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the rule review of Chapter 6, Health Education, Training, and Research Funds, in accordance with §2001.039 Texas Government Code. The proposed rule review was filed on September 4, 2003, and published in the September 19, 2003, edition of the *Texas Register* (28 TexReg 8153). No comments were received and no changes were made regarding the adoption of this chapter.

During its review, THECB determined that the initial reasons for adopting §§6.1 through 6.74 continue to exist. The rules are therefore readopted in accordance with the requirements of the Government Code, §2001.039.

In a separate but concurrent rulemaking, the agency final adopts amendments to §6.73 concerning the Nursing, Allied Health, and Other Health-Related Education Grant Program

This concludes the agency's review of Chapter 6 as required by the Texas Government Code, §2001.039.

TRD-200307773
Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
Filed: November 13, 2003

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the rule review of Chapter 7, Private and Out-of-State Public Postsecondary Educational Institutions Operating in Texas, in accordance with §2001.039 Texas Government Code. The proposed rule review was filed on September 4, 2003, and published in the September 19, 2003, edition of the *Texas Register* (28 TexReg 8154). No comments were received regarding the readoption of rules in this chapter.

During its review, THECB determined that the initial reasons for adopting §§7.1 through 7.17 continue to exist. The rules are therefore readopted in accordance with the requirements of the Government Code, §2001.039.

This concludes the agency's review of Chapter 7 as required by the Texas Government Code, §2001.039.

TRD-200307774
Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
Filed: November 13, 2003

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the rule review of Chapter 11, Texas State Technical College System, in accordance with §2001.039 Texas Government Code. The proposed rule review was filed on September 4, 2003, and published in the September 19, 2003, edition of the *Texas Register* (28 TexReg 8154). No comments were received regarding the readoption of rules in this chapter.

During its review, THECB determined that the initial reasons for adopting §§11.1 through 11.30 continue to exist. The rules are therefore readopted in accordance with the requirements of the Government Code, §2001.039. As part of the review process but in a separate proposal, the Texas Higher Education Coordinating Board has proposed an amendment to the rules which has been filed simultaneously with this rule review and readoption.

This concludes the agency's review of Chapter 11 as required by the Texas Government Code, §2001.039.

TRD-200307775
Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
Filed: November 13, 2003

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the review of Chapter 25, concerning Optional Retirement Program, composed of §25.1, concerning Purpose, through §25.3, concerning ORP Standards, without changes to the existing text. The proposed rule review was published in the September 19, 2003, issue of the *Texas Register* (28 TexReg 8154). No comments were received regarding adoption of the review.

As a result of the rules review, but in separate proposals, the agency is proposing repeal of this entire chapter, and proposing several new sections, and a reorganization of the remaining sections for the chapter.

This concludes the agency's review of Chapter 25. as required by the Texas Government Code, §2001.039.

TRD-200307776
Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
Filed: November 13, 2003

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## Texas Water Development Board

**Title 31, Part 10**

Pursuant to the notice of intent to review published in the September 26, 2003 issue of the *Texas Register*, (28 TexReg 8388), the Texas Water Development Board (the board) has reviewed and considered for readoption 31 TAC, Part 10, Chapter 363, Financial Assistance Programs, in accordance with the Government Code, §2001.039.

The board considered, among other things, whether the reasons for adoption of these rules continue to exist. No comments were received on the proposed rule review.

As a result of the review, the board determined that the rules are still necessary and readopts the sections because they govern the board's following programs which provide financial assistance for water and wastewater projects: Water Loan Assistance Fund; Storage Acquisition Program; Clean Water State Revolving Fund; Colonia Self-Help Program; Rural Pilot Program; State Participation Program; Development Fund I and II; Revenue Bond Program; and Groundwater District Loan Program. As a result of the review, the board adopts amendments to §§363.1, 363.2, 363.33, 363.801, and 363.904. The amendments will implement recent changes to Texas Water Code, §17.904, by the 78th Legislature and cure an oversight during the initial adoption of Subchapter I. This completes our review of 31 TAC Chapter 363.

TRD-200307966

Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: November 19, 2003

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Pursuant to the notice of intent to review published in the September 26, 2003 issue of the *Texas Register*, (28 TexReg 8388), the Texas Water Development Board (board) has reviewed and considered for readoption 31 TAC, Part 10, Chapter 379, Advisory Committees, in accordance with the Texas Government Code, §2001.039.

The board considered, among other things, whether the reasons for adoption of these rules continue to exist. No comments were received on the proposed rule review.

As a result of the review, the board determined that the rules are still necessary and readopts the sections because they govern the board's use of advisory committees as governed by the Texas Government Code, Chapter 2110. As a result of the review, the board adopts amendments to §379.1, Definitions, and §379.3, Groundwater Availability Modeling (GAM) Technical Advisory Group. The amendments will delete extraneous definitions and extend the expiration date of advisory committee. This completes our review of 31 TAC Chapter 379.

TRD-200307960
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: November 19, 2003

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# TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure 1: 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: 16 TAC §12.3(33)

**TABLE 1: LETTER AUTHORIZATIONS FOR REUSE OF BOTTOM ASH AT TEXAS LIGNITE MINES[1]**

| Company | Mine (Pmt. No.) | [2]Bottom Ash Disposal/Reuse | Disposal/Beneficial Reuse Method | TCEQ Letter Date |
|---|---|---|---|---|
| | | | | |
| **Alcoa Inc.** | | | | |
| | **Sandow (1E)** | **D, R** | Roads, Fill[3] | 8/25/1995 |
| | **Three Oaks (48)** | **R** | Roads | 8/25/1995 |
| **The Sabine Mining Company** | | | | |
| | **South Hallsville No. 1 (33E)** | **R** | AOC, Ramp Advance, Roads | 12/17/1998 |
| **TXU Mining Company LP** | | | | |
| | **Big Brown (3D)** | **R** | Roads, Fill | 3/31/1999 |
| | **Martin Lake (4H)** | **R** | Roads | 4/21/1992 |
| | **Oak Hill (22D & 46A)** | **R** | Roads | 4/21/1992 |
| **Walnut Creek Mining Company** | | | | |
| | **Calvert (27F)** | **R** | Roads | 3/25/1998 |

[1]The information in this table was obtained largely from the portion of the permit application files concerning general requirements for operations plans, as provided in 16 TAC §12.139(2)(D) (relating to Operation Plan: General Requirements).

[2]Title 30 of the Texas Administrative Code (TAC) addresses environmental quality. According to 30 TAC §335.506 and §335.507, fly ash is a Class II waste, and bottom ash is a Class III waste unless classed as a coproduct. These rules are enforced by the Texas Commission on Environmental Quality (TCEQ).

[3]Class III Waste Disposal ceased as of April, 1999, when the 2C and 3C pits were reclaimed. Reuse in A Mine Area continues.

Figure: 22 TAC §519.17(a)

| No. | Violation | Citation | Administrative Penalty Range |
|---|---|---|---|
| 1 | Failure to follow Generally Accepted Auditing Standards; Yellow Book Auditing Standards; AICPA Auditing Standards; and other auditing standards. | 22 TEX. ADMIN. CODE §§501.60 & 501.74;<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 2 | Failure to follow Generally Accepted Accounting Principles | 22 TEX. ADMIN. CODE §§501.53, 501.61 & 501.74;<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 3 | Failure to follow other Professional Standards<br><br>(e.g. Compilation Standards) | 22 TEX. ADMIN. CODE §§501.62 & 501.74;<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 4 | Lack of independence | 22 TEX. ADMIN. CODE §§501.70 & 501.73<br><br>TEX. OCC. CODE §§901.458, 901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |

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| 5 | Violation of rules regarding receipt of commissions and other compensation | 22 TEX. ADMIN. CODE §501.71;<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 6 | Violation of rules regarding contingency fees | 22 TEX. ADMIN. CODE §501.72;<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 7 | Lack of integrity and objectivity | 22 TEX. ADMIN. CODE §501.73;<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 8 | Incompetence | 22 TEX. ADMIN. CODE §501.74;<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |

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| 9 | Breach of confidential communications | 22 TEX. ADMIN. CODE §501.75;<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 10 | Failure to return client records or client's portion of work papers | 22 TEX. ADMIN. CODE §501.76;<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | $0 to $25,000 per violation. |
| 11 | Acting through others | 22 TEX. ADMIN. CODE §501.77 (and the rule violated by the actor);<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 12 | Practicing without a license | 22 TEX. ADMIN. CODE §501.80;<br><br>TEX. OCC. CODE §§901.401, 901.453, 901.456, 901.502(6) & 901.502(11) | $0 to $25,000 per violation. |
| 13 | Practicing through an unregistered entity | 22 TEX. ADMIN. CODE §501.81;<br><br>TEX. OCC. CODE §§901.401, 901.502(6) & 901.502(11) | $0 to $25,000 per violation. |

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| 14 | False, fraudulent, misleading, or deceptive advertising | 22 TEX. ADMIN. CODE §501.82;<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $1,000 per violation.<br><br>**Moderate:** $1,000 to $50,000 per violation.<br><br>**Major:** $50,000 to $100,000 per violation. |
| 15 | Improper firm name | 22 TEX. ADMIN. CODE §501.83;<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | $0 to $10,000 per violation. |
| 16 | Improper form of practice | 22 TEX. ADMIN. CODE §501.84;<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | $0 to $10,000 per violation. |
| 17 | Performing discreditable acts<br><br>(1) fraud or deceit in obtaining a certificate as a certified public accountant or in obtaining registration under the Act or in obtaining a license to practice public accounting | 22 TEX. ADMIN. CODE §501.90(1);<br><br>TEX. OCC. CODE §§901.502(1), 901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 18 | Performing discreditable acts<br><br>(2) dishonesty, fraud or gross negligence in the practice of public accountancy | 22 TEX. ADMIN. CODE §501.90(2);<br><br>TEX. OCC. CODE §§901.502(2), 901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |

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| 19 | Performing discreditable acts<br><br>(3) violation of any of the provisions of Subchapter J or §901.458 of the Act applicable to a person certified or registered by the board | 22 TEX. ADMIN. CODE §501.90(3);<br><br>TEX. OCC. CODE §§901.502(5), 901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 20 | Performing discreditable acts<br><br>(4) final conviction of a felony or imposition of deferred adjudication or community supervision in connection with a criminal prosecution of a felony under the laws of any state or the United States | 22 TEX. ADMIN. CODE §501.90(4);<br><br>TEX. OCC. CODE §§901.502(6), 901.502(10), & 901.502(11)<br><br>TEX. OCC. CODE CHAP. 53 | $0 to $100,000 per violation. |
| 21 | Performing discreditable acts<br><br>(5) final conviction of any crime or imposition of deferred adjudication or community supervision in connection with a criminal prosecution, an element of which is dishonesty or fraud under the laws of any state or the United States | 22 TEX. ADMIN. CODE §501.90(5);<br><br>TEX. OCC. CODE §§901.502(6), 901.502(10), & 901.502(11) | $0 to $100,000 per violation. |
| 22 | Performing discreditable acts<br><br>(6) cancellation, revocation, suspension or refusal to renew authority to practice as a certified public accountant or a public accountant by any other state for any cause other than failure to pay the appropriate registration fee in such other state | 22 TEX. ADMIN. CODE §501.90(6);<br><br>TEX. OCC. CODE §§901.502(6), 901.502(8), 901.502(9), & 901.502(11) | $0 to $100,000 per violation. |

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| 23 | Performing discreditable acts<br><br>(7) suspension or revocation of or a voluntary consent decree concerning the right to practice before any state or federal agency for a cause which in the opinion of the board warrants its action | 22 TEX. ADMIN. CODE §501.90(7);<br><br>TEX. OCC. CODE §§901.502(6), 901.502(8), 901.502(9), & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 24 | Performing discreditable acts<br><br>(8) knowingly participating in the preparation of a false or misleading financial statement or tax return | 22 TEX. ADMIN. CODE §501.90(8);<br><br>TEX. OCC. CODE §§901.502(2), 901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 25 | Performing discreditable acts<br><br>(9) fiscal dishonesty or breach of fiduciary responsibility of any type | 22 TEX. ADMIN. CODE §501.90(9);<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 26 | Performing discreditable acts<br><br>(10) failure to comply with a final order of any state or federal court | 22 TEX. ADMIN. CODE §501.90(10);<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 27 | Performing discreditable acts<br><br>(11) repeated failure to respond to a client's inquiry within a reasonable time without good cause | 22 TEX. ADMIN. CODE §501.90(11);<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |

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| 28 | Performing discreditable acts<br><br>(12) misrepresenting facts or making a misleading or deceitful statement to a client | 22 TEX. ADMIN. CODE §501.90(12);<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 29 | Performing discreditable acts<br><br>(13) false swearing or perjury in any communication to the board or any other federal or state regulatory or licensing authority | 22 TEX. ADMIN. CODE §501.90(13);<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 30 | Performing discreditable acts<br><br>(14) threats of bodily harm or retribution to a client | 22 TEX. ADMIN. CODE §501.90(14);<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 31 | Performing discreditable acts<br><br>(15) public allegations of a lack of mental capacity of a client which cannot be supported in fact | 22 TEX. ADMIN. CODE §501.90(15);<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 32 | Performing discreditable acts<br><br>(16) causing a breach in the security of the CPA examination | 22 TEX. ADMIN. CODE §501.90(16);<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |

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|---|---|---|---|
| 33 | Performing discreditable acts<br><br>(17) voluntarily disclosing information communicated to the certificate holder by an employer, past or present, or through the certificate holder's employment in connection with accounting services rendered to the employer, except:<br>(A) by permission of the employer;<br>(B) pursuant to the Government Code, Chapter 554 (commonly referred to as the "Whistle Blowers Act");<br>(C) pursuant to a subpoena or other compulsory process in a court proceeding;<br>(D) in an investigation or proceeding by the board under the Public Accountancy Act; or<br>(E) in an ethical investigation conducted by a professional organization of certified public accountants | 22 TEX. ADMIN. CODE §501.90(17);<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 34 | Performing discreditable acts<br><br>(18) breaching the terms of an agreed consent order entered by the Board or violating any Board Order | 22 TEX. ADMIN. CODE §501.90(18);<br><br>TEX. OCC. CODE §§901.502(6), 901.502(11) & 901.502(12) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |
| 35 | Failure to report reportable events | 22 TEX. ADMIN. CODE §501.91<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |

| | | | |
|---|---|---|---|
| 36 | Filing a frivolous complaint | 22 TEX. ADMIN. CODE §501.92<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | $0 to $10,000 per violation. |
| 37 | Failure to respond to Board communications | 22 TEX. ADMIN. CODE §501.93<br><br>TEX. OCC. CODE §§901.502(6) & 901.502(11) | **Minor:** $0 to $1,000 per violation.<br><br>**Moderate:** $1,000 to $50,000 per violation.<br><br>**Major:** $50,000 to $100,000 per violation. |
| 38 | Failure to comply with mandatory CPE | 22 TEX. ADMIN. CODE §§501.94 & 523.62<br><br>TEX. OCC. CODE §§901.502(6), 901.502(11) & 901.502(12) | $0 to $10,000 per violation. |
| 39 | Three year no-pay individual | TEX. OCC. CODE §§901.502(4) & 901.502(11) | $0 to $10,000 per violation. |
| 40 | CPA exam irregularities | 22 TEX. ADMIN. CODE §511.70<br><br>TEX. OCC. CODE §§901.502(11) & 901.502(12) | **Minor:** $0 to $25,000 per violation.<br><br>**Moderate:** $25,000 to 75,000 per violation.<br><br>**Major:** $75,000 to $100,000 per violation. |

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|---|---|---|---|
| 41 | Ineligible applicant certification hearings | 22 TEX. ADMIN. CODE §511.161 & 511.176<br><br>TEX. OCC. CODE §§901.502(11) & 901.502(12) | $0 to $10,000 per violation. |
| 42 | Moral character | 22 TEX. ADMIN. CODE §511.27 & 525.1<br><br>TEX. OCC. CODE §§901.502(11) & 901.502(12) | **Moderate:** $1,000 to $50,000 per violation.<br><br>**Major:** $50,000 to $100,000 per violation. |
| 43 | Failure to satisfy peer review requirements | 22 TEX. ADMIN. CODE §527.4<br><br>TEX. OCC. CODE §§901.502(11) & 901.502(12) | **Minor:** $0 to $1,000 per violation.<br><br>**Moderate:** $1,000 to $50,000 per violation.<br><br>**Major:** $50,000 to $100,000 per violation. |

# 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.

## Texas Department of Agriculture

Requests for Proposals--Texas Yes! Matching Fund Program

The Marketing and Promotion Division of the Texas Department of Agriculture (the department) hereby requests proposals for the Texas Yes! matching fund program projects for the period of September 1, 2003, through August 31, 2005. The Texas Yes! matching fund program is a matching funds reimbursement program designed to directly promote tourism in rural Texas by developing promotional campaigns based on project requests submitted by successful applicants. Program and project proposal application information can be obtained at: www.texasyes.org or by contacting the Director of the Texas Yes! Program at (512) 463-6490 or (866) 4TEX-YES.

***Eligibility.*** To be eligible for participation in the matching funds program, an applicant must be a Texas Yes! Community Member in good standing. Generally, any city, county or other governmental entity that is located in a rural area of the State of Texas is eligible to apply for Texas Yes! Community Membership. A Texas Yes! Community Member can submit a proposal on behalf of an event, festival or fair. The community member will be responsible for providing the sales tax information, other economic impact information, and any additional documentation or information requested by the department to indicate the impact of the project on the community or region. In any case the department has the sole discretion to determine whether a project meets program eligibility requirements.

***Proposal Requirements.*** To apply for Texas Yes! matching funds a community member must: (i) prepare and submit a project request in accordance with this RFP; (ii) submit a sworn affidavit disclosing any existing or potential conflict of interest related to the evaluation of the project plan by Texas Yes! STARS; and (iii) acknowledge that the applicant will notify the department of any change in the status of the project. The deadline for submission of project requests is December 15, 2003. The department will only consider the first fifteen applications that it receives.

Each project request submitted by an eligible applicant must describe the advertising or other market-oriented promotional activities to be carried out using matching funds and must include a cover page including the name, title and address of applicant; a table of contents; one page abstract of approximately 200 words or less, including the title, if any, a brief description of the project, a project plan and methodology, and expected contribution to further or enhance the Texas Yes! Program; a detailed specific narrative or factual description of the project; anticipated benefits to a specific region of the state; any preliminary market research; sales tax revenue percent increases to be achieved as a result of the project; any projected results of the project; a short narrative of the applicant; a description of the community member; a list of events, communities and businesses to be promoted; the target audience for each event, a detailed project budget including specific dollar amounts for all potential costs; a description of how anticipated sales tax revenue increases due to implementation of the project will be quantified and reported to the department and a completed creative blueprint on a form provided by the department. Please send one original with 16 additional copies.

All approved projects must be completed by August 31, 2005, or the date specified in the project contract, whichever is earlier. All approved projects will be subject to audit and periodic reporting requirements.

Proposals should be submitted to: Michael Muska, Director of Texas Yes!, Texas Department of Agriculture, 1700 North Congress Avenue, 11th Floor, Austin, Texas 78701. Mr. Muska may be contacted by telephone at (512) 463-6490 or by fax at (512) 463-7843 for additional information about preparing the proposal.

All qualifying proposals will be evaluated by the Texas Yes! STARS who are appointed by the Commissioner of Agriculture. The Texas Yes! STARS are representatives from the following areas: media, print, travel industry, art, agricultural tourism, rural economic development, historical preservation, cultural diversity, entertainment industry, GO TEXAN Partner Program and awarded Texas Yes! communities. Proposals will be selected for reimbursement funding on a competitive basis. The department will consider both quantitative and qualitative factors when evaluating and scoring the applications. Fifty percent (50%) of the applicants score will be based on the departments evaluation the following qualitative factors: (i) the quality of the project and its goals; (ii) the strength of the project's specific objective; (iii) the importance of the objective to the community member; (iv) how the project will contribute to or further enhance the Texas Yes! Program; (v) the projected increase in the community member's sales tax that will result from the project; (vi) whether the applicant's budget for the project is appropriate and well developed; (vii) the applicant's ability to provide the required economic development information-increases in sales tax revenue, etc.-when the project is over; (viii) whether the marketing plan for the project is easily understood; (ix) the history of the event, with preference being given to events that have taken place for two to five years; and (x) ability to report on the previous years' results.

The other fifty percent (50%) of each applicant's score will be based the on department's evaluation of the following quantitative factors: (i) whether the application displays a clear vision for the project; (ii) whether the applicant's strategic plan is adequate for the project; (iii) whether the idea for the project is innovative; (iv) whether the applicant has clear goals for the project; (v) whether the applicant has the ability to complete the project; (vi) whether the project is creative; (vii) whether the project will effectively utilize volunteers; (viii) whether the applicant has effectively utilized its available resources; (ix) whether the project can effectively cooperate with other events or projects in a way that furthers the goals of the Texas Yes! Program; and (x) whether the applicant has adequately prepared for the project. **The factors that the department will consider when evaluating each application are subject to change, without notice, at the discretion of the department.**

Only project requests that further or enhance the department's Texas Yes! Program and are submitted by applicants physically located in Texas will be funded. The department reserves the right to terminate any award if it determines, in its sole discretion, that a project does not further or enhance the goals of the Texas Yes! Program. The announcement of the grant awards will be made by the Director of Texas Yes! after the first fifteen applications received by the department have been fully considered.

TRD-200307975
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: November 19, 2003

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## Office of the Attorney General

### Texas Health and Safety Code and Texas Clean Air Act Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Health and Safety Code. Before the State may settle a judicial enforcement action under the Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code.

Case Title and Court: Harris County, Texas and the State of Texas v. Agrifos Fertilizer, L.P., Cause No. 2003-00403, in the 133rd Judicial District Court of Harris County, Texas

Nature of Defendant's Operations: Defendant Agrifos Fertilizer, L.P., owns and operates a fertilizer manufacturing facility at 2001 Jackson Road, Houston, Harris County, Texas. Harris County and the State of Texas alleges that the Defendant discharged air contaminant in such concentration and duration at the facility to cause a nuisance.

Proposed Agreed Judgment: The Agreed Final Judgment requires Defendant to pay Thirty-Three Thousand Hundred Fifty Dollars ($33,150.00) in civil penalties to be split equally between Harris County and the State of Texas, and Three Thousand Six Hundred Dollars ($3,600.00) in attorney fees due to Harris County, Texas, and Seven Hundred Fifty Dollars ($750.00) in attorney fees due to the State of Texas, plus Two Hundred Sixteen Dollars ($216.00) in court costs, payable to Harris County District Clerk. Defendant is also required to comply with injunctive relief.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement should be directed to Anthony W. Benedict, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

*For information regarding this publication you may contact A. G. Younger, Agency Liaison at (512) 463-2110.*

TRD-200307932
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: November 18, 2003

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## Texas Cancer Council

### Request for Applications

Texans Conquer Cancer Patient Support Services Program

**Introduction:**

The Texas Cancer Council (TCC) announces the availability of state funds to be awarded to support the *Texans Conquer Cancer Patient Support Services Program*. The TCC awards grants to organizations that provide support services to cancer patients and their families. Funding for these grants is derived from the sale of "Texans Conquer Cancer" specialty license plates through the Texas Department of Transportation.

Funds will be awarded to the selected organizations in the maximum amount of $2,000 per organization per fiscal year. Applicants may apply again in future funding years.

**Purpose:**

The purpose of this Request for Applications (RFA) is to solicit statewide applications for projects that will provide direct support services to cancer patients and their families.

**Eligibility requirements:**

Only nonprofit organizations located in Texas that provide support services for cancer patients and their families are eligible for funding under this program. Funds may be used to provide the following allowable services, which include but are not limited to:

A) Transportation

B) Childcare

C) Medical equipment

D) Consumable supplies for cancer care

E) Lodging for patients and/or family during active treatment

F) Medications and equipment required for symptom control

G) Rent assistance during active treatment

H) Food assistance during active treatment

Funds may not be used to provide the following disallowable services, which include but are not limited to:

A) Hospitalization

B) Surgery

C) Outpatient care, including laboratory tests and physician visits

D) Chemotherapy

E) Radiation

F) Health insurance deductibles

Operating expenses for grantee such as utilities, salaries, office equipment, and entertainment are also not allowed.

**Application requirements:**

Applications and instructions for completing the application can be obtained from TCC by calling (512) 463-3190, or on-line at the TCC website at www.tcc.state.tx.us. Applications are due at the TCC office by 5 p.m. on January 12, 2004. Applications must be submitted according to the TCC's application instructions and forms.

**Project requirements:**

Projects funded under this initiative must provide:

(Support services for cancer patients and their families.

(Documentation of previous successful experience in providing effective patient support services.

(Assurances that the project does not duplicate existing services or resources in the community.

(Documentation of an in-kind contribution of at least ten percent. In-kind contributions may include applicant funds committed to the project, donated services, indirect expenses, or other in-kind contributions. The Council reserves the right to waive this requirement, on a case-by-case basis.

(A process for collecting performance data and reporting on a quarterly basis the performance accomplished with funding from this program.

**Funding awards:**

Applications will be reviewed by the Texans Conquer Cancer Advisory Committee and TCC staff for completeness and technical merit. The Texas Cancer Council will make final funding decisions on or about February 20, 2004. Written notification of approval can be expected by March 5, 2004. All applicants will receive written notification of the Council's decisions regarding their applications.

The Council's funding decision will be based on:

• The scope of the project, including reaching a maximum number of people;

• Innovative aspects of the proposed project;

• Applicant's successful collaboration with other relevant organizations;

• Applicant's qualifications to conduct the proposed project;

• Reasonableness of budgeted amounts and appropriateness of budget justifications;

• Completeness and clarity of the application; and

• Applicant's ability to reach patients in greatest need.

The Texas Cancer Council has sole discretion and reserves the right to reject any or all applications received in response to this funding announcement. This announcement does not constitute a commitment by the Council to award a contract or to pay costs incurred in the preparation of an application.

It is anticipated that up to four (4) projects will be selected under this initiative to receive *Texans Conquer Cancer Patient Support Services Program* funding. The *Program* may fund more, or fewer projects, based on the merit of applications received and the availability of funding. The Council reserves the right to take the needs of geographic locations into consideration when selecting projects.

**Additional information:**

For additional information about this funding announcement, contact Mickey Jacobs, Executive Director, or Jane Osmond, Program Manager, Texas Cancer Council, P.O. Box 12097, Austin, Texas 78711, (512) 463-3190.

TRD-200307897
Mickey L. Jacobs, M.S. H.P.
Executive Director
Texas Cancer Council
Filed: November 17, 2003

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## Coastal Coordination Council

### Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of November 7, 2003, through November 13, 2003. The public comment period for these projects will close at 5:00 p.m. on December 19, 2003.

FEDERAL AGENCY ACTIONS:

Applicant: Pioneer Natural Resources USA, Inc.; Location: The project is located in and/or through East Breaks Blocks 579, 623, 667 and 668, Outer Continental Shelf (OCS) Federal Waters, Gulf of Mexico, Offshore Texas. Project Description: The applicant proposes to file for a right-of-way (ROW), two hundred (200) feet in width, for the construction, maintenance, and operation of a 6-inch bulk gas ROW pipeline to be installed in and/or through East Breaks (EB) Blocks 579, 623, 667 and 668, OCS Federal Waters, Gulf of Mexico, Offshore Texas. In addition to the proposed pipeline, the applicant also proposes to install an umbilical from a proposed UTA to be located in EB Blocks 579 and 668. The umbilical will be used to control the EB 668 SS001 and EB 623 SS003 subsea wells. The umbilical will be connected by flying leads to the wells, UTAs and PLETs. CCC Project No.: 03-0371-F1; Type of Application: Pipeline ROW Application according to MMS Notice to Pipeline ROW holders in the OCS, Gulf of Mexico OCS Region, NTL No. 2002-G15 issued effective December 20, 2002, under 30 CFR Part 250.

Applicant: Kirby Inland Marine, Inc.; Location: The project is located at the confluence of Carpenters Bayou and Buffalo Bayou, in Channelview, Harris County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Highlands, Texas. Approximate UTM Coordinates: Zone 15; Easting: 297200; Northing: 3296000. Project Description: The applicant proposes to install 5 spud barges, 12 pilings, and hydraulically dredge a 19.37-acre area to an average depth of 15 feet below the ordinary high water mark within the San Jacinto River. The applicant is also requesting to retain the placement of a geo-tube bulkhead and the fill behind the geo-tube bulkhead. The applicant proposes to place the dredge material on an upland area within their property. A delineation has been performed on the dredge placement area and verified by the U.S. Army Corps of Engineers (USACE). It was determined that there will be no impacts to wetlands within the dredge placement area. The proposed work will help facilitate the activities of the existing barge fleeting/cleaning facility. CCC Project No.: 03-0368-F1; Type of Application: U.S.A.C.E. permit application #19003(04) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A §1251-1387).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Diane P. Garcia, Council Secretary, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or diane.garcia@glo.state.tx.us. Comments should be sent to Ms. Garcia at the above address or by fax at 512/475-0680.

TRD-200307973

Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: November 19, 2003

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### Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of October 31, 2003, through November 6, 2003. The public comment period for these projects will close at 5:00 p.m. on December 12, 2003.

FEDERAL AGENCY ACTIONS:

Applicant: Hunt Oil Company; Location: The project is located in and/or through block 223, Galveston Area, OCS Federal Waters, Offshore, Texas. Project Description: The applicant proposes to install a 4.500" bulk gas and condensate right-of-way pipeline to be installed in Galveston Block 233, OCS Federal Waters, Gulf of Mexico, Offshore, Texas. CCC Project No.: 03-0366-F1; Type of Application: Pipeline ROW Application according to MMS Notice to Lessees No. 2002-G15 issued effective December 20, 2002 and I compliance with 15 CFR 930.

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Diane P. Garcia, Council Secretary, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or diane.garcia@glo.state.tx.us. Comments should be sent to Ms. Garcia at the above address or by fax at (512) 475-0680.

TRD-200307974
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: November 19, 2003

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## Comptroller of Public Accounts

### Notice of Additional Contract Awards

Notice of Awards: Pursuant to Chapter 403, Chapter 2254, Subchapter A, Texas Government Code, and Chapter 111 Texas Tax Code, the Comptroller of Public Accounts (Comptroller) announces this notice of contract awards.

The Comptroller's Request for Qualifications 157b (RFQ) related to these contract awards was published in the July 11, 2003, *Texas Register* at (28 TexReg 5559).

The contractors will provide Professional Contract Auditing Services as authorized by Subchapter A, Chapter 111, Section 111.0045 of the Texas Tax Code as described in the Comptroller's RFQ.

The Comptroller announces that a total of forty-two (42) contracts were awarded under RFQ 157b including four (4) new contracts dated November 14, 2003 that appear at the end of the following list:

A contract is awarded to David R. Kasen, 634 10th Street #1A, Brooklyn, New York, 11215. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 29, 2003 through August 31, 2004.

A contract is awarded to Tarrant and Bulgherini, P.C., CPAs, 7109 Yucca Dr., Galveston, Texas 7551-1725. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 29, 2003 through August 31, 2004.

A contract is awarded to Honorio N. Eugenio, 6108 Pinehurst Dr., El Paso, Texas 79912. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 29, 2003 through August 31, 2004.

A contract is awarded to SJL Group, Inc., 7502 Greenville Ave., Suite 500, Dallas, Texas 75231. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 29, 2003 through August 31, 2004.

A contract is awarded to Kelton Brown, 4100 Hwy. 158, #29, Midland, Texas 79706. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 29, 2003 through August 31, 2004.

A contract is awarded to Reynaldo A. Espinola, CPA, 9898 Bissonet, Suite 640, Houston, Texas 77036. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 28, 2003 through August 31, 2004.

A contract is awarded to David B. Perry, 6010 Ogden Forest, Houston, Texas 77088. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 28, 2003 through August 31, 2004.

A contract is awarded to Jodie Moore, 15822 Ridgerock Road, Missouri City, Texas 77489. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 28, 2003 through August 31, 2004.

A contract is awarded to Stephanie Clark, 2700 Blanchette St., Beaumont, Texas 77701. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 28, 2003 through August 31, 2004.

A contract is awarded to d3 Consulting, 184 Dos Cortes, Smithville, Texas 78957. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 29, 2003 through August 31, 2004.

A contract is awarded to GRW & Associates, 1241 Hanna Circle, De Soto, Texas 75115. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 29, 2003 through August 31, 2004.

A contract is awarded to Joe Wamp, 16027 Chalfont Place, Dallas, Texas 75248. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 29, 2003 through August 31, 2004.

A contract is awarded to Nicole Y. Thomas, 5414 Cactus Forest, Houston, Texas 77088. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 28, 2003 through August 31, 2004.

A contract is awarded to Taxsmith Consulting, 7603 Hollow Glen, Houston, Texas 77072. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 29, 2003 through August 31, 2004.

A contract is awarded to Ronnie Bouldin d/b/a Tax STAAR, L.L.C., P.O. Box 53522, Lubbock, Texas 79453. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 29, 2003 through August 31, 2004.

A contract is awarded to State and Local Tax Group, LLC., 3005 Ryan Avenue, Fort Worth, Texas 76110. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 29, 2003 through August 31, 2004.

A contract is awarded to Brenda Maldonado, 2095 Savannah Trace, Beaumont, Texas 77706. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 28, 2003 through August 31, 2004.

A contract is awarded to Art Koenings, Jr., CPA, 5012 Trail West Dr., Austin, Texas 78735. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 28, 2003 through August 31, 2004.

A contract is awarded to Audit Consulting, L.P., 8617 Davis Boulevard, Fort Worth, Texas 76180. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 29, 2003 through August 31, 2004.

A contract is awarded to Gonzalez, Cox & Arrambide, Inc., 415 International Blvd., Weslaco, Texas 78596. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 29, 2003 through August 31, 2004.

A contract is awarded to Johnson, Cerda & Hopkins, P.C., CPA's, 2656 South Loop West, Suite 100, Houston, Texas 77054. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 29, 2003 through August 31, 2004.

A contract is awarded JSO Group, Inc., 11610 Acuba Lane, Houston, Texas 77095. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 28, 2003 through August 31, 2004.

A contract is awarded to Jennifer Wilmoth, 2706 Edinburgh Street, B16 Fort Collins, Colorado 80525. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have audit packages totaling more than $150,000 in fees at any one time. The term of the contract is October 29, 2003 through August 31, 2004.

A contract is awarded to Elloine K. Andoh, 2819 Berry St., #1, Houston, Texas 77004. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have Audit Packages totaling more $150,000 in fees at any one time. The term of the contract is October 29, 2003 through August 31, 2004.

A contract is awarded to Dibrell P. Dobbs d/b/a State Tax Consulting Group, 3220 Elkhart Ct., Arlington, Texas 76016. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have Audit Packages totaling more $150,000 in fees at any one time. The term of the contract is November 5, 2003 through August 31, 2004.

A contract is awarded to Cherise D. Collins, 17011 Driver Ln., Sugar Land, Texas 77478. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have Audit Packages totaling more $150,000 in fees at any one time. The term of the contract is November 5, 2003 through August 31, 2004.

A contract is awarded to Louis A. Sanchez, 1319 Pine Mills Dr., Richmond, Texas 77469. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have Audit Packages totaling more $150,000 in fees at any one time. The term of the contract is November 5, 2003 through August 31, 2004.

A contract is awarded to Robert Gonzales, 11106 South Bay Lane, Austin, Texas 78739. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have Audit Packages totaling more $150,000 in fees at any one time. The term of the contract is November 5, 2003 through August 31, 2004.

A contract is awarded to Shedric M. McGill, 4727 Hardwood Glen Dr., Fresno, Texas 77545. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have Audit Packages totaling more $150,000 in fees at any one time. The term of the contract is November 5, 2003 through August 31, 2004.

A contract is awarded to G & V Tax Solution Services Inc., 9900 Preston Vineyard, Frisco, Texas 75035. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have Audit Packages totaling more $150,000 in fees at any one time. The term of the contract is November 5, 2003 through August 31, 2004.

A contract is awarded to Chennella Queen, 7829 Grove Ridge, Houston, Texas 77061. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have Audit Packages totaling more $150,000 in fees at any one time. The term of the contract is November 5, 2003 through August 31, 2004.

A contract is awarded to Tamesha A. Jumper, 7212 Coronado Circle, Austin, Texas 78752. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have Audit Packages totaling more $150,000 in fees at any one time. The term of the contract is November 5, 2003 through August 31, 2004.

A contract is awarded to Hamid Farooqi, CPA, PC, 9888 Bissonnet # 300, Houston, Texas 77036. Audits will be assigned in $60,000 or

$75,000 increments or packages but no contract auditor shall have Audit Packages totaling more $150,000 in fees at any one time. The term of the contract is November 5, 2003 through August 31, 2004.

A contract is awarded to Diccy P. Thurman, CPA, 400 South Zang Boulevard Suite 815 Dallas, Texas 75208. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have Audit Packages totaling more $150,000 in fees at any one time. The term of the contract is November 5, 2003 through August 31, 2004.

A contract is awarded to Danny A. Northern, 5527 50th St. # 507, Lubbock, Texas 79414. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have Audit Packages totaling more $150,000 in fees at any one time. The term of the contract is November 5, 2003 through August 31, 2004.

A contract is awarded to Frank J. Cox, LLC, 2421 Robin Ave., McAllen, Texas 78501. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have Audit Packages totaling more $150,000 in fees at any one time. The term of the contract is November 5, 2003 through August 31, 2004.

A contract is awarded to Xavier Cuellar, CPA, 1855 Trawood Dr., Suite 103, El Paso, Texas 79935-3109. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have Audit Packages totaling more $150,000 in fees at any one time. The term of the contract is November 5, 2003 through August 31, 2004.

A contract is awarded to Sonerka Mouton, 3230 Eagle Ridge Way, Houston, Texas 77084. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have Audit Packages totaling more $150,000 in fees at any one time. The term of the contract is November 5, 2003 through August 31, 2004.

A contract is awarded to Derrick Kwan, 1927 Bailey St., Houston, Texas 77006. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have Audit Packages totaling more $150,000 in fees at any one time. The term of the contract is November 14, 2003 through August 31, 2004.

A contract is awarded to Blythe Corporation, 3002 Sugar Maple, Friendswood, Texas 77546. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have Audit Packages totaling more $150,000 in fees at any one time. The term of the contract is November 14, 2003 through August 31, 2004.

A contract is awarded to Marcus, Fairall, Bristol + Co., LLP, 6090 Surety Drive, Suite 100, El Paso, Texas 79905. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have Audit Packages totaling more $150,000 in fees at any one time. The term of the contract is November 14, 2003 through August 31, 2004.

A contract is awarded to Ruzicka - Reed Partnership, 1555 Glenhill Ln., Lewisville, Texas 75077. Audits will be assigned in $60,000 or $75,000 increments or packages but no contract auditor shall have Audit Packages totaling more $150,000 in fees at any one time. The term of the contract is November 14, 2003 through August 31, 2004.

TRD-200307950
Pamela Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: November 19, 2003

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## Office of Court Administration

### 2004 Indigent Defense Plan Submission Instructions

The Texas Fair Defense Act requires judges of district and county courts trying criminal cases and the juvenile board to adopt and publish written countywide procedures for timely and fairly appointing counsel in criminal and juvenile cases. Government Code Section 71.0351 requires copies of those countywide plans to be submitted to the Office of Court Administration annually no later than January 1 of each year. Instructions available at www.courts.state.tx.us/tfid. Contact: Wesley Shackelford (512) 936-6994, Task Force on Indigent Defense

TRD-200307910
Wesley Shackelford
Special Counsel to Task Force on Indigent Defense
Office of Court Administration
Filed: November 17, 2003

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## Credit Union Department

### Applications to Amend Articles of Incorporation

Notice is given that the following application has been filed with the Credit Union Department and is under consideration:

An application for a name change was received from ChevronTexaco Employees Credit Union, Houston, Texas. The credit union is proposing to change its name to CTECU.

An application was filed by Community Credit Union, Plano, Texas, to amend its Articles of Incorporation relating to indemnification of an employee or director, who acts in good faith while serving in their official capacity, from personal liability.

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-200307948
Harold E. Feeney
Commissioner
Credit Union Department
Filed: November 19, 2003

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### 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 Harlingen Area Teachers Credit Union, Harlingen, Texas to expand its field of membership. The proposal would permit employees of Echostar Communications Corporation who work in, are paid from or supervised from Harlingen, Texas, to be eligible for membership in the credit union.

An application was received from Fort Worth City Credit Union, Houston, Texas to expand its field of membership. The proposal would allow all employees of the City of Fort Worth, Texas to be eligible for membership in the credit union.

An application was received from Texas Dow Employees Credit Union, Lake Jackson, Texas to expand its field of membership.

The proposal would permit members and employees of the Friends of the Texas Credit Union Foundation who reside, work or attend school in the following geographical areas: Brazoria County, Fort Bend County, Matagorda County, Calhoun County, Wharton County, Galveston County, and Harris County within these geographical confines: Beginning at the intersection of Loop 610 and Highway 288 South; south to Highway 6; west to Highway 59; south to Highway 99; northwest to IH-10; east to Highway 6; north to Highway 290; southeast to Loop 610; south and east following Loop 610 then back to the intersection of the beginning point at Highway 288 South, to be eligible for membership in the credit union.

An application was received from Telco Plus Credit Union, Longview, Texas (#1) to expand its field of membership. The proposal would permit persons who live or work in Rusk County, to be eligible for membership in the credit union.

An application was received from Telco Plus Credit Union, Longview, Texas (#2) to expand its field of membership. The proposal would permit persons who live or work in Upshur County, to be eligible for membership in the credit union.

An application was received from Texas DPS Credit Union, Austin, Texas to expand its field of membership. The proposal would permit persons who live, work or attend school within 10 miles of Texas DPS Credit Unions' office located at 621 West St. Johns Avenue, Austin, 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 the OmniAmerican Foundation, headquartered in Fort Worth, Texas, and the members and employees of the OmniAmerican Foundation, to be eligible for membership in the credit union.

An application was received from Reed Credit Union, Houston, Texas to expand its field of membership. The proposal would permit employees of Grant Prideco, who work at or are supervised or paid from the offices located at 1450 Lake Robbins Drive, Suite 600, The Woodlands, Texas, who acquired companies currently in their field of membership, to be eligible for membership in the credit union.

An application was received from TruWest Credit Union, Scottsdale, Arizona to expand the field of membership of its branch offices located in Austin, Texas and surrounding areas. The proposal would permit anyone that works, lives or goes to school in Williamson County, Texas, 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-200307946
Harold E. Feeney
Commissioner
Credit Union Department
Filed: November 19, 2003

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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

Texans Credit Union, Dallas, Texas (Amended) - Members of the Friends of the Texas Credit Union Foundation who live, work, or attend school in Grayson, Denton, Collin, Tarrant, Dallas, Williamson, Travis, Harris and Fort Bend County, Texas.

Premier America Credit Union, Chatsworth, California - See Texas Register issue dated July 25, 2003.

Premier America Credit Union, Chatsworth, California - See Texas Register issue dated July 25, 2003.

Neighborhood Credit Union, Dallas, Texas (Amended) - Persons who work or reside within Dallas County, Texas.

PriorityONE Credit Union, Dallas, Texas (#1) - See Texas Register issue dated August 29, 2003.

PriorityONE Credit Union, Dallas, Texas (#2) - See Texas Register issue dated August 29, 2003.

PriorityONE Credit Union, Dallas, Texas (#3) - See Texas Register issue dated August 29, 2003.

Pegasus Credit Union, Dallas, Texas (Amended) - Persons who work or reside within Dallas and Denton County, Texas.

TRD-200307947
Harold E. Feeney
Commissioner
Credit Union Department
Filed: November 19, 2003

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## Texas Education Agency

### Request for eGrant Applications Concerning Public Charter Schools Start-Up Grant, School Year 2003 - 2004

Eligible Applicants. The Texas Education Agency (TEA) is requesting eGrant applications under Request for Applications (RFA) #701-04-006 from newly approved open-enrollment charter schools established by Texas Education Code (TEC), Chapter 12, Subchapter D, and campus charters established by TEC, Chapter 12, Subchapter C, that have never received start-up grant funds. The grant funds shall be used for initial start-up funding for planning and/or implementing charter school activities.

Description. In accordance with the purpose of the federal Public Charter Schools Start-Up Grant Program, funds may be used for post-award planning and design of the school's educational program, which may include refining the desired educational results and methods for measuring progress toward achieving those results and providing professional development for teachers and other staff who will work in the public charter school. Funds may also be used for the initial implementation of the charter school, which may include: (1) informing the community about the public charter school; (2) acquiring necessary equipment and educational materials and supplies; (3) acquiring or developing curriculum materials; and (4) funding other initial operational costs that cannot be met from state or local sources.

Dates of Project. The Public Charter Schools Start-Up Grant will be implemented during the 2003 - 2004 school year. Applicants should plan for a starting date of no earlier than February 1, 2004, and an ending date of no later than July 31, 2004.

Project Amount. Funding will be provided for approximately 10 projects. Each project will receive a maximum of $175,000 for the 2003 - 2004 school year. Continuation funding will be based on satisfactory progress of the first-year objectives and activities and on general budget approval by the commissioner of education and the U.S. Congress. This project is funded 100% from the Public Charter Schools federal funds.

The TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Obtaining Access to TEA's eGrants. The Public Charter School Start-Up Grant is available only through TEA's eGrants and may not be obtained or submitted by any other means. The eGrant application will be available in eGrants beginning December 1, 2003. To apply for access to eGrants, go to the TEA website at http://www.tea.state.tx.us/grant. Under the *eGrants Toolbox*, select *External Users: Apply for eGrants Logon*. Complete the form as instructed, obtain the required signatures, and send it to the TEA contact listed on the form.

Further Information. For clarifying information about the eGrant RFA, contact Donnell Bilsky, Division of Discretionary Grants, Texas Education Agency, at (512) 463-9269.

Deadline for Receipt of eGrant Applications. Applications must be received by the Texas Education Agency by 5:00 p.m. (Central Time), Friday, January 9, 2004, to be considered for funding.

TRD-200307943
Cristina De La Fuente-Valadez
Manager, Policy Coordination
Texas Education Agency
Filed: November 19, 2003

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## Texas Commission on Environmental Quality

### 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 **December 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 December 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: DBW Enterprises dba Scotty Mint Groceries; DOCKET NUMBER: 2003-0259- PST-E; TCEQ ID NUMBER: none; LOCATION: corner of Rail Road and Highway 281, Hico, Hamilton County, Texas; TYPE OF FACILITY: store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.7(d)(1)(A) and (B), by failing to amend its petroleum storage tank registration and submit it to the TCEQ; and 30 TAC §334.47(a)(2), by failing to remove the existing underground storage tank (UST) systems that had not been brought into timely compliance with the upgrade requirements; PENALTY: $6,300; STAFF ATTORNEY: Shannon Strong, Litigation Division, MC 175, (512) 239-6201; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(2) COMPANY: Naushad Virani dba Happy Chap No. 5; DOCKET NUMBER: 2001-1292-PST-E; TCEQ ID NUMBER: 0025922; LOCATION: at the intersection of Highway 160 and Farm-to-Market Road 770, Raywood, Liberty 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 accidental releases from the operation of petroleum USTs; 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, an existing UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor USTs for releases at a frequency of at least once every month, not to exceed 35 days between each monitoring; 30 TAC §334.49(a) and TWC, §26.3475(d), by failing to provide corrosion protection for the UST systems; 30 TAC §334.8(c)(4)(B) and TWC, §26.346(a), by failing to submit a UST registration and self-certification form to the TCEQ; and 30 TAC §334.22(a), by failing to pay all outstanding UST fees; PENALTY: $20,900; STAFF ATTORNEY: James Biggins, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Nolan Ischy and Walter Ischy; DOCKET NUMBER: 2001-0105-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 an Edwards Aquifer water pollution abatement plan 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-12, (713) 422-8916; REGIONAL OFFICE: Austin Regional Office, 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(4) COMPANY: Royce Leatherman; DOCKET NUMBER: 2002-0859-MSW-E; TCEQ ID NUMBER: F1333; LOCATION: 1200 Atkins Street, Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: land disposal site; RULES VIOLATED: 30 TAC §330.5(a)(1) and TWC, §26.121(a), by disposing of concrete, concrete with reinforcement bars, wood, and other debris without authorization and allowing a corroded steel tank to leak an unknown quantity of oil on the surface soils and onto a storm water drainage area; PENALTY: $8,250; STAFF ATTORNEY: James Biggins, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200307928

Paul C. Sarahan

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: November 18, 2003

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## 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 **December 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 December 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: Citgo Refining and Chemical Company, L.P.; DOCKET NUMBER: 2001-1469- AIR-E; TCEQ ID NUMBERS: NE-0192-F and NE-0027-V; LOCATIONS: 1801 Nueces Bay Boulevard, 7350 Interstate Highway 37, and 4806 Up River Road, Corpus Christi, Nueces County, Texas; TYPE OF FACILITY: petrochemical refining and petroleum terminal; RULES VIOLATED: 30 TAC §101.201 and § 101.211, by failing to submit notifications of upset emissions in a timely manner, failing to maintain complete records regarding emission events, and failing to provide proper notification for maintenance events; 30 TAC §101.20(1) and §116.115(b) and (c), and TCEQ Air Permit Numbers 8778A and 3119A, by failing to comply with emissions limits applicable to the East and West Plant sulfur recovery units; 30 TAC §101.20(1) and §116.115(c), by failing to prevent fuel gas burned in combustion devices from containing excess hydrogen sulfide; 30 TAC §101.20(1), §111.111(a)(2), and §116.115(c), and TCEQ Air Permit Numbers 3123A and 9604A, by failing to comply with limits on emissions from fluid catalytic cracking units; 30 TAC §335.6(c), §335.69(a)(3) and (d)(1), 40 CFR §262.34(c)(1), and TCEQ Permit Number 50160, Provisions II.B.9 and IV.B.1, by failing to provide notification of hazardous waste management areas; to comply with the accumulation time requirements; to properly label drums of hazardous waste, maintain a closed container of hazardous waste, except when adding or removing waste, and mark hazardous waste containers in excess of 55 gallons with an accumulation start date; failing to submit certification of waste minimization in a timely manner; and to limit hazardous wastes managed in the permitted container storage area to wastes specified by permit; 30 TAC §327.5(a) and §335.4, and TWC, §26.121, by failing to prevent the unauthorized discharge of industrial or other waste and to initiate response actions; 30 TAC §101.20(1), by failing to meet the requirements of new source performance standards for petroleum refinery wastewater systems; 30 TAC §101.20(2), by failing to meet the requirements of national emission standards for hazardous air pollutants for benzene waste operations; 30 TAC §113.120, by failing to comply with the requirements for external floating roof tank seal gap repair and reporting; 30 TAC §101.20(1) and §116.115(c), and TCEQ Permit Number 3390A, by failing to comply with flare pilot operation requirements applicable to the Fluor flare or to obtain regulatory authority for uncombusted emissions from that flare; 30 TAC §305.125(1), §319.7, and §319.11(b), TWC, §26.121, and Texas Pollutant Discharge Elimination System (TPDES) Permit Number 00467, by failing to comply with its TPDES permit; 30 TAC §116.115(b)(2)(G) and TCEQ Air Permit Number 46637, by failing to comply with emission limits during vessel loading operations; 30 TAC §116.115(b) and (c) and TCEQ Air Permit Numbers 3390A and 20156, by failing to limit emissions released from the Unibon Unit to the levels allowed in the permit and by failing to limit emissions released from the Hydrar Unit to the levels allowed in the permit; 30 TAC §§116.110(a), 116.116(a), 101.20(3), 101.27(a), and 111.111(a)(4)(A)(ii), by failing to obtain appropriate regulatory authority for sour water and acid gas flares as installed and operated at the East and West Plants; to pay emissions fees for emissions from these flares; and to maintain a flare log for the flares; 30 TAC §122.145(2)(A) and §122.146(5)(D), by failing to submit timely and complete federal operating permit compliance certifications and deviation reports; and 30 TAC §116.115(b)(2)(G) and TCEQ Air Permit Number 46642, by failing to demonstrate initial compliance with emission tests of compressors; PENALTY: $1,740,000; STAFF ATTORNEY: Mary R. Risner, Litigation Division, MC 175, (512) 239-6224; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(2) COMPANY: Environmental Recovery and Recycling, Inc.; DOCKET NUMBER: 1999-1247- MSW-E; TCEQ ID NUMBER: 44114; LOCATION: Highway 277, one mile north of Stamford, Haskell County, Texas; TYPE OF FACILITY: tire storage; RULES VIOLATED: 30 TAC §328.59(b)(4), by failing to obtain all required state and local permits, licenses, or registrations and to operate in compliance with such permits, licenses, or registrations, or other applicable state and local codes; 30 TAC §328.61(a), (c), and (h), by failing to design the facility so that the health, welfare, and safety of operators, transporters, and others who may utilize the facility are maintained; by failing to maintain all- weather access roads for designated fire lanes; and failing to have large capacity dry chemical fire extinguishers located in strategically-placed enclosures throughout

the entire facility; 30 TAC §328.61(e) and (i), by failing to maintain appropriate vector controls and failing to maintain suitable drainage structures or features to divert the flow of rainfall runoff or other uncontaminated surface water within the facility to a location off-site; and 30 TAC §328.61(f), by failing to completely fence the facility with a chainlink type security fence at least six feet in height; PENALTY: $600; STAFF ATTORNEY: Snehal R. Patel, Litigation Division, MC R-12, (713) 422-8928; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(3) COMPANY: Texas Crumb Industries, L.L.C.; DOCKET NUMBER: 1999-1249-MSW-E; TCEQ ID NUMBER: 44150; LOCATION: Highway 277, one mile north of Stamford, Haskell County, Texas; TYPE OF FACILITY: tire storage; RULES VIOLATED: 30 TAC §328.59(b)(4), by failing to obtain all required state and local permits, licenses, or registrations and to operate in compliance with such permits, licenses, or registrations, or other applicable state and local codes; 30 TAC §328.61(a), (c), and (h), by failing to design the facility so that the health, welfare, and safety of operators, transporters, and others who may utilize the facility are maintained and by failing to maintain all-weather access roads for designated fire lanes, and failing to have large capacity dry chemical fire extinguishers located in strategically-placed enclosures throughout the entire facility; 30 TAC §328.61(e) and (i), by failing to maintain appropriate vector controls and by failing to maintain suitable drainage structures or features to divert the flow of rainfall runoff or other uncontaminated surface water within the facility to a location off-site; and 30 TAC §328.61(f), by failing to completely fence the facility with a chainlink type security fence at least six feet in height; PENALTY: $600; STAFF ATTORNEY: Snehal R. Patel, Litigation Division, MC R-12, (713) 422-8928; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

TRD-200307929
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 18, 2003

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## Notice of Water Quality Applications

The following notices were issued during the period of November 4, 2003 through November 10, 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.

CITY OF ARCOLA has applied for a major amendment to TPDES Permit No. 13367-001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 125,000 gallons per day to a daily average flow not to exceed 950,000 gallons per day. The facility is located approximately 1,000 feet east of Farm-to-Market Road 521 and 3,200 feet south of the intersection of Farm-to-Market Road 521 and Texas Highway 6 in Fort Bend County, Texas.

BENTWOOD ESTATES, INC. has applied for a renewal of TPDES Permit No. 12612-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day. The facility is located at 2719 Third Street, approximately 4,000 feet northeast of the intersection of Farm-to-Market Road 1960 and Farm-to-Market Road 2100, northeast of the incorporated township of Huffman in Harris County, Texas.

CITY OF CALVERT has applied for a renewal of TPDES Permit No. 10095-001, 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 on the east side of Tidwell Creek immediately adjacent to and on the north side of Farm-to-Market Road 1644, approximately 0.7 miles southwest of the intersection of State Highway 6 and Farm-to-Market Road 1644 in Robertson County, Texas.

CITY OF CROCKETT has applied for a renewal of TPDES Permit No. 10154-001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,000,000 gallons per day. The application also includes a request for an extension of the temporary variance to the existing water quality standards for Town Branch and Hurricane Bayou. The variance would authorize a three-year period in which the U.S. EPA will review the aquatic life uses and corresponding dissolved oxygen criteria for Town Branch and Hurricane Bayou. The review would determine whether a site-specific amendment to water quality standards is justified. The site-specific standard has not yet been adopted in Appendix D in 30 TAC Section 307.10. Prior to the expiration of the three-year variance period, the Commission will consider the site-specific standards and determine whether to adopt the standards or require the existing water quality standards to remain in effect. The facility is located on the west bank of Town Branch; approximately 2,000 feet north of the intersection of the Missouri-Pacific Railroad with State Loop 304 in Houston County, Texas.

CITY OF GALVESTON has applied for a renewal of TPDES Permit No. 10688-004, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 5,000 gallons per day. The facility is located at Seawolf Park on Pelican Island approximately 3.5 miles northeast of the Pelican Island Bridge in Galveston County, Texas.

GREIF, INC. has applied for a renewal of TPDES Permit No. 13949-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 3,000 gallons per day. The facility is located at 10700 Strang Road in the City of La Porte in Harris County, Texas.

HARRIS COUNTY has applied for a renewal of TPDES Permit No. 12213-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day. The facility is located in the Harris County Alexander Deussen Park, approximately 1/3 of the way up from the south boundary, in the approximate middle of the park, south of Lake Houston in Harris County, Texas.

CITY OF HOUSTON has applied for a renewal of TNRCC Permit No. 10495-115, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 3,000,000 gallons per day. The draft permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,000,000 gallons per day. The facility is located approximately 1,000 feet west of Interstate Highway 45 and 2,700 feet north of Gears Road, on the north side of and adjacent to Greens Bayou in Harris County, Texas.

MAGELLAN TERMINALS HOLDINGS, L.P. which operates the Corpus Christi Terminal, a bulk petroleum storage terminal, has applied for a renewal of TPDES Permit No. 02070, which authorizes the discharge of ballast water, oily wastewater, groundwater from hydrocarbon reclamation activities and storm water at a daily maximum dry weather flow not to exceed 350,000 gallons per day via Outfall 001. The facility is located at 1802 Poth Lane, approximately 250 feet northwest of the intersection of Interstate Highway 37 and Poth Lane in the City of Corpus Christi, Nueces County, Texas.

OXID, L.P. which operates an organic chemical processing, blending, storage, and transfer facility (SIC 2899 and 4226) , has applied for a major amendment to TPDES Permit No. 02102 to authorize the discharge of storm water associated with industrial activity on an intermittent and flow variable basis via Outfalls 001 and 002. The current permit authorizes the discharge of storm water associated with industrial activity on an intermittent and flow variable basis via Outfall 001. The issuance of this TPDES permit will supercede and replace TPDES Permit Nos. 02102 and 03243. The facility is located at 101 Concrete Street, in the City of Houston, Harris County, Texas.

ELI SASSON has applied for a renewal of TPDES Permit No. 11414-002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 99,000 gallons per day. The facility is located north of Greens Bayou, approximately 3,150 feet west of the intersection of Greens Road and Aldine Westfield Road, 5,100 feet east of the intersection of Greens Road and Hardy Road in Harris County, Texas.

CITY OF SOUTH HOUSTON has applied for a renewal of TPDES Permit No. 10287-001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 4,000,000 gallons per day. The facility is located on the west bank of Berry Bayou, at the intersection of Georgia Street and Amarillo Street, in the City of South Houston in Harris County, Texas.

TEMPE WATER SUPPLY CORPORATION has applied to the Texas Commission on Environmental Quality (TCEQ) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14474-001, to authorize the discharge of filter backwash water at a daily average flow not to exceed 7,500 gallons per day. The facility is located approximately 1.5 miles west of U.S. Highway 190 on Farm-to-Market Road 2457 in Polk County, Texas.

TRAVIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 4 has applied for a new permit, Proposed Permit No. 14430-001, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 600,000 gallons per day via surface irrigation of 220 acres of land. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located approximately 13,000 west-northwest of the intersection of Mopac Expressway (Loop1) and Loop 360 (Capital of Texas Highway) in Travis County, Texas. The facility and disposal site are located in the drainage basin of Barton Creek in Segment No. 1430 of the Colorado River Basin.

CITY OF VAN ALSTYNE has applied for a renewal of TPDES Permit No. 10502-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 950,000 gallons per day. The facility is located approximately 1/4 mile south of Farm-to-Market Road 121 on an unnamed rock road and 2 miles east of the intersection of State Highway 5 and Farm-to-Market Road 121 in Grayson County, Texas.

WARD TIMBER, LTD. which operates a sawmill and wood products manufacturing facility, has applied for a renewal of TPDES Permit No. 04188, which authorizes the discharge of wet decking wastewater and storm water runoff on an intermittent and flow variable basis via Outfall 001. The facility is located on the south side of State Highway 67, approximately 0.5 miles west of the City of Maud, Bowie County, Texas.

CITY OF WAXAHACHIE has applied for a major amendment to TPDES Permit No. 10379-001 to authorize an increase in the discharge of treated domestic wastewater from an annual average flow not to exceed 5,500,000 gallons per day to an annual average flow not to exceed 8,000,000 gallons per day. The applicant has also applied to the TCEQ for approval of a substantial modification to its pretreatment program under the TPDES program. The facility is located south of MKT Railroad and west of Waxahachie Creek in the southern portion of the City of Waxahachie in Ellis County, Texas.

TRD-200307853
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: November 14, 2003

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### Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on November 6, 2003, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Afton Park Civic Improvement Association dba Afton Park Water System; SOAH Docket No. 582-03-3360; TCEQ Docket No. 2002-0735-PWS-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Afton Park Civic Improvement Association dba Afton Park Water System, on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711- 3087. If you have any questions or need assistance, please contact Doug Kitts, Office of the Chief Clerk, (512) 239-3317.

TRD-200307858
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: November 14, 2003

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## Texas Department of Health

### 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 |
|---|---|---|---|---|---|
| Dallas | Valley View Surgery Center | L05686 | Dallas | 00 | 10/31/03 |
| Tyler | Sigal Heart Center | L05704 | Tyler | 00 | 11/03/03 |

AMENDMENTS TO EXISTING LICENSES ISSUED:

| Location | Name | License # | City | Amend-ment # | Date of Action |
|---|---|---|---|---|---|
| Abilene | Physician Reliance Network Inc | L05127 | Abilene | 06 | 11/04/03 |
| Abilene | ARMC LP | L02434 | Abilene | 72 | 11/12/03 |
| Arlington | General Electric Medical Systems | L05693 | Arlington | 02 | 11/05/03 |
| Arlington | Healthsouth Diagnostic Centers of Texas LP | L05033 | Arlington | 17 | 11/04/03 |
| Arlington | The University of Texas at Arlington | L00248 | Arlington | 39 | 11/13/03 |
| Austin | Daughters of Charity Health Svcs of Austin | L00268 | Austin | 81 | 11/07/03 |
| Austin | Seton Medical Center | L02896 | Austin | 72 | 10/31/03 |
| Austin | Columbia St Davids Healthcare System LP | L03273 | Austin | 51 | 11/03/03 |
| Austin | Heart Hospital IV LP | L05215 | Austin | 13 | 11/13/03 |
| Austin | Columbia/St Davids Healthcare System LP | L00740 | Austin | 84 | 10/10/03 |
| Baytown | Bayer Polymers | L01577 | Baytown | 58 | 11/03/03 |
| Brownsville | Columbia Valley Regional Medical Center | L02274 | Brownsville | 34 | 11/10/03 |
| College Station | College Station Hospital LP | L02559 | College Station | 51 | 11/12/03 |
| Corpus Christi | Spohn Hospital | L02495 | Corpus Christi | 78 | 11/06/03 |
| Crowley | Aztec Manufacturing Partnership LTD | L05056 | Crowley | 01 | 11/06/03 |
| Dallas | Retina Foundation of the Southwest | L05528 | Dallas | 01 | 11/07/03 |
| Dallas | Mallinckrodt Inc | L03580 | Dallas | 46 | 11/03/03 |
| Dallas | Physician Reliance Network | L05534 | Dallas | 02 | 10/31/03 |
| Dallas | Medi Physics Inc | L05529 | Dallas | 09 | 10/31/03 |
| Dallas | Bristol-Myers Squibb Medical Imaging Inc | L02481 | Dallas | 25 | 11/12/03 |
| El Paso | El Paso Healthcare System LTD | L02715 | El Paso | 58 | 11/06/03 |
| El Paso | Tenet Hospitals Limited | L02365 | El Paso | 48 | 10/31/03 |
| Friendswood | ISO TEX Diagnostics Inc | L02999 | Friendswood | 37 | 11/07/03 |
| Georgetown | Georgetown Healthcare System | L03152 | Georgetown | 29 | 11/10/03 |
| Houston | Memorial Hermann Hospital System | L01168 | Houston | 71 | 11/07/03 |
| Houston | Woodlands-N Houston Cardiovas Imag Ctr | L04253 | Houston | 17 | 11/06/03 |
| Houston | Univ of Texas MD Anderson Cancer Center | L00466 | Houston | 86 | 11/06/03 |
| Houston | Baylor College of Medicine | L02397 | Houston | 14 | 11/06/03 |
| Houston | The Methodist Hospital | L00457 | Houston | 117 | 11/05/03 |
| Houston | Heart Care Center of Northwest Houston | L05539 | Houston | 01 | 10/31/03 |
| Houston | Guidant Corporation VI | L05178 | Houston | 15 | 11/05/03 |
| Houston | Cardiology Associates of Houston PA | L05608 | Houston | 01 | 11/03/03 |
| Houston | Gammatron Inc | L02148 | Houston | 17 | 11/03/03 |
| Houston | Complete Cardiac Care | L05218 | Houston | 02 | 11/13/03 |

(CONTINUTED) AMENDMENTS TO EXISTING LICENSES ISSUED:

| Location | Name | License # | City | Amend-ment # | Date of Action |
|---|---|---|---|---|---|
| Houston | Cardinal Health | L01911 | Houston | 122 | 11/12/03 |
| Irving | Baylor Medical Center at Irving | L02444 | Irving | 51 | 11/05/03 |
| Irving | Columbia Medical Center of Las Colinas Inc | L05084 | Irving | 09 | 11/13/03 |
| Lewisville | Cardiovascular Specialists PA | L05507 | Lewisville | 02 | 11/05/03 |
| Longview | Longview Cancer Center | L05017 | Longview | 04 | 10/31/03 |
| Lubbock | Covenant Health System | L04881 | Lubbock | 29 | 10/30/03 |
| Lubbock | Radiation Oncology of the South Plains PA | L05418 | Lubbock | 06 | 11/12/03 |
| McKinney | Columbia Medical Center Subsidiary LP | L02415 | McKinney | 26 | 11/03/03 |
| Plano | Presbyterian Hospital of Plano | L04467 | Plano | 26 | 11/07/03 |
| Plano | Columbia Medical Center of Plano Subsid LP | L02032 | Plano | 69 | 10/31/03 |
| San Antonio | Cardinal Health | L02033 | San Antonio | 95 | 11/07/03 |
| San Antonio | South Texas Radiology Imaging Centers | L00325 | San Antonio | 130 | 11/05/03 |
| San Antonio | South Texas Radiology Imaging Centers | L03518 | San Antonio | 43 | 11/05/03 |
| San Antonio | M M Ontiveros MD PA | L05675 | San Antonio | 01 | 11/03/03 |
| San Antonio | Christus Santa Rosa Health Care | L02237 | San Antonio | 74 | 11/13/03 |
| San Antonio | Methodist Healthcare System | L05076 | San Antonio | 11 | 11/12/03 |
| The Woodlands | ADVISYS Inc | L05531 | The Woodlands | 02 | 11/03/03 |
| Throughout TX | TX Dept of Trans Construction Division | L00197 | Austin | 96 | 11/13/03 |
| Throughout TX | Applied Standards Inspection Inc | L03072 | Beaumont | 78 | 11/05/03 |
| Throughout TX | Applied Standards Inspection Inc | L03072 | Beaumont | 79 | 11/13/03 |
| Throughout TX | AITEC USA INC | L05718 | Houston | 01 | 11/06/03 |
| Throughout TX | Granite Construction Company | L04923 | Lewisville | 07 | 10/31/03 |
| Throughout TX | Turner Industrial Technical LLC | L05417 | Nederland | 08 | 11/07/03 |
| Throughout TX | Arts Inspection and Pipe Service | L04735 | Odessa | 04 | 11/13/03 |
| Throughout TX | Remington Support Services Inc | L05642 | Pasadena | 02 | 10/30/03 |
| Throughout TX | Drash Consulting Engineers Inc | L04724 | San Antonio | 12 | 11/04/03 |
| Tomball | Tomball Hospital Authority | L02514 | Tomball | 28 | 11/03/03 |
| Tyler | East Texas Medical Center | L00977 | Tyler | 101 | 11/04/03 |
| University Park | Cirrus Health | L05600 | University Park | 03 | 11/03/03 |
| Vidor | North Star Steel Texas | L02122 | Vidor | 22 | 10/31/03 |

RENEWAL OF LICENSES ISSUED:

| Location | Name | License # | City | Amend-ment # | Date of Action |
|---|---|---|---|---|---|
| Throughout TX | Digital Surveys Inc | L01611 | Alvin | 28 | 10/31/03 |
| Throughout TX | Cornerstone Testing & Engineering Inc | L04725 | Amarillo | 05 | 11/15/03 |
| Throughout TX | High Plains Underground Water Conservation District No 1 | L02598 | Lubbock | 18 | 10/30/03 |

TERMINATIONS OF LICENSES ISSUED:

| Location | Name | License # | City | Amend-ment # | Date of Action |
|---|---|---|---|---|---|
| Dallas | Tamko Roofing Products Inc | L05595 | Dallas | 02 | 11/05/03 |
| Fort Worth | Kindred Hospitals Limited Partnership | L04873 | Fort Worth | 07 | 11/12/03 |
| Houston | Paul H Murphy PhD | L01798 | Houston | 16 | 11/13/03 |
| Houston | PET Imaging SWH LTD | L05462 | Houston | 01 | 11/13/03 |
| Midland | Midland Certified Reagent Company | L03497 | Midland | 13 | 10/30/03 |
| Morton | Cochran Memorial Hospital District | L04215 | Morton | 04 | 11/12/03 |

LICENSE EXEMPTION ISSUED:

| Location | Name | License # | City | Amend-ment # | Date of Action |
|---|---|---|---|---|---|
| Corpus Christi | Southern Ecology Management Inc | L04711 | Corpus Christi | | 10/30/03 |
| Lubbock | Texas Tech University Health Science Center | L01869 | Lubbock | | 10/29/03 |

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-200307940
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: November 19, 2003

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### Notice of Revocation of Certificates of Registration

The Texas Department of Health, having duly filed complaints pursuant to 25 Texas Administrative Code, §289.205, has revoked the following certificates of registration: Silverbrook Pet Clinic, De Soto, R12357, November 7, 2003; Claude Williams, Jr., D.D.S., Tyler, R12539, November 7, 2003; Robert C. McDaniel, M.D., P.A., Longview, R16827, November 7, 2003; Joyce M. Munoz, D.D.S., San Antonio, R19368, November 7, 2003; Modern Back and Neck Clinic, Inc., Dallas, R19566, November 7, 2003; Desert Veterinary Medicine, Odessa, R23621, November 7, 2003; Lithotripsy Associates of Texas, LP, Houston, R23894, November 7, 2003; U.S. Healthworks-Northeast, Houston, R24419, November 7, 2003; James W. Branch, Jr., D.O., Palestine, R24439, November 7, 2003; Acupuncture/Chiropractic Pain Clinic, Port Arthur, R25053, November 7, 2003; Agee V. Kunjumon, D.M.D., San Antonio, R25892, November 7, 2003; Medical Equipment Designs, Inc., Arlington, Z01483, November 7, 2003; Midtown Laserderm Services, P.A., Houston, Z01533, November 7, 2003.

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-200307941
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: November 19, 2003

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### Notice of Revocation of the Radioactive Material License of Intercontinental Energy Corporation

The Texas Department of Health, having duly filed complaints pursuant to 25 Texas Administrative Code, §289.205, has revoked the following radioactive material license: Intercontinental Energy Corporation, Englewood, Colorado, L02538, November 7, 2003.

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-200307942
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: November 19, 2003

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## Texas Health and Human Services Commission

### Request for Public Comments on a Proposed Health Insurance Flexibility and Accountability (HIFA) Waiver to Implement a CHIP Premium Assistance Program

HHSC is requesting public comments on a proposed HIFA waiver for the Children's Health Insurance Program (CHIP). A HIFA waiver is a

Medicaid or CHIP waiver approach that permits greater flexibility in the design of federally funded health care programs. Additional information on HIFA waivers is available at:

http://www.cms.hhs.gov/hifa/

HHSC is proposing this HIFA waiver to implement the CHIP premium assistance provisions of SB 240, 78th Legislature, Regular Session. A discussion of the legislative requirements is included in the draft concept paper.

The concept paper describes the proposal in detail and is available through the following link:

http://www.hhsc.state.tx.us/chip/cnews/111003_HIFAWaiverCP.html

HHSC will consider all written public comments submitted by the deadline, prior to submitting the HIFA waiver application to the federal Centers for Medicare and Medicaid Services.

The deadline for comments is December 23, 2003.

Comments may be mailed or e-mailed to:

Greg Holt, Medicaid/CHIP Operations, Texas Health and Humans Services Commission, 1100 West 49th Street, Austin, Texas 78756-3199

Email: greg.holt@hhsc.state.tx.us

TRD-200307859
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Filed: November 14, 2003

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## Texas Department of Housing and Community Affairs

### Notice of Public Hearing

**Multifamily Housing Revenue Bonds (Bellfort Village Apartments) Series 2004**

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Issuer") at Milne Elementary School, 7800 Portal, Houston, Texas 77071, at 6:00 p.m. on December 17, 2003 with respect to an issue of tax-exempt multifamily residential rental development revenue bonds in an aggregate principal amount not to exceed $13,700,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Issuer. The proceeds of the Bonds will be loaned to Ascot Park Townhomes Limited Partnership, a limited partnership, or a related person or affiliate thereof (the "Borrower") to finance a portion of the costs of acquiring, constructing and equipping a high-quality, gated, controlled-access multifamily housing development (the "Development") described as follows: 280-unit multifamily residential rental development to be located at the northwest quadrant of Bellfort Avenue and South Gessner, Houston, Harris County, Texas 77071. The Development will initially be owned by the Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Development and the issuance of the Bonds. Questions or requests for additional information may be directed to Robbye Meyer: at the Texas Department of Housing and Community Affairs, 507 Sabine, Austin, Texas 78701; (512) 475-2213; and/or rmeyer@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Robbye Meyer in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Robbye Meyer prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at (800) 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200307889
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: November 17, 2003

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### Notice of Public Hearing on Section 8 Program 2004 Annual Plan

Section 511 of Title V of the Quality Housing and Work Responsibility Act of 1998 (P. L. 205-276) requires the Texas Department of Housing and Community Affairs (the Department) to prepare a 2004 Annual Plan covering operations of the Section 8 Program. Title 24, Section 903.17 of the Code of Federal Regulations requires that the Department conduct a public hearing regarding that plan. The Department will hold a public hearing to receive comments for the development of the Department's 2004 Annual Plan. The hearing will take place at the following time and location:

**January 20, 2004**

**Texas Department of Housing and Community Affairs**

**507 Sabine, Suite 400**

**Austin, Texas**

**1:30 P.M. - 4:30 P.M.**

The proposed 2004 Annual Plan and all supporting documentation are available to the public for viewing at the Department's main office, 507 Sabine, Suite 600, Attention: Section 8 Program, Austin, Texas on weekdays during the hours of 8:00 A.M. until 4:30 P.M. Once the 2004 Plan has been approved, it will also be available for viewing on the Department's website at www.tdhca.state.tx.us/sec8.htm.

Questions or requests for additional information may be directed to Willie Faye Hurd, Manager of Section 8 Program at whurd@tdhca.state.tx.us or by mail at P.O. Box 13941, Austin, Texas 78711-3941, (512) 475-3892. Comments must be received by 5:00 P.M. Friday, February 6, 2004.

Individuals who require auxiliary aids or services for this hearing should contact Gina Esteves at (512) 475-3943 or Relay Texas at 1-800-735-2989 at least 2 days before the scheduled hearing.

TRD-200307969
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: November 19, 2003

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### Notice to Public and to All Interested Mortgage Lenders

**Mortgage Credit Certificate Program**

The Texas Department of Housing and Community Affairs (the "Department") intends to implement a Mortgage Credit Certificate Program (the "Program") to assist eligible very low, low and moderate

income first-time homebuyers purchase a residence located within the State of Texas.

Under the Program, a first-time homebuyer who satisfies the eligibility requirements described below may receive a federal income tax credit in an amount equal to the product of the certificate credit rate established under the Program and the interest paid or accrued by the homeowner during the taxable year on the remaining principal of the certified indebtedness amount incurred by the homeowner to acquire the principal residence of the homeowner; provided that such credit allowed in any taxable year does not exceed $2,000. In order to qualify to receive a credit certificate, the homebuyer must qualify for a conventional, FHA, VA or other home mortgage loan from a lending institution and must meet the other requirements of the Program.

The credit certificates will be issued to qualified mortgagors on a first-come, first-served basis by the Department acting through an administrator, which will review applications from lending institutions and prospective mortgagors to determine compliance with the requirements of the Program and determine that credit certificates remain available under the Program. No credit certificates will be issued prior to 90 days from date of publication of this Notice nor after the date that all of the credit certificate amount has been allocated to homebuyers and in no event after December 31, 2005.

In order to satisfy the eligibility requirements for a certificate under the Program, (a) the prospective residence must be a single-family residence located within State of Texas that can be reasonably expected to become the principal residence of the mortgagor within a reasonable period of time after the financing is provided; (b) the prospective homebuyer's current income must not exceed, (i) for families of three or more persons, 115% (140% in certain targeted areas) of the area median income, and (ii) for individuals and families of two persons, 100% (120% in certain targeted areas) of the area median income; (c) the prospective homebuyer must not have owned a home as a principal residence during the past three years; (d) the acquisition cost of the residence must not exceed 90 percent (110 percent, in the case of certain targeted area residences) of the average area purchase price applicable to the residence; and (e) no part of the proceeds of the qualified indebtedness is used to acquire or replace an existing mortgage. To obtain additional information on the Program, including the current income and purchase price limits (which are subject to revision and adjustment from time to time by the Department pursuant to applicable federal law and Department policy), please contact Sue Cavazos at the Texas Department of Housing and Community Affairs, 507 Sabine Street, 7th Floor, Austin, Texas 78701; (512) 475-3962.

The Department intends to maintain a list of single family mortgage lenders that will participate in the Program by making loans to qualified holders of these mortgage credit certificates. Any lender interested in appearing on this list or in obtaining additional information regarding the Program should contact Sue Cavazos at the Texas Department of Housing and Community Affairs, 507 Sabine Street, 7th Floor, Austin, Texas 78701; (512) 475-3962. The Department may schedule a meeting with lenders to discuss in greater detail the requirements of the Program.

This notice is published in satisfaction of the requirements of Section 25 of the Internal Revenue Code of 1986, as amended, and Treasury Regulation Section 1.25-3T(j)(4) issued thereunder regarding the public notices prerequisite to the issuance of mortgage credit certificates and to maintaining a list of participating lenders.

TRD-200307939

Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: November 19, 2003

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## Texas Department of Insurance

### Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by Encompass Indemnity Company proposing to use rates for private passenger automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting flex percentages -87 to +100 by coverage, territory, and class with various other criteria.

Copies of the filing may be obtained by contacting the Texas Department of Insurance, P&C Actuarial Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 475-3017.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to Article 5.101 §3(h), is made with the Chief Actuary for P&C, Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by December 12, 2003.

TRD-200307971
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: November 19, 2003

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### Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for admission to Texas of DELTA DENTAL PLAN OF MICHIGAN, INC. (using the assumed name of Renaissance Benefit Administrators), a foreign third party administrator. The home office is OKEMOS, MICHIGAN.

Application for admission to Texas of AMERICAN INTERNATIONAL ASSISTANCE SERVICES, INC., a foreign third party administrator. The home office is DOVER, DELAWARE.

Application for admission to Texas of WASDOM BENEFITS GROUP, INC., a foreign third party administrator. The home office is WILMINGTON, DELAWARE.

Application to change the name of UNITED LIFE AGENCY SERVICES, LLC (DBA PAYLOGIX) to PAYLOGIX, LLC., a foreign third party administrator. The home office is GARDEN CITY, NEW YORK.

Application to change the name of BENEMETRICS CORPORATION (DBA EMS ADMINISTRATORS) to SMITH ADMINISTRATORS/EMS, LP., a domestic third party administrator. The home office is FORT WORTH, TEXAS.

Application to change the name of CITIFINANCIAL ADMINISTRATIVE SERVICES, INC. to CITICORP ADMINISTRATIVE SERVICES, INC., a domestic third party administrator. The home office is FORT WORTH, TEXAS.

Application to change the name and home office of CORPORATE CLAIMS MANAGEMENT, INC., SAN ANTONIO, TEXAS to

VALERO CLAIMS MANAGEMENT, INC., a domestic third party administrator. The new home office is HOUSTON, TEXAS.

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-200307972
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: November 19, 2003

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## North Central Texas Council of Governments

### Request for Proposals to Consultants for County Facility Siting and Service Needs Project

This notice by the North Central Texas Council of Governments (NCTCOG) for consultant services is filed under the provisions of Government Code, Chapter 2254.

Notice of Requests for Proposals

This request by the North Central Texas Council of Governments (NCTCOG) for consultant services is filed under the provision of Government Code, Chapter 2254.

Through its regional solid waste management program, NCTCOG intends to seek professional consulting services for a study to assist with implementation of the *SEE Less Trash Regional Solid Waste Management Plan* : County Facility Siting and Service Needs Project

Contract Award Procedures: The project will have an oversight subcommittee that will recommend the firm selected to perform the study. This oversight subcommittee will use evaluation criteria and methodology consistent with the scope of services contained in the RFP. The NCTCOG Executive Board with review the recommendations made by the subcommittee, and if found acceptable, will issue contract awards.

A consultant briefing will be held on Tuesday, December 2, 2003, at 1:30 p.m. in the NCTCOG offices. Copies of the Requests for Proposals will be available at the NCTCOG Web site: http://www.dfwinfo.com/envir/sw/index.html.

Closing Date: Proposals must be submitted no later than 5 p.m. Central Time on Wednesday, January 7, 2004, to the North Central Texas Council of Governments, Department of Environmental Resources, 616 Six Flags Drive, Arlington, Texas 76011 or P.O. Box 5888, Arlington, Texas 76005-5888. Questions may be directed to Rudy Nino, Jr., NCTCOG Environmental Planner II, 817/608-2379 or rnino@nctcog.org.

TRD-200307927
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: November 18, 2003

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## Public Utility Commission of Texas

### Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on November 14, 2003, for waiver of denial by the North American Numbering Plan Administrator (NANPA) Pooling Administrator (PA) of SBC Texas' request for NXX codes.

Docket Title and Number: Petition of Southwestern Bell Telephone, L.P., doing business as SBC Texas, for Waiver of PA Denial of NXX Code Request in the Temple Rate Center. Docket Number 28899.

The Application: SBC Texas is requesting a new 10,000 block of numbers with a prefix of NX5, NX6, or NX7 for customer Scott and White Memorial Hospital. SBC Texas does not have enough available numbers in its current inventory in the Temple rate center to meet the customer's request.

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 December 12, 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 28899.

TRD-200307935
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 18, 2003

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### Notice of Application for Waiver to Obtain Individual Growth Blocks from Pooling Administrator

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on November 12, 2003, for a waiver to obtain individual growth blocks from the North American Numbering Plan Administrator (NANPA) Pooling Administrator (PA).

Docket Title and Number: Petition of Time Warner Telecom of Texas, L.P. for State Waiver to Obtain Individual Growth Blocks from Pooling Administrator. Docket Number 28878.

The Application: Time Warner Telecom of Texas, L.P. (TWTC) requested and has been denied two additional thousand blocks in the Austin Rate Center. TWTC requested a waiver of the Months to Exhaust requirement for numbering resources in the Austin rate center for Switch AUSWTXSZDS1. TWTC asked that the commission instruct the PA to release the numbering resources it contends are necessary.

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 December 12, 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 28878.

TRD-200307888
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 17, 2003

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### Public Notice of Amendment to Interconnection Agreement

On November 10, 2003, Southwestern Bell Telephone, LP, doing business as SBC Texas, and Vartec Telecom, Incorporated, collectively referred to as applicants, filed a joint application for approval of amendment to an existing 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 28871. 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 amendment to 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 28871. 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 December 11, 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 28871.

TRD-200307759
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 12, 2003

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## Public Notice of Amendment to Interconnection Agreement

On November 10, 2003, Southwestern Bell Telephone, LP, doing business as SBC Texas, and Excel Telecommunications, Incorporated collectively referred to as applicants, filed a joint application for approval of amendment to an existing 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 28872. 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 amendment to 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 28872. 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 December 11, 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 28872.

TRD-200307758
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 12, 2003

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Public Notice of Amendment to Interconnection Agreement

On November 12, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and Max-Tel Communications, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing 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 2004) (PURA). The joint application has been designated Docket Number 28874. 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 amendment to 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 28874. 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 December 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 28874.

TRD-200307809

Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 13, 2003

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Public Notice of Amendment to Interconnection Agreement

On November 12, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and SmartCom Telephone, LLC, collectively referred to as applicants, filed a joint application for approval of amendment to an existing 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 2004) (PURA). The joint application has been designated Docket Number 28875. 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 amendment to 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 28875. 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 December 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 28875.

TRD-200307810
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 13, 2003

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## Public Notice of Amendment to Interconnection Agreement

On November 12, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and Rosebud Telephone, LLC, collectively referred to as applicants, filed a joint application for approval of amendment to an existing 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 2004) (PURA). The joint application has been designated Docket Number 28876. 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 amendment to 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 28876. 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 December 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 28876.

TRD-200307811
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 13, 2003

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## Public Notice of Amendment to Interconnection Agreement

On November 12, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and Trinity Valley Services, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing 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 2004) (PURA). The joint application has been designated Docket Number 28877. 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 amendment to 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 28877. 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 December 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 28877.

TRD-200307812
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 13, 2003

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## Public Notice of Amendment to Interconnection Agreement

On November 13, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and 1- 800-Reconex, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing 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 2004) (PURA). The joint application has been designated Docket Number 28886. 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 amendment to 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 28886. 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 December 16, 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 28886.

TRD-200307862
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 14, 2003

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## Public Notice of Amendment to Interconnection Agreement

On November 13, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and NTS Communications, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing 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 2004) (PURA). The joint application has been designated Docket Number 28887. 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 amendment to 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 28887. 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 December 16, 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 28887.

TRD-200307863
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 14, 2003

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## Public Notice of Amendment to Interconnection Agreement

On November 13, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and Lone Star Telephone, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing 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 2004) (PURA). The joint application has been designated Docket Number 28888. 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 amendment to 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 28888. 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 December 16, 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 28888.

TRD-200307864
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 14, 2003

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## Public Notice of Amendment to Interconnection Agreement

On November 14, 2003, Southwestern Bell Telephone, LP, doing business as SBC Texas, and National Discount Telecom, LLC, collectively referred to as applicants, filed a joint application for approval of amendment to an existing 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 2004) (PURA). The joint application has been designated Docket Number 28897. 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 amendment to 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 28897. 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 December 17, 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 28897.

TRD-200307898
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 17, 2003

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## Public Notice of Amendment to Interconnection Agreement

On November 14, 2003, Southwestern Bell Telephone, LP, doing business as SBC Texas, and Lone Star Telephone, Incorporated, collectively referred to as applicants, filed a joint application for approval of amendment to an existing 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 2004) (PURA). The joint application has been designated Docket Number 28898. 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 amendment to 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 28898. 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 December 17, 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 28898.

TRD-200307899
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 17, 2003

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## Public Notice of Amendment to Interconnection Agreement

On November 14, 2003, Southwestern Bell Telephone, LP, doing business as SBC Texas, and Express Telephone Services, Incorporated, collectively referred to as applicants, filed a joint application for approval of amendment to an existing 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 2004) (PURA). The joint application has been designated Docket Number 28902. 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 amendment to 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 28902. 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 December 17, 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 28902.

TRD-200307900
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 17, 2003

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## Public Notice of Amendment to Interconnection Agreement

On November 14, 2003, Southwestern Bell Telephone, LP, doing business as SBC Texas, and Alltel Communications, Incorporated, collectively referred to as applicants, filed a joint application for approval of amendment to an existing 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 2004) (PURA). The joint application has been designated Docket Number 28903. 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 amendment to 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 28903. 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 December 17, 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 28903.

TRD-200307901
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 17, 2003

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## Public Notice of Amendment to Interconnection Agreement

On November 17, 2003, Southwestern Bell Telephone, LP, doing business as SBC Texas, and Connect Paging, Incorporated, doing business as Get A Phone, collectively referred to as applicants, filed a joint application for approval of amendment to an existing 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 2004) (PURA). The joint application has been designated Docket Number 28907. 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 amendment to 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 28907. 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 December 19, 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 28907.

TRD-200307936
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 18, 2003

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## Public Notice of Amendment to Interconnection Agreement

On November 18, 2003, Southwestern Bell Telephone, LP, doing business as SBC Texas, and Connect Paging, Incorporated, doing business as Get A Phone, collectively referred to as applicants, filed a joint application for approval of amendment to an existing 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 2004) (PURA). The joint application has been designated Docket Number 28919. 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 amendment to 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 28919. 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 December 19, 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 28919.

TRD-200307945
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 19, 2003

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## Public Notice of Interconnection Agreement

On November 13, 2003, Santa Rosa Telephone Cooperative, Inc. and Bellerud Communications, LLC, 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 2004) (PURA). The joint application has been designated Docket Number 28889. 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 28889. 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 December 16, 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 28889.

TRD-200307865
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 14, 2003

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## Sam Houston State University

### Notice of Invitations for Proposals

**Comprehensive Campaign Feasibility Study Contract Specifications**

In compliance with the provisions of Texas Government Code, Chapter 2254, Sam Houston State University in Huntsville, Texas solicits proposals for a campaign feasibility study in preparation of the University's first major comprehensive fund raising campaign.

The chosen firm will be able to provide or demonstrate the following:

1. A proven tack record in assisting and preparing university development programs for a major comprehensive campaign with a special emphasis on public, doctoral or comprehensive universities.

2. A list of current and previous clients that includes colleges and universities.

3. An experienced staff with expertise in fund raising, alumni relations, public relations, media relations, foundation and corporate funding, volunteer management, donor relations and major gift cultivation and solicitation.

4. A compatibility with members of the Sam Houston State University Advancement staff.

5. A written proposal which outlines the services to be provided, a timetable for accomplishing the feasibility study, and the cost for such services.

6. On-site services with assigned personnel to provide the following:

A. An examination of the University's development program, including organized efforts that reside outside the administrative structure of the Division of University Advancement.

B. Examination of the current funding of the University's development program, and recommendations for the funding of the development program throughout and beyond the life of the campaign.

Proposals should be submitted to:

Frank R. Holmes

Vice President for University Advancement

Sam Houston State University

Huntsville, Texas 77341-2537

**Closing Date: January 2, 2004**

Contract will be awarded by the Board of Regents, The Texas State University System.

TRD-200307967
James F. Gaertner
President
Sam Houston State University
Filed: November 19, 2003

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## The University of Texas System

### Notice of Intent to Seek Consulting Services

The University of Texas System will be seeking competitive sealed proposals to hire a consultant to provide the U.T. System Board of Regents with reliable up-to-date market data for determining executive compensation, including base pay, incentive/bonus pay, supplemental retirement plans (such as deferred compensation) and other benefits such as housing, vehicle or memberships. The consultant will develop a survey instrument to solicit essential information and engage in any needed follow-up to encourage responses to the survey. The consultant will compile and analyze the survey results and report those results to the Board both orally and in writing.

The Chancellor of the U.T. System has made a finding of fact that the consulting services are necessary. The U.T. System does not currently have the in-house expertise to complete this project.

The award for the services will be made by a review of competitive sealed proposals that will result in the best value to the University.

Parties interested in a copy of the Request for Proposal should contact:

Arthur Martinez

Assistant Secretary to the Board of Regents

Office of the Board of Regents

The University of Texas System

201 West 7th Street

Austin, Texas 78701

Voice: (512) 499-4296

E-mail: Amartinez@utsystem.edu

The proposal submission deadline will be Wednesday, December 10, 2003 at 3:00 p.m. Central Time.

TRD-200307938

Francie A. Frederick
Counsel and Secretary to the Board
The University of Texas System
Filed: November 19, 2003

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## Texas Workers' Compensation Commission

### Invitation to Apply to the Medical Advisory Committee (MAC)

The Texas Workers' Compensation Commission seeks to have a diverse representation on the MAC and invites all qualified individuals from all regions of Texas to apply for openings on the MAC in accordance with the eligibility requirements of the Procedures and Standards for the Medical Advisory Committee.

The Medical Review Division is currently accepting applications for the following Medical Advisory Committee representative positions: 1. Alternate Public Health Care Facility Representative, 2. Alternate Private Health Care Representative, 3. Alternate Osteopath Representative, 4. Alternate Chiropractor, 5. Primary and Alternate Dentist Representatives, 6. Primary and Alternate Pharmacist, 7. Alternate Occupational Therapist, 8. Alternate Medical Equipment Supplier Representative, 9. Alternate Employer Representative, 10. Alternate General Public 1 Representative, 11. Alternate Insurance Carrier, and 12. Alternate Acupuncturist.

Commissioners for the Texas Workers' Compensation Commission appoint the Medical Advisory Committee members who are composed of 18 primary and 18 alternate members representing health care providers, employees, employers, insurance carriers, and the general public. Primary members are required to attend all Medical Advisory Committee meetings, subcommittee meetings, and work group meetings to which they are appointed. The alternate member may attend all meetings, however during a primary member's absence, the alternate member must attend all meetings to which the primary member is appointed. Requirements and responsibilities of members are established in the Procedures and Standards for the Medical Advisory Committee as adopted by the Commission.

The Medical Advisory Committee meetings must be held at least quarterly each fiscal year during regular Commission working hours. Members are not reimbursed for travel, per diem, or other expenses associated with Committee activities and meetings.

The purpose and task of the Medical Advisory Committee, which includes advising the Commission's Medical Review Division on the development and administration of medical policies, rules and guidelines, are outlined in the Texas Workers' Compensation Act, §413.005.

Applications and other relevant Medical Advisory Committee information may be viewed and downloaded from the Commission's website at *http://www/twcc.state.tx.us* and then clicking on Calendar of Commission Meetings, Medical Advisory Committee. Applications may also be obtained by calling Jane McChesney, MAC Coordinator at 512-804-4855 or Judy Bruce, Director, Medical Review at 512-804-4802.

The qualifications as well as the terms of appointment for all positions are listed in the Procedures and Standards for the Medical Advisory Committee. These Procedures and Standards are as follows:

LEGAL AUTHORITY The Medical Advisory Committee for the Texas Workers' Compensation Commission, Medical Review Division is established under the Texas Workers' Compensation Act, (the Act) §413.005.

PURPOSE AND ROLE The purpose of the Medical Advisory Committee (MAC) is to bring together representatives of health care specialties and representatives of labor, business, insurance and the general public to advise the Medical Review Division in developing and administering the medical policies, fee guidelines, and the utilization guidelines established under §413.011 of the Act.

COMPOSITION Membership. The composition of the committee is governed by the Act, as it may be amended. Members of the committee are appointed by the Commissioners and must be knowledgeable and qualified regarding work-related injuries and diseases.

Members of the committee shall represent specific health care provider groups and other groups or interests as required by the Act, as it may be amended. As of September 1, 2001, these members include a public health care facility, a private health care facility, a doctor of medicine, a doctor of osteopathic medicine, a chiropractor, a dentist, a physical therapist, a podiatrist, an occupational therapist, a medical equipment supplier, a registered nurse, and an acupuncturist. Appointees must have at least six (6) years of professional experience in the medical profession they are representing and engage in an active practice in their field.

The Commissioners shall also appoint the other members of the committee as required by the Act, as it may be amended. An insurance carrier representative may be employed by: an insurance company; a certified self-insurer for workers' compensation insurance; or a governmental entity that self-insures, either individually or collectively. An insurance carrier member may be a medical director for the carrier but may not be a utilization review agent or a third party administrator for the carrier.

A health care provider member, or a business the member is associated with, may not derive more than 40% of its revenues from workers compensation patients. This fact must be certified in their application to the MAC.

The representative of employers, representative of employees, and representatives of the general public shall not hold a license in the health care field and may not derive their income directly from the provision of health care services.

The Commissioners may appoint one alternate representative for each primary member appointed to the MAC, each of whom shall meet the qualifications of an appointed member.

Terms of Appointment: Members serve at the pleasure of the Commissioners, and individuals are required to submit the appropriate application form and documents for the position. The term of appointment for any primary or alternate member will be two years, except for unusual circumstances (such as a resignation, abandonment or removal from the position prior to the termination date) or unless otherwise directed by the Commissioners. A member may serve a maximum of two terms as a primary, alternate or a combination of primary and alternate member. Terms of appointment will terminate August 31 of the second year following appointment to the position, except for those positions that were initially created with a three-year term. For those members who are appointed to serve a part of a term that lasts six (6) months or less, this partial appointment will not count as a full term.

Abandonment will be deemed to occur if any primary member is absent from more than two (2) consecutive meetings without an excuse accepted by the Medical Review Division Director. Abandonment will be deemed to occur if any alternate member is absent from more than two (2) consecutive meetings which the alternate is required to attend because of the primary member's absence without an excuse accepted by the Medical Review Division Director.

The Commission will stagger the August 31st end dates of the terms of appointment between odd and even numbered years to provide sufficient continuity on the MAC.

In the case of a vacancy, the Commissioners will appoint an individual who meets the qualifications for the position to fill the vacancy. The Commissioners may re-appoint the same individual to fill either a primary or alternate position as long as the term limit is not exceeded. Due to the absence of other qualified, acceptable candidates, the Commissioners may grant an exception to its membership criteria, which are not required by statute.

RESPONSIBILITY OF MAC MEMBERS Primary Members. Make recommendations on medical issues as required by the Medical Review Division.

Attend the MAC meetings, subcommittee meetings, and work group meetings to which they are appointed.

Ensure attendance by the alternate member at meetings when the primary member cannot attend.

Provide other assistance requested by the Medical Review Division in the development of guidelines and medical policies.

Alternate Members. Attend the MAC meetings, subcommittee meetings, and work group meetings to which the primary member is appointed during the primary member's absence.

Maintain knowledge of MAC proceedings.

Make recommendations on medical issues as requested by the Medical Review Division when the primary member is absent at a MAC meeting.

Provide other assistance requested by the Medical Review Division in the development of guidelines and medical policies when the primary member is absent from a MAC meeting.

Committee Officers. The chairman of the MAC is designated by the Commissioners. The MAC will elect a vice chairman. A member shall be nominated and elected as vice chairman when he/she receives a majority of the votes from the membership in attendance at a meeting at which nine (9) or more primary or alternate members are present.

Responsibilities of the Chairman. Preside at MAC meetings and ensure the orderly and efficient consideration of matters requested by the Medical Review Division.

Prior to a MAC meeting confer with the Medical Review Division Director, and when appropriate, the TWCC Executive Director to receive information and coordinate: a. Preparation of a suitable agenda. b. Planning MAC activities. c. Establishing meeting dates and calling meetings. d. Establishing subcommittees. e. Recommending MAC members to serve on subcommittees.

If requested by the Commission, appear before the Commissioners to report on MAC meetings.

COMMITTEE SUPPORT STAFF The Director of Medical Review will provide coordination and reasonable support for all MAC activities. In addition, the Director will serve as a liaison between the MAC and the Medical Review Division staff of TWCC, and other Commission staff if necessary.

The Medical Review Director will coordinate and provide direction for the following activities of the MAC and its subcommittees and work groups:

Preparing agenda and support materials for each meeting.

Preparing and distributing information and materials for MAC use.

Maintaining MAC records.

Preparing minutes of meetings.

Arranging meetings and meeting sites.

Maintaining tracking reports of actions taken and issues addressed by the MAC.

Maintaining attendance records.

SUBCOMMITTEES The chairman shall appoint the members of a subcommittee from the membership of the MAC. If other expertise is needed to support subcommittees, the Commissioners or the Director of Medical Review may appoint appropriate individuals.

WORK GROUPS When deemed necessary by the Director of Medical Review or the Commissioners, work groups will be formed by the Director. At least one member of the work group must also be a member of the MAC.

WORK PRODUCT No member of the MAC, a subcommittee, or a work group may claim or is entitled to an intellectual property right in work performed by the MAC, a subcommittee, or a work group.

MEETINGS Frequency of Meetings. Regular meetings of the MAC shall be held at least quarterly each fiscal year during regular Commission working hours.

CONDUCT AS A MAC MEMBER Special trust has been placed in members of the Medical Advisory Committee. Members act and serve on behalf of the disciplines and segments of the community they represent and provide valuable advice to the Medical Review Division and the Commission. Members, including alternate members, shall observe the following conduct code and will be required to sign a statement attesting to that intent.

Comportment Requirements for MAC Members:

Learn their duties and perform them in a responsible manner;

Conduct themselves at all times in a manner that promotes cooperation and effective discussion of issues among MAC members;

Accurately represent their affiliations and notify the MAC chairman and Medical Review Director of changes in their affiliation status;

Not use their memberships on the MAC: a. in advertising to promote themselves or their business. b. to gain financial advantage either for themselves or for those they represent; however, members may list MAC membership in their resumes;

Provide accurate information to the Medical Review Division and the Commission;

Consider the goals and standards of the workers' compensation system as a whole in advising the Commission;

Explain, in concise and understandable terms, their positions and/or recommendations together with any supporting facts and the sources of those facts;

Strive to attend all meetings and provide as much advance notice to the Texas Workers' Compensation Commission staff, attn: Medical Review Director, as soon as possible if they will not be able to attend a meeting; and

Conduct themselves in accordance with the MAC Procedures and Standards, the standards of conduct required by their profession, and the guidance provided by the Commissioners, Medical Review Division or other TWCC staff.

TRD-200307926
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: November 18, 2003

♦ ♦ ♦

## Texas Workforce Commission

### Notice of Resolution of the Texas Workforce Commission Establishing the Unemployment Obligation Assessment for Calendar Year 2004

In accordance with the formula provided in 40 TAC §815.132 as set out in part:

"(e) Accordingly the rate of the portion of the assessment that is to be used to pay a bond obligation is a percentage of the product of the unemployment obligation assessment ratio and the sum of the employer's prior year general tax rate, the replenishment tax rate and the deficit tax rate." The percentage to be determined by Commission resolution, shall not exceed 200%. The "percentage" for 2004 is 66%.

TRD-200307761
John Moore
General Counsel
Texas Workforce Commission
Filed: November 13, 2003

♦ ♦ ♦

### Plan Modification of the Strategic Six Year Workforce Investment Plan for the Title I Workforce Investment Act of 1998 and the Wagner-Peyser Act

The Texas Workforce Commission (Commission) is modifying the Strategic Six Year State Workforce Investment Plan (Plan) for the Title I Workforce Investment Act of 1998 (WIA) and the Wagner-Peyser Act.

This notice of the Plan modification provides the public, local workforce development board (board) chairs, board members, board staff, chief elected officials, local partners, other state agencies, representatives of businesses, representatives of labor organizations and other interested parties an opportunity to comment.

The draft of the Plan modification will be available for public inspection on **November 17, 2003**. You may view the draft at 101 East 15th Street Room 440T, Austin, Texas, or you may request a hard copy by calling Debbie Carlson, at (512) 463-2675. An electronic copy will be available on **November 17, 2003** on the Texas Workforce Commission web site at: http://www.texasworkforce.org. From this site, select the "News" and then select "WIA Plan Modification".

The Commission welcomes and invites all interested parties to provide input on the draft Plan modification. All comments must be submitted in writing. The deadline for submitting all comments is **Friday, December 5, 2003** at 5:00 p.m. Comments may be submitted to: 101 East 15th Street, Room 440T, Attn: Debbie Carlson, Austin, Texas 78778-0001, faxed to 512-463-7379, or emailed to Ms. Carlson at debbie.carlson@twc.state.tx.us.

TRD-200307871
John Moore
General Counsel
Texas Workforce Commission
Filed: November 17, 2003

♦ ♦ ♦

## How to Use the Texas Register

**Information Available**: The 13 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

**Governor** - Appointments, executive orders, and proclamations.

**Attorney General** - summaries of requests for opinions, opinions, and open records decisions.

**Secretary of State** - opinions based on the election laws.

**Texas Ethics Commission** - summaries of requests for opinions and opinions.

**Emergency Rules**- sections adopted by state agencies on an emergency basis.

**Proposed Rules** - sections proposed for adoption.

**Withdrawn Rules** - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

**Adopted Rules** - sections adopted following a 30-day public comment period.

**Texas Department of Insurance Exempt Filings** - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

**Texas Department of Banking** - opinions and exempt rules filed by the Texas Department of Banking.

**Tables and Graphics** - graphic material from the proposed, emergency and adopted sections.

**Open Meetings** - notices of open meetings.

**In Addition** - miscellaneous information required to be published by statute or provided as a public service.

**Review of Agency Rules** - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

**How to Cite**: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 26 (2001) is cited as follows: 26 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "26 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 26 TexReg 3."

**How to Research**: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

## Texas Administrative Code

The ***Texas Administrative Code (TAC)*** is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

**How to Cite**: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

**How to update**: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 19, April 13, July 13, and October 12, 2001). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
***Part I. Texas Department of Human Services***
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).

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