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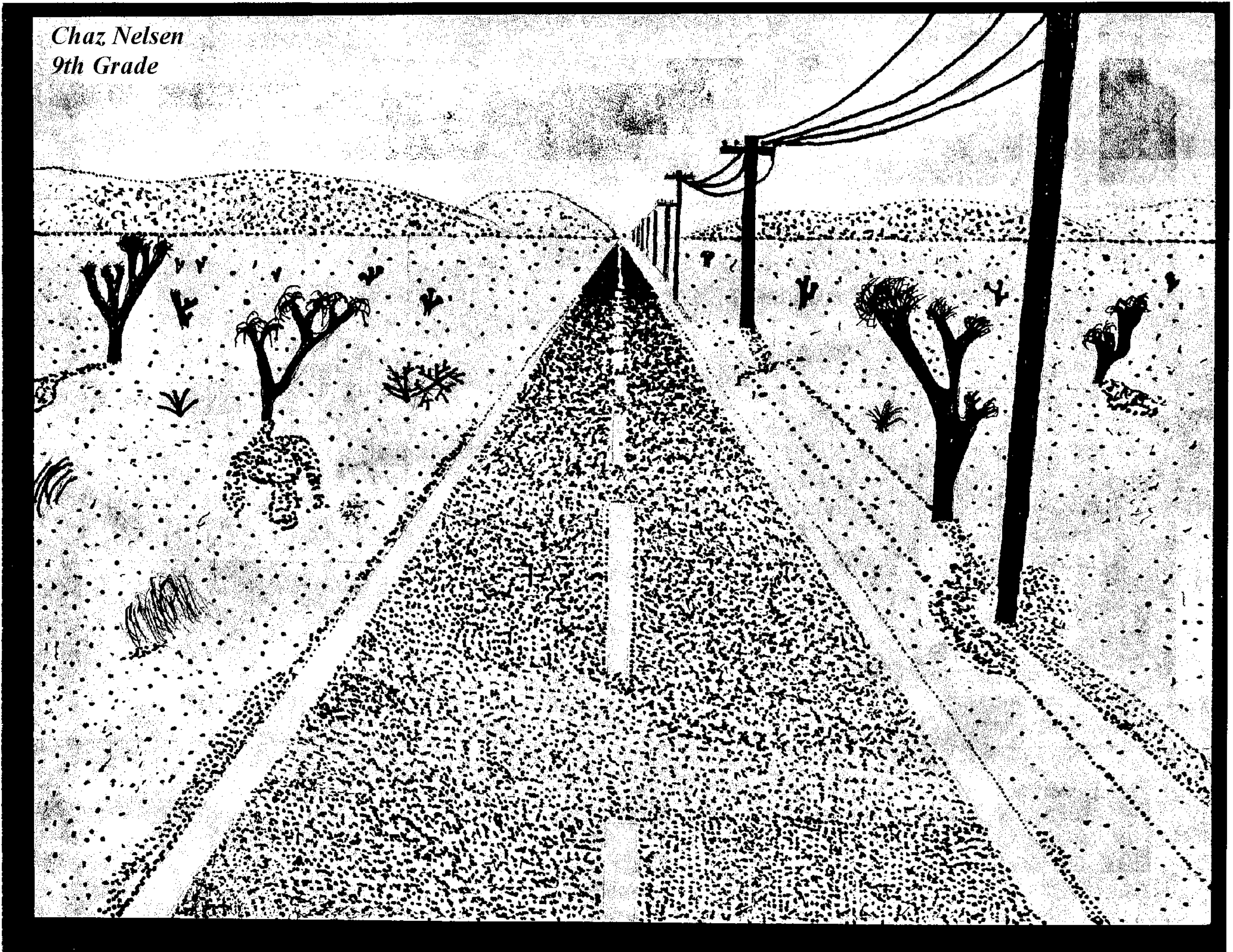
Chaz Nelsen
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TEXAS REGISTER

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Open Meetings

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

Notices are published in the electronic *Texas Register* and available on-line.
http://www.sos.state.tx.us/texreg

To request a copy of a meeting notice by telephone, please call 463-5561 if calling in Austin. For out-of-town callers our toll-free number is (800) 226-7199. Or fax your request to (512) 463-5569.

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

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

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

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.

Request for Opinions

RQ-0213-GA

Requestor:

The Honorable Ray Allen

Chair, Committee on Corrections

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Eligibility of employees and retirees of community supervision and corrections departments to participate in the group benefits programs of the Employees Retirement System (Request No. 0213-GA)

Briefs requested by June 12, 2004

RQ-0214-GA

Requestor:

The Honorable Frank J. Corte Jr.

Chair, Committee on Defense Affairs and State-Federal Relations

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether the legislature may authorize the use of video lottery terminals on Native American tribal lands, and receive a share of the revenue therefrom (Request No. 0214-GA)

Briefs requested by June 13, 2004

RQ-0215-GA

Requestor:

The Honorable Jeff Wentworth

Chair, Jurisprudence Committee

Texas State Senate

Post Office Box 12068

Austin, Texas 78711

Re: Constitutionality of the Texas grandparent access statute, section 153.433, Family Code, in light of *Troxel v. Granville*, 530 U.S. 57 (2000) (Request No. 0215-GA)

Briefs requested by June 13, 2004

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

TRD-200403358
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: May 18, 2004

Opinions

Opinion No. GA-0186

Mr. C. Tom Clowe, Jr.

Chair, Texas Lottery Commission

Post Office Box 16630

Austin, Texas 78761-6630

Re: Whether a corporate applicant is ineligible for a manufacturer's or distributor's license if a person holding ten percent or less of the corporation's stock also holds, or an individual related within the first degree by consanguinity to such individual holds, shares in another licensed bingo entity (RQ-0135-GA)

S U M M A R Y

A corporate applicant for a bingo manufacturer's or distributor's license is not rendered ineligible under section 2001.202 or 2001.207 of the Occupations Code solely because an individual holding less than ten percent of the corporation's stock also holds stock in, or is related within the first degree by consanguinity or affinity to an individual who holds stock in, another licensed bingo entity. On the other hand, the corporate applicant is rendered ineligible if an individual holding ten percent of the corporation's shares also holds shares, in any quantity, in, or holds an equitable or credit interest in, another licensed bingo manufacturer or distributor. The corporate applicant is not rendered ineligible solely because an individual holding exactly ten percent of the corporation's stock is related within the first degree to an individual holding shares in a commercial lessor or a manufacturer or distributor.

Opinion No. GA-0187

The Honorable James L. Keffer

Chair, Committee for Economic Development

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether the exception for continuous employment in the general nepotism statute, Government Code chapter 573, applies to an employment relationship prohibited by section 6.05(f) of the Tax Code (RQ-0138-GA)

S U M M A R Y

Section 6.05(f) of the Tax Code provides that a chief appraiser of an appraisal district "may not employ any individual related to a member of the board of directors within the second degree by affinity or within the third degree by consanguinity." The exception for continuous employment in the general nepotism statute, Government Code chapter 573, does not apply to an employment relationship prohibited by section 6.05(f).

Opinion No. GA-0188

The Honorable Tim Curry

Tarrant County Criminal District Attorney

1025 South Jennings, Suite 300

Fort Worth, Texas 76104

Re: Whether the Tarrant County Hospital District may expend funds to establish a self- insurance program providing liability coverage for JPS Physician Group, Inc. and its health-care- provider employees (RQ-0139-GA

S U M M A R Y

Section 281.0565 of the Health and Safety Code authorizes a hospital district to contract with a charitable organization that it has created "to facilitate the management of a district health care program by providing or arranging health care services, developing resources for health care services, or providing ancillary support services for the district." TEX. HEALTH & SAFETY CODE ANN. §281.0565(b) (Vernon 2001). The Tarrant County Hospital District may by contract provide funds to a charitable organization it has created under section 281.0565 for the charitable organization to self-insure under section 2259.031 of the Government Code if the contract facilitates the management of a district health care program. A Hospital District expenditure for this purpose will comport with article III, section 52(a) of the Texas Constitution if the Hospital District's board determines in good faith that the expenditure serves a public purpose of the Hospital District. In addition, the contract pursuant to which the Hospital District provides funds to the charitable organization must place sufficient controls on the transaction to ensure that the public purpose is carried out.

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

TRD-200403365
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: May 18, 2004

TEXAS ETHICS COMMISSION

The Texas Ethics Commission is authorized by the Government Code, §571.091, to issue advisory opinions in regard to the following statutes: the Government Code, Chapter 302; the Government Code, Chapter 305; the Government Code, Chapter 572; the Election Code, Title 15; the Penal Code, Chapter 36; and the Penal Code, Chapter 39. Requests for copies of the full text of opinions or questions on particular submissions should be addressed to the Office of the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, (512) 463-5800.

Ethics Advisory Opinions

EAO-454. The Texas Ethics Commission has been asked to consider whether a lawyer who is a member of the legislature may list his legislative position in legal directories, in legal letterhead, on business cards, and in other contexts. (AOR-509)

SUMMARY

There is nothing in the laws under the jurisdiction of the Ethics Commission that specifically addresses the issues of whether and when a legislator may mention his legislative service. Although it is conceivable that a legislator might refer to his legislative service in a context that raised questions about section 36.02, 36.07, or 36.08(f) of the Penal Code, a reference to legislative service, without more, would not constitute a violation of one of those provisions.

EAO-455. The Texas Ethics Commission has been asked whether the contingent fee prohibition in section 305.022 of the Government Code applies in a situation in which a lawyer seeks a legislative change that may increase the lawyer's chances of success in tax refund cases. (AOR-511)

SUMMARY

The compensation described in this opinion is not contingent on the passage of legislation.

The Texas Ethics Commission is authorized by section 571.091 of the Government Code to issue advisory opinions in regard to the following statutes: (1) Chapter 572, Government Code; (2) Chapter 302, Government Code; (3) Chapter 303, Government Code; (4) Chapter 305, Government Code; (5) Chapter 2004, Government Code; (6) Title 15, Election Code; (7) Chapter 36, Penal Code; and (8) Chapter 39, Penal Code.

Questions on particular submissions should be addressed to the Texas Ethics Commission, P.O. Box 12070, Capitol Station, Austin, Texas 78711-2070, (512) 463-5800.

TRD-200403387
Sarah Woelk
General Counsel
Texas Ethics Commission
Filed: May 19, 2004

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 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 353. MEDICAID MANAGED CARE

SUBCHAPTER F. SPECIAL INVESTIGATIVE UNITS

1 TAC §§353.501 - 353.505

The Texas Health and Human Services Commission (the Commission) proposes a new Subchapter F, §§353.501-353.505, concerning Special Investigations Unit, mandated by HB2292, 78th Legislature, Regular Session, 2003.

Background and Summary of Factual Basis for the Rules

The 75th Legislature, Regular Session, 1997, through Senate Bill 30, mandated managed care organizations (MCOs) develop and submit to the operating agency for approval by the commission a plan for preventing, detecting, and reporting fraud and abuse. The bill also required MCOs to report any known or suspected acts of fraud or abuse to the operating agency for referral to the commission for investigation.

The 78th Legislature, Regular Session, 2003, through House Bill 2292, expanded on Senate Bill 30 and mandated that, effective September 1, 2004, all MCOs that provide or arrange for the provision of health care services to an individual under a government-funded program, including the Medicaid program, establish and maintain a Special Investigations Unit (SIU) to investigate fraudulent claims and other types of program abuse by recipients and service providers.

The additions and revisions to state statutes passed through SB 30 and HB 2292 are designed to strengthen the state's ability to improve waste, abuse and fraud detection, investigation, criminal referral and prosecution, and recovery of overpayments, damages, and penalties from health and human service providers, recipients, and contractors. The rules provide an increased effort to identify fraud or abuse in managed care.

The proposed rules were developed in conjunction with HHSC's Office of Inspector General (OIG) and HHSC, Medicaid/CHIP Managed Care representatives. The proposed rules were submitted for review and comments to the MCOs currently under contract with the state of Texas.

Section-by-Section Explanation

Proposed new §353.501 generally describes the purpose of the plan to prevent waste, abuse and fraud. It details when the plan is to be submitted to the OIG, when the plan is to be resubmitted if denied, and the requirements of the MCO if it chooses to contract with another entity for the investigation of fraudulent claims and other types of program abuse.

Proposed new §353.502 describes the elements for the MCOs plan to detect and investigate possible acts of waste, abuse and fraud. The description is specific and provides the requirements for detecting and investigating waste, abuse and fraud by providers and recipients.

Proposed new §353.503 outlines the requirements for information that must be submitted to the OIG from the MCO if the MCO contracts with another entity for the investigation of fraudulent claims and other types of programs abuse by recipients and providers. It also provides the timeline for submittal of the information to the OIG.

Proposed new §353.504 contains specific language with regard to the MCOs maintaining and providing records upon request. The proposed rules provides detail language as to which agencies are to receive the records, when the records are to be produced and the records that are to be maintained by the MCO. It also provides general language for possible sanctions if the records request is out of compliance.

Proposed new §353.505 describes the process for the recovery of funds resulting from an investigation conducted by the MCO or the OIG. In addition, the proposed rule describes when the money will be recovered and how the recovered funds will be disbursed.

Public Benefit

Jason Cooke, Associate Commissioner for Medicaid and CHIP, has determined that for each year of the first five years the proposed rules are in effect, the public will benefit from adoption of the proposed rules. The anticipated public benefit as a result of enforcing the proposed rules will be to ensure that Medicaid funds are expended for medically necessary services. Monitoring and investigating suspected fraud and abuse will result in recovered dollars appropriated back to the program.

Small and Micro-business Impact Analysis

Tom Suehs, Deputy Commissioner for Financial Services, has determined that there will be no effect on small businesses or micro-businesses to comply with the rules as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the amendments. There are no anticipated economic costs to persons who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

Fiscal Note

Mr. Suehs has also determined that during the first five years the proposed rules are in effect there will not be any fiscal impact

to the state for fiscal years 2004 through 2008. Implementation of the proposed rules are not anticipated to result in any fiscal implications for local health and human service agencies. There are no foreseeable fiscal implications for local governments.

Regulatory Analysis

HHSC has determined that the proposed rules are not a "major environmental rule," as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the public health and safety of a state or a sector of the state. The proposed rules are not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Taking Impact Assessment

HHSC has determined that the proposed rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under §2007.043, Government Code.

Public Comment

Comments on the proposed rules may be submitted in writing to Juanita Henry, Office of Inspector General, Texas Health and Human Services Commission, P.O. Box 13247, Austin, Texas 78711-3247 or by e-mail to Juanita.Henry@hhsc.state.ts.us. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

Statutory authority

The new rules are proposed under the Texas Government Code, §531.033, which provides the Commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021, and the Texas Government Code, §531.021 (a), which provide the Health and Human Services Commission (HHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Government Code, §2001.006, which allows state agencies to adopt rules in preparation for the implementation of legislation.

The proposed new rules affect the Human Resources Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by the proposed new rules.

§353.501. Purpose.

(a) This subchapter implements the Health and Human Services Commission's (HHSC), Office of Inspector General (OIG) authority to approve annually, each managed care organization (MCO) plan to prevent and reduce waste, abuse, and fraud. This authority is granted by Chapter 531, Subchapter C, Government Code, Section 531.113.

(b) An MCO that provides or arranges for the provision of health care services to an individual under the Medical Assistance Program (Medicaid), must arrange for a special investigative unit to investigate fraudulent claims and other types of program abuse by recipients and providers. An MCO may choose to:

(1) Establish and maintain the special investigative unit within the managed care organization; or

(2) Contract with another entity for the investigation.

(c) An MCO must develop a plan to prevent and reduce waste, abuse, and fraud. The plan must be submitted annually to the HHSC-OIG for approval each year the MCO is enrolled with the State of Texas. The plan must be submitted 60 days prior to the start of the State fiscal year.

(d) If the initial plan to prevent and reduce waste, abuse, and fraud is not approved, the MCO must resubmit the plan to HHSC-OIG within 15 working days of receiving the denial letter, which will explain the deficiencies. If the plan is not resubmitted within the time allotted, the MCO will be in default and sanctions may be imposed.

(e) If the MCO elects to contract with another entity for the investigation of fraudulent claims and other types of program abuse as referenced in paragraph (b)(2) of this section, the MCO must adhere to all requirements of Chapter 42, §438.230 of the Code of Federal Regulations.

§353.502. Managed Care Organization's Plans and Responsibilities in Preventing and Reducing Waste, Abuse, And Fraud.

(a) Each managed care organization (MCO) subject to this section must develop a plan to prevent and reduce waste, abuse, and fraud and submit that plan annually to the Health and Human Services Commission (HHSC), Office of Inspector General (OIG) for approval.

(b) The MCO is responsible for investigating possible acts of waste, abuse, or fraud for all services, including those that the MCO subcontracts to outside entities.

(c) The plan submitted to the HHSC-OIG must include the information below to be considered for approval.

(1) A description of the MCO's procedures for detecting possible acts of waste, abuse, or fraud by providers. The description must address each of the following requirements:

(A) Use of audits to monitor compliance and assist in detecting and identifying Medicaid program violations and possible waste, abuse, and fraud overpayments through data matching, analysis, trending and statistical activities;

(B) Monitoring of service patterns for providers, subcontractors, and recipients;

(C) Use of a hotline or another mechanism to report potential or suspected violations;

(D) Use of random payment review of claims submitted by providers for reimbursement to detect potential waste, abuse, or fraud ;

(E) Use of edits or other evaluation techniques to prevent payment for fraudulent or abusive claims; and

(F) Use of routine validation of MCO data.

(2) A description of the MCO's procedures for investigating possible acts of waste, abuse, and fraud by providers. The procedures must satisfy the requirements in subparagraphs (A)-(C) of this paragraph.

(A) MCOs are required to conduct preliminary investigations. The preliminary investigation must be conducted within 15 working days of the identification and/or reporting of suspected and/or potential waste, abuse, or fraud

(B) The requirements for a preliminary investigation include but are not limited to the following:

(i) Determining if the MCO has received any previous reports of incidences of suspected waste, abuse, or fraud or conducted any previous investigations of the provider in question. If so, the investigation should include a review of all materials related to the previous investigations, the outcome of the previous investigations, and

a determination of whether the new allegations are the same or relate to the previous investigation.

(ii) Determining if the service provider has received any educational training from the MCO in regard to the allegation.

(iii) Conducting a review of the provider's billing pattern to determine if there are any suspicious indicators

(iv) Reviewing the provider's payment history for the past three years, if available, to determine if there are any suspicious indicators.

(v) Reviewing the policies and procedures for the program type in question to determine if what has been alleged is a violation.

(C) If it is determined that suspicious indicators of possible waste, abuse, or fraud exist, within 15 working days from the conclusion of subparagraphs (A) and (B) of this paragraph, the MCO must select a sample for further review. The sample must consist of a minimum of 50 recipients or 15% of a provider's claims related to the suspected waste, abuse, and fraud.

(i) Within 15 working days of the selection of the sample, request medical records and encounter data for the sample recipients.

(ii) Review the requested medical records and encounter data within 45 working days of receipt of the records to:

(I) validate the sufficiency of service delivery data and to assess utilization and quality of care.

(II) ensure that the encounter data submitted by the provider is accurate.

(III) evaluate if the review of other pertinent records is necessary to determine if waste, abuse, or fraud has occurred. If the review of additional records is necessary then conduct such review.

(3) A description of the MCO's procedures for detecting possible acts of waste, abuse, and fraud by recipients. The description must address the following:

(A) Review of claims when waste, abuse, or fraud is suspected or reported to determine if:

(i) Treatment(s) and/or medication(s) prescribed by more than one provider appears to be duplicative, excessive, or contraindicated; and

(ii) Recipients are using more than one physician to obtain similar treatments and /or medications; and,

(iii) Providers other than the assigned Primary Care Provider (PCP) are treating the recipient, and there is no evidence that the recipient was treated by the assigned PCP for a similar or related condition; and,

(iv) The recipient has a high volume of emergency room visits with a non-emergent diagnosis.

(B) Review medical records for the recipients in question if claims review does not clearly determine if waste, abuse, or fraud has occurred.

(C) Use of edits or other evaluation techniques to identify possible overuse and/or abuse of psychotropic and/or controlled medications by recipients who are allegedly treated at least monthly by two or more physicians. A physician includes but is not limited to: psychiatrists, pain management specialists, anesthesiologists, physical medicine and rehabilitation specialists.

(4) A description of the MCO's procedures for investigating possible acts of waste, abuse, and fraud by recipients. The procedures must satisfy the requirements in subparagraphs (A) and (B) of this paragraph.

(A) MCOs are required to conduct preliminary investigations. The preliminary investigation must be conducted within 15 working days of the identification and/or reporting of suspected and/or potential waste, abuse, or fraud.

(B) The requirements for a preliminary investigation consist of but are not limited to the following:

(i) Review of acute care and emergency room claims submitted by providers for the suspected recipient.

(ii) Analyze pharmacy claim data submitted by providers for the suspected recipient to determine possible abuse of controlled or non-controlled medications. If the MCO does not have the data necessary to conduct the pharmacy claims review, the MCO must request the data within 15 working days of the initial identification and/or reporting of the suspected or potential waste, abuse, or fraud.

(iii) Analyze claims submitted by providers to determine if the diagnosis is appropriate for the medications prescribed.

(5) A description of the MCO's internal procedures for referring possible acts of waste, abuse, or fraud to the MCO's Special Investigative Unit (SIU) and the mandatory reporting of possible acts of waste, abuse, or fraud by providers or recipients to the HHSC-OIG. The procedures must satisfy the requirements in subparagraphs (A)-(E) of this paragraph.

(A) Assign an officer or director the responsibility and authority for reporting all investigations resulting in a finding of possible acts of waste, abuse, or fraud to the OIG. An officer could be but is not limited to a Compliance Officer, a Manager of Government Programs, or a Regulatory Compliance Analyst.

(B) Provide specific and detailed internal procedures for officers, directors, managers, and employees to report possible acts of waste, abuse, and fraud to the MCO's SIU. The procedures must include but are not limited to:

(i) Guidance regarding what information must be reported to the MCO's SIU.

(ii) A requirement that information must be reported to the MCO's SIU within 24 hours of identification or reporting of suspected waste, abuse, and fraud.

(C) Provide specific and detailed internal procedures for the SIU to report investigations resulting in a finding of waste, abuse, or fraud to the assigned officer or director.

(i) Guidance regarding what information must be reported to the assigned officer or director.

(ii) A requirement that possible acts of waste, abuse, or fraud be reported to the assigned officer or director must occur within 15 working days of making the determination.

(D) Utilizing the HHSC-OIG fraud referral form, the assigned officer or director must report and refer all possible acts of waste, abuse or fraud to the HHSC- OIG within 30 working days of receiving the reports of possible acts of waste, abuse or fraud from the SIU. The report and referral must include an investigative reportidentifying the allegation, statutes/regulations violated or considered,

and the results of the investigation; copies of program rules and regulations violated for the time period in question; the estimated overpayment identified; a summary of interviews conducted; the encounter data submitted by the provider for the time period in question; and all supporting documentation obtained as the result of the investigation. This requirement applies to all reports of possible acts of waste, abuse, and fraud with the exception of an expedited referral.

(E) An expedited referral is required when the MCO has reason to believe that a delay may result in:

(i) harm or death to patients

(ii) the loss, destruction, or alteration of valuable evidence; or

(iii) a potential for significant monetary loss that may not be recoverable; or

(iv) hindrance of an investigation or criminal prosecution of the alleged offense.

(6) A description of the MCO's procedures for educating recipients and providers and training personnel to prevent waste, abuse, and fraud . The procedures must satisfy the requirements in subparagraphs (A)-(H) of this paragraph.

(A) On an annual basis, the organization shall provide waste, abuse and fraud training to each employee who is directly involved in any aspect of Medicaid. At a minimum, training is required for all individuals responsible for data collection, provider enrollment or disenrollment, encounter data, claims processing, utilization review, appeals or grievances, quality assurance, and marketing.

(B) The training must be specific to the area of responsibility for the staff receiving the training and contain examples of waste, abuse or fraud in their particulararea of interest.

(C) The organization must provide general training to all Medicaid managed care staff that is not directly involved with the areas listed in subparagraph (A) of this paragraph. The general training must provide information about the definition of waste, abuse, and fraud , how to report suspected waste, abuse, and fraud and to whom the suspected waste, abuse, and fraud is reported.

(D) The organization must provide waste, abuse, and fraud training to all new staff that will be directly involved with any aspect of Medicaid within 90 days of the employee's employment date.

(E) Provide updates to all affected areas when changes to policy and/or procedure may affect their area(s). The updates must be provided within 20 working days of the changes occurring.

(F) Educate recipients , providers, and employees about their responsibilities, the responsibility of others, the definition of waste, abuse, and fraud and how and where to report it. Appropriate methods of educating recipients, providers, and employees may include but are not limited to newsletters, pamphlets, bulletins, and provider manuals.

(G) The MCOs will maintain a training log for all training pertaining to waste, abuse, and/or fraud in Medicaid. The log must include the name and title of the trainer, names of all staff attending the training, and the date and length of the training. The log must be provided immediately upon request to the HHSC-OIG, Office of the Attorney General's (OAG)- Medicaid Fraud Control Unit (MFCU) and OAG - Civil Medicaid Fraud Division (CMFD), and the United States Health and Human Services- Office of Inspector General (HHS-OIG).

(H) Written standards of conduct, and written policies and procedures that include a clearly delineated commitment from the MCOs for detecting, preventing and investigating waste, abuse, and fraud.

(7) The name, title, address, telephone number, and fax number of the assigned officer or director responsible for carrying out the plan;

(A) The person carrying out the plan should be but is not limited to a Compliance Officer, a Manager of Government Programs, Regulatory Compliance Analyst, Director of Quality Integrity or a person in senior management.

(B) When the person that is responsible for carrying out the plan changes, the required information is to be reported to HHSC-OIG within 15 working days of the change.

(8) A description, process flow diagram, or chart outlining the organizational arrangement of the MCO's personnel responsible for investigating and reporting possible acts of waste, abuse, or fraud; and,

(9) Advertising and marketing materials utilized by the MCOs must be complete and accurately reflect the information about the MCO. Marketing materials includes any informational materials targeted to recipients.

(d) Each MCO must satisfy the requirements in paragraphs (1)-(3) of this subsection related to investigations of waste, abuse, and fraud conducted by the MCO's SIU.

(1) On a quarterly basis, submit to the HHSC- OIG a report listing all investigations conducted that resulted in no findings of waste, abuse, or fraud. The report shall include the allegation, the suspected recipient's or provider's Medicaid number, the source, the time period in question, and the date of receipt of the identification and or reporting of suspected and/or potential waste, abuse, or fraud.

(2) Maintain a log of all incidences of suspected waste, abuse and fraud, received by the MCO regardless of the source. The log shall contain the subject of the complaint, the source, the allegation, the date the allegation was received, the recipient or providers Medicaid number, and the status of the investigation.

(3) The log should be provided at the time of a reasonable request to the HHSC-OIG, OAG-MFCU, OAG-CMFD, and the HHS-OIG. A reasonable request means a request made during hours that the business or premises is open for business.

(e) MCOs must maintain the confidentiality of any patient information relevant to an investigation of waste, abuse, or fraud.

(f) MCOs must retain records obtained as the result of an investigation conducted by the SIU for a minimum period of five years or until all audit questions, appealed hearings, investigations, or court cases are resolved.

(g) Failure of the provider to supply the records requested by the MCO will result in the provider being reported to the HHSC-OIG as refusing to supply records upon request and the provider may be subject to sanction or immediate payment hold.

§353.503. Managed Care Organization's Contracts.

If a Managed Care Organization (MCO) contracts for the investigation of fraudulent claims and other types of programs abuse by recipients and providers under subsection 353.501(e), within 10 working days of executing the contract the MCO shall file with the Health and Human Services Commission, Office of Inspector General (HHSC-OIG):

(1) A copy of the written contract including any and all attachments.

(2) The names, titles, addresses, telephone numbers, and fax numbers of the principals of the entity with which the MCO has contracted; and

(3) A description of the qualifications of the principals of the entity with which the MCO has contracted to perform the contracted responsibilities.

§353.504. Review of Managed Care Organization's Records.

(a) Immediately upon request, the Health and Human Services Commission, Office of Inspector General (HHSC-OIG), Office of the Attorney General-Medicaid Fraud Control Unit (OAG-MFCU) and OAG, Office of the Attorney General- Civil Medicaid Fraud Division (OAG-CMFD), and the United States Health and Human Services, Office of Inspector General (HHS-OIG) may review the records of a Managed Care Organization (MCO) to determine compliance with this subchapter.

(b) Upon receipt of a record review request from any state or federal agency authorized to conduct compliance, regulatory, or program integrity functions, a MCO must:

(1) Provide the records requested by a properly identified agent of any state or federal agency authorized to conduct compliance, regulatory, or program integrity functions on the provider, person, MCO, or the services rendered by the provider or person within 24 hours of the request.

(2) An exception to the 24 hours stated in paragraph (1) of this subsection may be made when the OIG or another state or federal agency representative reasonably believes that the requested records are about to be altered or destroyed or that the request may be completed at the time of the request and/or in less than 24 hours.

(c) The request for record review includes, but is not limited to:

(1) clinical medical patient records;

(2) other records pertaining to the patient;

(3) any other records of services provided to Medicaid or other health and human services program recipients and payments made for those services;

(4) documents related to diagnosis, treatment, service, lab results, charting;

(5) billing records, invoices, documentation of delivery items, equipment, or supplies;

(6) radiographs;

(7) business and accounting records with backup support documentation;

(8) statistical documentation;

(9) computer records and data;

(10) contracts with providers and subcontractors.

(d) Failure to produce the records or make the records available for the purpose of reviewing, examining, and securing custody of the records may result in HHSC-OIG imposing sanctions against the MCO as described in 1 TAC (Texas Administrative Code), Chapter 371, Subchapter G, §371.1609, Grounds for Fraud Referral and Administrative Sanction.

§353.505. Recovery of Funds.

(a) Upon completion of the investigation and final disposition of any administrative, civil, or criminal action taken by the state or federal government, the Health and Human Service Commission-Office of Inspector General (HHSC-OIG) will determine and direct the collection of any overpayment.

(b) Overpayments collected as a result of an investigation will be distributed to the Managed Care Organization (MCO) unless HHSC-OIG determines that an alternative distribution is indicated.

(c) If the HHSC-OIG determines that an MCO is not entitled to all or any portion of the distribution of funds collected as a result of an overpayment then HHSC-OIG will provide the MCO with a written explanation indicating the rationale for the alternative distribution of funds.

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

Filed with the Office of the Secretary of State on May 17, 2004.

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Steve Aragón
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 424-6576

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

The Health and Human Services Commission (HHSC or Commission) proposes to amend Chapter 354, Medicaid Health Services, Subchapter A, Purchased Health Services, Division 10, Definitions, §354.1121, General Definitions for Purchased Health Services. In addition, the Health and Human Services Commission (HHSC or Commission) proposes new §354.1187, Responsibilities of Third-Party Billing Vendors, in Division 11 of Chapter 354.

Background and Justification

Section 2.111 of House Bill 2292, 78th Legislature, Regular Session (2003), requires third-party billing vendors to enter into a contract with HHSC prior to submitting claims on behalf of a provider of medical services under the medical assistance program authorizing such activity. The proposed amendments, to the rules are necessary to comply with legislative direction.

Section-by-Section Summary

The proposed amendment to §354.1121 incorporates the definition of a third-party billing vendor into current rule.

Proposed new §354.1187 would require third-party billing vendors to enter into a contract with HHSC prior to submitting claims on behalf of a provider of medical services under the medical assistance program authorizing such activity.

Fiscal Note

Tom Suehs, Deputy Executive Commissioner for Financial Services, has determined that during the first five years the proposed rules are in effect there will be no fiscal impact to the state. Implementation of the proposed rules will not result in any fiscal

implications for local health and human service agencies. There are no foreseeable fiscal implications for local governments.

Small and Micro-business Impact Analysis

Mr. Suehs has also determined that there will be no effect on small businesses or micro-businesses to comply with the rules as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the rules. There are no anticipated economic costs to persons who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

Public Benefit

Jason Cooke, Associate Commissioner for Medicaid and CHIP, has determined that for each year of the first five years the rules are in effect, the public will benefit from adoption of the rules. The anticipated public benefit, as a result of enforcing the rules, will be to institute provisions that are designed to prevent fraud and abuse under the medical assistance program related to third-party billing vendors.

Regulatory Analysis

HHSC has determined that the proposed rules are not a "major environmental rule," as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. The proposed amendments are not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that the proposed rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under §2007.043, Government Code.

Public Comment

Written comments on the proposal may be submitted to Jennifer Stansbury, Senior Policy Analyst, Texas Health and Human Services Commission, 1100 W. 49th Street, MC-H310, Austin, Texas 78756-3199, within 30 days of publication of this proposal in the *Texas Register*.

Public Hearing

A public hearing is scheduled for June 24, 2004, 1:30 p.m. to 3:00 p.m. The hearing will be held at the Health and Human Services Commission, Brown-Heatly Building, Public Hearing Room, 4900 N. Lamar Boulevard, Austin, Texas.

DIVISION 10. DEFINITIONS

1 TAC §354.1121

Statutory Authority

The amendment is proposed under the Texas Government Code, §531.033, which provides the Commissioner of HHSC with broad rulemaking authority; Human Resources Code, §32.063, and the Texas Government Code, §531.021(a), which provide the Health and Human Services Commission (HHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed amendment affects the Health Resource Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this rule.

§354.1121. Definitions.

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

(1) - (35) (No change.)

(36) Third-party billing vendor--A vendor that submits claims to HHSC, or its designee, for reimbursement on behalf of a provider of medical services under the medical assistance program.

(37) [~~(36)~~] Third-party liability--The resources that an eligible recipient may have which serve as a source of payment for services provided under the Medical Assistance Program.

(38) [~~(37)~~] Title XIX home health agency--An agency or organization approved as a home health agency under Medicare and which has been designated by the department as a Title XIX home health agency.

(39) [~~(38)~~] Title XIX hospital--A hospital which is participating as a hospital under Medicare, which has in effect a utilization review plan approved by the department applicable to all eligible recipients to whom it provides services or supplies, and has been designated by the department as a Title XIX hospital or a hospital not meeting all of the requirements listed in this definition but which provides services or supplies for which benefits are provided under Medicare, the Social Security Act, §1814(d), or would have been provided under such section had the recipients to whom the services or supplies are provided been eligible for and enrolled under Part A of Medicare, to the extent of such services and supplies only, and then only if such hospital has been designated by the department as a Title XIX emergency care only hospital, or has been approved by the department to provide emergency hospital services and agrees that the reasonable cost of such services or supplies, as defined in the Social Security Act, §1902(a)(13), will be such hospital's total charge for such services and supplies.

(40) [~~(39)~~] Title XIX spell of illness--With respect to inpatient hospital services, spell of illness is a continuous period of hospital confinement. Successive periods of hospital confinement are considered to be continuous unless the last date of discharge and the date of readmission are separated by at least 60 consecutive days.

(41) [~~(40)~~] Utilization review--The methods and procedures related to the review of utilization of covered care and services with respect to medical necessity and to safeguard against inappropriate utilization of care and services.

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

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Steve Aragón
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DIVISION 11. GENERAL ADMINISTRATION

1 TAC §354.1187

The new section is proposed under the Texas Government Code, §531.033, which provides the Commissioner of HHSC with broad rulemaking authority; Human Resources Code, §32.063, and the Texas Government Code, §531.021(a), which provide the Health and Human Services Commission (HHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed new rule affects the Health Resource Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this rule.

§354.1187. Responsibilities of Third-Party Billing Vendors.

A third-party billing vendor who submits a claim to the Health and Human Services Commission, or its designee, for payment on behalf of a provider of medical services under the medical assistance program must enter into a contract with the commission, or its designee, authorizing that activity.

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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CHAPTER 355. MEDICAID REIMBURSEMENT RATES

SUBCHAPTER A. COST DETERMINATION PROCESS

1 TAC §§355.101 - 355.111

The Texas Health and Human Services Commission (HHSC) proposes to amend §§355.101-355.111, concerning the cost determination process, in its Medicaid Reimbursement Rates chapter. The purpose of the amendments is to: (1) add references to the Texas Department of Mental Health and Mental Retardation (TDMHMR) and to make these rules applicable to TDMHMR contracted programs that submit cost reports used in rate determination; (2) remove references to the Texas Department of Human Services (DHS) and replace them with references to HHSC where appropriate and to indicate that "Texas Department of Human Services (DHS)" means DHS or its successor agency; (3) increase the limit at which a cost incurred by a provider can be expensed on the cost report in the year purchased instead of being depreciated from $1,000 to $2,500; and (4) make technical and other minor corrections.

Tom Suehs, Deputy Executive Commissioner for Financial Services, has determined that, for the first five-year period the proposed sections are in effect, there are fiscal implications for state government as a result of enforcing or administering the sections. There are no fiscal implications for local governments as a result of enforcing or administering the sections. The effect on state government for the first five-year period the sections are in effect is an estimated additional cost of $0 in fiscal year (FY) 2004; $0 in FY 2005; $594,630 in FY 2006; $594,630 in FY 2007; and $594,630 in FY 2008.

Ed White, Director for Rate Setting and Forecasting, has determined that, for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections is that the cost determination process rules will be consistent for all long term care programs for which cost reporting is required and will provide more comprehensive rules and guidelines on cost reporting, allowable and unallowable costs, and record keeping for providers contracted with TDMHMR. The rules will accurately reflect that HHSC manages the rate determination and audit processes. Providers will benefit from being able to expense items costing $2,500 on the cost report in the year of the purchase and will no longer need to depreciate items costing between $1,001 and $2,500, which will reduce some of their record- keeping time and expenses. There is no adverse economic effect on small or micro businesses, or on businesses of any size, as a result of enforcing or administering the sections, because the amendments impose no additional requirements on businesses. There is no anticipated economic cost to persons who are required to comply with the proposed sections. There is no anticipated effect on local employment in geographic areas affected by these sections.

Questions about the content of this proposal may be directed to Carolyn Pratt in HHSC's Rate Analysis Department (telephone: (512) 491-1359 or fax: (512) 491-1998)). Written comments on the proposal may be submitted to Ms. Pratt via fax at (512) 491-1998 or mailed to HHSC Rate Analysis, Mail Code H-400, 1100 West 49th Street, Austin, TX 78756-3101, within 30 days of publication in the *Texas Register*.

Under Government Code, §2007.003(b), HHSC has determined that Chapter 2007 of the Government Code does not apply to these rules. The changes these rules make do not implicate a recognized interest in private real property. Accordingly, HHSC is not required to complete a takings impact assessment regarding these rules.

The amendments are proposed under the Texas Government Code, §531.033, which authorizes the commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The amendments affect the Human Resources Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§355.101. Introduction.

(a) The information in §355.102 of this title (relating to General Principles of Allowable and Unallowable Costs), §355.103 of this title (relating to Specifications for Allowable and Unallowable Costs), §355.104 of this title (relating to Revenues), and §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures) applies to Intermediate Care Facilities for Persons with Mental Retardation, Home and Community-based Services, Service Coordination/Targeted Case Management, Rehabilitative Services, and Texas Home Living programs cost reports pertaining to providers' fiscal years ending in calendar year 2004 [~~1997~~] and subsequent years. For all other programs these sections apply to cost reports pertaining to the providers' fiscal years ending in calendar year 1997 and subsequent years.

(b) The following terminology applies to the state agencies referenced in this subchapter:

(1) Whenever the terms "Texas Health and Human Services Commission" or "HHSC" occur, they each mean the Texas Health and Human Services Commission or its designee.

(2) Whenever the terms "Texas Department of Human Services" or "DHS" occur, they each mean the Texas Department of Human Services or its successor agency [designee].

(3) Whenever the terms "Texas Department of Mental Health and Mental Retardation" or "TDMHMR" occur, they each mean the Texas Department of Mental Health and Mental Retardation or its successor agency.

(c) The Texas Health and Human Services Commission (HHSC) [Department of Human Services (DHS)] reimburses providers for contracted client services through reimbursement amounts determined as described in this chapter and in reimbursement methodologies for each program. Statewide, [Non-Medicaid, statewide, uniform reimbursements and reimbursement ceilings are approved by the Texas Department of Human Services. Medicaid, statewide,] uniform reimbursements, and reimbursement ceilings are approved by HHSC [the Texas Health and Human Services Commission (HHSC)]. Where [In Medicaid programs where] reimbursements are contractor-specific, [the] HHSC approves the reimbursement parameter dollar amounts, e.g., ceilings, floors, or program reimbursement formula limits. In approving reimbursement amounts [DHS or the] HHSC takes into consideration staff recommendations based on the application of formulas and procedures described in this chapter and in reimbursement methodologies for each program. However, [DHS or the] HHSC may adjust staff recommendations when [DHS or the] HHSC deems such adjustments are warranted by particular circumstances likely to affect achievement of program objectives, including economic conditions and budgetary considerations. Methodology [Medicaid reimbursement methodology] rules are developed and recommended for approval to [the] HHSC. [The] HHSC has oversight authority with respect to the state's reimbursement methodology and cost determination [Medicaid] rules.

(1) Reimbursement amounts will be determined coincident with the state's biennium [based upon odd-year reports].

(2) Objective of cost determination process. The objective of the cost determination process is to define direct and indirect costs that [which] are allowable and, therefore, may be considered for use in the overall reimbursement determination process. The cost determination process seeks to collect accurate financial and other statistical data that constitutes [which constitute] the foundation upon which reimbursements are determined.

(A) Cost-reporting. In order to ensure adequate financial and statistical information upon which to base reimbursement, HHSC [DHS] requires that each contracted provider submit a periodic cost report or supplemental report. It is the responsibility of the provider to submit accurate and complete information, in accordance with all pertinent HHSC [DHS] cost reporting rules and cost report instructions, on the cost report and any supplemental reports required by HHSC [DHS].

(B) Pro forma costing. When historical costs are unavailable, such as in the case of a new program, reimbursement may be based on a pro forma approach. This approach involves using historical costs of delivering similar services, where appropriate data are available, and estimating the basic types and costs of products and services necessary to deliver services meeting federal and state requirements.

(3) Relationship between cost determination and reimbursement determination processes. The cost determination process seeks to evaluate individual cost items of providers to determine their allowability and to determine whether individual cost reports are of reasonable accuracy for potential use in reimbursement determination. The reimbursement determination process takes the evaluation of allowable costs one step further by comparing allowable costs across providers to identify those levels of cost, either for individual cost items or groups of cost items, which must be incurred by efficient and economic providers of services meeting all state and federal standards. Thus, all costs allowed in the cost determination process may not necessarily be used in the reimbursement determination process. The basic objective of the reimbursement methodologies employed by HHSC [DHS] is to facilitate and balance the broader objectives of the programs administered by the agencies [agency] by:

(A) promoting reasonable access for eligible clients to services that meet federal and state quality standards via contracting with an adequate number of qualified providers; and

(B) expending taxpayer dollars in a reasonable and prudent manner such that eligible clients are served at the lowest cost to taxpayers consistent with state and federal laws, standards and regulations, and with program objectives.

§355.102. General Principles of Allowable and Unallowable Costs.

(a) Allowable and unallowable costs. Allowable and unallowable costs, both direct and indirect, are defined to identify expenses that [which] are reasonable and necessary to provide contracted client care and are consistent with federal and state laws and regulations. When a particular type of expense is classified as unallowable, the classification means only that the expense will not be included in the database for reimbursement determination purposes because the expense is not considered reasonable and/or necessary. The classification does not mean that individual contracted providers may not make the expenditure. The description of allowable and unallowable costs is designed to be a general guide and to clarify certain key expense areas. This description is not comprehensive, and the failure to identify a particular cost does not necessarily mean that the cost is an allowable or unallowable cost.

(b) Cost-reporting process. The primary objective of the cost-reporting process is to provide a basis for determining appropriate reimbursement to contracted providers. To achieve this objective, the reimbursement determination process uses allowable cost information reported on cost reports or other surveys. The cost report collects actual allowable costs and other financial and statistical information, as required. Costs may not be imputed and reported on the cost report when no costs were actually incurred (except as stated in §355.103(b)(16)(A)(i) of this title (relating to Specifications for Allowable and Unallowable Costs) or when documentation does not exist for costs even if they were actually incurred during the reporting period.

(c) Accurate cost reporting. Accurate cost reporting is the responsibility of the contracted provider. The contracted provider is responsible for including in the cost report all costs incurred, based on an accrual method of accounting, which are reasonable and necessary, in accordance with allowable and unallowable cost guidelines in this section and in §355.103 of this title [(relating to Specifications for Allowable and Unallowable Costs)], revenue reporting guidelines in §355.104 of this title (relating to Revenues), cost report instructions, and applicable program rules. Reporting all allowable costs on the cost report is the responsibility of the contracted provider. The Texas Health and Human Services Commission (HHSC) [Department of Human Services (DHS)] is not responsible for the contracted provider's failure to report allowable costs; however, in an effort to collect reliable,

accurate, and verifiable financial and statistical data, HHSC [~~DHS~~] is responsible for providing cost report training, general and/or specific cost report instructions, and technical assistance to providers. Furthermore, if unreported and/or understated allowable costs are discovered during the course of an audit desk review or field audit, those allowable costs will be included on the cost report or brought to the attention of the provider to correct by submitting an amended cost report.

(d) Cost report training. HHSC [~~DHS~~] is responsible for conducting, at no charge to the provider, comprehensive cost report training for each contracted program. It is the responsibility of the provider to ensure that each preparer signing the Cost Report Methodology Certification has attended the required cost report training conducted by HHSC [~~DHS~~]. Preparers may be employees of the provider or persons who have been contracted by the provider for the purpose of cost report preparation. Preparers must attend cost report training for each program for which a cost report is submitted. Beginning with the 2001 cost report for Texas Department of Human Services (DHS) contracted providers and the 2004 cost report for Texas Department of Mental Health and Mental Retardation (TDMHMR) contracted providers, preparers must attend cost report training every other year for the odd-year cost report in order to be certified to complete both that odd-year cost report and the following even-year cost report. If a new preparer wishes to complete an even- year cost report and has not attended the previous odd-year cost report training, to be certified to complete the even-year cost report, he/she must attend an even-year cost report training. [~~For the 2000 cost report, preparers that met their two-consecutive-year training requirement for the 1999 cost report are not required to attend cost report training for the 2000 cost report. Preparers that did not meet their two-consecutive-year requirement for the 2000 cost report are required to attend cost report training for the 2000 cost report.~~] A copy of the most recent cost report training certificate for each preparer of the cost report must be submitted with each cost report. Travel costs to attend the state-sponsored cost report training are allowable within the travel limits specified in §355.103(b)(12) of this title [~~(relating to Specifications for Allowable and Unallowable Costs)~~]. Contracted preparer's fees to attend state-sponsored cost report training are allowable.

(1) For nursing facilities, failure to file a completed cost report signed by preparers who have attended the required cost report training may result in vendor hold as specified in §355.403 of this title (relating to Vendor Hold).

(2) For Intermediate Care Facilities for Persons with Mental Retardation, Home and Community-based Services, Service Coordination/Targeted Case Management, Rehabilitative Services, and Texas Home Living programs, failure to file a completed cost report signed by preparers who have attended the required cost report training may result in vendor hold.

(3) [~~(2)~~] For all other programs, failure to file a completed cost report signed by preparers who have attended the required cost report training constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title (relating to Administrative Contract Violations).

(e) Generally accepted accounting principles. Except as otherwise specified by the cost determination process rules of this chapter, cost report instructions, or policy clarifications, cost reports should be prepared consistent with generally accepted accounting principles (GAAP), which are those principles approved by the American Institute of Certified Public Accountants (AICPA). Internal Revenue Service (IRS) laws and regulations do not necessarily apply in the preparation of the cost report. In cases where cost reporting rules differ from GAAP, IRS, or other authorities, HHSC [~~DHS~~] rules take precedence for provider cost-reporting purposes.

(f) Allowable costs. Allowable costs are expenses, both direct and indirect, that are reasonable and necessary, as defined in paragraphs (1) and (2) of this subsection, and which meet the requirements as specified in subsections (i), (j), and (k) of this section, in the normal conduct of operations to provide contracted client services meeting all pertinent state and federal requirements. Only allowable costs are included in the reimbursement determination process.

(1) "Reasonable" refers to the amount expended. The test of reasonableness includes the expectation that the provider seeks to minimize costs and that the amount expended does not exceed what a prudent and cost-conscious buyer pays for a given item or service. In determining the reasonableness of a given cost, the following are considered:

(A) the restraints or requirements imposed by arm's-length bargaining, i.e., transactions with nonowners or other unrelated parties, federal and state laws and regulations, and contract terms and specifications; and

(B) the action that a prudent person would take in similar circumstances, considering his responsibilities to the public, the government, his employees, clients, shareholders, and members, and the fulfillment of the purpose for which the business was organized.

(2) "Necessary" refers to the relationship of the cost, direct or indirect, incurred by a provider to the provision of contracted client care. Necessary costs are direct and indirect costs that are appropriate in developing and maintaining the required standard of operation for providing client care in accordance with the contract and state and federal regulations. In addition, to qualify as a necessary expense, a direct or indirect cost must meet all of the following requirements:

(A) the expenditure was not for personal or other activities not directly or indirectly related to the provision of contracted services;

(B) the cost does not appear as a specific unallowable cost in §355.103 of this title [~~(relating to Specifications for Allowable and Unallowable Costs)~~];

(C) if a direct cost, it bears a significant relationship to contracted client care. To qualify as significant, the elimination of the expenditure would have an adverse impact on client health, safety, or general well-being;

(D) the direct or indirect expense was incurred in the purchase of materials, supplies, or services provided to clients or staff in the normal conduct of operations to provide contracted client care;

(E) the direct or indirect costs are not allocable to or included as a cost of any other program in either the current, a prior, or a future cost-reporting period;

(F) the costs are net of all applicable credits;

(G) allocated costs of each program are adequately substantiated; and

(H) the costs are not prohibited under other pertinent federal, state, or local laws or regulations.

(3) Direct costs are those costs [~~which are~~] incurred by a provider that [~~which~~] are definitely attributable to the operation of providing contracted client services. Direct costs include, but are not limited to, salaries and nonlabor costs necessary for the provision of contracted client care. Whether or not a cost is considered a direct cost depends upon the specific contracted client services covered by the program. In programs in which client meals are covered program services, the salaries of cooks and other food service personnel are direct costs, as are food, nonfood supplies, and other such dietary costs. In programs

in which client transportation is a covered program service, the salaries of drivers are direct costs, as are vehicle repairs and maintenance, vehicle insurance and depreciation, and other such client transportation costs.

(4) Indirect costs are those costs that [~~which~~] benefit, or contribute to, the operation of providing contracted services, other business components, or the overall contracted entity [~~with which DHS has contracted~~]. These costs could include, but are not limited to, administration salaries and nonlabor costs, building costs, insurance expense, and interest expense. Central office and/or home office administrative expenses are considered indirect costs.

(g) Unallowable costs. Unallowable costs are expenses that are not reasonable or necessary, according to the criteria specified in subsection (f)(1)-(2) of this section and which do not meet the requirements as specified in subsections (i), (j), and (k) of this section or which are specifically enumerated in §355.103 of this title [~~(relating to Specifications for Allowable and Unallowable Costs)~~] or program-specific reimbursement methodology. Providers must not report as an allowable cost on a cost report a cost that has been determined to be unallowable. Such reporting may constitute fraud. (Refer to [~~40 TAC §79.2103 (Statutory Bases) for the statutory basis for Medicaid fraud and~~] §355.106(a) of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports)).

(1) For nursing facilities, placement as an allowable cost on a cost report of a cost which has been determined to be unallowable may result in vendor hold as specified in §355.403 of this title [~~(relating to Vendor Hold)~~].

(2) For Intermediate Care Facilities for Persons with Mental Retardation, Home and Community-based Services, Service Coordination/Targeted Case Management, Rehabilitative Services, and Texas Home Living programs, placement as an allowable cost on a cost report a cost, which has been determined to be unallowable, may result in vendor hold.

(3) [~~(2)~~] For all other programs, placement as an allowable cost on a cost report of a cost, which has been determined to be unallowable, constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title [~~(relating to Administrative Contract Violations)~~].

(h) Other financial and statistical data. The primary purpose of the cost report is to collect allowable costs to be used as a basis for reimbursement determination. In addition, providers may be required on cost reports to provide information in addition to allowable costs to support allowable costs, such as wage surveys, workers' compensation surveys, or other statistical and financial information. Additional data requested may include, when specified and in the appropriate section or line number specified, costs incurred by the provider which are unallowable costs. All information, including other financial and statistical data, shown on a cost report is subject to the documentation and verification procedures required for an audit desk review and/or field audit.

(1) For nursing facilities, inaccuracy in providing, or failure to provide, required financial and statistical data may result in vendor hold as specified in §355.403 of this title [~~(relating to Vendor Hold)~~].

(2) For Intermediate Care Facilities for Persons with Mental Retardation, Home and Community-based Services, Service Coordination/Targeted Case Management, Rehabilitative Services, and Texas Home Living programs, inaccuracy in providing, or failure to provide, required financial and statistical data may result in vendor hold.

(3) [~~(2)~~] For all other programs, inaccuracy in providing, or failure to provide, required financial and statistical data constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title [~~(relating to Administrative Contract Violations)~~].

(i) Related party transactions.

(1) In determining whether a contracted provider organization is related to a supplying organization, the tests of common ownership and control are to be applied separately. Related to a contracted provider means that the contracted provider to a significant extent is associated or affiliated with, has control of, or is controlled by the organization furnishing the services, equipment, facilities, leases, or supplies. Common ownership exists if an individual or individuals possess any ownership or equity in the contracted provider and the institution or organization serving the contracted provider. Control exists if an individual or an organization has the power, directly or indirectly, to significantly influence or direct the actions or policies of an organization or institution. If the elements of common ownership or control are not present in both organizations, then the organizations are deemed not to be related to each other. The existence of an immediate family relationship will create an irrefutable [~~irrebuttable~~] presumption of relatedness through control or attribution of ownership or equity interests where the significance tests are met. The following persons are considered immediate family for cost- reporting purposes:

(A) husband and wife;

(B) natural parent, child, and sibling;

(C) adopted child and adoptive parent;

(D) stepparent, stepchild, stepsister, and stepbrother;

(E) father-in-law, mother-in-law, sister-in-law, brother-in-law, son-in-law, and daughter-in-law;

(F) grandparent and grandchild;

(G) uncles and aunts by blood or marriage;

(H) nephews and nieces by blood or marriage; and

(I) first cousins.

(2) A determination as to whether an individual (or individuals) or organization possesses ownership or equity in the contracted provider organization and the supplying organization, so as to consider the organizations related by common ownership, will be made on the basis of the facts and circumstances in each case. This rule applies whether the contracted provider organization or supplying organization is a sole proprietorship, partnership, corporation, trust or estate, or any other form of business organization, proprietary or nonprofit. In the case of a nonprofit organization, ownership or equity interest will be determined by reference to the interest in the assets of the organization, e.g., a reversionary interest provided for in the articles of incorporation of a nonprofit corporation.

(3) The term control includes any kind of control, whether or not it is legally enforceable and however it is exercisable or exercised. It is the reality of the control which is decisive, not its form or the mode of its exercise. The facts and circumstances in each case must be examined to ascertain whether legal or effective control exists. Since a determination made in a specific case represents a conclusion based on the entire body of facts and circumstances involved, such determination should not be used as a precedent in other cases unless the facts and circumstances are substantially the same. Organizations, whether proprietary or nonprofit, are considered to be related through control to their directors in common.

(4) Costs applicable to services, equipment, facilities, leases, or supplies furnished to the contracted provider by organizations related to the provider by common ownership or control are includable in the allowable cost of the provider at the cost to the related organization. However, the cost must not exceed the price of comparable services, equipment, facilities, leases, or supplies that could be purchased or leased elsewhere. The purpose of this principle is twofold: to avoid the payment of a profit factor to the contracted provider through the related organization (whether related by common ownership or control), and to avoid payment of artificially inflated costs which may be generated from less than arm's-length bargaining. The related organization's costs include all actual reasonable costs, direct and indirect, incurred in the furnishing of services, equipment, facilities, leases, or supplies to the provider. The intent is to treat the costs incurred by the supplier as if they were incurred by the contracted provider itself. Therefore, if a cost would be unallowable if incurred by the contracted provider itself, it would be similarly unallowable to the related organization. The principles of reimbursement of contracted provider costs described throughout this title will generally be followed in determining the reasonableness and allowability of the related organization's costs, where application of a principle in a nonprovider entity would be clearly inappropriate.

(5) An exception is provided to the general rule applicable to related organizations. The exception applies if the contracted provider demonstrates by convincing evidence to the satisfaction of HHSC [~~DHS~~] that certain criteria have been met. If all of the conditions of this exception are met, then the charges by the supplier to the contracted provider for such services, equipment, facilities, leases, or supplies are allowable costs. If Medicare has made a determination that a related party situation does not exist or that an exception to the related party definition was granted, HHSC [~~DHS~~] will review the determination made by Medicare to determine if it is applicable to the current situation of the contracted provider and in compliance with this subsection (relating to related party transactions). In order to have the Medicare determination considered for approval by HHSC [~~the department~~], a copy of the applicable Medicare determination must accompany each written exception request submitted to HHSC [~~the department~~], along with evidence supporting the Medicare determination for the current cost-reporting period. If the exception granted by Medicare no longer is applicable due to changes in circumstances of the contracted provider or because the circumstances do not apply to the contracted provider, HHSC [~~DHS~~] may choose not to consider the Medicare determination. Written requests for an exception to the general rule applicable to related organizations must be submitted for approval to the HHSC Rate Analysis Department no later than [~~within~~] 45 days prior to [~~of~~] the due date of the cost report in order to be considered for that year's cost report. Each request must include documentation supporting that the contracted provider meets each of the four criteria listed in subparagraphs (A)-(D) of this paragraph. Requests that do not include the required documentation for each criteria will not be considered for that year's cost report.

(A) The supplying organization is a bona fide separate organization. This means that the supplier is a separate sole proprietorship, partnership, joint venture, association or corporation and not merely an operating division of the contracted provider organization.

(B) A majority of the supplying organization's business activity of the type carried on with the contracted provider is transacted with other organizations not related to the contracted provider and the supplier by common ownership or control and there is an open, competitive market for the type of services, equipment, facilities, leases, or supplies furnished by the organization. In determining whether the activities are of similar type, it is important also to consider the scope of the activity. The requirement that there be an open, competitive market is merely intended to assure that the item supplied has a readily discernible price that is established through arm's- length bargaining by well-informed buyers and sellers.

(C) The services, equipment, facilities, leases, or supplies are those which commonly are obtained by entities such as the contracted provider from other organizations and are not a basic element of contracted client care ordinarily furnished directly to clients by such entities. This requirement means that entities such as the contracted provider typically obtain the services, equipment, facilities, leases, or supplies from outside sources, rather than producing them internally.

(D) The charge to the contracted provider is in line with the charge of such services, equipment, facilities, leases, or supplies in the open, competitive market and no more than the charge made under comparable circumstances to others by the organization for such services, equipment, facilities, leases, or supplies.

(6) Disclosure of all related-party information on the cost report is required for all costs reported by the contracted provider, including related-party transactions occurring at any level in the provider's organization, (e.g., the central office level, and the individual contracted provider level). The contracted provider must make available, upon request, adequate documentation to support the costs incurred by the related party. Such documentation must include an identification of the related person's or organization's total costs, the basis of allocation of direct and indirect costs to the contracted provider, and other business entities served. If a contracted provider fails to provide adequate documentation to substantiate the cost to the related person or organization, then the reported cost is unallowable. For further guidelines regarding adequate documentation, refer to §355.105(b)(2) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(7) When calculating the cost to the related organization, the cost-determination guidelines specified in this section [~~§355.102~~] and in §355.103 of this title [~~(relating to General Principles of Allowable and Unallowable Costs and Specifications for Allowable and Unallowable Costs)~~] apply.

(j) Cost allocation. Direct costing must be used whenever reasonably possible. Direct costing means that allowable costs, direct or indirect, (as defined in subsection (f)(3)-(4) of this section) incurred for the benefit of, or directly attributable to, a specific business component must be directly charged to that particular business component. For example, the payroll costs of a direct care employee who works across cost areas within one contracted [~~DHS- contracted~~] program would be directly charged to each cost area of that program based upon that employee's continuous daily time sheets and the costs of a direct care employee who works across more than one service delivery area would also be directly charged to each service delivery area based upon that employee's continuous daily time sheets.

(1) If cost allocation is necessary for cost-reporting purposes, contracted providers must use reasonable methods of allocation and must be consistent in their use of allocation methods for cost-reporting purposes across all program areas and business entities.

(A) The allocation method should be a reasonable reflection of the actual business operations. Allocation methods that do not reasonably reflect the actual business operations and resources expended toward each unique business entity are not acceptable. Allocated costs are adjusted if HHSC [~~DHS~~] considers the allocation method to be unreasonable. An indirect allocation method approved by some other department, program, or governmental entity is not automatically approved by HHSC [~~DHS~~] for cost-reporting purposes.

(B) HHSC [~~DHS~~] reviews each cost-reporting allocation method on a case-by-case basis in order to ensure that the reported costs fairly and reasonably represent the operations of the contracted provider. If in the course of an audit it is determined that an existing or approved allocation method does not fairly and reasonably represent the operations of the contracted provider, then an adjustment to the allocation method will be made consistent with subsection (f)(3)-(4) of this section. A contracted provider may request an informal review, and subsequently an appeal, of a decision concerning its allocation methods in accordance with §355.110 of this title (relating to Informal Reviews and Formal Appeals).

(C) Any allocation method used for cost-reporting purposes must be consistently applied across all contracted programs and business entities in which the contracted provider has an interest.

(D) Providers must use an allocation method approved or required by HHSC [~~DHS~~]. Any change in cost-reporting allocation methods from one year to the next must be fully disclosed by the contracted provider on its cost report and must be accompanied by a written explanation of the reasons and justification for such change. If the provider wishes to use an allocation method that is not in compliance with the cost-reporting allocation methods in paragraphs (3)-(4) of this subsection, the contracted provider must obtain written prior approval from HHSC's [~~DHS's~~] Rate Analysis Department.

(i) Requests for approval to use an allocation method other than those identified in paragraphs (3)-(4) of this subsection or for approval of a provider's change in cost-reporting allocation method other than those identified in paragraphs (3)-(4) of this subsection must be received by HHSC's [~~DHS's~~] Rate Analysis Department prior to the end of the contracted provider's fiscal year. Requests for approval of allocation methods will not be acceptable as a basis for the extension of the cost report due date.

(ii) The HHSC Rate Analysis Department will forward its written decision to the contracted provider within 45 days of its receipt of the provider's original written request. If sufficient documentation is not provided by the provider to verify the acceptability of the allocation method, then HHSC [~~DHS~~] may extend the decision time frame. However, an extension of the due date of the cost report will not be granted. Written decisions made on or after the due date of the cost report will apply to the next year's cost report. A contracted provider may request an informal review, and subsequently an appeal, of a decision concerning its allocation methods in accordance with §355.110 of this title [~~(relating to Informal Reviews and Formal Appeals)~~].

(iii) Failure to use an allocation method approved or required by HHSC [~~DHS~~] or to disclose a change in an allocation to HHSC [~~DHS~~] will result in the following.

(I) For nursing facilities, failure to disclose a change in an allocation method or failure to use the allocation method approved or required by HHSC [~~DHS~~] may result in vendor hold as specified in §355.403 of this title [~~(relating to Vendor Hold)~~].

(II) For Intermediate Care Facilities for Persons with Mental Retardation, Home and Community-based Services, Service Coordination/Targeted Case Management, Rehabilitative Services, and Texas Home Living programs, failure to use the allocation method approved or required by HHSC may result in vendor hold.

(III) [~~(II)~~] For all other programs, failure to disclose a change in an allocation method or failure to use the allocation method approved or required by HHSC [~~DHS~~] constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title [~~(relating to Administrative Contract Violations)~~].

(2) Cost-reporting methods for allocating costs must be clearly and completely documented in the contracted provider's workpapers, with details as to how pooled costs are allocated to each segment of the business entity, for both contracted and noncontracted programs.

(A) If a contracted provider has questions regarding the reasonableness of an allocation method, that contracted provider should request written approval from the HHSC Rate Analysis Department prior to submitting a cost report utilizing the allocation method in question. Requests for approval must be received by the HHSC Rate Analysis Department prior to the end of the contracted provider's fiscal year. Requests for approval of allocation methods will not be acceptable as a basis for the extension of the cost report due date.

(B) The HHSC Rate Analysis Department will forward its written decision to the contracted provider within 45 days of its receipt of the original written request. If sufficient documentation is not provided by the provider to verify the acceptability of the allocation method, HHSC [~~DHS~~] may extend the decision time frame. However, an extension of the due date of the cost report will not be granted. Written decisions made on or after the due date of the cost report will apply to the next year's cost report. A contracted provider may request an informal review, and subsequently an appeal, of a decision concerning its allocation methods in accordance with §355.110 of this title [~~(relating to Informal Reviews and Formal Appeals)~~].

(3) When a building is shared and the building usage is separate and distinct for each entity using the building, the building costs, identified as building and facility cost categories on the cost report, should be allocated based upon square footage and may not be allocated with other indirect costs as a pool of costs. When the same building space is shared by various entities, the shared building costs, identified as building and facility cost categories on the cost report, should be allocated using a reasonable method which reflects the actual usage, such as an allocation based on time in shared activity areas or a functional study of shared dietary costs related to shared dining and kitchen areas.

(4) Where costs are shared, are not directly chargeable and are allocated as a pool of costs, the following allocation methods are acceptable for cost-reporting purposes.

(A) If all the business components of a contracted provider have equivalent units of equivalent service, indirect costs must be allocated based upon each business component's units of service. For example, if a provider had two nursing facilities, indirect costs requiring allocation as a pool of costs must be allocated based upon each nursing facility's units of service, since the units of service are equivalent units and the services are equivalent services. If a provider had a nursing facility and a residential care program, indirect costs requiring allocation as a pool of costs could not be allocated based upon units of service because even though the units of service for a nursing facility and a residential care facility are equivalent units, the services are not equivalent services. If a home health agency has indirect costs requiring allocation as a pool of costs across its Medicare home health services and its Medicaid primary home care services, it could not use units of service to allocate those costs, since neither the units of service nor the services are equivalent.

(B) If all of a contracted provider's business components are labor-intensive without programmatic residential facility or residential building costs, the contracted provider must allocate its indirect costs requiring allocation as a pool of costs based either on each

business component's pro rata share of salaries or labor costs or on a cost-to-cost basis.

(i) For cost-reporting cost allocation purposes, the term "salaries" includes wages paid to employees directly charged to the specific business component. The term "salaries" also includes fees paid to contracted individuals, excluding consultants, who perform services routinely performed by employees, which are directly charged to the specific business component. The term "salaries" does not include payroll taxes and employee benefits associated with the wages of employees.

(ii) For cost-reporting cost-allocation purposes, the term "labor costs" includes salaries as defined in clause (i) of this subparagraph, plus the payroll taxes and employee benefits associated with the wages of the employees.

(iii) The cost-to-cost method allocates costs based upon the percentage of each business component's directly-charged costs to the total directly-charged costs of all business components.

(C) If a contracted provider's business components are mixed, with some being labor-intensive and others having a programmatic residential or institutional component, the contracted provider must allocate its indirect costs requiring allocation as a pool of costs either:

(i) based upon the ratio of each business component's total costs less that business component's facility or building costs, as related to the contracted provider's total business component costs less facility or building costs for all the contracted provider's business components, with "facility or building costs" referring to those cost categories as identified on the cost report; or

(ii) based upon the labor costs method stated in subparagraph (B)(ii) of this paragraph.

(D) In order to achieve a more accurate and representative reporting of costs than results from allocating shared indirect costs as a pool of costs, a provider may choose to allocate its indirect shared expenses on an appropriate and reasonable functional basis. If allocating shared direct client care costs, a provider may use an appropriate and reasonable functional method. For example, costs of a central payroll operation could be allocated to all business components based on the number of checks issued; the costs of a central purchasing function could be allocated based on the number of purchases made or requisitions handled; payroll costs for an administrative employee working across business components could be directly charged based upon that employee's time sheets and/or allocated based upon a documented time study; food costs could be allocated based upon a functional study of shared dietary costs; transportation equipment costs could be allocated based upon mileage logs; and shared laundry costs could be allocated based upon a functional study of the number of pounds/loads of laundry processed. Providers choosing to allocate allowable employee-related self-insurance paid claims in accordance with §355.103(b)(10)(B)(ii) [~~§20.103(b)(10)(B)(ii)~~] of this title [~~relating to Specifications of Allowable and Unallowable Costs)~~] should base the allocation on percentage of salaries of employees benefiting from the coverage for fully self-insured situations or on percentage of premiums of covered employees for partially self-insured situations since purchased premiums must be directly charged.

(E) Because the determination of reimbursement is based on cost data, allocation methods based upon revenue streams are inappropriate and unallowable.

(k) Net expenses. Net expenses are gross expenses less any purchase discounts or returns and allowances. Purchase discounts are cash discounts reducing the purchase price as a result of prompt payment, quantity purchases, or for other reasons. Purchase returns and allowances are reductions in expenses resulting from returned merchandise or merchandise which is damaged, lost, or incorrectly billed. Only net expenses may be reported on the cost report. Expenses reported on the cost report must be adjusted for all such purchase discounts or returns and allowances.

§355.103. Specifications for Allowable and Unallowable Costs.

(a) Introduction. The following list of allowable and unallowable costs is not comprehensive but serves as a guide and clarifies certain key expense areas. If a particular type of expense is classified as unallowable for purposes of reporting on a cost report, it does not mean that individual contracted providers may not make such expenditures. Except where specific exceptions are noted, the allowability of all costs is subject to the general principles specified in §355.102 of this title (relating to General Principles of Allowable and Unallowable Costs). In addition, refer to program-specific allowable and unallowable costs, as applicable.

(1) Accounting and audit fees. See subsection (b)(2)(C)(i) of this section.

(2) Advertising and public relations. See subsection (b)(13) of this section.

(3) Amortization expense. See subsection (b)(7) of this section.

(4) Bad debt expense. See subsection (b)(17)(M) of this section.

(5) Boards of directors and trustees. See subsection (b)(2)(E) of this section.

(6) Bonuses. See subsection (b)(1)(A)(i) of this section.

(7) Central office costs. See subsection (b)(4) of this section.

(8) Charity allowance. See subsection (b)(17)(N) of this section.

(9) Compensation of employees. See subsection (b)(1) of this section.

(10) Compensation of owners and related parties. See subsection (b)(2) of this section [~~subsection~~].

(11) Compensation of outside consultants. See subsection (b)(2)(C) of this section.

(12) Courtesy allowance. See subsection (b)(17)(N) of this section [~~subsection~~].

(13) Depreciation expense. See subsection (b)(7) of this section.

(14) Donated revenues. See subsection (b)(15) of this section.

(15) Donated services, supplies, and assets. See subsection (b)(16) of this section.

(16) Dues or contributions to organizations. See subsection (b)(11) of this section.

(17) Employee relations expenses. See subsection (b)(17)(A) of this section.

(18) Employment-related taxes. See subsection (b)(9)(B) of this section.

(19) Endowment income. See subsection (b)(15) of this section.

(20) Expenses not related to contracted services. See subsection (b)(17)(H) of this section.

(21) Fines and penalties. See subsection (b)(17)(G) of this section.

(22) Franchise tax. See subsection (b)(9)(C) of this section.

(23) Finance charges. See subsection (b)(8)(E) of this section.

(24) Franchise fees. See subsection (b)(17)(C) of this section.

(25) Fringe benefits. See subsection (b)(1)(A)(iii) of this section.

(26) Fundraising activities. See subsection (b)(14) of this section.

(27) Gains on disposal of assets. See subsection (b)(7)(F) of this section.

(28) Gifts. See subsection (b)(15) of this section.

(29) Goodwill. See subsection (b)(7) and (17)(C)(ii) of this section.

(30) Grants, gifts and income from endowments. See subsection (b)(15) of this section.

(31) In-kind donations. See subsection (b)(16) of this section.

(32) Insurance expense. See subsection (b)(10) of this section.

(33) Interest expense. See subsection (b)(8) of this section.

(34) Legal fees. See subsection (b)(2)(C)(ii) of this section.

(35) Life insurance. See subsection (b)(10)(G) of this section.

(36) Litigation expenses and awards. See subsection (b)(17)(I) of this section.

(37) Lobbying costs. See subsection (b)(17)(J) of this section.

(38) Losses on disposal of assets. See subsection (b)(7)(F) of this section.

(39) Losses due to theft or embezzlement. See subsection (b)(17)(L) of this section.

(40) Management fees. See subsection (b)(3) of this section.

(41) Medicaid as payor of last resort. See subsection (b)(18) of this section.

(42) Medical supplies and medical costs. See subsection (b)(17)(F) of this section.

(43) Nonpaid workers. See subsection (b)(2)(D) of this section.

(44) Operating revenue. See subsection (b)(15)(D) of this section.

(45) Organization costs. See subsection (b)(17)(B) of this section.

(46) Payroll taxes and insurance. See subsection (b)(1)(A)(ii) of this section.

(47) Penalties. See subsection (b)(17)(G) of this section.

(48) Planning and evaluation expenses. See subsection (b)(7)(E) of this section.

(49) Promotional activities. See subsection (b)(14) of this section.

(50) Public relations. See subsection (b)(13) of this section.

(51) Repairs and maintenance. See subsection (b)(6) of this section.

(52) Research and development costs. See subsection (b)(17)(E) of this section.

(53) Salaries and wages. See subsection (b)(1) and (2) of this section.

(54) Self-insurance. See subsection (b)(10)(B) of this section.

(55) Staff training costs. See subsection (b)(12)(A) of this section.

(56) Startup costs. See subsection (b)(17)(D) of this section.

(57) Tax expense and credits. See subsection (b)(9) of this section.

(58) Travel costs. See subsection (b)(12)(B) of this section.

(59) Utilities. See subsection (b)(5) of this section.

(60) Volunteers. See subsection (b)(2)(D) of this section.

(61) Voucher-paid expenses. See subsection (b)(17)(K) of this section.

(62) Workers' compensation insurance. See subsection (b)(10) of this section.

(b) Allowable and unallowable costs.

(1) Compensation of employees. Compensation includes both cash and non-cash forms of compensation subject to federal payroll tax regulations. Compensation includes wages and salaries (including bonuses); payroll taxes and insurance; and benefits. Payroll taxes and insurance include Federal Insurance Contributions Act (old age, survivors, and disability insurance (OASDI) and Medicare hospital insurance); Unemployment Compensation Insurance; and Workers' Compensation Insurance.

(A) Allowable compensation of employees is compensation paid to employees in arm's-length transactions as nonowners and non-related parties and is subject to the reasonable and necessary costs which must be incurred by providers in the provision of contracted client services. Guidelines for compensation of owners and related parties are specified in paragraph (2) of this subsection.

(i) A bonus is a type of compensation granted to employees as a wage enhancement. Bonuses paid to employees in arm's-length transactions are allowable costs, subject to the reasonable and necessary costs that [~~which~~] must be incurred by providers in the provision of contracted client services. In determining the employee classification type, part-time employees may be considered a different classification type than full-time employees. To be allowable, bonuses to owners and/or related parties:

(I) must not represent any form of profit sharing and must not be determined on the level of profit earned by the contracted provider;

(II) effective with the 1997 cost report for Texas Department of Human Services (DHS) contracted providers and with the 2004 cost report for Texas Department of Mental Health and Mental Retardation (TDMHMR) contracted providers, must be clearly defined in a written agreement or employment policy;

(III) must not be made only to related parties, in which case the bonuses are unallowable costs;

(IV) must be based upon the same criteria for all members of the same employee classification type;

(V) must be made available to all employees of the same classification type, unless the employee classification type predominantly consists of related parties, in which case the bonuses are unallowable costs; and

(VI) must not discriminate in favor of certain employees, such as employees who are officers, stockholders, or the highest paid individual(s) of the organization.

(ii) Payroll taxes and insurance are described in paragraph (9) of this subsection, concerning tax expense and credits, and paragraph (10) of this subsection.

(iii) Benefits are amounts paid to or on behalf of an employee, in addition to direct salary or wages, and from which the employee, his dependent, or his beneficiary derives a personal benefit before or after the employee's retirement or death.

(I) Benefits paid to employees in arm's length transactions as nonowners and non-related parties are allowable costs, subject to the reasonable and necessary costs which must be incurred by providers in the provision of contracted client care. To be allowable, benefits paid to owners and/or related parties must not discriminate in favor of certain employees, such as employees who are officers, stockholders, or the highest paid individual(s) of the organization.

(II) Allowable benefits are reported on cost reports either as salaries and/or wages, as employee benefits, or as costs applicable to specific cost report line items, as specified in this subclause and in subclause (III) of this clause. Any benefit subject to payroll taxes is reported as salaries and wages. Allowable benefits that [~~which~~] are routinely reported as salaries and wages include paid vacations, paid holidays, sick leave, voting leave, court or jury duty leave, and/or all-inclusive paid days, as specified in subclause (III)(-c-) of this clause. Allowable benefits which are routinely reported as employee benefits include employer contributions to certain deferred compensation plans, as specified in subclause (III)(-a-) of this clause, employer contributions to an employee retirement fund or certain pension plans, as specified in subclause (III)(-b-) of this clause, and costs of certain employer-paid health, life, and disability insurance premiums, as specified in subclause (III)(-f-) of this clause. The contracted provider's unrecovered cost of meals and room and board furnished to direct care employees, uniforms, employee personal vehicle mileage reimbursement in accordance with paragraph (12) of this subsection, job-related training reimbursements in accordance with paragraph (12) of this subsection, and job certification renewal fees in accordance with paragraph (12) of this subsection are not to be reported as benefits but are to be reported as costs applicable to specific cost report line items, unless they are subject to payroll taxes, whereas they are reported as salaries and wages.

(III) Benefits include the following:

(-a-) Employer contributions to certain deferred compensation plans are reported as employee benefits. Deferred compensation is remuneration currently earned by an employee but which is not received until a subsequent period, usually after retirement. For the cost to be allowable, the deferred compensation plan must be formal, established, and maintained by the contracted provider and communicated to all eligible employees. A formal plan is one that is provided for in a written agreement executed between the contracted provider and the participating employees. The plan must:

(-1-) prescribe the method for calculating all contributions to the fund;

(-2-) be funded with contributions made systematically to a funding agency outside the contracted provider's ownership or control, such as a trustee, an insurance company, or a custodial bank account;

(-3-) provide for the protection of the plan's assets;

(-4-) designate the requirements for vested benefits;

(-5-) provide the basis for the computation of the amounts of benefits to be paid;

(-6-) be expected to continue despite normal fluctuations in the contracted provider's economic experience; and

(-7-) use all fund contributions and earnings for the sole benefit of the participating employees. Contributions made during the cost-reporting period to a deferred compensation plan meeting the requirements specified in subitems (-1-)-(-7-) of this item which represent legal obligations of the contracted provider and which are clearly enumerated as to dollar amount are allowable costs and should be reported on cost reports as employee benefits. Reasonable trustee or custodial fees paid by the contracted provider will be allowed as an administrative cost. However, such fees will not be allowable where the deferred compensation plan provides that they will be paid out of the corpus or earnings of the fund. To be allowable, contributions representing the employee's share cannot revert to the contracted provider. However employer- paid contributions can revert back to the contracted provider in the event an employee does not vest if designated in the requirements for vested benefits.

(-b-) Employer contributions to an employee retirement fund or certain pension plans are reported as employee benefits. A pension plan is a type of deferred compensation plan which is established and maintained by the employer to provide systematic payment of definitely determinable benefits to its employees over a period of years, or for life, after retirement. Such a plan may include disability, withdrawal, option for lump-sum payment, or insurance or survivorship benefits incidental and directly related to the pension benefits. A pension plan must meet all the requirements of a deferred compensation plan. All employees' pension fund rights must be nonforfeitable after such time as they vest under the plan. Pension fund rights cannot be contingent on continuance of employment or other factors. Only the amount the contracted provider or employer contributed to the pension fund during the reporting period is allowable and should be reported as an employee benefit. To be allowable, contributions representing the employee's share cannot revert to the contracted provider. However employer-paid contributions can revert to the contracted provider in the event an employee does not vest.

(-c-) Paid leave is reported as salaries or wages. Paid vacations, paid holidays, sick leave, voting leave, court or jury duty leave, and/or all-inclusive paid days, all are reported as

employee salaries and/or wages rather than as employee benefits, as follows:

(-1-) A vacation benefit is a right granted by an employer to an employee to be absent from his job for a stipulated period of time without loss of pay or to be paid an additional salary in lieu of taking a vacation. The contracted provider's vacation policy must be consistent among all employees of a specific category. Vacation expense subject to payroll taxes must be reported as salaries and wages. Accrued vacation expense not yet subject to payroll taxes must be reported as employee benefits. Providers must maintain adequate documentation to substantiate that costs reported one year as accrued benefits are not also reported, either the same or another year, as salaries and wages.

(-2-) The cost of sick leave taken, or payment in lieu of sick leave taken, is not to exceed the salary or wage the employee would have earned had they reported for work. Sick leave costs subject to payroll taxes must be reported as salaries and wages. Accrued sick leave costs not yet subject to payroll taxes must be reported as employee benefits. Providers must maintain adequate documentation to substantiate that costs reported one year as accrued benefits are not also reported, either the same or another year, as salaries and wages.

(-3-) A formal plan for all-inclusive paid days off (PDO) is one under which all employees earn accrued vested leave, or payment in lieu of leave taken, for an unallocated combination of occasions such as illness, medical appointments, holidays, vacations, family leave, and care of a sick child, based on actual hours worked. The cost of PDO subject to payroll taxes must be reported as salaries and wages. Accrued costs of PDO not yet subject to payroll taxes must be reported as employee benefits. Providers must maintain adequate documentation to substantiate that costs reported one year as accrued benefits are not also reported, either the same or another year, as salaries and wages.

(-d-) Provider-paid instructional courses benefiting the employer's interest are not to be reported as employee benefits, but are to be reported as costs related to specific cost report line items. Costs related to provider-paid instructional courses for the benefit of the employee only are unallowable costs. Refer to paragraph (12)(A) of this subsection, concerning staff training costs.

(-e-) Contracted provider's unrecovered cost of meals and room and board furnished on-site to direct care employees are not to be reported as employee benefits, but are to be reported as costs related to specific cost report line items. Any reasonable unrecovered cost of meals and/or room and board furnished on-site by a contracted provider to its direct care employees, which are equivalent to the meals and/or room and board provided to clients, are allowable costs since they are related to client care in that such reasonable costs are appropriate and helpful in developing and maintaining the contracted provider's operations to deliver contracted services. Such allowable costs should be reported in the cost area where the costs were incurred, such as meal costs being reported in the cost area associated with food and meal preparation and room and/or board costs being reported in the cost area associated with building costs.

(-f-) Costs of health, disability and life insurance premiums paid or incurred by the contracted provider if the benefits of the policy are payable to the employee or his beneficiary are reported as employee benefits. Report allowable health, disability, and life insurance premium costs as employee benefits. Refer to paragraph (10) of this subsection, concerning insurance expense.

(B) Compensation of employees that is not clearly enumerated as to dollar amount or which represent profit or surplus revenue distributions are unallowable costs. Accrued expenses that are not legal obligations of the contracted provider are unallowable costs, including any form of profit sharing and the accrued liabilities of unfunded deferred compensation plans.

(2) Compensation of owners and related parties. Compensation includes both cash and non- cash forms of compensation subject to federal payroll tax regulations. Compensation includes withdrawals from an owner's capital account; wages and salaries (including bonuses); payroll taxes and insurance; and benefits. Payroll taxes and insurance include Federal Insurance Contributions Act (old age, survivors, and disability insurance (OASDI) and Medicare hospital insurance); Unemployment Compensation Insurance; and Workers' Compensation Insurance. Allowable compensation must be reported as salaries and not as management fees.

(A) Allowable compensation of owners and related parties.

(i) A person who is a sole proprietor, partner, or corporate stockholder-employee owning any of the outstanding stock of the contracted provider is considered an owner for the purposes of this subparagraph. Allowable compensation for a related party, as defined in §355.102(i) of this title [~~(relating to General Principles of Allowable and Unallowable Costs)~~], a sole proprietor- employee, a partner-employee, or a corporate stockholder-employee is governed by the principles that the services rendered are necessary functions and that the remuneration is the reasonable value of the services rendered.

(I) A function is deemed necessary when, if the owner or related party had not performed said function, the contracted provider would have had to employ another person to perform that function. To be necessary, a function must pertain to direct or indirect activities in the provision or supervision of contracted client services. The fact that an owner may have potential supervisory and managerial authority and responsibility is not as important as the manner in which this authority and responsibility is actually exercised. As an example, the right of the owner-administrator to overrule decisions does not solely constitute a basis for recognition of compensation comparable to nonowner-administrators.

(II) The test of reasonableness requires that the compensation of owners or related parties be such an amount as would ordinarily be paid for comparable services performed by nonowners or unrelated parties. Reasonable compensation is limited to the fair market value of services rendered by the owner or related party in connection with contracted client care. Education and experience of the owner are pertinent only as they relate to the job being performed and the services being rendered. For example, where an owner-administrator is also a physician or a nurse or a lawyer, but the services evaluated are administrative in nature rather than the actual practice of medicine or nursing or law, the allowable compensation is based on the compensation nonphysician or nonnurse or nonlawyer administrators receive rather than on the rate physicians or nurses or lawyers receive for their professional services.

(ii) The compensation must be for services performed by the related party, owner, partner, or stockholder that do not duplicate services performed by another employee of the contracted provider.

(iii) Compensation for "full-time" service requires that at least 40 hours per week be devoted to the duties of the position for which compensation is requested. For owners devoting less than 40 hours per week to the position, allowable compensation is limited to the proportion of 40 hours actually devoted to the contract services. Documentation regarding owners and related parties must be kept in

accordance with §355.105(b)(2)(B)(xi) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(iv) Compensation must be in accordance with paragraph (1)(A) of this subsection concerning compensation of employees, must be made in regular periodic payments, must be subject to payroll or self-employment taxes, and must be verifiable by adequate documentation maintained by the contracted provider.

(B) Unallowable compensation of owners and related parties.

(i) Forms of compensation that are not clearly enumerated as to dollar amount or that [~~which~~] represent profit or surplus revenue distributions are unallowable costs.

(ii) Compensation in the form of salaries, benefits, or any form of perquisite provided to owners, partners, officers, directors, stockholders, employees, or others who do not provide services directly to clients or who do not provide services required in the normal conduct of operations to provide contracted client services, is an unallowable cost. Services which would be required in the normal conduct of operations to provide contracted client services would include expenses such as administration of the program or supervision of direct care staff.

(C) Compensation for outside consultants and fees for services provided by outside vendors. Allowable compensation for outside consultants and contracted services must meet the criteria in §355.102 of this title [~~(relating to General Principles of Allowable and Unallowable Costs)~~]. Specific criteria for certain types of compensation of outside consultants and contracted services are as follows:

(i) Accounting and audit fees.

(I) Allowable accounting and audit fees. Fees for preparation of business tax reports and returns, financial statements, and cost reports are allowable costs. Audit fees associated with the performance of a financial audit are allowable costs.

(II) Unallowable accounting and audit fees. Expenses related to the preparation of personal tax returns are unallowable costs as are certain taxes. Refer to paragraph (9) of this subsection, concerning tax expense and credits. Audit fees associated with the performance of a single audit are unallowable costs. The cost attributable to a financial audit that was conducted along with a single audit is allowable if the cost of the financial audit can be identified separately from the cost attributable to the single audit. Accounting fees and related costs associated with litigation between a provider and a governmental entity are unallowable. Accounting costs associated with any other unallowable costs are also unallowable. Fees related to the preparation of annual reports, reports to stockholders or other interested parties, or for investment management are unallowable costs.

(ii) Legal fees. Legal retainers are not allowable in and of themselves, but rather must be documented as specified in §355.105(b)(2)(B)(viii) of this title [~~(relating to General Reporting and Documentation Requirements, Methods, and Procedures)~~]. Legal costs associated with litigation between a provider and a governmental entity are unallowable. Legal costs associated with any other unallowable costs are also unallowable.

(D) Value of services of nonpaid workers. Since the contracted provider incurs no actual costs for nonpaid and/or volunteer workers, the value of the nonpaid work is not an element of cost; and the value of such nonpaid work is an unallowable cost.

(E) Boards of directors and trustees. Fees and expenses related to boards of directors and trustees are unallowable costs except for:

(i) Travel costs incurred by the contracted provider's board members or trustees to attend meetings of the contracted provider's board of directors or trustees are allowable costs in accordance with the travel guidelines as stated in paragraph (12)(B) of this subsection; and

(ii) Errors and omissions (liability) insurance for boards of directors or trustees are allowable costs.

(3) Management fees.

(A) Allowable management fees. Reasonable management fees paid to unrelated parties are allowable costs. Allowable management fees paid to related parties are the actual costs to the related party for the materials, supplies, and services provided directly to the individual contracted provider. Any related party compensation or owner compensation included in allowable management fees paid to related parties must follow the guidelines specified in §355.102(i) of this title [~~(relating to General Principles of Allowable and Unallowable Costs)~~] and in paragraph (2) of this subsection, concerning compensation of owners and related parties. Expenses for management provided by the contracted provider's central office must be reported as central office costs on the cost report. Cash management fees related to minimizing interest costs and banking expenses in the management of operating revenue necessary for contracted services are allowable costs.

(B) Unallowable management fees. Fees for management of personal investments or investments not necessary for the provision of contracted services are unallowable costs.

(4) Central office costs. A chain organization consists of a group of two or more contracted entities which are owned, leased or controlled through any other arrangement by one organization. A chain may also include business organizations which are engaged in other activities and which are not contracted program entities. Central offices of a chain organization vary in the services furnished to the components in the chain. The relationship of the central office to an entity providing contracted services is that of a related party organization to a contracted provider. Central offices usually furnish central management and administrative services such as central accounting, purchasing, personnel services, management direction and control, and other necessary services. To the extent the central office furnishes services related directly or indirectly to contracted client care, the reasonable costs of such services are allowable. Allowable central office costs include costs directly related to those services necessary for the provision of client care for contracted services in Texas and an appropriate share of allowable indirect costs. Where functions of the central office have no direct or indirect bearing on delivering contracted client care, the cost for those functions are not allowable costs. Costs which are unallowable to the contracted provider are also unallowable as central office costs. Where a contracted provider is furnished services, facilities, leases, or supplies from its central office, the costs allowed are subject to the guidelines of related party transactions in §355.102(i) of this title [~~(relating to General Principles of Allowable and Unallowable Costs)~~]. Owner-employees and related parties receiving compensation for services provided through the central office are allowable to the extent provided in paragraph (2)(A) and (B) of this subsection, concerning compensation of owners and related parties.

(5) Utilities. To be allowable, the utilities must be used directly or indirectly in the provision of contracted services.

(6) Repairs and maintenance. For cost-reporting purposes, repairs and maintenance are categorized as ordinary or extraordinary (major) repairs and should be handled as follows.

(A) Ordinary repairs and maintenance are defined as outlays for parts, labor, and related supplies that [~~which~~] are necessary to keep the asset in operating condition, but neither add materially to the use value of the asset nor prolong its life appreciably. Ordinary repairs are recurring and usually involve relatively small expenditures. Ordinary repairs include, but are not limited to, painting, wall papering, copy machine repair, repairing an electrical circuit, or replacing spark plugs. Because maintenance costs and ordinary repairs are similar, they are usually combined for accounting purposes. Ordinary repairs may be expensed.

(B) Extraordinary repairs (major repairs) involve relatively large expenditures, are not normally recurring in nature, and usually increase the use value (efficiency and use utility) or the service life of the asset beyond what it was before the repair. Extraordinary repairs costing $1,000 or more, with a useful life in excess of one year, should be capitalized and depreciated. The cost of the extraordinary repair should be added to the cost of the asset and depreciated over the remaining useful life of the original asset. If the life of the asset has been extended due to the repair, the useful life should be adjusted accordingly. Extraordinary repairs include, but are not limited to, major vehicle overhauls, major improvements in a building's electrical system, carpeting an entire building, replacement of a roof, or strengthening the foundation of a building.

(7) Depreciation and amortization expense. For DHS contracted providers: for purchases made after the beginning of the contracted provider's fiscal year 1997, an asset valued at $1,000 or more and with an estimated useful life of more than one year at the time of purchase must be depreciated or amortized, using the straight line method. In determining whether to expense or depreciate a purchased item, a contracted provider may expense any single item costing less than $1,000 or having a useful life of one year or less. For purchases made after the beginning of the contracted provider's fiscal year 2004, an asset valued at $2,500 or more and with an estimated useful life of more than one year at the time of purchase must be depreciated or amortized, using the straight line method. In determining whether to expense or depreciate a purchased item, a contracted provider may expense any single item costing less than $2,500 or having a useful life of one year or less. For TDMHMR contracted providers: for purchases made after the beginning of the contracted provider's fiscal year 1997, an asset valued at $2,500 or more and with an estimated useful life of more than one year at the time of purchase must be depreciated or amortized, using the straight line method. In determining whether to expense or depreciate a purchased item, a contracted provider may expense any single item costing less than $2,500 or having a useful life of one year or less. Depreciation and amortization expenses for unallowable assets and costs are also unallowable, including amounts in excess of those resulting from the straight line method, capitalized lease expenses in excess of actual lease payments, and goodwill or any excess above the actual value of physical assets at the time of purchase. The minimum useful lives to be assigned to common classes of depreciable property are as follows:

(A) Buildings. A building's life must be reported as a minimum of 30 years, with a minimum salvage value of 10%. All buildings, excluding the value of the land, are uniformly depreciated on a 30-year life basis, regardless of the actual date of construction or original purchase. Exceptions to this policy are permissible when contracted providers choose a useful-life basis in excess of 30 years. An example of depreciation on a 30-year life basis is:
Figure: 1 TAC §355.103(b)(7)(A)

(B) Building equipment; buildings and grounds improvements and repairs; durable medical equipment, furniture, and appliances; and power equipment and tools used for buildings and grounds maintenance. Use minimum schedules consistent with "Estimated Useful Lives of Depreciable Hospital Assets," published by the American Hospital Association. Copies of this publication may be obtained by contacting American Hospital Publishing, Inc., 737 North Michigan Ave., Chicago, IL 60611 or at www.aha.org. Leasehold improvements whose estimated useful lives according to the guidelines for depreciable hospital assets are longer than the term of the lease must be depreciated and/or amortized over the life of the leasehold improvement. Building improvements which are not structural in nature and do not extend the depreciable life of the building, but whose estimated useful lives according to the guidelines for depreciable hospital assets are longer than the remaining depreciable life of the building, must be depreciated over the normal useful life of the building improvements. Once the estimated useful life of the leasehold improvement has been established using the guidelines above, subsequent extensions of the lease period do not change the useful life of the leasehold improvement. Any exceptions to this policy shall be stated in each program- specific reimbursement methodology rules.

(C) Transportation equipment used for the transport of clients, staff, or materials and supplies utilized by the contracted provider. Cost reporting must reflect a minimum of three years for automobiles (including minivans); five years for light trucks and vans (up to and including 15- passenger vans); and seven years for buses and airplanes. Depreciation expenses for transportation equipment not generally suited or not commonly used to transport clients, staff, or provider supplies are unallowable costs. This includes motor homes and recreational vehicles; sports automobiles; motorcycles; heavy trucks, tractors and equipment used in farming, ranching, and construction; and transportation equipment used for other activities unrelated to the provision of contracted client care, unless program-specific reimbursement methodology rules provide otherwise. Refer to §355.105(b)(2)(B)(iii) of this title [~~(relating to General Reporting and Documentation Requirements, Methods, and Procedures)~~] for requirements for the maintenance of mileage logs and other documentation required to substantiate transportation equipment costs.

(i) Luxury automobiles are defined for cost-reporting purposes as passenger vehicles, including automobiles, light trucks, and vans (up to and including 15-passenger vans) and excluding buses, with an historical cost at time of purchase or a market value at execution of the lease exceeding $30,000 when purchased or leased before January 1, 1997. For vehicles leased or purchased on or after January 1, 1997, luxury vehicles are defined as a base value of $30,000 with 2.0% being added (using the compound method) to the base value each January 1 beginning on January 1, 1998. Any amount above the definition of a luxury vehicle stated above is an unallowable cost. When a passenger vehicle's cost exceeds the amount determined by the definition of a luxury vehicle stated above, the historical cost is reduced to the amount determined by the definition of a luxury vehicle. When a passenger vehicle's market value at the execution of the lease exceeds the amount determined by the definition of a luxury vehicle stated above, the allowable lease payment is limited to the lease amount for a vehicle with the base value as determined above, with substantiating documentation as specified in §355.105(b)(2)(B)(iv) of this title [~~(relating to General Reporting and Documentation Requirements, Methods, and Procedures)~~]. Luxury vehicles must be depreciated according to depreciation guidelines in this paragraph. Expenses for passenger luxury vehicles will be allowable if the contracted provider maintains adequate mileage logs substantiating the use of the luxury vehicles to

transport clients, contracted provider staff or provider supplies. Refer to §355.105(b)(2)(B)(iii) of this title [~~(relating to General Reporting and Documentation Requirements, Methods, and Procedures)~~] for requirements for the maintenance of mileage logs. The base value does not include specialized equipment, such as wheelchair lifts, added to assist clients.

(ii) The estimated life of a previously owned (used) vehicle is the longer of the number of years remaining in the vehicle's depreciable life or three years. For example, if a 1994 van were purchased in 1995, it would have four years remaining in its five-year depreciable life and that would become the depreciable life for the used vehicle. If a 1994 minivan were purchased in 1995, it would have two years remaining in its three-year depreciable life and the depreciable life for the used vehicle would then be three years.

(iii) Specialized equipment added to a vehicle to assist a client should be depreciated separately from the vehicle. Wheelchair lifts have an estimated useful life of four years.

(D) Depreciation for the first reporting period. Depreciation for the first reporting period is based on the length of time from the date of acquisition to the end of the reporting period. Depreciation on disposal is based on the length of time from the beginning of the reporting period in which the asset was disposed to the date of disposal.

(E) Planning and evaluation expenses. Planning and evaluation expenses for the purchase of depreciable assets are allowable costs only where purchases are actually made and the assets are put into service in the provision of care by the provider for contracted services.

(F) Gains and losses. Gains and losses realized from the trade-in or exchange of depreciable assets are included in the determination of allowable cost. When an asset is acquired by trading-in an asset that was being depreciated, the historical cost of the new asset is the sum of the undepreciated cost of the asset traded-in plus any cash or other assets transferred or to be transferred to acquire the new asset. Losses resulting from the involuntary conversion of depreciable assets, such as condemnation, fire, theft, or other casualty, are includable as allowable costs in the year of involuntary conversion, provided the total aggregate allowable losses incurred in any cost-reporting period do not exceed $5,000 and provided the assets are replaced. If the total aggregate allowable losses in any cost-reporting period exceed $5,000, the total amount of the losses over $5,000 is recognized as a deferred charge and treated as follows:

(i) If a depreciable asset is destroyed by an involuntary conversion beyond repair, then the amount of the loss over $5,000 must be capitalized as a deferred charge over the estimated useful life of the asset which replaces it. The allowable loss for a total casualty is the undepreciated cost of the asset, less insurance proceeds, gifts, and grants from any source as a result of the involuntary conversion. If the unrepairable asset is disposed of by scrapping, income received from salvage is treated as a reduction in the amount of the allowable loss. Conversely, where additional expense is incurred in the scrapping operation, such cost would be added to the allowable loss of the destroyed asset.

(ii) If a depreciable asset is partially destroyed or damaged as a result of an involuntary conversion, a reduction in its cost basis is assumed to have taken place. Therefore, the cost basis of the asset must be reduced to reflect the amount of the casualty loss, regardless of whether the loss is covered by insurance.

(I) The amount of the casualty loss is the difference between the fair market value immediately before the casualty and the fair market value immediately after the casualty; however, for cost-reporting purposes, the allowable loss is limited to the percent of loss in fair market value applied to the net book value of the asset at the time the casualty occurred. This method of calculating the allowable loss recognizes the actual reduction in the cost value of the asset rather than the reduction in replacement value.

(II) Any loss over $5,000 must be capitalized as a deferred charge and amortized over the useful life of the restored asset.

(III) The fair market value generally can be ascertained by competent appraisal. If no appraisal is made, the cost of repairs to the damaged property is acceptable as evidence of the loss of value if the repairs restore the property to its condition immediately before the casualty and, as a result of the repairs, the value of the property has not been increased. The amount of the allowable loss is then deducted from the cost basis of the asset before the casualty, to arrive at the adjusted cost basis of the asset. Any insurance proceeds received or recoverable must be deducted from the amount of the casualty loss to determine the gain or the loss.

(IV) Actual costs incurred in the restoration of an asset are added to the adjusted cost basis of the asset to arrive at the revised cost of the restored asset and capitalized over the remaining useful life of the restored asset.

(V) When the repairs materially improve or add to the value or utility of the property or appreciably prolong its useful life, the repairs must be depreciated over the estimated life of the repairs.

(VI) When the contracted provider maintains a self-insurance reserve fund, the amount of the casualty loss recognized as an allowable cost is limited to the lesser of the decrease in fair market value, as adjusted, of the damaged or destroyed asset or the amount of cash, and/or investments, comprising the accumulated balance of the self-insurance reserve account.

(VII) When an asset is sold before the end of its useful life and a gain is realized (the sales price is greater than the remaining allowable depreciation), no additional depreciation or expense is allowed.

(8) Interest expense. Reasonable and necessary interest on current and capital indebtedness is an allowable cost. In the case of allowable interest incurred on a loan, in order to be determined necessary, the loan must have been made to satisfy a financial need for a purpose reasonably related to contracted client care.

(A) For cost-reporting purposes, allowable interest expenses are limited to that net portion of interest accrued which has not been reduced or offset by interest income. Refer to §355.104(5) of this title (relating to Revenues). To be allowable, the following requirements must be met:

(i) the [~~The~~] loan must be supported by evidence in writing of an agreement that funds were borrowed and that payment of interest and repayment of the funds are required and systematically made. Refer to §355.105(b)(2)(B)(ii) of this title [~~(relating to General Reporting and Documentation Requirements, Methods, and Procedures)~~];

(ii) the [~~The~~] loan must be made in the name of the contracted provider entity as maker or comaker of the note; and

(iii) the [~~The~~] proceeds of the note or loan must be used for allowable costs.

(B) Interest expense on a demand note is allowable if the loan is the result of an arm's-length transaction.

(C) Where the lender is a related party, allowable interest is limited to the prevailing national average prime interest rate in effect at the time at which the loan contract was finalized, as reported by the United States Department of Commerce, Bureau of Economic Analysis, in the Survey of Current Business.

(D) Interest costs incurred during the period of construction or enlarging of a building must be capitalized as part of the cost of the building.

(E) Reasonable finance charges and service charges, together with interest on indebtedness, are allowable costs.

(F) Other fees associated with obtaining an allowable loan, such as broker's fees to solicit financing, lender's fees, attorney's fees, and due diligence fees, are allowable costs.

(G) Interest expenses on funds borrowed for purposes of investing in operations other than contracted services, on loans pertaining to unallowable items, and on borrowed funds creating excess working capital are unallowable costs.

(9) Tax expense and credits.

(A) Generally, taxes assessed against the contracted provider, in accordance with the levying enactments of Texas and lower levels of government and for which the contracted provider is liable for payment, are allowable costs. Tax expense based on fines and penalties are unallowable costs.

(B) Employment-related taxes such as Federal Insurance Contribution Act (FICA), Workers' Compensation and Unemployment Compensation, are allowable costs. Refer to paragraph (1) and (1)(A) of this subsection.

(C) Franchise taxes are allowable costs. A franchise tax is a periodic assessment, as defined by the Texas Comptroller of Public Accounts and paid to the Texas State Treasurer, levied on the operation of a business in the State of Texas. Franchise taxes do not refer to franchise fees, which are the costs associated with a company's granting the right to sell its products or services in a specified territory.

(D) Unallowable taxes include:

(i) federal income taxes and excess profit or surplus revenue based taxes, including any interest or penalties paid thereon. However, fees for preparation of business tax reports and business returns required by law are allowable;[.]

(ii) state or local income and excess profit or surplus revenue based taxes. However, fees for preparation of business tax reports and/or business returns are allowable;[.]

(iii) taxes in connection with financing, refinancing, or refunding operations, such as taxes on the issuance of bonds, property transfers, issuance or transfer of stocks;[.] Generally, these costs are either amortized over the life of the securities or depreciated over the life of the asset. They are, however, unallowable as tax expense;[.]

(iv) taxes from which exemptions are available to the contracted provider;[.]

(v) special assessments on land which represent capital improvements should be capitalized and depreciated over their estimated useful lives and are not allowable as tax expenses;[.]

(vi) taxes, such as sales taxes, levied against the client and collected and remitted by the contracted provider; and[.]

(vii) self-employment taxes.

(10) Insurance expense. This section covers the following types of insurance: property damage and destruction; fire and casualty; malpractice and comprehensive general liability; errors and omissions insurance covering boards of directors; theft insurance (fidelity bonds and burglary insurance); workers' compensation; transportation equipment insurance; life insurance for owners, officers, and key employees; health; disability; and unemployment compensation.

(A) Purchased and commercial insurance. The reasonable costs of insurance purchased from a commercial carrier or a nonprofit service corporation are allowable if resulting from an arm's-length transaction. The commercial carrier or nonprofit service corporation must meet the standards as set by the Texas Department of Insurance. Costs of insurance purchased from a limited purpose insurer are allowable if they are not in excess of the cost of available comparable commercial insurance premiums and meet the reasonable cost provisions. If comparable insurance premiums are not available, the limited purpose insurer or captive insurance company must obtain an evaluation of the adequacy and reasonableness of its insurance premium by an independent actuary, commercial insurance company, or broker.

(B) Self-insurance [Self-Insurance]. Self-insurance is a means whereby a contracted provider undertakes the risk to protect itself against anticipated liabilities by providing funds in an amount equivalent to liquidate those liabilities. Self-insurance can also be described as being uninsured. To qualify as an allowable self-insurance plan, a contracted provider must enter into an agreement with an unrelated party that does not provide for the shifting of risk to the unrelated party designed to provide only administrative services to liquidate those liabilities and manage risks. Self-insurance costs for contracted providers who have received certificates of authority to self-insure from the Texas Workers' Compensation Commission are allowable costs. Self-insurance costs in excess of costs for similar, comparable coverage by purchased and/or commercial insurance premiums are subject to a cost ceiling in accordance with subparagraph (E)(i)-(iv) of this paragraph. Documentation substantiating the cost of comparable coverage by purchased and/or commercial insurance premiums must be obtained and maintained as specified in §355.105(b)(2)(B)(ix) of this title [(relating to General Reporting and Documentation Requirements, Methods, and Procedures)].

(i) Costs related to self-insurance are allowable on a claims-paid basis. Contributions to the self-insurance fund or reserve which do not represent payments based on current liabilities are not considered actual incurred expenses and are not allowable costs. For cost-reporting purposes, self-insurance costs are reported on a cash basis. For cost-reporting purposes, compensation paid to employees who have been injured on the job is allowable and should be reported as compensation according to the type of compensation expense incurred in accordance with paragraphs (1) and (2) of this subsection.

(ii) For cost-reporting purposes, allowable employee-related paid claims, such as health insurance and workers' compensation costs, may either be directly charged to the business component in which the employee worked or may be allocated across all business components as an administrative expense. The method chosen to report these costs must remain consistent each year. Changes in the method for reporting those costs must be approved in accordance with §355.102(j) of this title [(relating to General Principles of Allowable and Unallowable Costs)].

(C) Determining self-insurance or purchased commercial insurance. There may be situations in which there is a fine line between self-insurance and purchased or commercial insurance. This is particularly true of "cost-plus" type arrangements. As long as there is at least some shifting of risk to the unrelated party, even if limited to situations such as provider bankruptcy or employee termination, the arrangement will not be considered self-insurance. Contributions to

a special risk management fund or pool that [which] is operated by a third party that [which] assumes some of the risk and that [which] has an annual actuarial review are allowable costs. Examples of such special risk management funds and pools include the Texas Council Risk Management Fund and the Texas Municipal League Intergovernmental Risk Pool.

(D) Reporting of insurance costs. All allowable insurance premium costs should be reported on cost reports, with amounts accrued for premiums, modifiers, and surcharges during the cost- reporting period being adjusted by any refunds and discounts actually received or settlements paid during the same cost-reporting period.

(E) Losses in excess of coverage. When a contracted provider is not fully insured by a purchased commercial insurance policy, i.e., the provider's coverage includes coinsurance provisions and/or deductibles, the amount of allowable insurance costs reported for each cost- reporting period is subject to a cost ceiling.

(i) The cost ceiling for employee-related insurance, such as health insurance, or workers' compensation coverage, is either the amount that would have been incurred had the provider purchased full coverage for its entire business entity through a commercial insurance policy or an amount equal to 10% of the payroll for employees eligible for such coverage. This cost ceiling is applied separately to employee-related insurance and to workers' compensation coverage.

(ii) The cost ceiling for non-employee-related insurance, such as malpractice insurance, comprehensive general liability insurance, or property insurance, is the amount that would have been incurred had the provider purchased full coverage for its entire business entity through a commercial insurance policy.

(iii) If, during a cost-reporting period, a provider incurs allowable paid claims in excess of the applicable cost ceiling, the provider reports on its current cost report allowable insurance costs up to the amount of the applicable cost ceiling, with the allowable costs in excess of the applicable cost ceiling being carried forward to future cost-reporting periods. When, during a future cost-reporting period, a provider incurs allowable insurance costs in an amount less than the applicable cost ceiling, the provider reports on its cost report the allowable insurance costs (paid claims) incurred during that cost-reporting period plus any allowable carry forward amount up to the amount of the applicable cost ceiling, with any excess carry forward being carried forward to future cost reporting periods.

(iv) Documentation requirements are stated in §355.105(b)(2)(B)(ix) of this title [(relating to General Reporting and Documentation Requirements, Methods, and Procedures)].

(F) Absence of coverage. Where a contracted provider, other than a governmental provider, has no insurance protection, the reporting of the provider's paid claims must follow the guidelines stated in paragraph (10)(E) of this subsection. For governmental providers, allowable paid claims for cost-reporting purposes include all claims paid during the cost-reporting period only if the provider demonstrates that it has a claims management and risk management program.

(G) Life insurance costs.

(i) In general, premiums related to insurance on the lives of owners, officers, and key employees where the contracted provider is a direct or indirect beneficiary are unallowable costs.

(ii) Life insurance costs are allowable if:

(I) a contracted provider is required by a lending institution or other lender to purchase such insurance to guarantee the outstanding loan balance;

(II) the lending institution or other lender must be designated as the beneficiary of the insurance policy; and

(III) upon the death of the insured, the proceeds are restricted to paying off the balance of the loan.

(iii) Allowable insurance premiums are limited to premiums equivalent to that of a decreasing term life insurance policy needed to pay off the outstanding loan balance or that portion of the premium which can be equated to the premium for a similar face amount of a decreasing term life policy. In addition, the loan must be reasonable and necessary and must meet the criteria for allowable loans and interest expense as stated in subsection (b)(8) of this section [§355.103(b)(8) of this title (relating to Specifications for Allowable and Unallowable Costs)].

(iv) Provider-paid premiums related to insurance on the lives of owners-employees, officers, and key employees where the individual's relatives or his estate are the beneficiary are considered to be employee benefits to the individual and are allowable costs to the extent such employee benefits are allowable. Provider-paid premiums related to insurance on the lives of owners-employees, officers, and key employees where required by a financial institution and the financial institution is the beneficiary is allowable.

(H) Insurance costs pertaining to unallowable costs. Insurance costs pertaining to items of unallowable costs are themselves unallowable costs.

(I) Board of directors' or trustees insurance. Errors and omissions insurance (liability) on members of boards of directors or trustees is an allowable cost.

(11) Dues or contributions to organizations.

(A) Allowable dues and contributions to organizations. Costs are allowable for membership in professional associations directly and primarily concerned with the provision of services for which the provider is contracted. Allowable costs of memberships in such organizations include initiation fees, dues, and subscriptions to related professional periodicals. Allowable costs related to meetings and conferences whose primary purpose is to disseminate information for the advancement of contracted client care or the efficient operation of the contracted program include reasonable travel costs in accordance with paragraph (12)(B) of this subsection and reasonable registration fees and other costs incidental to those functions. Travel costs incurred by members of the board of directors of professional associations that [which] are directly and primarily concerned with the provision of services for which the provider has contracted are allowable in accordance with paragraph (12)(B) of this subsection. Dues or licensing fees related to maintaining the professional accreditation or license of an employee are allowable to the extent that the professional accreditation or license is directly related to and necessary for the performance of that employee's functions.

(B) Unallowable dues and contributions to organizations. Dues to nonprofessional organizations are unallowable. Assessments whose purpose is to fund lawsuits or any legal action against the state or federal government are unallowable. Portions of dues based on revenue or for the purposes of lobbying, or campaign contributions are unallowable costs. Costs of membership in civic organizations whose primary purpose is the promotion and implementation of civic objectives are unallowable. Dues or contributions made to any type of political, social, fraternal, or charitable organization are unallowable. Chamber of Commerce dues are unallowable. Franchise fees are not considered dues or contributions to organizations.

(C) Dues to purchasing organizations or buying clubs. Allowable dues to purchasing organizations or buying clubs are limited

to the pro-rata amount representing purchases made for use in providing contracted services.

(12) Training and travel costs.

(A) Staff training costs.

(i) Staff training costs refer to costs associated with educational activities for provider staff. To qualify as an allowable staff training cost, the training must:

(I) have a direct relationship with the employee's job responsibilities, thereby increasing the quality of contracted client care or the efficient operation of the contracted provider. Management training, if it is designed to enhance quality or improve administration and is relevant to the contracted service, is an allowable cost. The following apply to staff training costs.

(-a-) Non-related party staff. Costs of tuition, books, and related fees for courses required to complete the designated degree or certification are allowable. The degree or certification must be necessary to the provision of contracted client services of the contracted provider. An example would be any course required to be taken by a licensed vocational nurse (LVN) working toward a degree as a registered nurse (RN) where RN services are necessary to deliver services as required under the contract.

(-b-) Related party staff. Allowable costs are restricted to specific courses which have a direct relationship with the employee's job responsibilities. Examples of allowable staff training costs include tuition, books, and related fees for an accounting course for a bookkeeper and a management course for a supervisor. However, a history course for a bookkeeper, even though it may be a requirement for a college degree in accounting or business, is unallowable.

(II) be located within the state of Texas unless the purpose of the training is for staff training in contracted client care-related services or quality assurance which is not available in the state of Texas. All costs for training outside the continental United States are unallowable costs. For further guidelines regarding adequate documentation, refer to §355.105(b)(2)(B)(vi) of this title [~~(relating to General Reporting and Documentation Requirements, Methods, and Procedures)~~].

(ii) Staff training may be conducted within the provider setting or off-site. It may be operated by the contracted provider, provided by an accredited academic or technical institution, or conducted by a recognized professional organization for the particular training activity. Workshops on particular contracted client services, health applications, on-the-job safety, data processing, accounting, the Texas Health and Human Services Commission (HHSC) [~~Department of Human Services (DHS)~~] programmatic or cost related training, supervisory techniques, and other administrative activities are examples of allowable types of training. Costs of orientation, on-the-job training, and in-service [~~inservice~~] training are recognized as normal operating costs and are allowable training costs.

(iii) For staff training conducted within the provider setting, allowable training costs include, but are not limited to, instructor and consultant fees, training supplies, and visual aids. For off-site training, allowable costs include costs such as allowable travel costs, registration fees, seminar supplies, and classroom costs. For additional guidelines regarding allowable travel costs, please refer to paragraph (12)(B) of this subsection.

(iv) Staff training costs must be reported as net costs, having been offset by any reimbursement from grants, tuitions, or donations received for staff educational purposes.

(v) For information regarding nursing facility nurse aide training, refer to paragraph (17)(K) of this subsection and program-specific reimbursement methodology rules.

(vi) For guidelines on allowability for client prevocational, vocational, and educational costs, refer to program-specific reimbursement methodology rules for guidelines on allowability.

(B) Travel costs.

(i) Maximum allowable travel costs for allowable activities are as follows:

(I) 150% of the limits established by the Texas Legislature for non-exempt state employees, with respect to hotel costs and per diem rates; and[~~.~~]

(II) the maximum allowable mileage reimbursement amount set by the Texas Legislature for non-exempt state employees.

(ii) Out-of-state travel costs are unallowable, unless the purpose of the travel is for staff training in contracted client-care-related services or in quality assurance which is not available in the state of Texas; the purpose of delivering direct contracted client services within 25 miles of the Texas border with adjoining states or Mexico; or the purpose for the travel is to conduct business related to contracted client services in Texas and the travel is between Texas and the contracted provider's central office. All costs for travel outside the continental United States are unallowable costs, with the singular exception of travel required for the delivery of direct contracted client services within 25 miles of the Texas-Mexico border.

(iii) Expenses for private aircraft are allowable only if:

(I) written documentation supporting the calculations for expenses for private aircraft and commercial alternatives, and flight logs are maintained as specified in §355.105(b)(2)(B)(iii) of this title [~~(relating to General Reporting and Documentation Requirements, Methods, and Procedures)~~]; and

(II) the documentation demonstrates that the expenses for travel via private aircraft were not greater than those for commercial alternatives at the time the travel took place. If the expenses for private aircraft were greater than the documented costs for commercial alternatives at the time the travel took place, allowable private aircraft costs are limited to the documented costs for commercial alternatives.

(13) Advertising and public relations.

(A) Allowable advertising and public relations include:[~~.~~]

(i) costs [~~Costs~~] of advertising to meet statutory or regulatory requirements, such as program standards, rules, or contract requirements, are allowable costs;[~~.~~]

(ii) informational [~~Informational~~] listings of contracted providers in a telephone directory, including yellow page listings up to one-eighth of a page per telephone directory in the provider's service area or in a directory of similar facilities in a given area are allowable if the listings are consistent with practices that are common and accepted in the industry;[~~.~~]

(iii) costs [~~Costs~~] of advertising for the purpose of recruiting necessary personnel are allowable costs. Refer to the definition of necessary in §355.102 (f)(2) of this title; [~~(relating to General Principles of Allowable and Unallowable Costs).~~]

(iv) costs [~~Costs~~] of advertising for procurement of items related to contracted client care, and for sale or disposition of

surplus or scrap material are treated as adjustments of the purchase or selling price; and[~~.~~]

(v) costs [~~Costs~~] of advertising incurred in connection with obtaining bids for construction or renovation of the contracted provider's facilities should be included in the capitalized cost of the asset. Refer to paragraph (7) of this subsection.

(B) Unallowable advertising and public relations include:

(i) costs [~~Costs~~] of advertising of a general nature designed to invite physicians to utilize a contracted provider's facilities in their capacity as independent practitioners;

(ii) costs [~~Costs~~] of advertising incurred in connection with the issuance of a contracted provider's own stock, or the sale of stock held by the contracted provider in another corporation considered as reductions in the proceeds from the sale;

(iii) costs [~~Costs~~] of advertising to the general public which seeks to increase client utilization of the contracted provider's facilities;

(iv) public [~~Public~~] relations costs;

(v) any [~~Any~~] business promotional advertising; and

(vi) costs [~~Costs~~] of the development of logos or other company identification.

(14) Promotional and fundraising activities. Promotional refers to any activity whose intent is to advertise or aid in the development of the business. Expenses relating to fundraising and promotional activities are unallowable, including salaries, benefits, and payroll taxes for staff performing these activities. If a staff member performs these activities along with allowable activities, a portion of that staff member's salary must be allocated to these unallowable activities and as such not be reported on the cost report. Other expenses associated with these activities are also unallowable, including advertising, publicity, travel, and meals.

(15) Grants, gifts, and income from endowments and operating revenue.

(A) Restricted grants, gifts, and income from endowments from private sources used to purchase allowable program costs should not be deducted and offset from allowable costs prior to reporting on the cost report.

(B) Grants and contracts from federal, state or local government, such as transportation grants, United States Department of Agriculture grants, education grants, Housing and Urban Development grants, and Community Service Block Grants, should be offset, prior to reporting on the cost report, against the particular cost or group of costs for which the grant was intended. If federal funds are paid for the care of a specified client, those federal funds should not be offset prior to reporting on the cost report, unless otherwise specified in the program- specific reimbursement methodology rules.

(C) Unrestricted grants, gifts, and income from endowments from private sources used to purchase allowable program items should not be offset by the contracted provider prior to reporting on the cost report. All unrestricted funds which are properly allocable to the cost report should be reported on a contracted provider's cost report, as well as any allowable costs to which the unrestricted funds were applied.

(D) Nonroutine revenues such as income from operations not associated with providing contracted services, including, but not limited to, beauty and barber shops, vending machines, gift shops, canteen stores, and meals sold to employees or guests should be offset or reduced by the related expenses prior to reporting the revenue on the cost report. Expenses related to providing these types of non-contracted operations are unallowable costs. If nonroutine operating expenses, including overhead costs incurred to generate nonroutine operating revenue, exceed nonroutine operating revenues, the net nonroutine operating expenses are unallowable costs. Routine operating revenue received as payments for the contracted services, such as income from private clients, private room and board, or other sources of routine contracted services are not to be offset. Refer to §355.102(k) of this title [~~(relating to General Principles of Allowable and Unallowable Costs)~~] for further guidelines on reporting net expenses.

(16) In-kind donations.

(A) Allowable in-kind donations.

(i) Depreciation of in-kind donations is limited to donated buildings and donated vehicles used in the direct provision of contracted client services, where title has been transferred to the provider entity by a third party in an arm's-length transaction. Depreciation must be reported in accordance with subsection (b)(7) of this section [~~§355.103(b)(7) of this title (relating to Specifications for Allowable and Unallowable Costs)~~]. The historical cost basis used to depreciate vehicles must be consistent with the retail price of the National Automobile Dealers Association (NADA) listings; or, in the case of a new vehicle, the documented historical cost to the donor or NADA may be used. The historical cost basis used to depreciate donated buildings must be the lower of:

(I) the most recent tax appraisal of the building prior to donation, unless the donor was exempt from tax appraisal, in which case an independent appraisal made by a third-party appraiser at the time of donation may be used in place of the tax appraisal (for donations made prior to the provider's 1997 fiscal year, a current appraisal from an independent third-party appraiser may be used to establish the historical cost); or

(II) the documented historical cost to the donor.

(ii) Expenses actually incurred to maintain a donated asset for use in providing contracted client care [~~to DHS~~] clients are allowable.

(iii) If a provider receives a donation of the use of space owned by another organization and if the provider and the donor organization are both part of a larger organizational entity (such as units of a state or county government), the space is not considered a related-party donation, but rather treated as allowable costs requiring allocation between the provider and the other organization. For example, if a county home health agency is given space to use in the county office building, costs associated with the use of the space (such as depreciation, janitorial services, maintenance, and repairs) must be allocated from the county to the county home health agency. Allocation of costs must be in compliance with §355.102(j) of this title [~~(relating to General Principles of Allowable and Unallowable Costs)~~].

(B) Unallowable in-kind donations. The value of unallowable in-kind donations may be collected for specific programs at the discretion of HHSC [~~DHS~~] for statistical purposes only, on a schedule separately identified for such purpose. The value of in-kind donations to a contracted provider, such as produce, supplies, materials, services, equipment, or other items used by the contracted provider which the contracted provider did not purchase, is an unallowable cost. The value of in-kind donations of buildings or vehicles when the title is not transferred to the provider is an unallowable cost. The value of in-kind

donations to a contracted provider which are not arm's-length transactions are unallowable costs. The contracted provider may not treat as an allowable cost the imputed value for unallowable in-kind donations.

(17) Miscellaneous costs.

(A) Employee relations expenses. Costs relating to employee relations are different from fringe benefits, as specified in paragraph (1)(A)(iii) of this subsection, in that employee relations expenses incurred are for employees as a group rather than as a fringe benefit for an individual employee. Examples of allowable employee relations costs, which are reported as administrative costs for cost-reporting purposes, include a staff party, an employee outing, or other such staff expenses intended to boost employee morale and in turn increase the efficiency and quality of care provided. Other examples of allowable employee relations expenses are plaques or awards presented to employees for certain achievements or honors. Employee relations cost which discriminates in favor of certain employees, such as employees who are officers, stockholders, related parties, or the highest paid individual(s) in the organization are unallowable. Employee relations costs are limited to a ceiling of $50 per employee eligible to participate per year. If a staff party includes nonemployees, an allocation must be made such that only the portion of costs relating to employees and their families in attendance is reported on the cost report. If a staff party also serves as an open house for promotional purposes, an allocation of costs must be made so that only costs relating to employees and their families in attendance are reported as allowable costs. Entertainment expenses other than those for the benefit of current clients or those for staff employee relations described above are unallowable costs.

(B) Organization costs. Organization costs are those costs directly incident to the creation of a corporation or other form of business necessary to provide contracted services. These costs are intangible assets in that they represent expenditures for rights and privileges which have a value to the business enterprise.

(i) Allowable organization costs include, but are not limited to, legal fees incurred (such as drafting documents) in establishing the corporation or other organization, necessary accounting fees, and fees paid to states for incorporation. Allowable organization costs must be amortized over a period of not less than 60 consecutive months, beginning with the first month in which services are delivered to the first client.

(ii) The following types of costs are considered unallowable organization costs: costs relating to the issuance and sale of shares of capital stock or other securities, reorganization costs, and stockholder servicing costs. If the business or corporation never commences actual operations, the organization costs are unallowable.

(C) Franchise fees.

(i) Allowable franchise fees. Allowable franchise fees include those costs related to actual goods, supplies, and services received in return for fees paid to a company for the right to sell its goods and/or services in a specific territory.

(ii) Unallowable franchise fees. Franchise fees based upon percentages of revenues and/or sales are unallowable costs. Franchise fees based upon goodwill are unallowable, with goodwill being that intangible, salable asset arising from the reputation of a business and its relationship with its customers.

(D) Startup costs. Startup costs are those reasonable and necessary preparation costs incurred by a provider in the period of developing the provider's ability to deliver services. Startup costs can be incurred prior to the beginning of a newly-formed business and/or prior to the beginning of a new contract or program for an existing business. Allowable startup costs include, but are not limited to, employee salaries, utilities, rent, insurance, employee training costs, and any other allowable costs incident to the startup period. Startup costs do not include capital purchases, which are purchased assets meeting the criteria for depreciation in paragraph (7) of this subsection. Any costs that are properly identifiable as organization costs or capitalizable as construction costs must be appropriately classified as such and excluded from startup costs. Allowable startup costs should be amortized over a period of not less than 60 consecutive months. If the business or corporation never commences actual operations or if the new contract/program never delivers services, the startup costs are unallowable.

(i) For a newly-formed business, startup costs should be accumulated up to the time the business begins (that is, when services are delivered to the first client/customer). Amortization of startup costs for a newly-formed business begins the month the business begins. In the event that a newly-formed business is established for the direct purpose of contracting with the state [~~State~~] for delivery of client care services, startup costs should be accumulated up to the time the contract is effective or the time the first client receives services, whichever comes first, with amortization of startup costs beginning the same month.

(ii) For a new contract or program implemented by an existing business, startup costs are related only to the development of the provider's ability to furnish services according to the standards of the new contract/program and should be accumulated up to the time the first client receives services according to the contract/program standards or the effective date of the contract, whichever occurs first. Amortization of startup costs for a new contract/program implemented by an existing business begins the month in which the first client receives services according to contract/program standards or the effective date of the contract, whichever occurs first. If a contracted provider intends to prepare all portions of its entire program at the same time, startup costs for all portions of the program should be accumulated in a single account and should be amortized beginning either when the first client is admitted or the effective date of the contract, whichever occurs first. However, if a contracted provider intends to prepare portions of its program on a piecemeal basis, startup costs should be capitalized and amortized separately for the portion(s) of the provider's program prepared during different time periods. For example, a newly-formed corporation opens a senior citizen center for private clients, serving its first client on April 4, 1995. Startup costs would be those costs incurred prior to April 4, 1995, which meet the above definition of startup costs. Amortization of the startup costs for this newly-formed business would begin April 1995. If this same corporation received a contract [~~with DHS~~] to provide Day Activity and Health Services (DAHS) effective October 1, 1995 and if the corporation served its first DAHS client on November 5, 1995, startup costs would be those costs incurred to be able to deliver services according to DAHS program standards. If the corporation was in compliance with the DAHS standards from its beginning (April 1995), no new startup costs would be allowable for amortization as a result of the implementation of the new DAHS contract by the existing corporation. On the other hand, if the corporation was required to incur additional costs to bring the operation up to the DAHS program standards, those startup costs incurred prior to October 1, 1995 (since the contract effective date occurred prior to serving the first DAHS client) would be amortized beginning with October 1995.

(E) Research and development costs. Research and development costs, including, but not limited to, telephone costs, travel costs, attorney fees, and staff salaries, must be segregated into separate, individual accounts for each venture in the contracted provider's general ledger. Should such a "venture" result in a contract for a program, the allowable research and development costs would be incorporated as

startup costs for that program. Research and development costs related to states other than Texas are not allowable costs for any allocation to any contracted program.

(F) Medical supplies and medical costs. In general, medical supplies and equipment required by the Occupational Safety and Health Administration (OSHA), used for universal health and safety precautions, or otherwise required to meet contracted program requirements are allowable costs. Refer to program-specific reimbursement methodology rules to determine program requirements for medical supplies and medical costs.

(G) Fines and penalties. Fines and penalties for violations of regulations, statutes, and ordinances of all types are unallowable costs. Penalties or charges for late payment of taxes, utilities, mortgages, loans or insufficient banking funds are unallowable costs.

(H) Business expenses not directly related to contracted services. Business expenses not directly related to contracted services, including business investment activities, stockholder and public relations activities, and farm and ranch operations (unless farm and ranch operations are specifically allowed by the contracted program as necessary to the provision of client care), are unallowable costs.

(I) Litigation expenses and awards. Unless explicitly allowed elsewhere in this chapter, no court- ordered award of damages or settlements made in lieu thereof or legal fees associated with litigation which resulted in any court-ordered award of damages or settlements made in lieu thereof, or a criminal conviction, are allowable.

(J) Lobbying costs. Lobbying costs are unallowable.

(i) Lobbying means the influencing or attempting to influence an officer or employee of any governmental agency, an officer or employee of Congress or the state legislature [~~State Legislature~~], or an employee of a member [~~Member~~] of Congress or the state legislature [~~State Legislature~~] in connection with any of the following actions:

(I) the awarding of any governmental contract;

(II) the making of any governmental grant;

(III) the making of any governmental loan;

(IV) the entering of any cooperative agreement; and

(V) the extension, continuation, renewal, amendment, or modification of any governmental contract, grant, loan or cooperative agreement.

(ii) Costs associated with the following activities are unallowable as lobbying costs:

(I) attempting to influence the outcomes of any governmental election, referendum, initiative, or similar procedure, through in-kind or cash contributions, endorsements, publicity, or similar activity;

(II) establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections;

(III) attempting to influence the introduction of governmental legislation, the enactment or modification of any pending governmental legislation through communication with any member or employee of the Congress or state legislature [~~State Legislature~~] (including efforts to influence state or local officials to engage in similar lobbying activity) or any governmental official or employee in connection with a decision to sign or veto enrolled legislation;

(IV) attempting to influence the introduction of governmental legislation, or the enactment or modification of any pending governmental legislation by preparing, distributing or using publicity or propaganda, or by urging members of the general public, or any segment thereof, to contribute to or participate in any mass demonstration, march, rally, fund raising drive, lobbying campaign or letter writing or telephone campaign; and

(V) performing legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable lobbying.

(iii) The cost to contracted providers or their staff to attend meetings with the staff of state agencies or to attend public hearings or advisory committee meetings held by state agencies that [~~which~~] are involved in the regulation of contracted client care in the program with which they are contracting and which meetings do not meet the definition of lobbying stated above, are not considered lobbying and are therefore allowable costs.

(iv) Expenses relating to lobbying are unallowable including salaries, benefits, and payroll taxes for staff performing these activities. If a staff member performs these activities along with allowable activities, a portion of that staff member's salary must be allocated to the unallowable activities and as such not be reported on the cost report.

(K) Direct reimbursements. Unless specifically exempted through program-specific reimbursement methodology rules, HHSC [~~department~~] procedures or cost report instructions, any expenses directly reimbursable to the contracted provider that [~~which~~] are considered outside the reimbursement payment system are unallowable costs. Such expenses include but are not limited to those associated with Medicare Part A and B ancillary services, HHSC [~~department~~] voucher payment systems and vendor drug coverage. For guidelines on allowability of reporting costs in excess of those reimbursable directly through a voucher payment system, refer to program-specific reimbursement methodology rules.

(L) Losses resulting from theft or embezzlement. Losses resulting from theft or embezzlement of property or funds of the contracted provider or clients by the owners or employees of the contracted provider are not allowable costs.

(M) A bad debt. A bad debt allowance is a reduction in revenue resulting from unrecoverable revenue in uncollectible accounts created or acquired in the provision of contracted client care. Bad debt as an expense is unallowable.

(N) A charity or courtesy allowance. A charity allowance is a reduction in normal charges due to the indigence of the client or resident. A courtesy allowance is a reduction in charges granted as a courtesy to certain individuals, such as physicians or clergy. These allowances themselves are not costs since the costs of the services rendered are already included in the contracted provider's costs.

(18) Medicaid as payor of last resort. Medicaid is the payor of last resort. If a recipient has Medicare Part A or B benefits, other third party payor benefits, or any other benefits available those benefits must be accessed before Medicaid.

§355.104. Revenues.

A provider must report in the format specified by the Texas Health and Human Services Commission (HHSC) revenues that reflect the activity of the provider and that are directly related to the provision of contracted client care or services. A provider may not report revenues

from other programs or activities in which the contracted provider may be engaged.

(1) Revenues should be reported net of charity allowances and courtesy allowances, and bad debt expense.

(2) Any revenues received directly by the provider through a voucher or from other direct payment systems as described in §355.103(b)(17)(K) of this title (relating to Specifications for Allowable and Unallowable Costs) must not be reported on the cost report unless specifically requested by the program-specific reimbursement methodology rules, HHSC [~~department~~] procedures, or cost report instructions.

(3) For guidelines in reporting revenue received as a federal grant, refer to §355.103(b)(15) of this title [~~(relating to Specifications for Allowable and Unallowable Costs)~~] and to program- specific reimbursement methodology rules.

(4) For guidelines in offsetting revenues against certain expenses, refer to §355.103(b)(15)(D) of this title [~~(relating to Specifications for Allowable and Unallowable Costs)~~].

(5) For reporting interest income:

(A) report as interest income, with no offset to interest expense, any interest earned on funded depreciation accounts, qualified pension funds, and debt service reserve funds required by non- related party lenders; and[~~.~~]

(B) report as interest income, interest earned from all other sources, after first netting this income against interest expenses in the following sequence:

(i) interest incurred on working capital loans; and

(ii) interest incurred on all other loans except mortgage loans. Mortgage loans are not to be offset.

§355.105. General Reporting and Documentation Requirements, Methods, and Procedures.

(a) General reporting. Except where otherwise specified under this title, the Texas Health and Human Services Commission (HHSC) [~~Department of Human Services (DHS)~~] follows the requirements, methods, and procedures set forth in subsections (b)-(h) [~~(b)-(g)~~] of this section to determine costs appropriate for use in the reimbursement determination process.

(b) Cost report requirements. Unless specifically stated in program rules, each provider must submit financial and statistical information on cost report forms provided by HHSC [~~DHS~~], or on facsimiles that [~~which~~] are formatted according to HHSC [~~DHS~~] specifications and are pre-approved by HHSC [~~DHS~~] staff, or electronically in HHSC-prescribed [~~DHS-prescribed~~] format in programs where these systems are operational. The cost reports must be submitted to HHSC [~~DHS~~] in a manner prescribed by HHSC [~~DHS~~]. The cost reports must be prepared to reflect the activities of the provider while delivering contracted services during the fiscal year specified by the cost report. Cost reports or other special surveys or reports may be required for other periods at the discretion of HHSC [~~DHS~~]. Each provider is responsible for accurately completing any cost report or other special survey or report submitted to HHSC [~~DHS~~].

(1) Accounting methods. All financial and statistical information submitted on cost reports must be based upon the accrual method of accounting, except where otherwise specified in §355.102 and §355.103 of this title (relating to General Principles of Allowable and Unallowable Costs, and Specifications for Allowable and Unallowable Costs) and in the case of governmental entities operating on a cash or modified accrual basis. For cost-reporting purposes, accrued expenses must be incurred during the cost reporting period and must be paid within 180 days after the end of that cost reporting period. In situations where a contracted provider, any of its controlling entities, its parent company/sole member, or its related-party management company has filed for bankruptcy protection, the contracted provider may request an exception to the 180-day requirement for payment of accrued allowable expenses by submitting a written request to the HHSC Rate Analysis Department [~~of DHS~~]. The written request must be submitted within 60 days of the date of the bankruptcy filing or at least 60 days prior to the due date of the cost report for which the exception is being requested, whichever is later. The contracted provider will then be requested by the HHSC Rate Analysis Department to provide certain documentation, which must be provided by the specified due date. Such exceptions due to bankruptcy may be granted for reasonable, necessary and documented accrued allowable expenses that were not paid within the 180-day requirement. Accrued revenues must be for services performed during the cost reporting period and do not have to be received within 180 days after the end of that cost reporting period in order to be reported as revenues for cost-reporting purposes. Except as otherwise specified by the cost determination process rules of this chapter, cost report instructions, or policy clarifications, cost reports should be prepared consistent with generally accepted accounting principles (GAAP), which are those principles approved by the American Institute of Certified Public Accountants (AICPA). Internal Revenue Service (IRS) laws and regulations do not necessarily apply in the preparation of the cost report. In cases where cost reporting rules differ from GAAP, IRS, or other authorities, HHSC [~~DHS~~] rules take precedence for provider cost-reporting purposes.

(2) Recordkeeping and adequate documentation. There is a distinction between noncompliance in recordkeeping, which equates with unauditability of a cost report and constitutes an administrative contract violation or, for the Nursing Facility, Intermediate Care Facilities for Persons with Mental Retardation, Home and Community-based Services, Service Coordination/Targeted Case Management, Rehabilitative Services, and Texas Home Living programs [~~nursing facilities~~], may result in vendor hold, and a provider's inability to provide adequate documentation, which results in disallowance of relevant costs. Each is discussed in the following paragraphs.

(A) Recordkeeping. [~~Each provider must maintain records according to the requirements stated in 40 TAC §69.205 (Contractor's Records) and according to DHS's prescribed chart of accounts, when available.~~] Providers must ensure that records are accurate and sufficiently detailed to support the legal, financial, and other statistical information contained in the cost report. Providers must maintain all workpapers and any other records that support the information submitted on the cost report relating to all allocations, cost centers, cost or statistical line items, surveys, and schedules. HHSC [~~DHS~~] may require supporting documentation other than that contained in the cost report to substantiate reported information.

(i) For Texas Department of Human Services (DHS) contracted providers, each provider must maintain records according to the requirements stated in 40 TAC §69.205 (relating to Contractor's Records) and according to the HHSC's prescribed chart of accounts, when available.

(ii) For Texas Department of Mental Health and Mental Retardation (TDMHMR) contracted providers, contractors must keep financial and supporting documents, statistical records, and any other records pertinent to the services for which a claim or cost report is submitted to HHSC. The records and documents must be kept for a minimum of five years after the end of the reporting period. If any litigation, claims, or audit involving these records begins before the five-year period expires, the contractor must keep the records and

documents for not less than five years or until all litigation, claims, or audit findings are resolved. If a contractor is terminating business operations, the contractor must ensure that:

(I) records are stored and accessible; and

(II) someone is responsible for adequately maintaining the records.

(iii) [~~(i)~~] For nursing facilities, failure to maintain all workpapers and any other records that support the information submitted on the cost report relating to all allocations, cost centers, cost or statistical line items, surveys and schedules may result in vendor hold as specified in §355.403 of this title (relating to Vendor Hold).

(iv) For Intermediate Care Facilities for Persons with Mental Retardation, Home and Community-based Services, Service Coordination/Targeted Case Management, Rehabilitative Services, and Texas Home Living programs, failure to maintain all workpapers and any other records that support the information submitted on the cost report relating to all allocations, cost centers, cost or statistical line items, surveys and schedules may result in vendor hold.

(v) [~~(ii)~~] For all other programs, failure to maintain all workpapers and any other records that support the information submitted on the cost report relating to all allocations, cost centers, cost or statistical line items, surveys and schedules constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title (relating to Administrative Contract Violations).

(B) Adequate documentation. To be allowable, the relationship between reported costs and contracted services must be clearly and adequately documented. Adequate documentation consists of all materials necessary to demonstrate the relationship of personnel, supplies, and services to the provision of contracted client care or the relationship of the central office to the individual service delivery entity level. These materials may include, but are not limited to, accounting records, invoices, organizational charts, functional job descriptions, other written statements, and direct interviews with staff, as deemed necessary by HHSC [~~DHS~~] auditors to perform required tests of reasonableness, necessity, and allowability. [~~For the 1997 cost report only, DHS will accept documentation to retrospectively support expenses which were incurred in the provider's 1997 fiscal year prior to the adoption of these rules and reported on the provider's 1997 cost report.~~]

(i) The minimum allowable statistical duration for a time study upon which to base salary allocations is four weeks per year, with one week being randomly selected from each quarter so as to assure that the time study is representative of the various cycles of business operations. One week is defined as only those days the contracted provider is in operation during seven continuous days. The time study [~~timestudy~~] can be performed for one continuous week during a quarter, or it can be performed over five or seven individual days, whichever is applicable, throughout a quarter. The time study must be a 100% time study, accounting for 100% of the time paid the employee, including vacation and sick leave.

(ii) To support the existence of a loan, the provider must have available a signed copy of the loan contract which contains the pertinent terms of the loan, such as amount, rate of interest, method of payment, due date, and collateral. The documentation must include an explanation for the purpose of the loan and an audit trail must be provided showing the use of the loan proceeds. Evidence of systematic interest and principal payments must be available and supported by the payback schedule in the note or amortization schedule supporting the note. Documentation must also include substantiation of any costs associated with the securing of the loan, such as broker's fees, due diligence fees, lender's fees, attorney's fees, etc. To document allowable interest costs associated with related party loans, the provider is required to maintain documentation verifying the prime interest rate in accordance with §355.103(b)(8)(C) of this title [~~(relating to Specifications for Allowable and Unallowable Costs)~~] for a similar type of loan as of the effective date of the related party loan.

(iii) For ground transportation equipment, a mileage log is not required if the equipment is used solely (100%) for provision of contracted client services in accordance with program requirements in delivering one type of contracted care. However, the contracted provider must have a written policy that [~~which~~] states that the ground transportation equipment is restricted to that use and that policy must be followed. For ground transportation equipment that is used for several purposes (including for personal use) or multiple programs or across various business components, mileage logs must be maintained. Personal use includes, among other things, driving to and from a personal residence. At a minimum, mileage logs must include for each individual trip the date, the time of day (beginning and ending), driver, persons in the vehicle, trip mileage (beginning, ending, and total), purpose of the trip, and the allocation centers (the departments, programs, and/or business entities to which the trip costs should be allocated). Flight logs must include dates, mileage, passenger lists, and destinations, along with any other information demonstrating the purpose of the trips so that a relationship to contracted client care in Texas can be determined. For the purpose of comparison to the cost of commercial alternatives, documentation of the cost of operating and maintaining a private aircraft includes allowable expenses relating to the lease or depreciation of the aircraft; aircraft fuel and maintenance expenses; aircraft insurance, taxes, and interest; pilot expenses; hangar and other related expenses; mileage, vehicle rental or other ground transportation expense; and airport parking fees. Documentation demonstrating the allowable cost of commercial alternatives includes commercial airfare ticket costs at lowest fare offered (including all discounts) and associated expenses including mileage, vehicle rental or other ground transportation expense; airport parking fees; and any hotel or per diem due to necessary layovers (no scheduled flights at time of return trip).

(iv) To substantiate the allowable cost of leasing a luxury vehicle as defined in §355.103(b)(7)(C)(i) of this title [~~(relating to Specifications for Allowable and Unallowable Costs)~~], the provider must obtain at the time of the lease a separate quotation establishing the monthly lease costs for the base amount allowable for cost-reporting purposes as specified in §355.103(b)(7)(C)(i) of this title [~~(relating to Specifications for Allowable and Unallowable Costs)~~]. If the lease of the luxury vehicle occurred prior to January 1, 1997, then the provider must obtain the separate quotation prior to submitting its 1997 cost report in order for the allowable costs to be reported on the cost report. Without adequate documentation to verify the allowable lease costs of the luxury vehicle, the reported costs shall be disallowed.

(v) For adequate documentation purposes, a written description of each cost allocation method must be maintained that [~~which~~] includes, at a minimum, a clear and understandable explanation of the numerator and denominator of the allocation ratio described in words and in numbers, as well as a written explanation of how and to which specific business components the remaining percentage of costs were allocated.

(vi) To substantiate the allowable cost for staff training as defined in §355.103(b)(12)(A) of this title [~~(relating to Specifications for Allowable and Unallowable Costs)~~], the provider must maintain a description of the training verifying that the training pertained to

contracted client care-related services or quality assurance. At a minimum, a program brochure describing the seminar or a conference program with description of the workshop must be maintained. The documentation must provide a description clearly demonstrating that the seminar or workshop provided training pertaining to contracted client care-related services or quality assurance.

(vii) Documentation regarding the allocation of costs related to noncontracted services, as specified in §355.102(j)(2) of this title [~~(relating to General Principles of Allowable and Unallowable Costs)~~], must be maintained by the provider. At a minimum, the provider must maintain written records verifying the number of units of noncontracted services provided during the provider's fiscal year, along with adequate documentation supporting the direct and allocated costs associated with those noncontracted services.

(viii) Adequate documentation to substantiate legal, accounting, and auditing fees must include, at a minimum, the amount of time spent on the activity, a written description of the activity performed which clearly explains to which business component the cost should be allocated, the person performing the activity, and the hourly billing amount of the person performing the activity. Other legal, accounting, and auditing costs, such as photocopy costs, telephone costs, court costs, mailing costs, expert witness costs, travel costs, and court reporter costs, must be itemized and clearly denote to which business component the cost should be allocated.

(ix) Providers who self insure for all or part of their employee-related insurance costs, such as health insurance and workers' compensation costs, must use one of the two following methods for determining and documenting the provider's allowable costs under the cost ceilings and any carry forward as described in §355.103(b)(10)(E) of this title [~~(relating to Specifications for Allowable and Unallowable Costs)~~].

(I) Providers may obtain and maintain each fiscal year's documentation to establish what their premium costs would have been had they purchased commercial insurance for total coverage. The documentation should include, at a minimum, bids from two commercial carriers. Bids must be obtained no less frequently than every three years.

(II) If providers choose not to obtain and maintain commercial bids as described in subclause (I) of this clause, providers may claim as an allowable cost the health insurance actual paid claims incurred on behalf of the employees that does not exceed 10% of the payroll for employees eligible for receipt of this benefit. In addition, providers may claim as an allowable cost the workers' compensation actual paid claims incurred on behalf of the employees, an amount each cost report period not to exceed 10% of the payroll for employees eligible for receipt of this benefit.

(III) Providers who self insure must also maintain documentation that supports the amount of claims paid each year and any allowable costs to be carried forward to future cost-reporting periods.

(x) Providers who self insure for all or part of their coverage for nonemployee-related insurance, such as malpractice insurance, comprehensive general liability, and property insurance, must maintain documentation for each cost-reporting period to establish what their premium costs would have been had they purchased commercial insurance for total coverage. The documentation should include, at a minimum, bids from two commercial carriers. Bids must be obtained no less frequently than every three years. Providers who self insure must also maintain documentation that supports the amount of claims paid each year and any allowable costs to be carried forward to future cost-reporting periods. Governmental providers must document the existence of their claims management and risk management programs.

(xi) Regarding compensation of owners and related parties, providers must maintain the following documentation, at a minimum, for each owner or related party: a detailed written description of actual duties, functions, and responsibilities; documentation substantiating that the services performed are not duplicative of services performed by other employees; time sheets or other documentation verifying the hours and days worked; the amount of total compensation paid for these duties, with a breakdown detailing regular salary, overtime, bonuses, benefits, and other payments; documentation of regular, periodic payments and/or accruals of the compensation, documentation that the compensation is subject to payroll or self-employment taxes; and a detailed allocation worksheet indicating how the total compensation was allocated across business components receiving the benefit of these duties.

(I) Regarding bonuses paid to owners and related parties, the provider must maintain clearly defined bonus policies in its written agreements with employees or in its overall employment policy. At a minimum, the bonus policy must include the basis for distributing the bonuses including qualifications for receiving the bonus, and how the amount of each bonus is calculated. Other documentation must specify who received bonuses, whether the persons receiving bonuses are owners, related parties, or arm's-length employees, and the bonus amount received by each individual.

(II) Regarding benefits provided to owners and related parties, the provider must maintain clearly defined benefit policies in its written agreements with employees or in its overall employment policy. At a minimum, the documentation must include the basis for eligibility for each type of benefit available, who is eligible to receive each type of benefit, who actually receives each type of benefit, whether the persons receiving each type of benefit are owners, related parties, or arm's-length employees, and the amount of each benefit received by each individual.

(xii) Regarding all forms of compensation, providers must maintain documentation for each employee which clearly identifies each compensation component, including regular pay, overtime pay, incentive pay, mileage reimbursements, bonuses, sick leave, vacation, other paid leave, deferred compensation, retirement contributions, provider-paid instructional courses, health insurance, disability insurance, life insurance, and any other form of compensation. Types of documentation would include insurance policies; provider benefit policies; records showing paid leave accrued and taken; documentation to support hours (regular and overtime) worked and wages paid; and mileage logs or other documentation to support mileage reimbursements and travel allowances. For accrued benefits, the documentation must clearly identify the period of the accrual. For example, if an employee accrues two weeks of vacation during 20x1 [~~19x1~~] and receives the corresponding vacation pay during 20x3 [~~19x3~~], that employee's compensation documentation for 20x3 [~~19x3~~] should clearly indicate that the vacation pay received had been accrued during 20x1 [~~19x1~~].

(xiii) Management fees paid to related parties must be documented as to the actual costs of the related party for materials, supplies, and services provided to the individual provider, and upon which the management fees were based. If the cost to the related party includes owner compensation or compensation to related parties, documentation guidelines for those costs are specified in clause (xi) of this subparagraph. Documentation must be maintained that indicates stated objectives, periodic assessment of those objectives, and evaluation of the progress toward those objectives.

(xiv) For central office and/or home office costs, documentation must be maintained that indicates the organization of the business entity, including position, titles, functions, and compensation. For multi-state organizations, documentation must be maintained that clearly defines the relationship of costs associated with any level of management above the individual Texas contracted entity which are allocated to the individual Texas contracted entity.

(xv) Documentation regarding depreciable assets includes, at a minimum, historical cost, date of purchase, depreciable basis, estimated useful life, accumulated depreciation, and the calculation of gains and losses upon disposal.

(xvi) Providers must maintain documentation clearly itemizing their employee relations expenditures. For employee entertainment expenses, documentation must show the names of all persons participating, along with classification of the person attending, such as employee, nonemployee, owner, family of employee, client, or vendor.

(xvii) Adequate documentation substantiating the offsetting of grants and contracts from federal, state, or local governments prior to reporting either the net expenses or net revenue must be maintained by the provider. As specified in §355.103(b)(15) of this title [~~(relating to Specifications for Allowable and Unallowable Costs)~~], such offsetting is required prior to reporting on the cost report. The provider must maintain written documentation as to the purpose for which the restricted revenue was received and the offsetting of the restricted revenue against the allowable and unallowable costs for which the restricted revenue was used.

(xviii) During the course of an audit or an audit desk review, the provider must furnish any reasonable documentation requested by HHSC [~~DHS~~] auditors within ten working days of the request or a later date as specified by the auditors. If the provider does not present the requested material within the specified time, the audit or audit desk review is closed, and HHSC [~~DHS~~] automatically disallows the costs in question.

(xix) Any expense that [~~which~~] cannot be adequately documented or substantiated is disallowed. HHSC [~~DHS~~] is not responsible for the contracted provider's failure to adequately document and substantiate reported costs.

(xx) Any cost report that [~~which~~] is determined unauditable through a field audit or that [~~which~~] cannot have its costs verified through a desk review will not be used in the reimbursement determination process.

(3) Cost report and methodology certification. Providers must certify the accuracy of cost reports submitted to HHSC [~~DHS~~] in the format specified by HHSC [~~DHS~~]. Providers may be liable for civil and/or criminal penalties if the cost report is not completed according to HHSC [~~DHS~~] requirements or is determined to contain misrepresented or falsified information. Cost report preparers must certify that [~~they received reimbursement methodology rules regarding allowable and unallowable costs, that~~] they read the cost determination process rules, the reimbursement methodology rules, the cost report cover letter and cost report instructions, and that they understand that the cost report must be prepared in accordance with the cost determination process rules, the reimbursement methodology rules and cost report instructions. Not all persons who contributed to the completion of the cost report must sign the certification page. However, the certification page must be signed by a responsible party with direct knowledge of the preparation of the cost report. A person with supervisory authority over the preparation of the cost report who reviewed the completed cost report may sign a certification page in addition to the actual preparer.

(4) Requirements for cost report completion.

(A) A completed cost report must:

(i) be completed according to the cost determination rules of this chapter, program-specific allowable and unallowable rules, cost report instructions, and policy clarifications;

(ii) contain a signed, notarized, original certification page;

(iii) be legible with entries in sufficiently dark print to be photocopied;

(iv) contain all pages and schedules;

(v) be submitted on the proper cost report form;

(vi) be completed using the correct cost reporting period; and

(vii) contain a copy of the state-issued cost report training certificate, beginning with the 1997 cost report for DHS contracted providers and beginning with the 2004 cost report for TDMHMR contracted providers.

(B) Providers are required to report amounts on the appropriate line items of the cost report pursuant to guidelines established in the methodology rules, cost report instructions, and/or policy clarifications. Refer to program-specific reimbursement methodology rules, cost report instructions, and/or policy clarifications for guidelines used to determine placement of amounts on cost report line items.

(i) For nursing facilities, placement on the cost report of an amount, which was determined to be inaccurately placed, may result in vendor hold as specified in §355.403 of this title (relating to Vendor Hold).

(ii) For Intermediate Care Facilities for Persons with Mental Retardation, Home and Community-based Services, Service Coordination/Targeted Case Management, Rehabilitative Services, and Texas Home Living programs, placement on the cost report of an amount, which was determined to be inaccurately placed, may result in vendor hold.

(iii) [~~(ii)~~] For all other programs, placement on the cost report of an amount, which was determined to be inaccurately placed, constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title (relating to Administrative Contract Violations).

(C) A completed cost report must be filed by the cost report due date.

(i) For nursing facilities, failure to file a completed cost report by the cost report due date may result in vendor hold as specified in §355.403 of this title [~~(relating to Vendor Hold)~~].

(ii) For Intermediate Care Facilities for Persons with Mental Retardation, Home and Community-based Services, Service Coordination/Targeted Case Management, Rehabilitative Services, and Texas Home Living programs, failure to file a completed cost report by the cost report due date may result in vendor hold.

(iii) [~~(ii)~~] For all other programs, failure to file a completed cost report by the cost report due date constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title [~~(relating to Administrative Contract Violations)~~].

(D) HHSC [~~DHS~~] may excuse providers from the requirement to submit a cost report. Exceptions are granted by HHSC [~~DHS~~] as described by the program-specific reimbursement methodology rules. Providers who are excused from cost report submission will receive written notice from HHSC [~~DHS~~] verifying that an exception has been granted.

(5) Cost report year. Effective for reporting periods beginning on September 1, 2001 and thereafter, a provider's cost report year must coincide with the provider's fiscal year as used by the provider for reports to the Internal Revenue Service (IRS) or with the state of Texas' fiscal year, which begins September 1 and ends August 31.

(A) Providers whose cost report year coincides with their IRS fiscal year are responsible for reporting to HHSC Rate Analysis any change in their IRS fiscal year and subsequent cost report year by submitting written notification of the change to HHSC Rate Analysis along with supportive IRS documentation. HHSC Rate Analysis must be notified of the provider's change in IRS fiscal year no later than 30 days following the provider's receipt of approval of the change from the IRS.

(B) Providers who chose to change their cost report year from their IRS fiscal year to the state fiscal year or from the state fiscal year to their IRS fiscal year must submit a written request to HHSC Rate Analysis by August 1 of state fiscal year in question.

(6) Failure to report allowable costs. HHSC [~~DHS~~] is not responsible for the contracted provider's failure to report allowable costs, however any omitted costs which are identified during the desk review or audit process will be included in the cost report or brought to the attention of the provider to correct by submitting an amended cost report.

(c) Cost report due date.

(1) Providers must submit cost reports to HHSC Rate Analysis [~~DHS~~] no later than 90 days following the end of the provider entity's fiscal year or 90 days from the transmittal date of the cost report forms, whichever due date is later.

(2) HHSC [~~DHS~~] may grant extensions of due dates for good cause. A good cause is defined as a circumstance which the provider could not reasonably be expected to control and for which adequate advance planning and organization would not have been of any assistance. Providers must submit requests for extensions in writing to HHSC Rate Analysis [~~DHS~~]. Requests for extensions must be received by HHSC Rate Analysis [~~DHS~~] prior to the cost report due date. HHSC [~~DHS~~] staff will respond in writing to requests within 15 days of receipt.

(3) HHSC [~~DHS~~] may require additional financial and other statistical information, in the form of special surveys or reports, to ensure the fiscal integrity of the program. Providers must submit such additional information and/or special surveys or reports to HHSC Rate Analysis [~~DHS~~] upon request by the date specified by HHSC Rate Analysis [~~DHS~~] in its transmittal or cover letter to the special survey, report, or request for additional information.

(d) Amended cost report due dates. HHSC [~~DHS~~] accepts submittal of provider- initiated or HHSC-requested [~~DHS-requested~~] amended cost reports as follows.

(1) Provider-initiated amended cost reports must be received no later than the date in subparagraph (A) or (B) of this paragraph, whichever occurs first. Amended cost reports received after the required date have no effect on the reimbursement determination. Amended cost report information that cannot be verified will not be used in reimbursement determinations. Provider-initiated amended cost reports must be received no later than the earlier of:

(A) 60 days after the original due date of the cost report; or

(B) [~~for Medicaid programs,~~] 30 days prior to the public hearing on proposed reimbursement or reimbursement parameter amounts [~~; and for non-Medicaid programs 30 days prior to the administrative closing of the cost report database for reimbursement determination~~].

(2) HHSC-required [~~DHS-required~~] amendments to the cost reports must be received on or before the date specified by HHSC [~~the DHS~~] in its request for the amended cost report. Failure to submit the requested amendment to the cost report by the due date is considered a failure to complete a cost report as specified in subsection (b)(4)(C) of this section.

(e) Field audit standards. HHSC [~~DHS~~] performs cost report field audits in a manner consistent with Government Auditing Standards issued by the Comptroller General of the United States.

(f) Cost of out-of-state audits. As specified in §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), HHSC [~~DHS~~] conducts desk reviews of all cost reports not selected for field audit. HHSC [~~DHS~~] also conducts field audits of provider records and cost reports. Although the number of field audits performed each year may vary, HHSC [~~DHS~~] seeks to maximize the number of field audited cost reports available for use in its cost projections. Whenever possible, all the records necessary to verify information submitted to HHSC [~~DHS~~] on cost reports, including related party transactions and other business activities engaged in by the provider, must be accessible to HHSC [~~DHS~~] audit staff within the state of Texas within fifteen working days of field audit or desk review notification. When records are not available to HHSC [~~DHS~~] audit staff within the state of Texas, the provider must pay the actual costs for HHSC [~~DHS~~] staff to travel and review the records out-of-state. HHSC [~~DHS~~] must be reimbursed for these costs within 60 days of the request for payment.

(1) For nursing facilities, failure to reimburse HHSC [~~DHS~~] for these costs within 60 days of the request for payment may result in vendor hold as specified in §355.403 of this title [~~(relating to Vendor Hold)~~].

(2) For Intermediate Care Facilities for Persons with Mental Retardation, Home and Community-based Services, Service Coordination/Targeted Case Management, Rehabilitative Services, and Texas Home Living programs, failure to reimburse HHSC for these costs within 60 days of the date of the request for payment may result in vendor hold.

(3) [~~(2)~~] For all other programs, failure to reimburse HHSC [~~DHS~~] for these costs within 60 days of the request for payment constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title [~~(relating to Administrative Contract Violations)~~].

(g) Public hearings.

(1) Uniform reimbursements. For [~~Medicaid~~] programs where reimbursements are uniform by class of service and/or provider type, [~~DHS and the~~] HHSC will hold a public hearing on proposed reimbursements before [~~the~~] HHSC approves reimbursements. The purpose of the hearing is to give interested parties an opportunity to comment on the proposed reimbursements. Notice of the hearing will be provided to the public. The notice of the public hearing will

identify the name, address, and telephone number to contact for the materials pertinent to the proposed reimbursements. At least ten working days before the public hearing takes place, material pertinent to the proposed statewide uniform [~~Medicaid~~] reimbursements will be made available to the public. This material will include the proposed reimbursements, the inflation adjustments used to determine them, and the impact on reimbursements of the major cost limits. This material will be furnished to anyone who requests it. After the public hearing, if negative comments are received, a summary of the comments made during the public hearing will be presented to [~~the~~] HHSC.

(2) Contractor-specific reimbursements. For [~~Medicaid~~] programs in which reimbursements are contractor-specific, [~~DHS and the~~] HHSC will hold a public hearing on the reimbursement determination parameter dollar amounts (e.g., ceilings, floors, or program reimbursement formula limits) before [~~the~~] HHSC approves parameter dollar amounts. The purpose of the hearing is to give interested parties an opportunity to comment on the proposed reimbursement parameter dollar amounts. Notice of the hearing will be provided to the public. The notice of the public hearing will identify the name, address, and telephone number to contact for the materials pertinent to the proposed reimbursement parameter dollar amounts. At least ten working days before the public hearing takes place, material pertinent to the proposed reimbursement parameter dollar amounts will be made available to the public. This material will include the proposed reimbursement parameter dollar amounts, the inflation adjustments used to determine them, and the impact on the reimbursement parameter dollar amounts of the major cost limits. This material will be furnished to anyone who requests it. After the public hearing, if negative comments are received, a summary of the comments made during the public hearing will be presented to [~~the~~] HHSC.

(h) Insufficient cost data. If an insufficient number of accurate, full-year cost reports is submitted, as would occur with a new program, or if there are insufficient available data, as would occur in changes in program design, changes in the definition of units of service or changes in regulations or program requirements, reimbursements may be based on a pro- forma analysis by HHSC [~~DHS~~] staff. A pro-forma analysis is defined as an item-by- item, or classes-of-items, calculation of the reasonable and necessary expenses for a provider to operate. The analysis may involve assumptions about the salary of an administrator or program director, staff salaries, employee benefits and payroll taxes, building depreciation, mortgage interest, contracted client care expenses, and other building or administration expenses. To determine the cost per unit of service, HHSC [~~DHS~~] adds all the pro- forma expenses and divides the total by the estimated number of units of service that a fully operational provider is likely to provide. The pro-forma analysis is based on available information that is determined to be sufficient, accurate, and reliable by HHSC [~~DHS~~], including valid cost report data and survey data. The pro-forma analysis is conducted in a way that ensures that the resultant reimbursements are sufficient to support the requirements of the contracted program. When HHSC [~~DHS~~] staff determine that sufficient and reliable cost report data have become available, the pro-forma reimbursement determination may be replaced with a process based on cost reports.

§355.106. Basic Objectives and Criteria for Audit and Desk Review of Cost Reports.

(a) The Texas Health and Human Services Commission (HHSC) [~~Department of Human Services (DHS)~~] conducts desk reviews and field audits of provider cost reports in order to ensure that all financial and statistical information reported in the cost reports conforms to all applicable rules and instructions. Cost reports must be completed according to instructions and rules in accordance with §355.105(b)(4) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures). HHSC [~~DHS~~] may require supporting documentation other than that contained in the cost report to substantiate reported information.

(1) For nursing facilities, failure to complete cost reports according to instructions and rules in accordance with §355.105(b)(4) of this title [~~(relating to General Reporting and Documentation Requirements, Methods, and Procedures)~~] may result in vendor hold as specified in §355.403 of this title [~~40 TAC §19.2703~~] (relating to Vendor Hold).

(2) For Intermediate Care Facilities for Persons with Mental Retardation, Home and Community-based Services, Service Coordination/Targeted Case Management, Rehabilitative Services, and Texas Home Living programs, failure to complete cost reports according to instructions and rules may result in vendor hold.

(3) [~~(2)~~] For all other programs, failure to complete cost reports according to instructions and rules in accordance with §355.105(b)(4) of this title [~~(relating to General Reporting and Documentation Requirements, Methods, and Procedures)~~] constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title (relating to Administrative Contract Violations).

(b) The basic objective of audits and desk reviews is to verify that each provider's cost report:

(1) displays financial and other statistical information in the format required by HHSC [~~DHS~~];

(2) reports expenses in conformity with HHSC's [~~DHS's~~] lists of allowable and unallowable costs;

(3) follows generally accepted accounting principles, except as otherwise specified in HHSC's [~~DHS's~~] lists of allowable and unallowable costs, and other pertinent rules or as otherwise permitted in the case of governmental entities operating on a cash or modified accrual basis; and

(4) is completed in accordance with each program's cost report instructions and rules.

(c) HHSC [~~DHS~~] verifies the information specified in subsection (b) of this section by:

(1) comparing each provider's reported costs to:

(A) past patterns of expenditures for similar services;

(B) the results of previous field audits;

(C) normal operating cost relationships; and

(D) industry average costs, when available;

(2) reviewing each provider's reported costs for:

(A) reported unallowable costs;

(B) omitted allowable costs, if discovered during the course of the audit or desk review; and

(C) understated or overstated allowable costs, if discovered during the course of the audit or desk review;

(3) checking for completion of required information;

(4) checking the format for proper cost classification;

(5) checking for mathematical accuracy; and

(6) adjusting the cost report, or notifying the provider that research and/or corrections are required.

(d) In accordance with methodology rules, cost report instructions or policy clarifications, HHSC [~~DHS~~] may reassign allowable costs to the appropriate line items of a cost report.

(e) HHSC [~~DHS~~] seeks to maximize the number of field audited cost reports available for use in its cost projections. In addition to cost reports selected for field audit based upon risk analysis, other specific criteria and random sampling, HHSC [~~DHS~~] may conduct field audits of cost reports that show unusual fluctuations or trends in costs or other statistics. HHSC [~~DHS~~] may also conduct field audits when desk reviews are insufficient to verify the accuracy of reported costs.

(f) For cost reports pertaining to providers' fiscal years ending in calendar year 1997 and subsequent years, each provider entity or its designated agent(s) must allow access to any and all records necessary to verify information submitted to HHSC [~~DHS~~] on cost reports. This requirement includes records pertaining to related party transactions or other business activities engaged in by the provider.

(1) For nursing facilities, failure to allow access to any and all records necessary to verify information submitted to HHSC [~~DHS~~] on cost reports may result in vendor hold as specified in §355.403 of this title (relating to Vendor Hold).

(2) For Intermediate Care Facilities for Persons with Mental Retardation, Home and Community-based Services, Service Coordination/Targeted Case Management, Rehabilitative Services, and Texas Home Living programs, failure to allow access to any and all records necessary to verify information submitted to HHSC on cost reports may result in vendor hold.

(3) [~~(2)~~] For all other programs, failure to allow access to any and all records necessary to verify information submitted to HHSC [~~DHS~~] on cost reports constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title [~~(relating to Administrative Contract Violations)~~].

(g) A contracted provider may request an informal review, and subsequently an appeal, of a desk review or field audit disallowance in accordance with §355.110 of this title (relating to Informal Reviews and Formal Appeals).

§355.107. Notification of Exclusions and Adjustments.

(a) The Texas Health and Human Services Commission (HHSC) [~~Department of Human Services (DHS)~~] notifies providers of exclusions and adjustments to reported expenses made during HHSC's [~~DHS's~~] desk reviews and field audits of cost reports. HHSC [~~DHS~~] mails notices of desk-review exclusions and adjustments within 15 working days after finalization of the desk-review by HHSC [~~DHS~~] auditors. The notice consists of a letter to the provider and desk-review adjustment sheet(s) that specifies:

(1) the line-items on the cost report that have been adjusted or excluded;

(2) the amount of each adjustment or exclusion; and

(3) the principal reason for each adjustment or exclusion.

(b) HHSC [~~DHS~~] also furnishes providers with written reports of the results of field audits. HHSC [~~DHS~~] mails each field audit report within 30 days after the final exit interview with the provider. An exit interview is final when HHSC [~~DHS~~] audit staff have received, reviewed, and analyzed all documentation from the provider pertinent to the scope of the audit. The field audit report consists of a professional report prepared by HHSC [~~DHS~~] audit staff to enumerate the results of a field audit. Each field audit report includes a specification of:

(1) cost report line-items that have been adjusted or excluded;

(2) the amount of each adjustment or exclusion; and

(3) the principal reason for each adjustment or exclusion.

(c) A provider may also submit a written request for HHSC [~~DHS~~] to provide additional information about exceptions and adjustments to the provider's cost report, including citations of the laws or regulations that constitute the grounds for the exceptions and adjustments. HHSC [~~DHS~~] must comply with such requests in writing within 30 calendar days.

§355.108. Determination of Inflation Indices.

(a) Function and types of indices. In order to account for cost inflation between the reporting period and the prospective reimbursement period, the Texas Health and Human Services Commission (HHSC) [~~Department of Human Services (DHS)~~] makes adjustments to allowable costs based on inflation factors or multipliers calculated from appropriate inflation indices. HHSC [~~DHS~~] retains the discretion, on a program- by-program [~~program by program~~] basis, to exercise the following options in order to obtain appropriate inflation indices.

(b) Contracting for inflation index development. HHSC [~~DHS~~] may contract with a reputable and experienced independent professional firm to develop appropriate optional indices for Texas. If HHSC [~~DHS~~] obtains such indices under contract, the agency retains the option, on a program-by-program [~~program by program~~] basis, of utilizing these indices and/or those described in the remainder of this section, either separately or in combination, for reimbursement determination purposes.

(c) Cost inflation indices. HHSC [~~DHS~~] may utilize a general cost inflation index obtained from a reputable independent professional source and, where HHSC [~~DHS~~] deems appropriate and pertinent data are available, develop and/or utilize several item-specific and program-specific inflation indices, as follows.

(d) General cost inflation index. HHSC [~~DHS~~] uses the Personal Consumption Expenditures (PCE) chain-type price index as the general cost inflation index. The PCE is a nationally recognized measure of inflation published by the Bureau of Economic Analysis of the U.S. Department of Commerce. To project or inflate costs from the reporting period to the prospective reimbursement period, HHSC [~~DHS~~] uses the lowest feasible PCE forecast consistent with the forecasts of nationally recognized sources available to HHSC [~~DHS~~] at the time proposed reimbursement is prepared for public dissemination and comment.

(e) Item-specific and program-specific inflation indices. HHSC [~~DHS~~] may use specific indices in place of the general cost inflation index specified in subsection (d) of this section when appropriate item-specific or program-specific cost indices are available from HHSC [~~DHS~~] cost reports or other surveys, other Texas state agencies or independent private sources, or nationally recognized public agencies or independent private firms, and HHSC [~~DHS~~] has determined that these specific indices are derived from information that adequately represents the program(s) or cost(s) to which the specific index is to be applied. For example, HHSC [~~DHS~~] may use specific indices pertaining to cost items such as payroll taxes, key professional and non-professional staff wages, and other costs subject to specific federal or state limits. The specific indices that HHSC [~~DHS~~] may use include the following.

(1) Federal Insurance Contributions Act (FICA) or Social Security taxes, including Old Age, Survivors, and Disability Insurance (OASDI) and Medicare taxes, are set by Federal statute. The inflation index for these taxes is the average tax rate, or average tax per payroll

dollar, during the prospective reimbursement period divided by the average tax rate, or average tax per payroll dollar, during each provider's reporting period. If tax rates for the prospective reimbursement period are not available at the time proposed reimbursements are prepared for public dissemination and comment, the most recent known rates are assumed to remain in effect.

(2) Costs associated with workers' compensation, e.g., traditional insurance coverage, risk pool participation, and direct claims settlement costs, vary widely among individual providers. Even for those subscribing to traditional insurance, there is no uniform "rate" per payroll dollar. Consequently, these costs are inflated at the same rate as applicable employee wages.

(3) Except where indicated otherwise for specific programs, the unemployment tax inflation index is based on unemployment insurance payroll taxes in accordance with the Federal Unemployment Tax Act (FUTA) and the Texas Unemployment Compensation Act (TUCA) rates obtained from the Texas Workforce [Employment] Commission [(TEC)]. Because the TUCA component of the tax rate may be contractor-specific, HHSC [DHS] obtains the average effective rates for the lowest available Standard Industrial Classification (SIC) code pertinent to each program. The unemployment tax inflation index is the average tax rate during the prospective reimbursement period divided by the average tax rate during each provider's reporting period. If either the FUTA or TUCA rates for the prospective rate period are not available at the time proposed reimbursements are prepared for public dissemination and comment, the most recent known rates are assumed to remain in effect. When changes occur in such factors as payroll limits to which tax rates apply, HHSC [DHS] may make appropriate adjustments in projections to reflect new limits and related factors affecting the impact of new limits, such as employee turnover rates.

(4) Inflation factors for key professional and/or paraprofessional staff wages and salaries, e.g., nurses, nurse aides and attendants, are based on wage survey data pertaining to specific types of professional and paraprofessional staff in Texas when HHSC [DHS] has determined that reliable data of this kind are available for specific or comparable programs. Projections from the cost reporting period to the reimbursement period are based on discernible trends or experience as evidenced by the most recent reliable data available at the time proposed reimbursement is prepared for public dissemination and comment, and take into consideration economic conditions and regulatory changes which may be reasonably anticipated for the reimbursement period. When HHSC [DHS] has determined that reliable wage and salary data pertaining to specific types of staff in Texas are unavailable for specific or comparable programs, inflation factors for professional and/or paraprofessional staff are based on the lowest feasible forecast of the PCE. Professional and/or paraprofessional wage and benefit inflation rates for state employees are based on state employee wage and salary increases determined by the Texas Legislature.

(5) For the Medicaid nursing facility program, determination of adjustments to historical costs of fixed capital assets are consistent with requirements of the federal Omnibus Budget Reconciliation Act of 1984 (OBRA 1984) and Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA 1985). For each program, one of two options is used.

(A) Reimbursement is in the form of a fixed capital asset use fee component of the overall reimbursement, based on facility appraisals, as described in program-specific reimbursement methodology rules.

(B) Reimbursement for fixed capital asset costs is calculated based on historical costs included in the reimbursement component designated in program-specific reimbursement methodology rules. The index used to inflate lease expense and to adjust the allowable depreciation base of assets which have undergone ownership changes is one-half the All-item Urban Consumer Price Index (CPI-U).

§355.109. Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs.

(a) In conducting reimbursement reviews for adjustments the Texas Health and Human Services Commission [Department of Human Services (DHS)] takes into consideration changes in laws, rules, regulations, policies, guidelines, or economic factors which will have a demonstrable material impact on most contracted providers' costs of providing services meeting federal and state standards.

(1) HHSC [DHS] may recommend adjustments to reimbursement when federal or state laws, rules, regulations, policies, or guidelines are adopted, promulgated, judicially interpreted, or otherwise changed in ways that affect allowable costs. The law, rule, regulation, policy, or guideline change must result in necessary changes in allowable costs that:

(A) affect most, if not all, contracted providers; and

(B) require contracted providers to take definitive action to incur additional allowable costs not included in the cost data base used to determine reimbursements and which would not otherwise be covered in reimbursements.

(2) HHSC [DHS] may recommend adjustments to reimbursement when it can be clearly demonstrated that changes in economic factors will result in changes in allowable costs. The changes in economic factors must result in changes in allowable costs that:

(A) affect most, if not all, providers; and

(B) are allowable cost changes that the providers have little or no control over and are allowable costs that are not included in the cost data base used to determine reimbursements and which would not otherwise be covered in reimbursements.

(b) HHSC [DHS] may recommend adjustments to reimbursement for the reasons stated in subsection (a)(1) of this section at the earliest feasible opportunity in order for the adjustment to become effective on the effective date of the federal or state laws, rules, regulations, policies, or guidelines. In the case of Medicaid state plan program reimbursements, the adjustments will not be effective until after the federal requirements for notice are met.

(c) HHSC [DHS] may recommend adjustments to reimbursement when federal or state funding is changed in ways that affect the available funding for programs.

§355.110. Informal Reviews and Formal Appeals.

(a) General provisions.

(1) Definitions. The following words or terms, when used in this section, [shall] have the following meanings [meaning], unless the context clearly indicates otherwise.

(A) Formal appeal--An administrative hearing requested by an interested party under subsection (d) of this section and conducted in accordance with procedures described at 40 TAC §§79.1601-79.1610 (relating to Formal Appeals) for appeals related to Texas Department of Human Services (DHS) contracted providers and at 25 TAC Chapter 411, Subchapter D (relating to Administrative Hearings of the Department in Contested Cases) for appeals related to Texas Department of Mental Health and Mental Retardation (TDMHMR) contracted providers.[;]

(B) Informal review--The informal reexamination of an action or determination by the Texas Health and Human Services Commission (HHSC) under this chapter requested by an interested party and conducted in accordance with subsection (c) of this section.

(C) Interested party--A DHS or TDMHMR contracted [~~Texas Department of Human Services (DHS)-contracted~~] provider.

(2) Standing to file informal reviews or formal appeals. Only an interested party has standing to file for an informal review or formal appeal under this section.

(3) Subject matter of informal reviews and formal appeals. An interested party may request an informal review or formal appeal regarding an action or determination under §355.102 of this title (relating to General Principles of Allowable and Unallowable Costs), §355.103 of this title (relating to Specifications for Allowable and Unallowable Costs), §355.104 of this title (relating to Revenues), and §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods and Procedures), or program-specific allowable or unallowable costs, taken specifically in regard to the interested party.

(b) Separation of informal reviews and formal appeals from the reimbursement determination process.

(1) The filing of a request for an informal review or formal appeal under this section does not stay or delay implementation of reimbursement adopted by HHSC in accordance with the requirements of this chapter.

(2) Closure of cost report databases used in the reimbursement determination process and application of results of pending review or appeal. To facilitate the timely and efficient calculation of reimbursement amounts, HHSC closes cost report databases used in the reimbursement determination process prior to the proposal of reimbursement amounts.

(A) Impact on database of pending informal review or formal appeal. If an informal review is pending at the time the database is closed, the database shall include the interested party's cost report data including any adjustments made either in the desk review or field audit. If a formal appeal is pending at the time the database is closed, the database shall include the interested party's cost report data including any adjustments required as a result of the informal review.

(B) Uniform reimbursement.

(i) For programs where reimbursement is uniform by class of service and/or provider type, the cost report database used in reimbursement determination is closed six weeks prior to the public hearing on the proposed reimbursement that is based on the cost report database.

(ii) If an informal review or formal appeal is pending at the time the cost report database is closed, the results of the informal review or formal appeal shall be applied during the next reimbursement determination cycle, if applicable.

(C) Contractor-specific reimbursement.

(i) For programs where reimbursement is contractor-specific the cost report database is closed ten weeks prior to the end of the reimbursement determination cycle.

(ii) If an informal review or formal appeal is pending at the time the cost report database is closed, the results of the informal review or formal appeal shall be applied to the interested party's payment retroactively to the beginning of the current reimbursement determination cycle. The results of the informal review or formal appeal shall not be applied to the cost report database as a whole or to any other reimbursement amounts influenced by the cost report database as a whole until the next reimbursement determination cycle, if applicable.

(c) Informal review.

(1) An interested party who disputes an action or determination under this chapter may request an informal review under this section. The purpose of an informal review is to provide for the informal and efficient resolution of the matters in dispute. An informal review is not a formal administrative hearing, but is a prerequisite to obtaining a formal administrative hearing and is conducted according to the following procedures:

(A) HHSC Rate Analysis must receive a written request for an informal review by hand delivery, United States (U.S.) mail, or special mail delivery no later than 30 calendar days from the date on the written notification of the adjustments. If the 30th calendar day is a weekend day, national holiday, or state holiday, then the first business day following the 30th calendar day is the final day the receipt of the written request will be accepted. HHSC Rate Analysis will extend this deadline if it receives a written request for the extension by hand delivery, U.S. mail, or special mail delivery no later than 30 calendar days from the date of the written notice of adjustments. The extension gives the requester a total of 45 calendar days from the date of the written notice of adjustment to file a request for an informal review. If the 45th calendar day is a weekend day, national holiday, or state holiday, then the 45th day is considered the next business day following the 45th calendar day. A request for an informal review or extension that is not received by the stated deadline will not be accepted.

(B) An interested party must, with its request for an informal review, submit a concise statement of the specific actions or determinations it disputes, its recommended resolution, and any supporting documentation the interested party deems relevant to the dispute. It is the responsibility of the interested party to render all pertinent information at the time of its request for an informal review.

(C) The written request for the informal review or extension must be signed by an individual legally responsible for the conduct of the interested party, such as the sole proprietor, a partner, a corporate officer, an association officer, a governmental official, a limited liability company member, a person authorized by the applicable DHS Form 2031 for the interested party on file at the time of the request, or a legal representative for the interested party. The administrator or director of the facility or program is not authorized to sign the request unless the administrator or director holds one of these positions. A request for an informal review that is not signed by an individual legally responsible for the conduct of the interested party will not be accepted.

(2) On receipt of a request for informal review:

(A) The lead staff member coordinates the review of the information submitted by the interested party. Staff may request additional information from the interested party, which must be received in writing by the lead staff member no later than 14 calendar days from the date the interested party receives the written request for additional information. If the 14th calendar day is a weekend day, national holiday, or state holiday, then the first business day following the 14th calendar day is the final day the receipt of the additional information will be accepted. Information received after 14 calendar days may not be used in the panel's written decision unless the interested party receives written approval of the lead staff member to submit the information after 14 calendar days. A request for an extension to the 14 calendar day due date must be received by HHSC Rate Analysis prior to the 14th calendar day.

(B) Within 30 calendar days of the date a written request for informal review that complies with paragraphs (1) and (2) of this

subsection is received or the date additional requested information is due or received, whichever is later [sooner], the lead staff member will send the interested party its written decision by certified mail, return receipt requested. If the 30th calendar day is a weekend day, national holiday, or state holiday, then the first business day following the 30th calendar day is the final day by which the written decision must be sent.

(d) Administrative hearings. An interested party who disagrees with the results of an informal review conducted under subsection (c) of this section may file a formal appeal of the review.

(1) For DHS contracted providers: The Hearings Department of the Texas Department of Human Services, Mail Code W-613, P.O. Box 149030, Austin, Texas 78714- 9030, must receive the written request for a formal appeal from the interested party within 15 calendar days after receiving the written decision as specified in subsection (c) of this section. The written request for a formal appeal must state the basis of the appeal of the adverse action and include a legible copy of the written decision from the informal review referenced in subsection (c)(2)(B) of this section. The formal appeal is limited to the issues that were considered in the informal review process. The information from the interested party is limited to the pertinent information considered in the informal review process. Formal appeals are conducted in accordance with the provisions of 40 TAC §§79.1601-79.1610. If there is a conflict between the applicable section of 40 TAC Chapter 79 (relating to Legal Services) and the provisions of this chapter, the provisions of this chapter prevail.

(2) For TDMHMR contracted providers: The Hearings Office of the Texas Department of Mental Health Mental Retardation, P.O. Box 12668, Austin, Texas 78711- 2668, must receive the written request for a formal appeal from the interested party within 15 calendar days after the interested party receives the written decision as specified in subsection (c) of this section. The written request for a formal appeal must state the basis of the appeal of the adverse action and include a legible copy of the written decision from the informal review referenced in subsection (c)(2)(B) of this section. The formal appeal is limited to the issues that were considered in the informal review process. The information from the interested party is limited to the pertinent information considered in the informal review process. Formal appeals are conducted in accordance with the provisions 25 TAC Chapter 411, Subchapter D (relating to Administrative Hearings of the Department in Contested Cases). If there is a conflict between the applicable section of 25 TAC Chapter 411, Subchapter D, and the provisions of this chapter, the provisions of this chapter prevail.

(e) Because the formal appeal is limited to issues considered in the informal review process, an informal review request that does not comply with subsections (c)(1)(A), (c)(1)(C), and (c)(2)(A) of this section is not subject to further appeal under either 40 TAC §§79.1601-79.1610 or 25 TAC Chapter 411, Subchapter D.

§355.111. Administrative Contract Violations.

The Texas Health and Human Services Commission (HHSC) [Department of Human Services (DHS)] may take the following actions for administrative contract violations.

(1) HHSC [DHS] grants the following compliance periods for administrative contract violations:

(A) For failure to submit a cost report by the due date, HHSC [DHS] grants the provider a compliance period of no more than 15 calendar days.

(B) For all other administrative contract violations, HHSC [DHS] grants the provider a compliance period of no more than 30 calendar days to correct a contract violation. At the end of the compliance period, if HHSC [DHS] determines that a contract violation is not corrected, but determines that the provider has made substantial progress toward correcting the contract violation, HHSC [DHS] may grant an additional one-time extension period of up to 15 calendar days.

(2) If the contract violation is not corrected within the compliance period, HHSC [DHS] imposes vendor hold on payments to the provider.

(3) If a contract violation is not corrected within 60 days from the date the provider is placed on vendor hold, HHSC [DHS] may cancel the provider's contract on the 61st day. A provider may request an appeal hearing of the contract cancellation. Formal [DHS conducts formal] appeals are conducted in accordance with the provisions of 40 TAC §§79.1601-79.1610 [§§79.1601-79.1614] (relating to Formal Appeals). If there is a conflict between the applicable section of 40 TAC Chapter 79 (relating to Legal Services) and the provisions of this chapter, the provisions of this chapter prevail. If the provider appeals the contract cancellation by HHSC [DHS] and the adverse action is sustained by an administrative law judge or judicial proceeding, the effective date of the contract cancellation is the date specified in the notice of contract cancellation. Unless otherwise specifically provided for, HHSC [DHS] makes no payment for services provided by the provider after the effective date of the provider's contract cancellation. HHSC [DHS] may continue payments for no more than 30 calendar days from the date DHS cancels or fails to renew a provider's contract if HHSC [DHS] determines that:

(A) reasonable efforts are being made to transfer clients to another provider or to alternate care; and

(B) additional time is needed to effect an orderly transfer of the clients.

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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Steve Aragón
General Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 438-3734

1 TAC §355.114

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.114, concerning the Consumer Directed Services Payment Option, in its Medicaid Reimbursement Rates chapter. The purpose of the amendment is to lower the minimum spending requirement that a consumer must spend on attendant compensation to reflect the lower spending requirement implemented in the attendant compensation rate enhancement. Since the spending requirement for the consumer directed services payment option is based on the attendant compensation rate enhancement spending requirement, the proposed reduction in the spending requirement is being made so as to match the spending requirement reduction adopted in rule for the attendant compensation rate enhancement.

Tom Suehs, Deputy Executive Commissioner for Financial Services, has determined that, for the first five-year period the proposed section is in effect, there is no fiscal implication for state

government as a result of enforcing or administering the section. There are no fiscal implications for local governments as a result of enforcing or administering the section.

There is no adverse economic effect on small or micro businesses, or on businesses of any size, as a result of enforcing or administering the section, because the proposal increases flexibility for providers and does not add any new requirements on businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section. There is no anticipated effect on local employment in geographic areas affected by the section.

Ed White, Director for Rate Setting and Forecasting, has determined that, for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section is that the consumer will be allowed more flexibility in spending more of the rate on other costs if necessary.

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environment exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environment exposure.

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

Questions about the content of this proposal may be directed to Carolyn Pratt at (512) 491-1359 in the Texas Health and Human Services Commission's Rate Setting and Forecasting Department. Written comments on the proposal may be submitted to Ms. Pratt via facsimile at (512) 491-1998 or mail to Texas Health and Human Services Commission, Rate Setting and Forecasting, Mail Code H-400, 1100 West 49th Street, Austin, TX 78756-3101, within 30 days of publication in the *Texas Register*. For further information regarding the proposal or to make the proposal available for public review, contact local offices of the Texas Department of Human Services or Carolyn Pratt at (512) 491-1359 in HHSC's Rate Setting and Forecasting Department.

The amendment is proposed under the Texas Government Code, §531.033, which authorizes the commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.021(b), which established HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The amendment implements the Government Code, §§531.033 and 531.021(b).

§355.114. Consumer Directed Services Payment Option.

(a) The consumer directed services (CDS) payment option is made available to eligible consumers in the Community Based Alternatives (CBA), Community Living Assistance and Support Services (CLASS), Deaf-Blind Multiple Disabilities, Medically Dependent Children, and Primary Home Care (PHC) programs.

(b) The sum of the payment rate for the contracted CDS agency and the payment rate for the consumer participating in CDS must not exceed the payment rate made to contracted providers in these programs. The payment rate for the contracted CDS agency is determined by modeling the estimated administrative cost to carry out the responsibilities of the CDS agency. The payment rate for the consumer is determined by subtracting the contracted CDS payment rate from the payment rate made to contracted providers in these programs.

(c) The CDS payment rate is paid to the CDS agency as a percentage of the amount expended and claimed to the Texas Department of Human Services.

(d) Consumers must expend on the average hourly compensation of attendants, an amount equal to the calculated attendant cost component of the consumer payment rate per hour of service divided by 1.10 [~~1.07~~]. Compensation includes salaries and wages, payroll taxes, workers' compensation, employee benefits/insurance, and mileage reimbursement.

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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Steve Aragón
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SUBCHAPTER C. REIMBURSEMENT METHODOLOGY FOR NURSING FACILITIES

1 TAC §355.404

The Texas Health and Human Services Commission (HHSC) proposes new §355.404 concerning the reimbursement methodology for nursing facilities, in its Medicaid Reimbursement Rates chapter. The rule provides for a supplemental payment for qualifying non-state government-owned or operated nursing facilities. The supplemental payment shall not exceed the difference between the Medicaid payment and the federal upper payment limit established in 42 CFR 447.272 for the class of non-state government-owned or operated nursing facilities. The rule describes the calculation of the upper payment limit and the calculation of the supplemental payment amount.

Tom Suehs, Deputy Executive Commissioner for Financial Services, has determined that, for the first five-year period the proposed section is in effect, there are fiscal implications for state government as a result of enforcing or administering the section. The effect on state government for first five-year period the rule is in effect is an estimated cost of $6,156,510 for state fiscal year 2004 and $7,009,498 for each year of state fiscal years 2005 through 2008. The proposed section is estimated to result in increased federal matching funds of $10,559,509 for state fiscal year 2004 and in increased federal matching funds of $10,747,404 for each year of state fiscal years 2005 through 2008. There are no fiscal implications for local governments as a result of enforcing or administering the section. There may be a minimal additional cost to local governments of qualifying facilities to administer this rule.

Ed White, Director for Rate Setting and Forecasting, has determined that, for each year of the first five years the section is in

effect, the public benefit anticipated as a result of enforcing the section is that the unique role that non-state government-owned or operated nursing facilities play in the Texas healthcare delivery system for the Medicaid population will be recognized and that Medicaid payments will be commensurate with Medicare payments and/or Medicare payment principles for this class of facilities. There is no adverse economic effect on small or micro businesses, or on businesses of any size, as a result of enforcing or administering the section, because the section imposes no additional requirements on businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section. There is no anticipated effect on local employment in geographic areas affected by this section.

Questions about the content of this proposal may be directed to Carolyn Pratt at (512) 491-1359 in the Texas Health and Human Services Commission's Rate Analysis Department. Written comments on the proposal may be submitted to Ms. Pratt via facsimile at (512) 491-1998 or mail to Texas Health and Human Services Commission, Rate Analysis, Mail Code H-400, 1100 West 49th Street, Austin, TX 78756-3101, within 30 days of publication in the *Texas Register*.

Under §2007.003(b) of the Government Code, HHSC has determined that Chapter 2007 of the Government Code does not apply to this rule. Accordingly, HHSC is not required to complete a takings impact assessment regarding this rule.

The new rule is proposed under the Texas Government Code, §531.033, which authorizes the commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.021(b), which established HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The new rule implements the Government Code, §§531.033 and 531.021(b).

§355.404. Supplemental payments to qualifying non-state government-owned or operated nursing homes.

(a) The aggregate supplemental payment for non-state government-owned or operated nursing homes is calculated as follows:

(1) The aggregate upper payment limit for the class of non-state government-owned or operated nursing homes is calculated based on Medicare payment principles and in accordance with the federal upper payment limit rules at 42 CFR Part 447 using applicable Medicare payment rates and Resource Utilization Groups (RUGs) frequency distributions for Medicaid clients.

(2) The aggregate Medicaid payment for the class of non-state government-owned or operated nursing facilities prior to the supplemental payment is the sum of the products of the Medicaid days of service by case mix group multiplied by the final case mix rates for each facility for the period, calculated for all non-state government-owned or operated nursing homes from data derived from the most recent complete fiscal year paid claims.

(3) The aggregate supplemental amount is determined by:

(A) Calculating the difference between the aggregate upper payment limit from paragraph (1) of this subsection and the aggregate Medicaid payment prior to supplementation from paragraph (2) of this subsection; and

(B) Adjusting the difference for other ancillary services not included in Medicaid per diem payments for nursing home services including, but not limited to, pharmacy services, specialized services, and emergency dental services.

(b) Effective October 1, 2003, the Texas Department of Human Services, or its successor agency, makes annual supplemental Medicaid payments to qualifying non-state government-owned or operated nursing facilities. Qualifying non-state government-owned or operated facilities are those non-state government-owned or operated facilities which, for SFY 2001, provided a designated number of days of care to Medicaid recipients and had a minimum Medicaid occupancy rate, as specified by the Health and Human Services Commission.

(c) The supplemental payment for each qualifying non-state government-owned or operated nursing facility from subsection (b) of this section is determined by dividing that facility's Medicaid units of service as reported on the 2001 cost report by the Medicaid units of service as reported on the 2001 cost report for all facilities identified by subsection (b) of this section and multiplying the resulting percentage by the aggregate supplemental amount from subsection (a) of this section.

(d) Supplemental payments are made annually to each qualifying nursing facility from subsection (b) of this section.

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

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Steve Aragón

General Counsel

Texas Health and Human Services Commission

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For further information, please call: (512) 424-6576

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CHAPTER 355. MEDICAID REIMBURSEMENT RATES

The Texas Health and Human Services Commission (HHSC) proposes to amend Subchapter D §§355.452, 355.453, 355.456, and 355.457 concerning the reimbursement methodology for Intermediate Care Facilities for persons with mental retardation (ICF/MR), in its Medicaid Reimbursement Rates chapter. HHSC also proposes to amend Subchapter F §§355.722, 355.741, 355.773, and 355.791 concerning the reimbursement methodology for programs serving persons with mental illness and mental retardation, in its Medicaid Reimbursement Rates chapter. HHSC also proposes to repeal §355.792 and §355.707 concerning the reimbursement methodology for programs serving persons with mental illness and mental retardation, in its Medicaid Reimbursement Rates chapter.

The purpose of the amendments to §§355.452, 355.453, 355.456 355.457, 355.722, 355.741, 355.773, and 355.791 are to add references to the cost determination process rules from subchapter A of this chapter to make the rules contained in subchapter A applicable to contracted providers that are required to submit cost reports used in rate determination for programs operated by the Texas Department of Mental Health and Mental Retardation (TDMHMR). The amendments also remove language that is (1) no longer necessary as a result of the new references to the cost determination process rules;

(2) obsolete because the timeframe in the rules has passed; and (3) duplicative. The amendments clarify when a contract violation can result in a vendor hold of provider payments. The amendments also clarify that the total amount of hours that an owner or related party employee can report on a cost report is 2080 hours per fiscal year. Other minor changes and clarifications were also made. These changes are being made so that all long term care programs that require cost reporting will be required to use the same rules for determining allowable and unallowable costs; cost reporting guidelines; recordkeeping requirements; audit/review procedures; and informal reviews and formal appeals.

The purpose of the repeal of §355.792 is to incorporate the rule language from this section into §355.791 to create a single rule section for the reimbursement methodology for the Texas Home Living waiver program. The purpose of the repeal of §355.707 is because it is no longer needed due to the use of the informal review and formal appeal processes in §355.110 of the cost determination process rules.

Tom Suehs, Deputy Executive Commissioner for Financial Services, has determined that, for the first five-year period the proposed sections are in effect, there are no fiscal implications for state government as a result of enforcing or administering the sections. There are no fiscal implications for local governments as a result of enforcing or administering the sections.

Ed White, Director for Rate Setting and Forecasting, has determined that, for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections is that the cost determination process rules will be consistent for all long term care programs for which cost reporting is required and will provide more comprehensive rules and guidelines on cost reporting, allowable and unallowable costs and recordkeeping for providers contracted with TDMHMR. Also, obsolete and duplicative rules will be removed. The rules will be clarified as to when a contract violation can result in a vendor hold of provider payments and will be clarified to state the maximum hours that can be reported on a cost report for owner and related party employees. The Texas Home Living waiver program will have all the reimbursement methodology rules consolidated into one rule section for ease of reference. There is no adverse economic effect on small or micro businesses, or on businesses of any size, as a result of enforcing or administering the sections, because the amendments impose no additional requirements on businesses. The cost determination process rules clarify in greater detail the expectations of providers when reporting costs on cost reports submitted to HHSC. There is no anticipated economic cost to persons who are required to comply with the proposed sections. There is no anticipated effect on local employment in geographic areas affected by these sections.

Under §2007.003(b) of the Government Code, HHSC has determined that Chapter 2007 of the Government Code does not apply to this rule. Accordingly, HHSC is not required to complete a takings impact assessment regarding this rule.

Questions about the content of this proposal may be directed to Carolyn Pratt at (512) 491-1359 in the Texas Health and Human Services Commission's Rate Analysis Department. Written comments on the proposal may be submitted to Ms. Pratt via facsimile at (512) 491-1998 or mail to Texas Health and Human Services Commission, Rate Analysis, Mail Code H-400, 1100 West 49th Street, Austin, TX 78756-3101, within 30 days of publication in the *Texas Register*.

SUBCHAPTER D. REIMBURSEMENT METHODOLOGY FOR INTERMEDIATE CARE FACILITIES FOR PERSONS WITH MENTAL RETARDATION (ICF/MR)

1 TAC §§355.452, 355.453, 355.456, 355.457

The amendments are proposed under the Texas Government Code, §531.033, which authorizes the commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.021(b), which established HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The amendments implement the Government Code, §§531.033 and 531.021(b).

§355.452. Cost Reporting Procedures.

(a) Reporting costs. Each provider must submit financial and statistical information on forms provided by HHSC on facsimiles which are formatted according to HHSC's specifications and are preapproved by HHSC.

(b) Record keeping requirements. Each provider must retain records according to TDMHMR and HHSC rules. Providers must ensure that records are accurate and sufficiently detailed to support the legal, financial, and statistical information provided to HHSC.

(c) Noncompliance with record keeping requirements. Failure to retain records that support the information submitted to HHSC constitutes a [~~an administrative~~] contract violation and may result in a vendor hold on the contracts for which the necessary records are not made available to HHSC staff. [~~In the case of an administrative contract violation, penalties are applied as specified in TDMHMR and HHSC rules.~~]

(d) Allowable and unallowable costs. Providers must complete cost reports in accordance with §355.453 of this title (relating to Allowable and Unallowable Costs) and §355.708 of this title (relating to Allowable and Unallowable Costs).

(e) Certification. Providers must certify the accuracy of cost reports submitted to HHSC. Providers may be liable for civil and/or criminal penalties if the cost report is not completed according to HHSC requirements.

(f) Due date. Providers must submit direct services cost surveys no later than 45 calendar days after the end of the reporting period or 45 days after the date that HHSC mails the form to the provider, whichever is later. Providers must submit full cost reports no later than 90 days after the reporting period or 90 days after the date that HHSC mails the form to the provider, whichever is later.

(g) Extension of due date. HHSC may grant extensions of due dates for good cause. Good cause is defined as one that the provider could not reasonably be expected to control. A provider must submit a written request for extension to HHSC before the cost report due date. HHSC will respond to a request for extension within 10 working days of its receipt.

(h) Cost data. HHSC may at times require additional financial and statistical information to ensure the fiscal integrity of the Texas Medicaid ICF/MR Program. Each provider must submit additional information to HHSC upon request, unless the information is not at the provider's disposal.

(i) Failure to submit requested data. Failure to submit acceptable cost data by the due date may result in a vendor hold

[constitutes an administrative contract violation. In the case of an administrative contract violation, penalties are applied as specified in 25 TAC §406.62(c)(2) (Sanction Provisions for Violations of Title XIX ICF/MR Contractual Agreements).]

(j) Review of cost data. HHSC reviews each provider's cost data to ensure that the financial and statistical information submitted conforms to all applicable rules and instructions. Forms that are not completed according to HHSC's instructions or rules may be returned to the provider for proper completion.

(k) On-site audits. HHSC performs a sufficient number of on-site financial audits to ensure the fiscal integrity of the TDMHMR Medicaid Programs. The number of on-site audits performed may vary.

(l) On-site audit standards. HHSC performs on-site financial audits in a manner consistent with the generally accepted auditing standards (GAAS) approved by the American Institute of Certified Public Accountants and included in Standards for Audit of Governmental Organizations, Programs, Activities and Functions, issued by the United States Comptroller General.

(m) Access to records. Each provider must allow access to any and all records necessary to verify cost data submitted to HHSC. This requirement includes records pertaining to related-party transactions and other business activities engaged in by the provider that are directly or indirectly related to the provision of contracted services. Failure to allow inspection of pertinent records within 10 working days following written notice from HHSC constitutes a [an administrative] contract violation and may result in vendor hold. [In the case of an administrative contract violation, penalties are applied as specified in TDMHMR and HHSC rules.] If a central office or other entity pertaining to a multi-facility operation refuses access to records, then the vendor hold may be [penalties are] extended to all of the provider's contracted entities [having Medicaid contracts with TDMHMR]. Additional rules regarding access to records that are out-of-state are in §355.105 [§355.703] of this title (relating to Basic Objectives and Criteria for Review of Cost Reports).

(n) Reviews of exclusions or adjustments. A provider who disagrees with HHSC's exclusion or adjustment of items in cost reports may request an informal review and, when necessary, an administrative hearing as specified in §355.110 [§355.707] of this title (relating to Informal Reviews and Formal Appeals [Reviews and Administrative Hearings]).

(o) Notification of exclusions and adjustments. HHSC will notify a provider of exclusions and any adjustments including caps applied to reported costs made during HHSC's desk reviews and on-site audits.

(p) The information in subsections (a)-(o) of this section applies to cost reports pertaining to providers' fiscal years ending in calendar year 2001, 2002 and 2003.

(q) For cost reports pertaining to providers' fiscal years ending in calendar year 2004 and subsequent years the information in §355.102 of this title (relating to General Principles of Allowable and Unallowable Costs), §355.103 of this title (relating to Specifications for Allowable and Unallowable Costs), §355.104 of this title (relating to Revenues), §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures) applies to the completion of cost reports. Desk reviews and field audits will be conducted in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), and providers will be notified of the results of a desk review or a field audit in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments). Providers may request an informal review and, if necessary, an administrative hearing to dispute an action taken under §355.110 of this title (relating to Informal Reviews and Formal Appeals).

§355.453. Allowable and Unallowable Costs.

(a) General information. HHSC defines allowable and unallowable costs in order to identify expenses that are reasonable and necessary when an economical and efficient provider cares for Medicaid recipients. The primary objective of the cost reporting process is to determine fair and reasonable reimbursement rates. To achieve this objective, HHSC compiles a rate base consisting, if possible, only of allowable cost information. When HHSC classifies a particular type of expense as unallowable for purposes of compiling a rate base, the classification does not mean that individual providers must not make expenditures of this type. Allowable costs included in the rate base reflect only the costs and maximum reimbursement rates associated with an economical and efficient operator. Providers must report costs in accordance with the generally accepted accounting principles (GAAP) of the American Institute of Certified Public Accountants. However, if particular HHSC cost reporting requirements conflict with GAAP, with Internal Revenue Service requirements, or with other authorities, the HHSC requirements take precedence for provider cost reporting purposes.

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

(1) Allowable costs--Those expenses that are reasonable and necessary in the normal conduct of operations relating to recipient care in an ICF/MR. Whenever possible, only allowable costs are included in the rate base.

(A) The word "reasonable" applies to the amount expended. The test of reasonableness is that the amount expended does not exceed the cost which would be incurred by a prudent business operator seeking to contain costs.

(B) The word "necessary" applies to the relationship of the cost to the provision of care. To qualify as a necessary expense, a cost must be one that is usual and customary in the operation of an ICF/MR, and must meet all of the following requirements.

(i) The expenditure is not for personal or other activities not specifically related to the provision of long-term care.

(ii) The cost does not appear on the list of specific unallowable costs.

(iii) The cost bears a significant relationship to client care. The test of significance in this case is whether there would be an adverse impact on the individual's health, safety, or general well-being if the expenditure were eliminated.

(iv) The expense was incurred in the purchase of materials, supplies, or services provided directly to the recipients or staff of individual ICF/MR in the conduct of normal operations relating to client care.

(v) The costs are not unallowable under other federal, state, or local laws or regulations.

(C) The phrase "normal conduct of operations relating to client care" applies to costs for, but not limited to, the following.

(i) Expenses for facilities, materials, supplies, or services not used by an ICF/MR solely for providing long-term client care. Whenever otherwise allowable costs are attributable partially to personal or other business interests and partially to ICF/MR client

care, the latter portion may be allowed on a pro rata basis if the proportion used for ICF/MR client care is well-documented.

(ii) Related-party transactions. Allowable costs are those which result from arm's-length transactions involving unrelated parties. In related-party transactions, the allowable cost to the ICF/MR is the cost to the related party. Allowable costs in this regard are limited either to the actual purchase prices paid by the related party or to the usual and customary charges for comparable goods or services, whichever is less. Two or more individuals or organizations constitute related parties whenever they are affiliated or associated in a manner that entails some degree of legal control or practical influence of one over the other. This affiliation or association can be based on common ownership, past or present mutual interests in long-term care or other types of enterprises, or family ties.

(2) Unallowable costs--Expenses that are not reasonable or necessary for the provision of client care in an ICF/MR, in accordance with the criteria specified in paragraph (1) of this subsection. Unallowable costs are not included in the rate base used for determining recommended reimbursement rates.

(c) The information in this section applies to cost reports pertaining to providers' fiscal years ending in calendar year 2001, 2002, and 2003.

(d) For cost reports pertaining to provider's fiscal years ending in calendar year 2004 and subsequent years, providers must follow the guidelines in determining whether a cost is allowable or unallowable as specified in §355.102 and §355.103 of this title (relating to General Principles of Allowable and Unallowable Costs, and Specifications for Allowable and Unallowable Costs).

§355.456. Rate Setting Methodology.

(a) Types of facilities. There are two types of facilities for purposes of rate setting: state-operated and non-state operated. Facilities are further divided into classes that are determined by the size of the facility.

(b) Classes of non-state operated facilities. There is a separate set of reimbursement rates for each class of non-state operated facilities, which are as follows.

(1) Large facility--A facility with a Medicaid certified capacity of 14 or more as of the first day of the full month immediately preceding a rate's effective date or, if certified for the first time after a rate's effective date, as of the date of initial certification.

(2) Medium facility--A facility with a Medicaid certified capacity of nine through 13 as of the first day of the full month immediately preceding a rate's effective date or, if certified for the first time after a rate's effective date, as of the date of initial certification.

(3) Small facility--A facility with a Medicaid certified capacity of eight or fewer as of the first day of the full month immediately preceding a rate's effective date or, if certified for the first time after a rate's effective date, as of the date of initial certification

(c) Classes of state-operated facilities. There is a separate interim rate for each class of state-operated facilities, which are as follows:

(1) Large facility--A facility with a Medicaid certified capacity of 17 or more as of the first day of the full month immediately preceding a rate's effective date or, if certified for the first time after a rate's effective date, as of the date of initial certification.

(2) Small facility--A facility with a Medicaid certified capacity of 16 or less as of the first day of the full month immediately preceding a rate's effective date or, if certified for the first time after a rate's effective date, as of the date of initial certification.

(d) Reimbursement rate determination for non-state operated facilities. HHSC will adopt the reimbursement rates for non-state operated facilities in accordance with §§355.101 [~~Chapter 355, Subchapter F~~] of this title (relating to Introduction [~~General Reimbursement Methodology for all Medical Assistance Programs~~]) and this subchapter.

(1) The initial modeled rates for calendar year 1997 are set according to paragraph (7) of this subsection.

(2) Annual rates for the time period between the years that modeled rates are rebased are set by inflating the direct service portion of the previous year's rates by the Personal Consumption Expenditures (PCE) Chain-Type Index as defined in §355.108 [~~Chapter 355, Subchapter F~~] of this title (relating to Determination of Inflation Indices [~~General Reimbursement Methodology for all Medical Assistance Programs~~]). These rates are uniform by class of facility and client level-of-need, and determined prospectively and annually.

(3) In the year 2000, the models from which the rates are based are analyzed to determine if rebasing is necessary for the rates paid in the year 2001. The models will be analyzed every three years thereafter to determine if rebasing is necessary.

(4) Reimbursement rates combine residential and day program services, i.e., payment for the full 24 hours of daily service.

(5) Reimbursement rates are differentiated based on client level-of-need. The levels of need are intermittent, limited, extensive, pervasive, and pervasive plus.

(6) Modeled rates are rebased according to §55.458 of this title (relating to Rebasing the Non-State Operated Facility Modeled Rates).

(7) The modeled rates are based on cost components deemed appropriate for economically and efficiently operated services. The determination of these components is based on a combination of data including, but not limited to, historical costs and operational information collected from a representative sample of ICF/MR providers. In the year 2000 and every three years thereafter, an advisory panel consisting of providers, advocates, and HHSC, and an independent consultant retained by HHSC analyzes available information regarding historical cost and operational data and level-of-need assessment to determine if revisions to the models are necessary. HHSC will review the analysis in setting rates.

(e) Transitional add-on. A transitional add-on, in an amount to be determined by HHSC, will be paid to a provider for a consumer who is admitted to a small non-state operated facility on or after October 1, 2001, if the consumer is admitted from a large state-operated facility. The transitional add-on will be paid for the time period the consumer resides in the small non-state operated facility or for 180 calendar days, whichever time period is less.

(f) Reimbursement determination for state-operated facilities. Except as provided in paragraph (2) of this subsection and subsection (g) of this section, state-operated facilities are reimbursed an interim rate with a settlement conducted in accordance with paragraph (1)(B) of this subsection. HHSC will adopt the interim reimbursement rates for state-operated facilities in accordance with §§355.101 [~~§§355.701-355.709 of Chapter 355, Subchapter F~~] of this title (relating to Introduction [~~General Reimbursement Methodology for all Medical Assistance Programs~~]) and this subchapter.

(1) State-operated facilities certified prior to January 1, 2001, will be reimbursed using an interim reimbursement rate and settlement process.

(A) Interim reimbursement rates for state-operated facilities are based on the most recent cost report accepted by HHSC.

(B) Settlement is conducted each state fiscal year by class of facility. If there is a difference between allowable costs and the reimbursement paid under the interim rate, including applied income, for a state fiscal year, federal funds to the state will be adjusted based on that difference.

(2) A state-operated facility certified on or after January 1, 2001, will be reimbursed using a pro forma rate determined in accordance with §355.101(c)(2)(B) and §355.105(h) [§355.702(i)] of this title (relating to Introduction and General Reporting and Documentation Requirements [Method for Cost Determination]). A facility will be reimbursed under the pro forma rate methodology until HHSC receives an acceptable cost report which includes at least 12 months of the facility's cost data and is available to be included in the annual interim rate determination process.

(g) Experimental class. HHSC may define experimental classes of service to be used in research and demonstration projects on new reimbursement methods. Demonstration or pilot projects based on experimental classes may be implemented on a statewide basis or may be limited to a specific region of the state or to a selected group of providers. Reimbursement for an experimental class is not implemented, however, unless HHSC and the Health Care Financing Administration (HCFA) approve the experimental methodology.

(h) Cost Reporting. For cost reports pertaining to providers' fiscal years ending in calendar year 2004 and subsequent years the following applies:

(1) Providers must follow the cost-reporting guidelines as specified in §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(2) Providers must follow the guidelines in determining whether a cost is allowable or unallowable as specified in §355.102 and §355.103 of this title (relating to General Principles of Allowable and Unallowable Costs, and Specifications for Allowable and Unallowable Costs), in addition to the following.

(3) Revenues must be reported on the cost report in accordance with §355.104 of this title (relating to Revenues).

(i) Adjusting costs. Each provider's total reported allowable costs, excluding depreciation and mortgage interest, are projected from the historical cost-reporting period to the prospective reimbursement period as described in §355.108 of this title (relating to Determination of Inflation Indices). HHSC may adjust reimbursement if new legislation, regulations, or economic factors affect costs, according to §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs).

(j) Field Audit and Desk Review. Desk reviews or field audits are performed on cost reports for all contracted providers. The frequency and nature of the field audits are determined by HHSC to ensure the fiscal integrity of the program. Desk reviews and field audits will be conducted in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), and providers will be notified of the results of a desk review or a field audit in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments). Providers may request an informal review and, if necessary, an administrative hearing to dispute an action taken under §355.110 of this title (relating to Informal Reviews and Formal Appeals).

§355.457. Fiscal Accountability.

(a) General principles. The Texas Health and Human Services Commission (HHSC) applies the general principles of cost determination as specified in §355.101 of this title (relating to introduction). Fiscal accountability is a process used to gauge the ongoing financial performance under the non-state operated facility reimbursement rates.

(b) Annual reporting. Fiscal accountability will consist of the annual reporting of direct service costs from all non-state operated providers. The data will be collected on a cost report designed by HHSC in accordance with §355.105(b) [§355.452] of this title (relating toGeneral Reporting and Documentation Requirements, Methods, and Procedures [Cost Reporting Procedures]).

(1) Direct service costs include costs associated with personnel who provide direct hands-on support for consumers and include personnel such as direct care workers, first-level supervisors of direct care staff, QMRPs, registered nurses, and licensed vocational nurses. Direct service costs include: costs related to wage rates, benefits, payroll taxes, contracts for direct services, and direct service supervision information. Accrued leave (sick or annual) can only be considered a direct service cost if the employee has a right to the cash value of that leave upon termination.

(2) The provider is responsible for submission of the fiscal accountability cost report to HHSC, and payment of amounts owed [to TDMHMR] in accordance with subsection (c)[(2) and] (3) of this section, regardless of whether the provider contracts with another entity for the management or operation of the ICF/MR.

(A) If the provider contracts with another entity for the management or operation of the ICF/MR, the provider must report the specific direct services costs of that entity as required in the cost report instructions and not the amount for which the provider is contracting for the entity's services.

(B) For staff whose duties include work other than the provision of direct services, the proportion of work that is spent on direct services may be included in the direct service costs. The proportion of their salary and benefits that is compensation for direct services work can be included in the direct service cost report. The facility must have a procedure that specifies how direct service work time is allocated.

(C) If the staff providing direct services is an owner, operator, or a related party as defined in §§355.102(i)-355.103(b)(2) [§355.701(a)(9)] of this title (relating to General Principles of Allowable and Unallowable Costs and Specifications for Allowable and Unallowable Costs [Definitions and General Specifications]), the salary and benefits must be the lesser of the actual wages and benefits paid or the wages and benefits for a comparable staff person assumed in the model. [The facility must have a procedure that specifies how direct service work time is allocated.] Owner and related party employees who provide both direct care and indirect services must maintain daily time sheets that record the time spent on activities in each area. The provider must maintain documentation relating to compensation, bonuses, and benefits of each owner or related party in accordance with §355.105(b)(2)(B)(xi) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures). The maximum hours per fiscal year that an owner and related party employee may report on the cost report is 2080 hours per fiscal year.

(3) The direct service portions of the current rate model are inflated on an annual basis as specified in §355.456(d)(2) of this title (relating to Rate Setting Methodology).

(4) TDMHMR will place a vendor hold on a prior owner at a change of ownership which results in the execution of a new provider agreement. The prior owner must submit a fiscal accountability report to HHSC for the current reporting period. Upon receipt of an acceptable fiscal accountability report and resolution of any outstanding balances, the vendor hold will be released.

(5) For cost reports pertaining to providers' fiscal years ending in calendar year 2004 and subsequent years the following applies:

(A) Providers must follow the cost-reporting guidelines as specified in §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(B) Providers must follow the guidelines in determining whether a cost is allowable or unallowable as specified in §355.102 and §355.103 of this title (relating to General Principles of Allowable and Unallowable Costs, and Specifications for Allowable and Unallowable Costs), in addition to the following.

(C) Revenues must be reported on the cost report in accordance with §355.104 of this title (relating to Revenues).

(6) Field Audit and Desk Review. Desk reviews or field audits are performed on cost reports for all contracted providers. The frequency and nature of the field audits are determined by HHSC to ensure the fiscal integrity of the program. Desk reviews and field audits will be conducted in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), and providers will be notified of the results of a desk review or a field audit in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments).

(c) HHSC will require providers to report all direct costs incurred in their annual fiscal year. HHSC will compare the reported direct service costs to the direct service cost component of the modeled rates.

(1) Paragraph (2) of this subsection, concerning the fiscal accountability repayment, applies to that portion of the provider's fiscal year that occurs after April 5, 1998. Paragraph (3) of this subsection, concerning the fiscal accountability repayment, applies to that portion of the provider's fiscal year that begins on or after January 1, 1999.

[(2) The total direct service revenue of the modeled rates is the direct service portion of the rate multiplied by the number of allowable units paid for services provided during the reporting period.]

[(A) Providers whose direct service costs are 90% or more of the direct service revenues will not be subject to repayment under this section.]

[(B) Providers whose direct service costs are less than 80% of the direct service revenues will be required to pay to TDMHMR the difference between the direct service costs and 95% of the direct service revenues.]

[(C) Providers whose direct service costs are between 80% and 85% of the direct service revenues will be required to pay to TDMHMR 100% of the difference between the direct service costs and 85% of the direct service revenues plus 50% of the difference between 85% and 90% of the direct service revenues.]

[(D) Providers whose direct service costs are between 85% and 90% of the direct service revenues will be required to pay to TDMHMR 50% of the difference between the direct service costs and 90% of the direct service revenues.]

(2) [(3)] The total direct service revenue of the modeled rates is the direct service portion of the rate multiplied by the number of allowable units paid for services provided during the reporting period.

(A) Providers whose direct service costs are 90% or more of the direct service revenues will not be subject to repayment under this section.

(B) Providers whose direct service costs are less than 85% of the direct service revenues will be required to pay to TDMHMR the difference between the direct service costs and 95% of the direct service revenues.

(C) Providers whose direct service costs are between 85% and 90% of the direct service revenues will be required to pay to TDMHMR 75% of the difference between the direct service costs and 90% of the direct service revenues.

[(4) Providers will be notified of their repayment status within 90 days of submitting their cost reports. A provider's repayment status may change as a result of the desk reviews or outside audits of cost reports, or by adjustments to claims paid to the provider for services provided in the cost reporting period. Providers will submit the repayment amount within 60 days of notification.]

(3) The fiscal accountability calculation shows an estimated amount due for repayment. A provider's repayment status may change as a result of the desk review or onsite audit of the cost report or adjustments to claims paid to the provider for services provided in the cost reporting period. The provider will be notified of the results of the desk reviews or onsite audits in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments). If the adjustments and or exclusions result in an amount due, or if the original estimated amount due calculation is upheld, HHSC will notify the provider of the amount due and the provider will remit the repayment amount no later than 60 calendar days of the date the notification was received by the provider.

(4) [(5)] Repayment will be collected from the following:

(A) the provider or legal entity submitting the report;

(B) any other legal entity responsible for the debts or liabilities of the submitting entity; or

(C) the legal entity on behalf of which a report is submitted.

(5) [(6)] Providers [These entities] will be jointly and severally liable for any repayment due [to TDMHMR]. Failure to repay the amount due by the 61st calendar day after the provider has received notification [when notified] may result in a vendor hold on all of the ICF/MR payments to a provider [facilities included in the cost report].

(6) [(7)] Providers may request an informal review and, if necessary, an administrative hearing to dispute an action taken under §355.110 of this title (relating to Informal Reviews and Formal Appeals). [Providers who wish to appeal the requirement to make payment to TDMHMR in accordance with this section may do so in accordance with 25 TAC Chapter 409, Subchapter B (relating to Adverse Actions)].

(d) If a provider is paid a transitional add-on for a consumer in accordance with §355.456(e) of this title, the provider may exclude the amount of the transitional add-on from its fiscal accountability cost report only if the consumer resides in the small non-state operated facility for at least 12 months.

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 May 17, 2004.

TRD-200403319
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 424-6576

SUBCHAPTER F. GENERAL REIMBURSEMENT METHODOLOGY FOR ALL MEDICAL ASSISTANCE PROGRAMS

1 TAC §355.707

(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 Health and Human Services Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Government Code, §531.033, which authorizes the commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.021(b), which established HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The repeal implements the Government Code, §§531.033 and 531.021(b).

§355.707. Reviews and Administrative Hearings.

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

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SUBCHAPTER F. REIMBURSEMENT METHODOLOGY FOR PROGRAMS SERVING PERSONS WITH MENTAL ILLNESS AND MENTAL RETARDATION

1 TAC §§355.722, 355.741, 355.773, 355.791

The amendments are proposed under the Texas Government Code, §531.033, which authorizes the commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.021(b), which established HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The amendments implement the Government Code, §§531.033 and 531.021(b).

§355.722. Reporting Costs by Home and Community-based Services (HCS) [~~HCS~~] Providers.

(a) On an annual basis, all state-operated HCS providers must submit cost reports as directed by HHSC or its designee and in accordance with this subchapter. The Texas Health and Human Services Commission (HHSC) applies the general principles of cost determination as specified in §355.101 of this title (relating to Introduction).

[~~(b) On an annual basis, non-state operated HCS providers must report direct service costs as specified in this subsection and in accordance with this subchapter.~~]

(1) Direct service costs are defined to include costs associated with personnel who provide direct hands-on support for consumers and include personnel such as direct care workers, first-level supervisors of direct care workers, registered nurses, licensed vocational nurses, and other personnel who provide activities of daily living training and clinical program services. Direct service costs include: costs related to wage rates, benefits, payroll taxes, contracts for direct services, and direct service supervision information. Accrued leave (sick or vacation) can only be considered a direct service cost if the employee has a right to a cash value of that leave upon termination.

(2) For staff whose duties include work other than the provision of direct services, the proportion of work that is spent on direct services may be included in the direct service costs. The proportion of their salary and benefits that are compensation for direct services work can be included in the direct service cost report only to the extent that the salary and benefits for this direct service work must be the lesser of the actual wages and benefits or the wages and benefits for a comparable direct care workers assumed in the model. The provider must have a procedure that specifies how direct service work time is allocated.

(3) The direct service portions of the current rate model are inflated on an annual basis as specified in §355.723(g)(1) of this title (relating to Reimbursement Methodology for Home and Community-Based Services (HCS)). This will increase the indirect part of the rate proportionately.

[~~(4) On an annual basis, non-state operated providers will submit direct service cost data.~~]

(4) [~~(5)~~] Providers must report the following costs:

(A) Staff wages related to the delivery of direct services including residential assistance, day habilitation services, and the direct supervision of the delivery of these services.

(B) These costs may be either the HCS provider's actual expense or contracted expenditures.

(b) [~~(c)~~] HHSC will select a sample of non-state operated HCS providers which will be required to submit a full and accurate account of all costs related to the provision of services for an HCS provider's fiscal year in order to collect data for the analysis referenced in §355.723(g)(2) of this title (relating to Reimbursement Methodology for Home and Community-Based Services (HCS).

(c) [~~(d)~~] HHSC will conduct desk audits of all full cost reports and/or direct service cost reports, and will conduct on-site reviews of a sample of providers submitting cost reports.

(d) [~~(e)~~] Record keeping requirements. Each HCS provider must retain records according to HHSC's requirements. HCS providers must ensure that records are accurate and sufficiently detailed to support the legal, financial, and statistical information provided to HHSC.

(e) [~~(f)~~] Noncompliance with record keeping requirements. Failure to maintain records that support the information submitted to HHSC constitutes a violation of the HCS provider contract.

(f) [~~(g)~~] Allowable and unallowable costs. HCS providers must complete cost reports in accordance with this subchapter.

(g) [~~(h)~~] Certification. HCS providers must certify the accuracy of cost reports submitted to HHSC. HCS providers may be liable for civil and/or criminal penalties if the cost report is not completed according to HHSC requirements.

(h) [~~(i)~~] Due date. HCS providers must submit direct service cost reports no later than 90 calendar days after the end of the reporting period or 90 days after the date that HHSC mails the form to the HCS provider, whichever is later. HCS providers must submit full cost reports no later than 90 days after the reporting period or 90 days after the date that HHSC mails the form to the HCS provider, whichever is later.

(i) [~~(j)~~] Extension of due date. HHSC may grant extensions of due dates for good cause. Good cause is defined as one that the HCS provider could not reasonably be expected to control. An HCS provider must submit a request for extension in writing to HHSC before the cost report due date. HHSC will respond to a request for extension within 10 working days of its receipt.

(j) [~~(k)~~] Cost data. HHSC may at times require additional financial and statistical information to ensure the fiscal integrity of the HCS Program. Each provider must submit additional information to HHSC upon request, unless the information is not at the HCS provider's disposal.

(k) [~~(l)~~] Failure to submit requested data. Failure to submit acceptable cost data by the due date constitutes a violation of the HCS provider contract.

(l) [~~(m)~~] Review of cost data. HHSC or its designee reviews each HCS provider's cost data to ensure that the financial and statistical information submitted conforms to all applicable rules and instructions. Forms that are not completed according to HHSC's instructions or rules may be returned to the HCS provider for proper completion.

(m) [~~(n)~~] On-site audits. TDMHMR or its designee performs a sufficient number of on-site financial audits to ensure the fiscal integrity of the HCS Programs. The number of on-site audits performed may vary.

(n) [~~(o)~~] On-site audit standards. HHSC performs on-site financial audits in a manner consistent with the generally accepted auditing standards (GAAS) approved by the American Institute of Certified Public Accountants and included in Standards for Audit of Governmental Organizations, Programs, Activities and Functions, issued by the United States Comptroller General.

(o) [~~(p)~~] Access to records. Each HCS provider must allow access to HHSC to any and all records necessary to verify cost data submitted to HHSC. This requirement includes records pertaining to related-party transactions and other business activities engaged in by the HCS provider that are directly or indirectly related to the provision of contracted services. Failure to allow inspection of pertinent records within 10 working days following written notice from HHSC constitutes a violation of the HCS provider contract. If the administrative office or other entity pertaining to a multi-contract operation refuses access to records, then the penalties are extended to all of the provider's entities having Medicaid contracts with TDMHMR. Additional rules regarding access to records that are out-of-state may be found in §355.105 [~~§355.702~~] of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures [~~Methods for Cost Determination~~]).

(p) [~~(q)~~] Reviews of exclusions or adjustments. An HCS provider who disagrees with HHSC's exclusion or adjustment of items in cost reports may request an informal review and, when appropriate, an administrative hearing as specified in §355.110 [~~§355.7~~] of this title (relating to Informal Reviews and Formal Appeals [~~Reviews and Administrative Hearings~~]).

(q) [~~(r) Notification of exclusions and adjustments. HHSC will notify an HCS provider of exclusions and any adjustments, including caps applied, to reported costs in accordance with §355.705 of this title (relating to Notification).~~] Field Audit and Desk Review. Desk reviews or field audits are performed on cost reports for all contracted providers. The frequency and nature of the field audits are determined by HHSC to ensure the fiscal integrity of the program. Desk reviews and field audits will be conducted in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), and providers will be notified of the results of a desk review or a field audit in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments).

(r) The information in subsections (d)-(p) of this section applies to cost reports pertaining to provider's fiscal years ending in calendar year 2001, 2002 and 2003.

(s) For cost reports pertaining to providers' fiscal years ending in calendar year 2004 and subsequent years the following applies:

(1) Providers must follow the cost-reporting guidelines as specified in §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(2) Providers must follow the guidelines in determining whether a cost is allowable or unallowable as specified in §355.102 and §355.103 of this title (relating to General Principles of Allowable and Unallowable Costs, and Specifications for Allowable and Unallowable Costs), in addition to the following.

(3) Revenues must be reported on the cost report in accordance with §355.104 of this title (relating to Revenues).

(t) Allowable compensation for owners and related parties and definitions of owners and related parties are specified in §355.102(i) and §355.103(b)(2) of this title (relating to General Principles of Allowable and Unallowable Costs and Specifications for Allowable and Unallowable Costs. Owner and related party employees who provide both direct care and indirect services must maintain daily time sheets that record the time spent on activities in each area. The provider must maintain documentation relating to compensation, bonuses, and benefits of each owner or related party in accordance with §355.105(b)(2)(B)(xi) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures). The maximum hours per fiscal year that an owner and related party employee may report on the cost report is 2080 hours per fiscal year.

(u) Each provider's total reported allowable costs, excluding depreciation and mortgage interest, are projected from the historical cost-reporting period to the prospective reimbursement period as described in §355.108 of this title (relating to Determination of Inflation Indices). HHSC may adjust reimbursement if new legislation, regulations, or economic factors affect costs, according to §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs).

(v) [~~(s)~~] Fiscal Accountability.

(1) General principles. Fiscal accountability is a process used to gauge the ongoing financial performance under the non-state operated reimbursement rates.

(2) Annual reporting. Fiscal accountability will consist of the annual reporting of the direct service costs including wages, and

benefits, from all non-state operated HCS providers. The data will be collected on a cost report designed by HHSC in accordance with §355.105(b) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(A) TDMHMR will place a vendor hold on payments to an HCS provider whose provider agreement is being assigned or terminated. The HCS provider will submit a cost report for the current reporting period to HHSC. Upon receipt of an appropriate cost report and repayment of any amounts due to HHSC in accordance with this section, the vendor hold will be released.

(B) HCS providers are exempt from submitting cost reports in accordance with this section for the portion of their programs which convert to the Mental Retardation Local Authority (MRLA Program) for the fiscal year in which the conversion occurred.

(3) HHSC will require HCS providers to report all direct costs incurred on an annual fiscal year basis. HHSC will compare the reported direct service costs to the total direct service revenue.

(4) Paragraph (5) of this subsection applies to that portion of the HCS provider's fiscal year that occurs after April 5, 1998. Paragraph (6) of this subsection, concerning the following fiscal accountability repayment, applies to that portion of the provider's fiscal year that begins on or after January 1, 1999.

(5) Direct service revenues are calculated by multiplying the number of units eligible for payment that have been paid, for services delivered during the reporting period times the appropriate direct service portion of the rate for the service billed.

(A) HCS providers whose direct service costs are 85% or more of the direct service revenues will not be subject to repayment under this section.

(B) HCS providers whose direct service costs are less than 80% of the direct service revenues will be required to pay to TDMHMR the difference between the direct service costs and 95% of the direct service revenues.

(C) HCS providers whose direct service costs are between 80% and 85% of the direct service revenues will be required to pay to TDMHMR 100% of the difference between the direct service costs and 85% of the direct service revenues.

(6) Direct Service Revenues are calculated by multiplying the number of units eligible for payment that have been paid for services delivered during the reporting period times the appropriate direct service portion of the rate for the service billed.

(A) HCS providers whose direct service costs are 90% or more of the direct service revenues will not be subject to repayment under this section.

(B) HCS providers whose direct service costs are between 85% and 90% of the direct service revenues will be required to pay to TDMHMR 50% of the difference between the direct service costs and 90% of the direct service revenues.

(C) HCS providers whose direct service costs are between 80% and 85% of the direct service revenues will be required to pay to TDMHMR 100% of the difference between the direct service costs and 85% of the direct service revenues plus 50% of the difference between 85% and 90% of the direct service revenues.

(D) HCS providers whose direct service costs are less than 80% of the direct service revenues will be required to pay to TDMHMR the difference between the direct service costs and 95% of the direct service revenues.

(7) Where applicable, HCS providers will be notified of the requirement to repay revenues within 90 days of submitting their cost reports. An HCS provider's repayment status may change as a result of the desk reviews or outside audits of cost reports, or adjustments to claims paid to the HCS provider for services provided in the cost reporting period. HCS providers will submit the repayment amount within 60 days of notification.

(8) Repayment will be made by the following:

(A) the HCS provider or legal entity submitting the report;

(B) any other legal entity responsible for the debts or liabilities of the submitting entity; or

(C) the legal entity on behalf of which a report is submitted.

(9) HCS providers required to repay revenues to TDMHMR will be jointly and severally liable for any repayment. TDMHMR will apply a vendor hold on Medicaid payments to a HCS provider for not making the payment to TDMHMR within 60 days of receiving notice.

[~~(10) HCS providers who wish to appeal the requirement to make payment to TDMHMR should do so in accordance with 25 TAC §409.106.~~]

§355.741. Definitions for Service Coordination and Targeted Case Management.

The following words and terms, when used in §§355.741-743, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Allowable costs--Those expenses that are reasonable and necessary costs in the normal conduct of operations relating to case management services. See also definitions of "reasonable cost" and of "necessary cost" in this section, and §355.102 (f)(1) and (2) [~~§355.743(e)(2)~~] of this title (relating to General Principles of Allowable and Unallowable Costs [~~Reimbursement Methodology for Service~~]).

(2) Case management contact--An action taken on behalf of a client to locate, coordinate and monitor necessary and appropriate services with a specific person or organization. This activity is referred to as service coordination in the Texas Department of Mental Health and Mental Retardation (TDMHMR) Services Coordination program rule.

(3) Developmental period--The period of time from conception to 18 years of age.

(4) Functional retardation--Arrest or deterioration of intellectual ability that occurs after the developmental period. It is not the same as mental retardation.

(5) Mental retardation--Significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and originating during the developmental period.

(6) Necessary cost--A cost that is usual and customary in the operation of case management services in accordance with §355.102(f)(2) of this title (relating to General Principles of Allowable and Unallowable Costs) and that meets the following requirements.

(A) The cost is not for personal or other activity not specifically related to the provision of case management services.

(B) The cost does not appear on the list of specific unallowable costs and is not unallowable under §355.102 and §355.103

of this title (relating to General Principles of Allowable and Unallowable Costs and Specifications for Allowable and Unallowable Costs) or other federal, state, or local laws or regulations. [See definition of "unallowable cost" in this section, and see §355. 743(e)(3) of this title (relating to Reimbursement Methodology for Service)].

(C) The cost bears a significant relationship to case management services. The test of significance is whether there would be an adverse impact on the delivery of case management services if the expenditure were eliminated.

(7) Prospective reimbursement--Reimbursement payment amounts that are determined for a future period of time and that are not to be readjusted during that period

(8) Reasonable cost--The amount that does not exceed the cost which would be incurred by a prudent business operator seeking to contain costs in accordance with §355.102(f)(1) of this title (relating to General Principles of Allowable and Unallowable Costs).

(9) Related condition--A severe, chronic disability that meets all the criteria outlined in 42 Code of Federal Regulations 435.1009.

(10) Subaverage general intellectual functioning--Measured intelligence on standardized psychometric instruments of two or more standard deviations below the age group mean for the tests used.

[(11) Unallowable cost--A cost that is not a reasonable or necessary cost for the provision of case management services. See definitions of "necessary cost" and of "reasonable cost" in this section.]

§355.773. Reporting Costs by Mental Retardation Local Authority (MRLA) [MRLA] Providers.

(a) Submission of cost reports. All MRLA providers must submit cost reports as directed by the Health and Human Services Commission (HHSC) in accordance with §§355.701-355.709 of this title (relating to General Reimbursement Methodology for Programs Serving Persons with Mental Illness and Mental Retardation [All Medicaid Assistance Programs]).

(b) Recordkeeping requirements. Each MRLA provider must retain records according to HHSC's requirements. MRLA providers must ensure that records are accurate and sufficiently detailed to provide the legal, financial, and statistical information requested by HHSC.

(c) Noncompliance with recordkeeping requirements. If an MRLA provider fails to maintain records that support the information submitted, HHSC will notify TDMHMR to place the provider on vendor hold.

(d) Cost certification. Providers must certify the accuracy of cost reports submitted to HHSC. Providers may be liable for civil and/or criminal penalties if the cost report is not completed according to HHSC requirements.

(e) Due date. Providers must submit cost reports no later than 90 days after the reporting period or 90 days after the date that HHSC mails the form to the provider, whichever is later.

(f) Extension of due date. HHSC may grant extensions of due dates for good cause. Good cause is defined as a causal factor that the provider could not reasonably be expected to control. A provider must submit a request for an extension in writing to HHSC before the cost survey or cost report due date. HHSC will respond to a request for extension within 10 working days of its receipt.

(g) Cost data. HHSC may at times require additional financial and statistical information to ensure the fiscal integrity of the MRLA program. Each provider must submit additional information to HHSC upon request, unless the information is not at the provider's disposal.

(h) Failure to submit requested data. Failure to submit acceptable cost data by the due date may result in HHSC notifying TDMHMR to place the provider on vendor hold.

(i) Review of cost data. HHSC reviews each provider's cost data to ensure that the financial and statistical information submitted conforms to all applicable rules and instructions. Forms that are not completed according to HHSC's instructions or rules may be returned to the provider for proper completion.

(j) On-site financial audits. HHSC performs a sufficient number of on-site financial audits to ensure the fiscal integrity of the MRLA program. The number of on-site audits performed may vary.

(k) On-site financial audit standards. HHSC or its designee performs on-site financial audits in a manner consistent with the generally accepted auditing standards (GAAS) approved by the American Institute of Certified Public Accountants and included in Standards for Audit of Governmental Organizations, Programs, Activities and Functions, issued by the United States Comptroller General.

(l) Access to records. Each provider must allow access by HHSC to any and all records necessary to verify cost data submitted to HHSC. This requirement includes records pertaining to related-party transactions and other business activities engaged in by the provider that are directly or indirectly related to the provision of contracted services. Failure to allow inspection of pertinent records within 10 working days following written notice from HHSC constitutes a violation of the MRLA provider contract. If the administrative office or other entity pertaining to a multi-contract operation refuses access to records, then the penalties are extended to all of the provider's entities having Medicaid contracts with TDMHMR. Additional rules regarding access to records that are out-of-state may be found in §355.703 of this title (relating to Basic Objectives and Criteria for Review of Cost Reports).

(m) Reviews of exclusions or adjustments. A provider who disagrees with HHSC's exclusion or adjustment of items in cost reports may request an informal review and, when appropriate, an administrative hearing as specified in §355.110 [§355.707] of this title (relating to Informal Reviews and Formal Appeals [Reviews and Administrative Hearings]).

(n) Notification of exclusions and adjustments. HHSC will notify a provider of exclusions and any adjustments, including caps applied, to reported costs in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments).

(o) Fiscal Accountability. Fiscal accountability is a process used to gauge the ongoing financial performance under the reimbursement rates.

(1) Fiscal accountability will consist of the annual reporting of direct service costs including wages, benefits, staffing, and supervisory span-of-control information from all MRLA providers. The data will be collected on a cost survey designed by HHSC.

(2) Providers are required to submit direct services costs on a survey during a uniform three-month period of the year, selected by HHSC. The survey will reflect the provider's actual direct costs for the three-month period. The direct service costs will be compared to the "direct service cost" component of the MRLA rates. Instances in which a provider's actual direct service costs, as captured by the quarterly cost surveys, are less than 85% of the direct service revenues in the model will require additional reporting of costs and other information from the provider.

(3) HHSC will review the results obtained from the direct services cost surveys with representatives of provider associations and advocacy groups to further refine the fiscal accountability process. Direct services cost surveys will be collected in each fiscal year. In instances in which a provider's actual direct service costs are less than 85% of the direct service revenues in the model, HHSC may require the provider to:

(A) report more detailed financial information;

(B) submit to a quality assurance survey and review;

(C) submit to a utilization review of all services provided; and/or

(D) submit to a detailed audit of all relevant financial records.

(p) Owner and related party employees who provide both direct care and indirect services must maintain daily time sheets that record the time spent on activities in each area. The provider must maintain documentation relating to compensation, bonuses, and benefits of each owner or related party in accordance with §355.105(b)(2)(B)(xi) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures). The maximum hours per fiscal year that an owner and related party employee may report on the cost report is 2080 hours per fiscal year.

§355.791. Reporting Costs and Reimbursement Methodology for the Texas Home Living (TxHmL) [by TxHmL] Program [Providers].

(a) Submission of cost reports. On an annual basis, Texas Home Living (TxHmL) Program providers must submit cost reports [Full Cost Reports] as directed by the Health and Human Services Commission (HHSC) or its designee in accordance with §§355.105 [§§355.701-355.709] of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures [General Reimbursement Methodology for All Medical Assistance Programs]).

(1) "Direct service costs" are defined in §355.102(f)(3) [§355.708(c)(3)] of this title (relating to General Principles of Allowable and Unallowable Costs [Allowable and Unallowable Costs]). For purposes of this section, direct service costs include:

(A) costs associated with personnel who provide direct hands-on support for consumers and include personnel such as:

(i) direct care workers;

(ii) first-level supervisors of direct care workers;

(iii) registered nurses;

(iv) licensed vocational nurses; and

(v) other personnel who provide activities of daily living training and clinical program services; and

(B) costs related to:

(i) wage rates;

(ii) benefits;

(iii) payroll taxes;

(iv) contracts for direct services; and

(v) direct service supervision information; and

(C) [accrued] leave (sick or vacation) in accordance with §355.103(b)(1)(A)(iii)(III)(-c-) of this title (relating to Specifications for Allowable and Unallowable Costs) including accrued leave if the TxHmL Program provider has implemented a written policy that entitles an employee to the cash value of accrued leave upon termination.

(2) For staff whose duties include work other than the provision of direct services, the proportion of work that is spent on direct services may be included in the direct service costs.

(A) The proportion of their salary and benefits that is compensation for direct services work can be included in the direct service cost report only to the extent that the salary and benefits for this direct service work must be the lesser of the actual wages and benefits or the wages and benefits for a comparable direct care worker assumed in the model.

(B) The TxHmL Program provider must have a procedure in place that specifies how direct service work time is allocated.

(3) TxHmL Program providers must report the following information in the Full Cost Report:

(A) direct service costs related to the delivery of direct services including, but not limited to community support services, supported employment, and the direct supervision of the delivery of these services; and

(B) indirect costs including but not limited to facility operating and administrative costs.

(4) These direct service costs and indirect costs may be either the TxHmL Program provider's actual expense or contracted expenditures.

(b) Record keeping requirements.

(1) A TxHmL Program provider must:

(A) retain records according to HHSC's requirements;

(B) ensure that records are accurate and sufficiently detailed to provide the legal, financial, and statistical information requested by HHSC; and

(C) maintain all work papers and any other records that support the information submitted on the Full Cost Reports relating to all allocations, cost centers, cost or statistical line items, surveys, and schedules.

(2) HHSC may require supporting documentation other than that contained in the cost report to substantiate reported information.

(3) A TxHmL Program provider must maintain [the following] documentation [, at a minimum,] relating to compensation, bonuses, and benefits of each owner or related party [:] in accordance with §355.105(b)(2)(B)(xi) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

[(A) a detailed written description of actual duties, functions, and responsibilities;]

[(B) documentation substantiating that the services performed are not duplicative of services performed by other employees;]

[(C) time sheets or other documentation verifying the hours and days worked;]

[(D) the amount of total compensation paid for these duties, with a breakdown detailing regular salary, overtime, bonuses, benefits, and other payments;]

[(E) documentation of regular, periodic payments and/or accruals of the compensation;]

[~~(F) documentation that the compensation is subject to payroll or self-employment taxes; and~~]

[~~(G) a detailed allocation worksheet indicating how the total compensation was allocated across business components receiving the benefit of these duties.~~]

(4) A TxHmL Program provider must maintain clearly defined bonus policies in its written agreements with employees or in its overall employment policy in accordance with §355.103 (b)(1)(A)(i) of this title (relating to Specifications for Allowable and Unallowable Costs) and for owners and related parties §355.105(b)(2)(B)(xi)(I) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

[~~(A) At a minimum, the bonus policy must include the basis for distributing the bonuses including qualifications for receiving the bonus, and how the amount of each bonus is calculated.~~]

[~~(B) Other documentation must specify who received bonuses, whether the persons receiving bonuses are owners, related parties, or arm's-length employees, and the bonus amount received by each individual.~~]

(5) A TxHmL Program provider must maintain clearly defined benefit policies in its written agreements with employees or in its overall employment policy in accordance with §355.103(b)(1)(A)(iii) of this title (relating to Specifications for Allowable and Unallowable Costs) and for owners and related parties §355.105(b)(2)(B)(xi)(II) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures). [~~At a minimum, the documentation must include:~~]

[~~(A) the basis for eligibility for each type of benefit available;~~]

[~~(B) who is eligible to receive each type of benefit;~~]

[~~(C) who actually receives each type of benefit;~~]

[~~(D) whether the persons receiving each type of benefit are owners, related parties, or arm's-length employees; and~~]

[~~(E) the amount of each benefit received by each individual.~~]

(6) A TxHmL Program provider must maintain documentation for each employee that clearly identifies each compensation component, including regular pay, overtime pay, incentive pay, mileage reimbursements, bonuses, sick leave, vacation, other paid leave, deferred compensation, retirement contributions, TxHmL Program provider-paid instructional courses, health insurance, disability insurance, life insurance, and any other form of compensation.

(A) Types of documentation would include insurance policies, TxHmL Program provider benefit policies, records showing paid leave accrued and taken, documentation to support hours (regular and overtime) worked and wages paid, and mileage logs or other documentation to support mileage reimbursements and travel allowances.

(B) For accrued benefits, the documentation must clearly identify the period of the accrual. For example, if an employee accrues two weeks of vacation during 20X1 and receives the corresponding vacation pay during 20X3, that employee's compensation documentation for 20X3 should clearly indicate that the vacation pay received had been accrued during 20X1.

(c) Noncompliance with record keeping requirements. Failure to maintain accurate records is a violation of the TxHmL Program provider contract, and will result in HHSC notifying TDMHMR to place the TxHmL Program provider and all waiver contracts on vendor hold.

(d) Cost reporting. [~~Allowable and unallowable costs.~~] A TxHmL Program provider must complete Full Cost Reports in accordance with HHSC's rules, regulations, and instructions.

(1) Providers must follow the cost-reporting guidelines as specified in §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(2) Providers must follow the guidelines in determining whether a cost is allowable or unallowable as specified in §355.102 and §355.103 of this title (relating to General Principles of Allowable and Unallowable Costs, and Specifications for Allowable and Unallowable Costs), in addition to the following.

(3) Revenues must be reported on the cost report in accordance with §355.104 of this title (relating to Revenues).

(4) Allowable compensation for owners and related parties and definitions of owners and related parties are specified in §355.102(i) and §355.103(b)(2) of this title (relating to General Principles of Allowable and Unallowable Costs and Specifications for Allowable and Unallowable Costs. Owner and related party employees who provide both direct care and indirect services must maintain daily time sheets that record the time spent on activities in each area. The provider must maintain documentation relating to compensation, bonuses, and benefits of each owner or related party in accordance with §355.105(b)(2)(B)(xi) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures). The maximum hours per fiscal year that an owner and related party employee may report on the cost report is 2080 hours per fiscal year.

(e) Cost certification. A TxHmL Program provider must certify the accuracy of cost reports submitted to HHSC. A TxHmL Program provider may be liable for civil and/or criminal penalties if the cost report is not completed according to HHSC requirements.

(f) Due date. A TxHmL Program provider must submit Full Cost Reports in accordance with §355.105(c) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures) [~~no later than 90 days after the reporting period or 90 days after the date that HHSC mails the form to the TxHmL Program provider, whichever is later.~~]

(g) Extension of due date. HHSC may grant extensions of due dates for good cause in accordance with §355.105(c)(2). [~~Good cause is defined as a causal factor that the TxHmL Program provider could not reasonably be expected to control. A TxHmL Program provider must submit a request for an extension in writing to HHSC before the cost survey or Full Cost Report due date. HHSC will respond to a request for extension within 15 business days of its receipt.~~]

(h) Cost data. HHSC may at times require additional financial and statistical information to assess the fiscal integrity of the TxHmL Program in accordance with §355.105(c)(3). [~~A TxHmL Program provider must submit additional information to HHSC upon request, unless the information is not subject to the TxHmL Program provider's control.~~]

(i) Failure to submit requested data. Failure to submit acceptable cost data by the due date constitutes a violation of the TxHmL Program provider contract and may result in [~~HHSC notifying TDMHMR to place the TxHmL Program provider and all waiver contracts on~~] vendor hold.

(j) Review of cost data. HHSC reviews each TxHmL Program provider's cost data to determine whether the financial and statistical

information submitted conforms to all applicable rules and instructions. Forms that are not completed according to HHSC's instructions or rules may be returned to the TxHmL Program provider for proper completion.

(k) Desk reviews or field audits are performed on cost reports for all contracted providers. The frequency and nature of the field audits are determined by HHSC to ensure the fiscal integrity of the program. Desk reviews and field audits will be conducted in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), and providers will be notified of the results of a desk review or a field audit in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments). [~~On-site financial audits. HHSC performs a sufficient number of on-site financial audits to assess the fiscal integrity of the TxHmL Program. The number of on-site audits performed may vary.~~]

[~~(l) On-site financial audit standards. HHSC or its designee performs on-site financial audits in a manner consistent with the Government Auditing Standards issued by the United States Comptroller General.~~]

(l) [~~(m)~~] Access to records. Each TxHmL Program provider must allow access by HHSC or its authorized representatives to any and all records necessary to verify cost data submitted to HHSC.

(1) This requirement includes records pertaining to related-party transactions and other business activities engaged in by the TxHmL Program provider that are directly or indirectly related to the provision of contracted services.

(2) Failure to allow inspection of pertinent records within 10 working days following written notice from HHSC constitutes a violation of the TxHmL Program provider contract.

(3) If the administrative office or other entity pertaining to a multi-contract operation refuses access to records, then the penalties are extended to all of the TxHmL Program provider's entities having Medicaid contracts with TDMHMR.

(4) Additional rules regarding access to records that are out-of-state may be found in §355.105 [~~§355.703~~] of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures [~~Basic Objectives and Criteria for Review of Cost Reports~~]).

(m) [~~(n)~~] Reviews of exclusions or adjustments. An TxHmL Program provider who disagrees with HHSC's exclusion or adjustment of items in cost reports may request an informal review and, when appropriate, an administrative hearing as specified in §355.110 [~~§355.707~~] of this title (relating to Informal Reviews and Formal Appeals [~~Reviews and Administrative Hearings~~]).

(n) [~~(o)~~] Notification of exclusions and adjustments. HHSC will notify a TxHmL Program provider of exclusions and any adjustments, including caps applied, to reported costs in accordance with §355.107 [~~§355.705~~] of this title (relating to Notification of Exclusions and Adjustments [~~Notification~~]).

(o) General requirements. HHSC determines reimbursement rates according to §355.101 of this title (relating to Introduction).

(p) Payment rate determination. For the initial reimbursement period, beginning the effective date of the Center for Medicare and Medicaid Services (CMS) approval of the waiver, payment rates are those rates determined for other Medicaid programs with similar services. When payment rates are not available from other Medicaid programs with similar services, payment rates are determined on a pro forma approach in accordance with §355.101(c)(2)(B) and §355.105(h) of this title (relating to Introduction and General Reporting and Documentation Requirements, Methods, and Procedures).

(q) Payment rates for TxHmL services in effect for the initial reimbursement period will remain in effect until HHSC obtains sufficient reliable cost data to determine new payment rates.

(r) Each TxHmL Program provider's total reported allowable costs, excluding depreciation and mortgage interest, are projected from the historical cost-reporting period to the prospective reimbursement period as described in §355.108 of this title (relating to Determination of Inflation Indices). HHSC may adjust reimbursement if new legislation, regulations, or economic factors affect costs, according to §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs).

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

Filed with the Office of the Secretary of State on May 17, 2004.

TRD-200403321
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 424-6576

SUBCHAPTER F. GENERAL REIMBURSEMENT METHODOLOGY FOR ALL MEDICAL ASSISTANCE PROGRAMS

1 TAC §355.792

(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 Health and Human Services Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Government Code, §531.033, which authorizes the commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.021(b), which established HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The repeal implements the Government Code, §§531.033 and 531.021(b).

§355.792. Reimbursement Methodology for the TxHmL 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 May 17, 2004.

TRD-200403322
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 424-6576

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SUBCHAPTER E. COMMUNITY CARE FOR AGED AND DISABLED

1 TAC §355.505

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.505 concerning the Reimbursement Methodology for the Community Living Assistance and Support Services (CLASS) Waiver Program, in its Medicaid Reimbursement Rates chapter. The purpose of the amendment is to add the reimbursement methodology for a new service in the CLASS program, support family service, and to define the method that will be used to determine the payment rate for this service. The amendment specifies that a modeled rate will be used to determine the payment rate for this service.

Tom Suehs, Deputy Executive Commissioner for Financial Services, has determined that, for the first five-year period the proposed section is in effect, there are no fiscal implications for state government as a result of enforcing or administering the section. The support family services will substitute for habilitation services the child would have been eligible for as a waiver service if they lived in their own home. The support family services daily rate will not exceed the average daily cost for habilitation services for children in the waiver. There are no fiscal implications for local governments as a result of enforcing or administering the section.

There is no adverse economic effect on small or micro businesses, or on businesses of any size, as a result of enforcing or administering the section, because the amendments impose no additional requirements on businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section. There is no anticipated effect on local employment in geographic areas affected by this section.

Ed White, Director for Rate Setting and Forecasting, has determined that, for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section is that the method of determining the payment rate for this new service will be identified in rule.

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environment exposure.

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

Questions about the content of this proposal may be directed to Carolyn Pratt at (512) 491-1359 in the Texas Health and Human Services Commission's Rate Setting and Forecasting Department. Written comments on the proposal may be submitted to Ms. Pratt via facsimile at (512) 491-1998 or mail to Texas Health and Human Services Commission, Rate Setting and Forecasting, Mail Code H-400, 1100 West 49th Street, Austin, TX 78756-3101, within 30 days of publication in the *Texas Register.*

The amendment is proposed under the Texas Government Code, §531.033, which authorizes the commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.021(b), which established HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The amendment implements the Government Code, §§531.033 and 531.021(b).

§355.505. Reimbursement Methodology for the Community Living Assistance and Support Services Waiver Program.

(a) General requirements. The Texas Health and Human Services Commission (HHSC) applies the general principles of cost determination as specified in §355.101 of this title (relating to Introduction).

(b) General. Texas Medicaid contracted providers will be reimbursed for waiver services provided to Medicaid-eligible persons with related conditions (waiver services). Additionally, Texas Medicaid contracted providers will be reimbursed for a pre-enrollment assessment of potential waiver participants. The pre-enrollment assessment covers care planning for the participant and is reimbursed by a one-time administrative expense fee which is not included in the waiver services but will be paid from Medicaid administrative funds.

(c) Reporting of cost.

(1) Providers must follow the cost reporting guidelines as specified in §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(2) All contracted providers must submit a cost report unless the number of days between the date the first Texas Department of Human Services (DHS) client received services and the provider's fiscal year end is 30 days or fewer.

(3) A provider may be excused from submitting a cost report if circumstances beyond the control of the provider make cost report completion impossible, such as the loss of records due to natural disasters or removal of records from the provider's custody by any governmental entity. Requests to be excused from submitting a cost report must be received by HHSC Rate Analysis before the due date of the cost report.

(d) Waiver reimbursement determination methodology.

(1) Unit of service reimbursement or reimbursement ceiling by unit of service. Reimbursement or reimbursement ceilings for related-conditions waiver services, habilitation, nursing services provided by an RN, nursing facilities provided by an LVN, physical therapy, occupational therapy, speech pathology, and psychological and respite care services will be determined on a fee-for-service basis. These services are provided under §1915(c) of the Social Security Act Medicaid waiver for persons with related conditions.

(2) Monthly reimbursement. The reimbursement for the related-conditions case management waiver service will be determined as a monthly reimbursement. This service is provided under the §1915(c) of the Social Security Act Medicaid waiver for persons with related conditions.

(3) Reporting and verification of allowable cost.

(A) Providers are responsible for reporting only allowable costs on the cost report, except where cost report instructions indicate that other costs are to be reported in specific lines or sections. Only allowable cost information is used to determine recommended reimbursements. HHSC excludes from reimbursement determination any unallowable expenses included in the cost report and makes the

appropriate adjustments to expenses and other information reported by providers; the purpose is to ensure that the database reflects costs and other information that are necessary for the provision of services and are consistent with federal and state regulations.

(B) Individual cost reports may not be included in the database used for reimbursement determination if:

(i) there is reasonable doubt as to the accuracy or allowability of a significant part of the information reported; or

(ii) an auditor determines that reported costs are not verifiable.

(C) When material pertinent to proposed reimbursements is made available to the public, the material will include the number of cost reports eliminated from reimbursement determination for the reason stated in subparagraph (B)(i) of this paragraph.

(4) Reimbursement determination. Recommended unit of service reimbursements are determined in the following manner.

(A) Unit of service reimbursement for habilitation, nursing services provided by an RN, nursing services provided by an LVN, physical therapy, occupational therapy, speech pathology, and psychological services are determined in the following manner:

(i) Total allowable costs for each provider will be determined by analyzing the allowable historical costs reported on the cost report and other pertinent cost survey information.

(ii) Total allowable costs are reduced by the amount of the administrative expense fee and requisition fee revenues accrued for the reporting period.

(iii) Each provider's total allowable costs, excluding depreciation and mortgage interest, are projected from the historical cost reporting period to the prospective reimbursement period as described in §355.108 of this title (relating to Determination of Inflation Indices).

(iv) Payroll taxes and employee benefits are allocated to each salary line item on the cost report on a pro rata basis based on the portion of that salary line item to the amount of total salary expense for the appropriate group of staff. Employee benefits will be charged to a specific salary line item if the benefits are reported separately. The allocated payroll taxes are Federal Insurance Contributions Act (FICA) or social security, Medicare contributions, Workers' compensation Insurance (WCI), the Federal Unemployment Tax Act (FUTA), and the Texas Unemployment Compensation Act (TUCA).

(v) Each provider's projected total allowable costs are divided by the number of monthly units of service to determine the projected cost per client month of service.

(vi) For nursing services provided by an RN, nursing services provided by an LVN, physical therapy, occupational therapy, speech pathology, and psychological services:

(I) An allowable cost per unit of service is calculated for each service. The allowable costs per unit of service for each contracted provider are arrayed and weighted by the number of units of service, and the median cost per unit of service is calculated. The allowable costs per unit of service may be combined into an array with the allowable cost per unit of service of similar services provided by other programs in determining the median cost per unit of service.

(II) The median cost per unit of service for each waiver service is multiplied by 1.044.

(III) Specialized nursing reimbursement add-on. A specialized nursing reimbursement add-on will be paid in addition to the unit-of-service reimbursements for skilled nursing services provided by an RN or by an LVN. The specialized nursing reimbursement add-on is paid when a client requires, as determined by a physician, daily skilled nursing to cleanse, dress, and suction a tracheostomy or daily skilled nursing assistance with ventilator or respirator care. The client must be unable to do self-care and require the assistance of a nurse for the ventilator, respirator, or tracheostomy care. This specialized nursing reimbursement add-on will be determined in accordance with §355.105(h) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(vii) For habilitation services two cost areas are created:

(I) The attendant cost area includes salaries, wages, benefits, and mileage reimbursement calculated as specified in §355.112 of this title (relating to Attendant Compensation Rate Enhancement).

(II) Another attendant cost area is created which includes the other habilitation services costs not included in subclause (I) of this clause as determined in clauses (i)-(v) of this subparagraph to create an other attendant cost area. An allowable cost per unit of service is calculated for the other habilitation cost area. The allowable costs per unit of service for each contracted provider are arrayed and weighted by the number of units of service, and the median cost per unit of service is calculated. The median cost per unit of service is multiplied by 1.044.

(III) The attendant cost area and the other attendant cost area are summed to determine the habilitation attendant cost per unit of service.

(B) Unit of service reimbursement and reimbursement ceilings for respite care services are determined in the following manner:

(i) For in-home respite care services, a unit of service reimbursement is determined using a method based on modeled projected expenses which are developed using data from surveys, cost report data from other similar programs or services, professionals' experience in delivering similar type services, and other relevant sources.

(ii) For out-of-home respite care services, a unit of service reimbursement ceiling is determined using a method based on modeled projected expenses which are developed using data from surveys, cost report data from other similar programs or services, professionals' experience in delivering similar type services, and other relevant sources.

(C) The monthly reimbursement for case management services is determined in the following manner:

(i) Total allowable costs for each provider will be determined by analyzing the allowable historical costs reported on the cost report and other pertinent cost survey information.

(ii) Total allowable costs are reduced by the amount of administrative expense fee revenues reported.

(iii) Each provider's total allowable costs, excluding depreciation and mortgage interest, are projected from the historical cost reporting period to the prospective reimbursement period as described in §355.108 of this title (relating to Determination of Inflation Indices).

(iv) Payroll taxes and employee benefits are allocated to each salary line item on the cost report on a pro rata basis

based on the portion of that salary line item to the amount of total salary expense for the appropriate group of staff. Employee benefits will be charged to a specific salary line item if the benefits are reported separately. The allocated payroll taxes are Federal Insurance Contributions Act (FICA) or social security, Medicare contributions, Workers' compensation Insurance (WCI), the Federal Unemployment Tax Act (FUTA), and the Texas Unemployment Compensation Act (TUCA).

(v) Each provider's projected total allowable costs are divided by the number of monthly units of service to determine the projected cost per client month of service.

(vi) Each provider's projected cost per client month of service is arrayed from low to high and weighted by the number of units of service and the median cost per client month of service is calculated.

(vii) The median projected cost per client month of service is multiplied by 1.044.

(D) HHSC also adjusts reimbursement according to §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs) if new legislation, regulations, or economic factors affect costs.

(5) The reimbursement for support family services will be determined as a per day rate using a method based on modeled costs which are developed by using data from surveys, cost report data from other similar programs, payment rates from other similar programs, consultation with other service providers and/or professionals experienced in delivering contracted services, or other sources as determined appropriate by HHSC. The per day rate will have two parts, one part for the child placing agency and one part for the support family.

(e) Administrative expense fee determination methodology.

(1) One-time administrative expense fee. Reimbursement for the pre-enrollment assessment and care planning process required to determine eligibility for the waiver program will be provided as a one-time administrative expense fee.

(2) Administrative expense fee determination process. The recommended administrative expense fee is determined using a method based on modeled projected expenses which are developed using data from surveys, cost report data from other similar programs or services, professionals' experience in delivering similar services, and other relevant sources.

(f) Requisition fees. Requisition fees are reimbursements paid to the CLASS direct service agency contracted providers for their efforts in acquiring adaptive aids and minor home modifications for CLASS participants. Reimbursement for adaptive aids and minor home modifications will vary based on the actual cost of the adaptive aid and minor home modification. Reimbursements are determined using a method based on modeled projected expenses which are developed by using data from surveys; cost report data from similar programs; consultation with other service providers and/or professionals experienced in delivering contracted services; and/or other sources.

(g) Allowable and unallowable costs.

(1) Providers must follow the guidelines in determining whether a cost is allowable or unallowable as specified in §355.102 and §355.103 of this title (relating to General Principles of Allowable and Unallowable Costs, and Specifications for Allowable and Unallowable Costs) as well as the following provisions.

(2) Participant room and board expenses are not allowable, except for those related to respite care.

(3) The cost of adaptive aids and home modifications is not allowable. Allowable labor costs associated with acquiring adaptive aids and home modifications should be reported in the cost report. Any item purchased for participants in this program and reimbursed through a voucher payment system is unallowable. Refer to §355.103(b)(17)(K) of this title (relating to Specifications for Allowable and Unallowable Costs).

(h) Authority to determine reimbursement. The authority to determine reimbursement is specified in §355.101 of this title (relating to Introduction).

(i) Reporting revenue. Revenues must be reported on the cost report in accordance with §355.104 of this title (relating to Revenues).

(j) Reviews and field audits of cost reports. Desk reviews or field audits are performed on all contracted providers' cost reports. The frequency and nature of the field audits are determined by HHSC to ensure the fiscal integrity of the program. Desk reviews and field audits will be conducted in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), and providers will be notified of the results of a desk review or a field audit in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments). Providers may request an informal review and, if necessary, an administrative hearing to dispute an action taken under §355.110 of this title (relating to Informal Reviews and Formal Appeals).

(k) Reporting requirements. The program director's full salary is to be reported on the line item of the cost report designated for the director.

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

Filed with the Office of the Secretary of State on May 17, 2004.

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Steve Aragón
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 424-6576

1 TAC §355.508

The Texas Health and Human Services Commission (HHSC) proposes new §355.508 concerning the Reimbursement Methodology for Transition Assistance Services, in its Medicaid Reimbursement Rates chapter. The purpose of the new rule is to create a reimbursement methodology for a new service in the Community Based Alternatives, Community Living Assistance and Support Services, Medically Dependent Children, Deaf Blind with Multiple Disabilities and Consolidated Waiver programs, transition assistance services, and to define the method that will be used to determine the payment rate for this service. The amendment specifies that a modeled rate will be used to determine the payment rate for this service.

Tom Suehs, Deputy Executive Commissioner for Financial Services, has determined that, for the first five-year period the proposed section is in effect, there are no fiscal implications for state government as a result of enforcing or administering the section. There are no fiscal implications for local governments as a result of enforcing or administering the section.

There is no adverse economic effect on small or micro businesses, or on businesses of any size, as a result of enforcing or administering the section, because the amendments impose no additional requirements on businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section. There is no anticipated effect on local employment in geographic areas affected by the section.

Ed White, Director for Rate Setting and Forecasting, has determined that, for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section is that the method of determining the payment rate for this new service will be identified in rule.

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environment exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environment exposure.

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

Questions about the content of this proposal may be directed to Carolyn Pratt at (512) 491-1359 in the Texas Health and Human Services Commission's Rate Setting and Forecasting Department. Written comments on the proposal may be submitted to Ms. Pratt via facsimile at (512) 491-1998 or mail to Texas Health and Human Services Commission, Rate Setting and Forecasting, Mail Code H-400, 1100 West 49th Street, Austin, TX 78756-3101, within 30 days of publication in the *Texas Register*.

The new rule is proposed under the Texas Government Code, §531.033, which authorizes the commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.021(b), which established HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The new rule implements the Government Code, §§531.033 and 531.021(b).

§355.508. Reimbursement Methodology for Transition Assistance Services Case Management.

The reimbursement for transition assistance services will be determined as a one-time rate per client based on modeled costs of compensation and other support costs using data from surveys, cost reports, consultation with other professionals in delivering contracted services, or other sources determined appropriate by HHSC. This rate is for eligible clients receiving transition assistance services in the Community Based Alternatives, Community Living Assistance and Support Services, Medically Dependent Children, Deaf Blind with Multiple Disabilities, and Consolidated Waiver programs.

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

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Steve Aragón
General Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6576

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SUBCHAPTER F. REIMBURSEMENT METHODOLOGY FOR PROGRAMS SERVING PERSONS WITH MENTAL ILLNESS AND MENTAL RETARDATION

1 TAC §355.743

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.743, Subchapter F, concerning reimbursement methodology for Mental Health Case Management in its Medicaid Reimbursement Rates chapter. The purpose of the amendment is to separate the reimbursement methodologies for Mental Health Case Management and Mental Retardation Service Coordination to reflect the separation of these services in the Texas Department of Mental Health and Mental Retardation (TDMHMR) programmatic rules. References to MR Service Coordination are being removed from this rule. The reimbursement methodology for MR Service Coordination will be proposed under a separate rule. This rule is also being amended to change the services due to the implementation of the Resiliency and Disease Management model; change references from the general cost determination rules of Subchapter F to the cost determination process rules of Subchapter A. The proposed rule replaces the references to "TDMHMR" with references to "TDMHMR or its successor agency". Also, references to a settle-up process are being removed. Proposed changes are to be effective August 31, 2004.

Tom Suehs, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five-year period that the proposed amendment is in effect, there are no foreseeable fiscal implications relating to costs or revenues of state or local government.

Ed White, Director of HHSC Rate Setting and Forecasting, has determined that, for each year of the first five-year period the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the section is that the reimbursement methodology for Mental Health Case Management will: (a) reflect the services offered under the Resiliency and Disease Management model; (b) reflect the structure of the TDMHMR programmatic rules by separating the MR Service Coordination and MH Case Management programs into separate reimbursement methodology rules; (c) reflect use of the cost determination process rules which will be consistent for all HHSC long-term care programs; (d) reflect the elimination of the settle-up process after the payment rates have been established and paid to providers; and (e) recognize the impending transfer of TDMHMR's program responsibilities to agencies created by H.B. 2292, 78th Legislature (R.S.). There is no anticipated impact on small or micro-businesses to comply with the proposed amendments, as they will not be required to alter their business practices as a result of the amendments. There are no anticipated economic costs to persons required to comply with the proposed amendments. There is no anticipated impact on a local economy.

Under §2007.003(b) of the Government Code, HHSC has determined that Chapter 2007 of the Government Code does not apply to this proposed rule. The changes made by this rule do not implicate a recognized interest in private real property. Accordingly, HHSC is not required to complete a takings impact assessment regarding this rule.

Comments concerning the proposed amendments may be submitted in writing to Lupita Villarreal, Rate Analysis, by mail to 1100 West 49th Street, Mail Code H-400, Austin, Texas 78756-3101, by fax to 512/491-1998, or by e-mail to lupita.villarreal@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*. For further information regarding the proposal or to make the proposal available for public review, contact local offices of DHS or Lupita Villarreal at (512) 491-1178 in HHSC's Rate Analysis Department.

The amendment is proposed under the Texas Government Code, §531.033, which provides the executive commissioner of HHSC with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code, §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

The proposed amendment affects the Texas Government Code, Chapter 531, and the Texas Human Resources Code, Chapter 32.

§355.743. Reimbursement Methodology for Mental Health Case Management [~~Service~~]

(a) The Texas Department of Mental Health and Mental Retardation (TDMHMR) or its successor agency reimburses qualified local authorities for Mental Health Case Management (CM) [~~service coordination~~] provided to Medicaid-eligible individuals who are eligible for CM [~~service coordination~~] according to program rules established by TDMHMR or its successor agency [~~25 Texas Administrative Code §412.455 (relating to Eligibility)~~]. HHSC determines reimbursement for CM [~~service coordination~~]. Reimbursement is:

(1) uniform statewide;

(2) prospective; and

(3) cost related [~~with a year-end settlement~~].

(b) Separate rates. Separate rates are set for services based on their intensity [~~provided to~~]:

[~~(1) individuals in the mental retardation priority population as defined in 25 TAC §412.453 (to Definitions) and persons with a related condition (as defined in 42 CFR §435.1009);~~]

(1) [~~(2)~~] Routine CM which is a low intensity service that will be provided to both adults and children who need limited assistance in obtaining access to services and is primarily site-based [~~individuals in the adult mental health priority population as defined in 25 TAC §412.453 (Definitions);~~] and

(2) [~~(3)~~] Intensive CM is a high-intensity service that will be provided to just children who need a greater level of assistance in obtaining services and is primarily community-based [~~individuals in the child mental health priority population as defined in 25 TAC §412.453 (Definitions)~~].

(c) [~~Local authority qualifications.~~] Section 1396n(g) of Title 42 of the U.S. Code [~~USC~~] is invoked to limit the provision of CM [~~service coordination~~] to [~~the state mental retardation authorities, the~~] state mental health authorities, TDMHMR or its successor agency, or its designated local authorities authorized under §534.054 of the Texas Health and Safety Code, who offer a service delivery system of required services as outlined in §534.053 of the Texas Health and Safety Code.

(d) Rules and procedures. TDMHMR or its successor agency has implemented rules and procedures to ensure that CM [~~service coordination~~] is provided by persons who meet the requirements specified by TDMHMR or its successor agency and is provided in compliance with federal and state laws, rules, and regulations.

(e) Reimbursement methodology. HHSC determines reimbursement according to §355.101 [~~§355.701~~] of this title (relating to Introduction [~~General Specifications~~]). HHSC may also adjust reimbursement if new legislation, regulations or economic factors affect costs, according to [~~As specified in~~] §355.109 [~~§355.706~~] of this title (relating to Adjusting Reimbursement. [~~Rates~~] When New Legislation, Regulations, or Economic Factors Affect Costs)[~~, HHSC may also adjust reimbursements~~].

(1) Local authorities will be reimbursed [a] statewide rates [~~rate~~] comprising a modeled rate plus a statewide weighted average associated service add-on.

(A) The modeled rate is based on cost calculations that include a statewide weighted average hourly wage for persons who provide CM [~~service coordination~~] as 100 percent of their job responsibilities, a predetermined caseload size, a statewide weighted average supervisory wage rate and span of control, and a statewide weighted average benefits factor.

(B) The associated service add-on includes clerical and support costs, travel and training costs, and other allowable operating costs (e.g., rent, utilities, office supplies, administration, and depreciation) necessary to provide CM [~~service coordination~~].

[~~(2) At the end of each reimbursement period HHSC will compare the difference between the statewide rate and each local authority's service coordination costs as submitted on its cost report in accordance with subsection (g) of this section.~~]

[~~(A) If a local authority's costs are less than 95 percent of the statewide rate, the local authority will pay TDMHMR the difference between that local authority's costs and 95 percent of the statewide rate. The local authority will be notified of the amount due to TDMHMR by certified mail.~~]

[~~*(i)* The local authority will have 30 days to make payment. If payment is not received from the local authority within 30 days of the date that the notice was received, as specified on the certified mail receipt, HHSC will notify TDMHMR to place the local authority on vendor hold.~~]

[~~*(ii)* A local authority that has been placed on vendor hold may request an administrative hearing in accordance with §355.707 of this title (relating to Reviews and Administrative Hearings).~~]

[~~(B) If a local authority's costs exceed the statewide rate, TDMHMR will reimburse the local authority its costs up to 125 percent of the statewide rate. TDMHMR will notify the local authority by certified mail of the amount that is owed to the local authority and will make payment within 30 days of the date that the notice was received, as specified on the certified mail receipt.~~]

(2) [~~(3)~~] At such time as HHSC determines that cost data collected as described in subsection (g) of this section are reliable, statewide reimbursement rates will be developed based on the cost data submitted by local authorities in the following manner:

(A) Total allowable costs for each provider for each rate will be determined from analyzing the allowable historical costs reported on the cost report.

(B) Each provider's total allowable costs are projected from the historical cost reporting period to the prospective reimbursement period using inflation factors according to §355.108 [§355.704] of this title (relating to Determination of Inflation Indices) for each covered contact.

(C) Each provider's projected cost per unit of service is calculated. The mean provider cost per contact is calculated, and the statistical outliers (those providers whose cost per contact exceeds plus or minus (+/-) two standard deviations of the mean provider cost per contact) are removed. After removal of the statistical outliers, the mean cost per contact is calculated. This mean cost per contact becomes the recommended cost per contact. [Following each annual reimbursement period, allowable costs will be compared to reimbursement and any resulting monetary reconciliation will be made in accordance with paragraph (2) of this subsection.]

(f) Reimbursable unit of service.

(1) The unit of service upon which reimbursement is made is a face-to-face contact with a Medicaid-eligible individual eligible for CM [service coordination] in accordance with TDMHMR's or its successor agency's program rules [25 TAC §412.455 (Eligibility)] by:

(A) a local authority as required by subsection (c) of this section; and

(B) a person who meets the qualifications set forth in TDMHMR's or its successor agency's program rules [25 TAC §412.461 (Minimum Qualifications)].

(2) The face-to-face contact must include the provision of one or more services as defined in TDMHMR's or its successor agency's program rules [25 TAC §412.453(18) (Definitions)].

(3) Reimbursement is [limited to] one unit of service per 15 continuous minutes of face-to-face contact with a Medicaid-eligible individual [per month].

(g) Reporting of costs. HHSC or its designee collects from local authorities statistical and cost data. The statistical data includes, but is not limited to, the total number of individuals receiving CM [service coordination], and the number of Medicaid-eligible individuals receiving CM [service coordination]. The cost data include direct costs, programmatic indirect costs, and general and administrative costs including salaries, benefits, and non-labor costs.

(1) Cost reports. Each local authority must submit financial and statistical information in a cost report or survey format designated by HHSC or its designee. The cost report will capture the expenses of the local authority including salaries and benefits, administration, building and equipment, utilities, supplies, travel, and indirect overhead costs related to the provision of CM [service coordination]. Only allowable cost information is used to compile the cost base. Each Local authority must follow the guidelines in determining whether a cost is allowable or unallowable as specified in §§355.102 & 355.103 [, as defined in §355.741 of this title and §355.708] of this title (relating to General Principles of Allowable and Unallowable Costs and Specifications for Allowable and Unallowable Costs). Local Authorities must follow the cost-reporting guidelines as specified in §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures). Revenues must be reported on the cost report in accordance with §355.104 of this title (relating to Revenues).

(A) Accounting requirements. All information submitted on the cost reports must be based upon the accrual method of accounting unless the governmental entity operates on a cash or modified accrual basis. The local authority must complete the cost report according to the prescribed statement of allowable and unallowable costs as referenced in §355.101 [§355.702] of this title (relating to Introduction [Method of Cost Determination]). Cost reporting should be consistent with generally accepted accounting principles (GAAP). In cases in which cost reporting rules conflict with GAAP, Internal Revenue Service, or other authorities, the cost reporting rules take precedence.

(B) Reporting period. The local authority must prepare the cost report according to §355.105 [§355.702] of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures [Method of Cost Determination]).

(2) Exclusions or adjustments. Local authorities must exclude unallowable costs from the cost report. HHSC or its designee excludes from the cost reimbursement base any unallowable costs included in the cost report and makes adjustments to expenses reported by local authorities to ensure that the cost reimbursement base reflects costs which are consistent with efficiency, economy, and quality care, are necessary for the provision of CM [service coordination] services, and are consistent with federal and state Medicaid regulations as specified in §§355.102 & 355.103 [§355.701] of this title (relating to General Principles of Allowable and Unallowable Costs and Specifications for Allowable and Unallowable Costs [Definitions and General Specifications]). If there is doubt as to the accuracy of allowability of a significant part of the information reported, individual cost reports may be eliminated from the cost base.

(3) Desk reviews. As specified in §355.106 [§355.703] of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), HHSC or its designee reviews such cost reports or surveys. Cost reports not completed according to instructions or rules will be corrected and resubmitted by the local authority within the time frame prescribed by HHSC.

(4) On-site audit of cost reports. HHSC or its designee performs a sufficient number of audits each year to ensure the fiscal integrity of the CM [service coordination] reimbursement. The number of on-site audits actually performed each year may vary.

(A) HHSC or its designee notifies local authorities of disallowances and adjustments to reported expenses made during desk reviews and on-site audits of cost reports according to §355.107 [§355.705] of this title (relating to Notification of Exclusions and Adjustments).

(B) Reviews of cost report disallowances. A local authority, which disagrees with HHSC or its designee on cost report disallowances, may request a review of the disallowances as specified in §355.110 [§355.707] of this title (relating to Informal Reviews and Formal Appeals [Administrative Hearings]).

(5) Recordkeeping requirements. Each local authority must maintain records according to the requirements specified in TDMHMR or its successor agency's rules and the provider agreement. The local authority must ensure that the records are accurate and sufficiently detailed to support the financial and statistical information reported in the cost report. If a local authority does not maintain records, which support the financial and statistical information submitted on the cost report, the local authority will be given 90 days to correct this recordkeeping. HHSC will notify TDMHMR or its successor agency to place the authority on vendor hold if the correction is not made within 90 days from the date the local authority receives notification.

(6) Access to records. The local authority must allow HHSC access to any and all records necessary to verify information on the cost report.

(h) Billing and payment reviews. The provider must allow TDMHMR or its successor agency access to any and all records regarding CM [~~service coordination~~].

(1) TDMHMR or its successor agency will conduct periodic billing and payment reviews utilizing TDMHMR's or its successor agency's Billing and Payment Review Protocol.

(2) Recoupment will be taken according to the application of error calculations contained in TDMHMR's or its successor agency's Billing and Payment Review Protocol.

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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Steve Aragón

General Counsel

Texas Health and Human Services Commission

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1 TAC §355.781

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.781, concerning reimbursement methodology for Rehabilitative Services, in its Medicaid Reimbursement Rates chapter. The proposed amendment to the methodology adds new services for the Resiliency and Disease Management model and deletes services the Resiliency and Disease Management model will not be using. This rule is also being amended to change the references from the general cost determination rules of Subchapter F to the cost determination process rules of Subchapter A. The proposed rule replaces the references to "TDMHMR" with references to "TDMHMR or its successor agency". Also, references to a settle-up process are being removed. Proposed changes are to be effective August 31, 2004.

Tom Suehs, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five-year period the proposed rule is in effect, there are no foreseeable fiscal implications relating to costs or revenues of state or local government.

Ed White, Director, of HHSC Rate Setting and Forecasting, has determined that, for each year of the first five-year period the proposal is in effect, the public benefit anticipated as a result of enforcing the section is that the reimbursement methodology for rehabilitative services will: (a) reflect the services offered under the Resiliency and Disease Management model; (b) reflect use of the cost determination process rules consistent with all HHSC long-term care programs; (c) reflect the elimination of the settle-up process after the payment rates have been established and paid to providers; and (d) recognize the impending transfer of TDMHMR's program responsibilities to agencies created by H.B. 2292, 78th Legislature (R.S.). There is no anticipated impact on small or micro-businesses to comply with the proposed amendment, as they will not be required to alter their business practices as a result of the amendment. There are no anticipated economic costs to persons required to comply with the proposed amendment. There is no anticipated impact on a local economy.

Under §2007.003(b) of the Government Code, HHSC has determined that Chapter 2007 of the Government Code does not apply to this proposed rule. The changes made by this rule do not implicate a recognized interest in private real property. Accordingly, HHSC is not required to complete a takings impact assessment regarding this rule.

Comments concerning the proposed amendment may be submitted in writing to Lupita Villarreal, Rate Analysis, by mail to 1100 West 49th Street, Mail Code H-400, Austin, Texas 75756-3101, by fax to 512/491-1998, or by e-mail to lupita.villarreal@hhsc.state.tx.us within 30 days of publication of this proposal in the Texas Register. For further information regarding the proposal or to make the proposal available for public review, contact local offices of DHS or Lupita Villarreal at (512) 491-1178 in HHSC's Rate Analysis Department.

The amendment is proposed under the Texas Government Code, §531.033, which provides the executive commissioner of HHSC with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code, §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursement.

The proposed amendment affects the Texas Government Code, Chapter 531, and the Texas Human Resources Code, Chapter 32.

§355.781. Rehabilitative Services Reimbursement Methodology.

(a) General information.

(1) The Texas Health and Human Services Commission (HHSC) will reimburse qualified rehabilitative services providers for rehabilitative services provided to Medicaid-eligible persons with mental illness.

(2) The HHSC establishes the reimbursement rate. The HHSC sets reimbursement rates that reflect cost-effective operations and are within State appropriation constraints.

(b) Definitions.

(1) Rate [~~Interim rate~~]--Rate paid to a rehabilitative services provider based on cost reports [~~prior to settle-up conducted in accordance with subsection (d)(4) of this section~~].

(2) Service type--Types of Medicaid reimbursable rehabilitative services as specified in program rules for the following [~~§419.453 of Title 25 (relating to Definitions); §419.456 of Title 25 (relating to Community Support Services); §419.457 of Title 25 (relating to Day Programs for Acute Needs); §419.458 of Title 25 (relating to Day Programs for Skills Training); §419.459 of Title 25 (relating to Day Programs for Skills Maintenance); and §419.460 of Title 25 (relating to Rehabilitative Treatment Plan Oversight)~~]:

(A) Day programs for acute needs--adult;

(B) Crisis intervention services--individual-child/adolescent and adult [~~Day programs for skills training--adult~~];

(C) Medication training and support--individual-child/adolescent and adult [~~Day programs for skills maintenance--adult~~];

(D) Medication training and support--group-adult [~~Day programs for acute needs--child~~];

(E) Medication training and support--group-child/adolescent [~~Day programs for skills training--child~~];

(F) Psychosocial rehabilitative services--individual-adult [~~Community support services by professional--individual~~];

(G) Psychosocial rehabilitative services--group-adult [~~Community support services by paraprofessional--individual~~];

(H) Rehabilitative counseling and psychotherapy--individual-adult [~~Community support services by professional--group~~];

(I) Rehabilitative counseling and psychotherapy--group-adult; [~~Community support services by paraprofessional--group; and~~]

(J) Skills training and development--individual-child/adolescent and adult; [~~Rehabilitative treatment plan oversight.~~]

(K) Skills training and development--group-adult; and

(3) Unit of service--The amount of time an individual, eligible for Medicaid rehabilitative services or non-Medicaid rehabilitative services (or parent or guardian of the person of an eligible minor), is engaged in face-to-face contact with a person described in program rules established by TDMHMR or its successor agency. [~~§419.455(d) of Title 25 (relating to Rehabilitative Services: General Requirements) plus any time spent by such person traveling to and from the off-site location of the eligible individual to provide the contact~~]. The units of service are as follows:

[~~(A) Individual and group community support services--15 continuous minutes~~];

(A) [~~(B)~~] Day programs for acute needs--45-60 continuous minutes;[~~and~~]

(B) [~~(C)~~] Crisis intervention services--15 continuous minutes; [~~Rehabilitative treatment plan oversight--one contact of 15 or more continuous minutes.~~]

(C) Medication training and support--15 continuous minutes;

(D) Psychosocial rehabilitative services--15 continuous minutes;

(E) Rehabilitative counseling and psychotherapy--15 continuous minutes; and

(F) Skills training and development--15 continuous minutes.

[~~(4) Settle-up categories--The settle-up process utilizes the following groupings of service types:~~]

[~~(A) Category 1:~~]

[~~(i)~~ ~~Day programs for acute needs--adult;~~]

[~~(ii)~~ ~~Day programs for acute needs--child; and~~]

[~~(iii)~~ ~~Day programs for skills maintenance--adult.~~]

[~~(B) Category 2:~~]

[~~(i)~~ ~~Day programs for skills training--adult;~~]

[~~(ii)~~ ~~Day programs for skills training--child;~~]

[~~(iii)~~ ~~Community support services by professional--group; and~~]

[~~(iv)~~ ~~Community support services by paraprofessional--group;~~]

[~~(C) Category 3:~~]

[~~(i)~~ ~~Community support services by professional--individual; and~~]

[~~(ii)~~ ~~Community support services by paraprofessional--individual.~~]

[~~(D) Category 4: Rehabilitative treatment plan oversight.~~]

(c) Reporting of Costs.

(1) Cost reporting. Rehabilitative services providers must submit information quarterly, unless otherwise specified, on a cost report formatted according to HHSC's specifications. Rehabilitative services providers must complete the cost report according to §§355.101, 355.102, 355.103, 355.104, and 355.105 [§§~~355.701-355.709~~] of this title [~~subchapter~~], (relating to Introduction, General Principles of Allowable and Unallowable Costs, Specifications for Allowable and Unallowable Costs, Revenues, and General Reporting and Documentation Requirements, Methods, and Procedures [~~General Reimbursement Methodology For All Medical Assistance Programs~~]).

(2) Reporting period and due date. Rehabilitative services providers must prepare the cost report to reflect rehabilitative services provided during the designated cost report reporting period. The cost reports must be submitted to the HHSC no later than 45 days following the end of the designated reporting period unless otherwise specified by the HHSC.

(3) Extension of the due date. The HHSC may grant extensions of due dates for good cause. A good cause is one that the rehabilitative services provider could not reasonably be expected to control. Rehabilitative services providers must submit requests for extensions in writing. Requests for extensions must be received by HHSC prior to the cost report due date. HHSC will respond to requests within 15 days of receipt.

(4) Failure to file an acceptable cost report. If a rehabilitative services provider fails to file a cost report according to all applicable rules and instructions, [~~the~~] HHSC will notify TDMHMR or its successor agency to place the rehabilitative services provider on vendor hold until the rehabilitative services provider submits an acceptable cost report.

(5) Allocation method. If allocations of cost are necessary, rehabilitative services providers must use and be able to document reasonable methods of allocation. HHSC adjusts allocated costs if HHSC considers the allocation method to be unreasonable. The rehabilitative services provider must retain work papers supporting allocations for a period of three years or until all audit exceptions are resolved (whichever is longer).

(6) Cost report certification. Rehabilitative services providers must certify the accuracy of cost reports submitted to HHSC in the format specified by HHSC. Rehabilitative services providers may be liable for civil and/or criminal penalties if they misrepresent or falsify information.

(7) Cost data supplements. HHSC may require additional financial and statistical information other than the information contained on the cost report.

(8) Allowable and unallowable costs. Cost reports may only include costs that meet the requirements as specified in §§355.102 and 355.103 [§~~355.708~~] of this title (relating to General Principles of

Allowable and Unallowable Costs and Specifications for Allowable and Unallowable Costs).

(9) Review of cost reports. HHSC reviews each cost report to ensure that financial and statistical information submitted conforms to all applicable rules and instructions. The review of the cost report includes a desk review [audit]. HHSC reviews all cost reports according to the criteria specified in §355.106 [§355.703] of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports). If a rehabilitative services provider fails to complete the cost report according to instructions or rules, HHSC returns the cost report to the rehabilitative services provider for proper completion. HHSC may require information other than that contained in the cost report to substantiate reported information. Providers will be notified of the results of a desk review or a field audit in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments).

(10) On-site audits. HHSC may perform on-site audits on all rehabilitative services providers that participate in the Medicaid program for rehabilitative services. HHSC determines the frequency and nature of such audits but ensures that they are not less than that required by federal regulations related to the administration of the program.

(11) Notification of exclusions and adjustments. HHSC notifies rehabilitative services providers of exclusions and adjustments to reported expenses made during desk reviews and on-site audits of cost reports.

(12) Reviews and administrative hearings. Rehabilitative services providers may request an informal review and, if necessary, an administrative hearing to dispute the action taken by HHSC under §355.110 [§355.707] of this title (relating to Informal Reviews and Formal Appeals [Administrative Hearings]).

(13) Access to records. Each rehabilitative services provider must allow access to all records necessary to verify cost report information submitted to HHSC. Such records include those pertaining to related-party transactions and other business activities engaged in by the rehabilitative services provider. If a rehabilitative services provider does not allow inspection of pertinent records within 14 days following written notice HHSC will notify TDMHMR or its successor agency to place the rehabilitative services provider on vendor hold until access to the records is allowed. If the rehabilitative services provider continues to deny access to records, TDMHMR or its successor agency may terminate the rehabilitative services provider agreement with the rehabilitative services provider.

(14) Record keeping requirements. Rehabilitative services providers must maintain service delivery records and eligibility determination for a period of five years or until any audit exceptions are resolved (whichever is later). Rehabilitative services providers must ensure that records are accurate and sufficiently detailed to support the financial and statistical information contained in cost reports.

(15) Failure to maintain adequate records. If a rehabilitative services provider fails to maintain adequate records to support the financial and statistical information reported in cost reports, HHSC allows 30 days for the rehabilitative services provider to bring record keeping into compliance. If a rehabilitative services provider fails to correct deficiencies within 30 days from the date of notification of the deficiency, HHSC will notify TDMHMR or its successor agency to terminate the rehabilitative services provider agreement with the rehabilitative services provider.

(d) Reimbursement determination. [The] HHSC determines reimbursement according to §355.101 of this title [§§355.701-355.709 of this subchapter,] (relating to Introduction [General Reimbursement Methodology For All Medical Assistance Programs]). Rehabilitative services providers are reimbursed a uniform, statewide [, interim] rate [with a cost-related year-end settle-up]. The HHSC determines reimbursement in the following manner:

(1) Inclusion of certain reported expenses. Rehabilitative services providers must ensure that all allowable costs are included in the cost report.

(2) Data collection. The HHSC collects several different kinds of data. These include the number of units of service that individuals receive and cost data, including direct costs, programmatic indirect costs, and general and administrative overhead costs. These costs include salaries, benefits, and other costs. Other costs include nonsalary related costs such as building and equipment maintenance, repair, depreciation, amortization, and insurance expenses; employee travel and training expenses; utilities; and material and supply expenses.

(3) Rate[Interim rate] methodology. A [The interim] rate is determined biennially for each service type [prospectively] based on cost reports. [and at least annually. An interim rate is set for each service type by settle-up category.]

(A) The HHSC projects and adjusts reported costs from the historical reporting period to determine the [interim] rate for the prospective reimbursement period. Cost projections adjust the allowed historical costs based on significant changes in cost-related conditions anticipated to occur between the historical cost period and the prospective reimbursement period. Changes in cost-related conditions include, but are not limited to, inflation or deflation in wage or price, changes in program utilization and occupancy, modification of federal or state regulations and statutes, and implementation of federal or state court orders and settlement agreements. Costs are adjusted for the prospective reimbursement period by a general cost inflation index as specified in §355.108 [§355.704] of this title (relating to Determination of Inflation Indices).

(B) For each service [settle-up] category, each rehabilitative services provider's projected cost per unit of service is calculated. The mean rehabilitative services provider cost per unit of service is calculated, and the statistical outliers (those rehabilitative services providers whose unit costs exceed plus or minus (+/-) two standard deviations of the mean rehabilitative services provider cost) are removed. After removal of the statistical outliers, the mean cost per unit of service is calculated. This mean cost per unit of service becomes the recommended reimbursement per unit of service.

[(4) Settle-up process. At the end of each reimbursement period, the HHSC will compare the amount reimbursed at the interim rate for each settle-up category and the rehabilitative services provider's costs for each category, as submitted on its cost report in accordance with subsection (c) of this section.]

[(A) Rehabilitative service provider's whose costs are less than 95% of the amount reimbursed at the interim rate, will be required to pay to TDMHMR 100% of the difference between its allowable costs and 95% of the amount reimbursed at the interim rate for each settle-up category. TDMHMR will notify the rehabilitative services provider of the amount due by certified mail and the rehabilitative services provider will remit the repayment amount within 60 days of notification. TDMHMR will apply a vendor hold on Medicaid payments to a rehabilitative services provider for not making the payment to TDMHMR within 60 days of receiving notice.]

[(B) If a rehabilitative services provider's costs exceed the amount reimbursed at the interim rate, TDMHMR will reimburse the rehabilitative services provider the difference between its allowable costs and the reimbursement at the interim rate up to 125% of the

~~interim rate for each settle-up category. TDMHMR will notify the rehabilitative services provider of the amount owed to the provider via certified mail. TDMHMR will make payment within 30 days of the date the notice was received, as indicated by the certified mail receipt.~~]

(4) Adjustments to the reimbursement determination methodology. HHSC may adjust reimbursement if new legislation, regulations, or economic factors affect costs as described in §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs).

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

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Steve Aragón
General Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6576

CHAPTER 370. STATE CHILDREN'S HEALTH INSURANCE PROGRAM
SUBCHAPTER F. SPECIAL INVESTIGATIVE UNITS
1 TAC §§370.501 - 370.505

The Texas Health and Human Services Commission (the Commission) proposes a new Subchapter F, §§370.501-370.505, concerning Special Investigations Unit mandated by HB2292, 78th Legislature, Regular Session, 2003.

Background and Summary of Factual Basis for the Rules

The 75th Legislature, Regular Session, 1997, through Senate Bill 30, mandated managed care organizations (MCOs) develop and submit to the operating agency for approval by the commission a plan for preventing, detecting, and reporting fraud and abuse. The bill also required MCOs to report any known or suspected acts of fraud or abuse to the operating agency for referral to the commission for investigation.

The 78th Legislature, Regular Session, 2003, through House Bill 2292, expanded on Senate Bill 30 and mandated that, effective September 1, 2004, all MCOs that provide or arrange for the provision of health care services to an individual under a government-funded program, including the Children's Health Insurance Program (CHIP), establish and maintain a Special Investigations Unit (SIU) to investigate fraudulent claims and other types of program abuse by recipients and service providers.

The additions and revisions to state statutes passed through SB 30 and HB 2292 are designed to strengthen the state's ability to improve waste, abuse and fraud detection, investigation, criminal referral and prosecution, and recovery of overpayments, damages, and penalties from health and human service providers, recipients, and contractors. The rules provide an increased effort to identify fraud or abuse in managed care.

The proposed rules were developed in conjunction with the Commission's Office of Inspector General (OIG) and HHSC, Medicaid/CHIP Managed Care representatives. The proposed rules were submitted for review and comments to the MCOs currently under contract with the state of Texas.

Section-by-Section Explanation

Proposed new §370.501 generally describes the purpose of the plan to prevent waste, abuse and fraud. It details when the plan is to be submitted to the OIG, when the plan is to be resubmitted if denied, and the requirements of the MCO if it chooses to contract with another entity for the investigation of fraudulent claims and other types of program abuse.

Proposed new §370.502 describes the elements for the MCOs plan to detect and investigate possible acts of waste, abuse and fraud. The description is specific and provides the requirements for detecting and investigating waste, abuse and fraud by providers and recipients.

Proposed new §370.503 outlines the requirements for information that must be submitted to the OIG from the MCO if the MCO contracts with another entity for the investigation of fraudulent claims and other types of programs abuse by recipients and providers. It also provides the timeline for submittal of the information to the OIG.

Proposed new §370.504 contains specific language with regard to the MCOs maintaining and providing records upon request. The proposed rules provides detail language as to which agencies are to receive the records, when the records are to be produced and the records that are to be maintained by the MCO. It also provides general language for possible sanctions if the records request is out of compliance.

Proposed new §370.505 describes the process for the recovery of funds resulting from an investigation conducted by the MCO or the OIG. In addition, the proposed rule describes when the money will be recovered and how the recovered funds will be disbursed.

Public Benefit

Jason Cooke, Associate Commissioner for Medicaid and CHIP, has determined that for each year of the first five years the proposed rules are in effect, the public will benefit from adoption of the proposed rules. The anticipated public benefit as a result of enforcing the proposed rules will be to ensure that CHIP funds are expended for medically necessary services. Monitoring and investigating suspected fraud and abuse will result in recovered dollars appropriated back to the program.

Small and Micro-business Impact Analysis

Tom Suehs, Deputy Commissioner for Financial Services, has determined that there will be no effect on small businesses or micro-businesses to comply with the rules as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the rules. There are no anticipated economic costs to persons who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

Fiscal Note

Mr. Suehs has also determined that during the first five years the proposed rules are in effect there will not be any fiscal impact to the state for fiscal years 2004 through 2008. Implementation of the proposed rules are not anticipated to result in any fiscal implications for local health and human service agencies. There are no foreseeable fiscal implications for local governments.

Regulatory Analysis

HHSC has determined that the proposed rules are not a "major environmental rule," as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the public health and safety of a state or a sector of the state. The proposed rules are not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Taking Impact Assessment

HHSC has determined that the proposed rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under §2007.043, Government Code.

Public Comment

Comments on the proposed rules may be submitted in writing to Juanita Henry, Office of Inspector General, Texas Health and Human Services Commission, P.O. Box 13247, Austin, Texas 78711-3247 or by e-mail to Juanita.Henry@hhsc.state.ts.us. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

Statutory Authority

The new rules are proposed under the Texas Government Code, §531.033, which provides the Commissioner of HHSC with broad rulemaking authority; the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program; and Government Code, §2001.006, which allows state agencies to adopt rules in preparation for the implementation of legislation.

The rules are implemented under the authority of the Texas Health and Safety Code, §62.051, concerning development of and the making of policy for the state child health plan program.

The proposed rules affect the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by these rules.

§370.501. Purpose.

(a) This subchapter implements the Health and Human Services Commission's (HHSC), Office of Inspector General (OIG) authority to approve annually, each managed care organization (MCO) plan to prevent and reduce waste, abuse, and fraud. This authority is granted by Chapter 531, Subchapter C, Government Code, Section 531.113.

(b) An MCO that provides or arranges for the provision of health care services to an individual under the children's health insurance program (CHIP), must arrange for a special investigative unit to investigate fraudulent claims and other types of program abuse by recipients and providers. An MCO may choose to:

(1) Establish and maintain the special investigative unit within the managed care organization; or

(2) Contract with another entity for the investigation.

(c) An MCO must develop a plan to prevent and reduce waste, abuse, and fraud. The plan must be submitted annually to the HHSC-OIG for approval each year the MCO is enrolled with the State of Texas. The plan must be submitted 60 days prior to the start of the State fiscal year.

(d) If the initial plan to prevent and reduce waste, abuse, and fraud is not approved, the MCO must resubmit the plan to HHSC-OIG within 15 working days of receiving the denial letter, which will explain the deficiencies. If the plan is not resubmitted within the time allotted, the MCO will be in default and sanctions may be imposed.

(e) If the MCO elects to contract with another entity for the investigation of fraudulent claims and other types of program abuse as referenced in paragraph (b)(2) of this section, the MCO must adhere to all requirements of Chapter 42, §438.230 of the Code of Federal Regulations.

§370.502. Managed Care Organization's Plans and Responsibilities in Preventing and Reducing Waste, Abuse, And Fraud.

(a) Each managed care organization (MCO) subject to this section must develop a plan to prevent and reduce waste, abuse, and fraud and submit that plan annually to the Health and Human Services Commission (HHSC), Office of Inspector General (OIG) for approval.

(b) The MCO is responsible for investigating possible acts of waste, abuse, or fraud for all services, including those that the MCO subcontracts to outside entities.

(c) The plan submitted to the HHSC-OIG must include the information below to be considered for approval.

(1) A description of the MCO's procedures for detecting possible acts of waste, abuse, or fraud by providers. The description must address each of the following requirements:

(A) Use of audits to monitor compliance and assist in detecting and identifying CHIP program violations and possible waste, abuse, and fraud overpayments through data matching, analysis, trending and statistical activities;

(B) Monitoring of service patterns for providers, subcontractors, and recipients;

(C) Use of a hotline or another mechanism to report potential or suspected violations;

(D) Use of random payment review of claims submitted by providers for reimbursement to detect potential waste, abuse, or fraud ;

(E) Use of edits or other evaluation techniques to prevent payment for fraudulent or abusive claims; and

(F) Use of routine validation of MCO data.

(2) A description of the MCO's procedures for investigating possible acts of waste, abuse, and fraud by providers. The procedures must satisfy the requirements in subparagraphs (A)-(C) of this paragraph.

(A) MCOs are required to conduct preliminary investigations. The preliminary investigation must be conducted within 15 working days of the identification and/or reporting of suspected and/or potential waste, abuse, or fraud

(B) The requirements for a preliminary investigation include but are not limited to the following:

(i) Determining if the MCO has received any previous reports of incidences of suspected waste, abuse, or fraud or conducted any previous investigations of the provider in question. If so, the investigation should include a review of all materials related to the previous investigations, the outcome of the previous investigations, and a determination of whether the new allegations are the same or relate to the previous investigation.

(ii) Determining if the service provider has received any educational training from the MCO in regard to the allegation.

(iii) Conducting a review of the provider's billing pattern to determine if there are any suspicious indicators

(iv) Reviewing the provider's payment history for the past three years, if available, to determine if there are any suspicious indicators.

(v) Reviewing the policies and procedures for the program type in question to determine if what has been alleged is a violation.

(C) If it is determined that suspicious indicators of possible waste, abuse, or fraud exist, within 15 working days from the conclusion of subparagraphs (A) and (B) of this paragraph, the MCO must select a sample for further review. The sample must consist of a minimum of 50 recipients or 15% of a provider's claims related to the suspected waste, abuse, and fraud.

(i) Within 15 working days of the selection of the sample, request medical records and encounter data for the sample recipients.

(ii) Review the requested medical records and encounter data within 45 working days of receipt of the records to:

(I) validate the sufficiency of service delivery data and to assess utilization and quality of care.

(II) ensure that the encounter data submitted by the provider is accurate.

(III) evaluate if the review of other pertinent records is necessary to determine if waste, abuse, or fraud has occurred. If the review of additional records is necessary then conduct such review.

(3) A description of the MCO's procedures for detecting possible acts of waste, abuse, and fraud by recipients. The description must address the following:

(A) Review of claims when waste, abuse, or fraud is suspected or reported to determine if :

(i) Treatment(s) and/or medication(s) prescribed by more than one provider appears to be duplicative, excessive, or contraindicated; and

(ii) Recipients are using more than one physician to obtain similar treatments and /or medications; and,

(iii) Providers other than the assigned Primary Care Provider (PCP) are treating the recipient, and there is no evidence that the recipient was treated by the assigned PCP for a similar or related condition; and,

(iv) The recipient has a high volume of emergency room visits with a non-emergent diagnosis.

(B) Review medical records for the recipients in question if claims review does not clearly determine if waste, abuse, or fraud has occurred.

(C) Use of edits or other evaluation techniques to identify possible overuse and/or abuse of psychotropic and/or controlled medications by recipients who are allegedly treated at least monthly by two or more physicians. A physician includes but is not limited to: psychiatrists, pain management specialists, anesthesiologists, physical medicine and rehabilitation specialists.

(4) A description of the MCO's procedures for investigating possible acts of waste, abuse, and fraud by recipients. The procedures must satisfy the requirements in subparagraphs (A) and (B) of this paragraph.

(A) MCOs are required to conduct preliminary investigations. The preliminary investigation must be conducted within 15 working days of the identification and/or reporting of suspected and/or potential waste, abuse, or fraud.

(B) The requirements for a preliminary investigation consist of but are not limited to the following:

(i) Review of acute care and emergency room claims submitted by providers for the suspected recipient.

(ii) Analyze pharmacy claim data submitted by providers for the suspected recipient to determine possible abuse of controlled or non-controlled medications. If the MCO does not have the data necessary to conduct the pharmacy claims review, the MCO must request the data within 15 working days of the initial identification and/or reporting of the suspected or potential waste, abuse, or fraud.

(iii) Analyze claims submitted by providers to determine if the diagnosis is appropriate for the medications prescribed.

(5) A description of the MCO's internal procedures for referring possible acts of waste, abuse, or fraud to the MCO's Special Investigative Unit (SIU) and the mandatory reporting of possible acts of waste, abuse, or fraud by providers or recipients to the HHSC-OIG. The procedures must satisfy the requirements in subparagraphs (A)-(E) of this paragraph.

(A) Assign an officer or director the responsibility and authority for reporting all investigations resulting in a finding of possible acts of waste, abuse, or fraud to the OIG. An officer could be but is not limited to a Compliance Officer, a Manager of Government Programs, or a Regulatory Compliance Analyst.

(B) Provide specific and detailed internal procedures for officers, directors, managers, and employees to report possible acts of waste, abuse, and fraud to the MCO's SIU. The procedures must include but are not limited to:

(i) Guidance regarding what information must be reported to the MCO's SIU.

(ii) A requirement that information must be reported to the MCO's SIU within 24 hours of identification or reporting of suspected waste, abuse, and fraud.

(C) Provide specific and detailed internal procedures for the SIU to report investigations resulting in a finding of waste, abuse, or fraud to the assigned officer or director.

(i) Guidance regarding what information must be reported to the assigned officer or director.

(ii) A requirement that possible acts of waste, abuse, or fraud be reported to the assigned officer or director must occur within 15 working days of making the determination.

(D) Utilizing the HHSC-OIG fraud referral form, the assigned officer or director must report and refer all possible acts of waste, abuse or fraud to the HHSC- OIG within 30 working days of receiving the reports of possible acts of waste, abuse or fraud from the SIU. The report and referral must include an investigative report identifying the allegation, statutes/regulations violated or considered,

and the results of the investigation; copies of program rules and regulations violated for the time period in question; the estimated overpayment identified; a summary of interviews conducted; the encounter data submitted by the provider for the time period in question; and all supporting documentation obtained as the result of the investigation. This requirement applies to all reports of possible acts of waste, abuse, and fraud with the exception of an expedited referral.

(E) An expedited referral is required when the MCO has reason to believe that a delay may result in:

(i) harm or death to patients

(ii) the loss, destruction, or alteration of valuable evidence; or

(iii) a potential for significant monetary loss that may not be recoverable; or

(iv) hindrance of an investigation or criminal prosecution of the alleged offense.

(6) A description of the MCO's procedures for educating recipients and providers and training personnel to prevent waste, abuse, and fraud . The procedures must satisfy the requirements in subparagraphs (A)-(H) of this paragraph.

(A) On an annual basis, the organization shall provide waste, abuse and fraud training to each employee who is directly involved in any aspect of CHIP. At a minimum, training is required for all individuals responsible for data collection, provider enrollment or disenrollment, encounter data, claims processing, utilization review, appeals or grievances, quality assurance, and marketing.

(B) The training must be specific to the area of responsibility for the staff receiving the training and contain examples of waste, abuse or fraud in their particulararea of interest.

(C) The organization must provide general training to all CHIP managed care staff that is not directly involved with the areas listed in subparagraph (A) of this paragraph. The general training must provide information about the definition of waste, abuse, and fraud , how to report suspected waste, abuse, and fraud and to whom the suspected waste, abuse, and fraud is reported.

(D) The organization must provide waste, abuse, and fraud training to all new staff that will be directly involved with any aspect of CHIP within 90 days of the employee's employment date.

(E) Provide updates to all affected areas when changes to policy and/or procedure may affect their area(s). The updates must be provided within 20 working days of the changes occurring.

(F) Educate recipients , providers, and employees about their responsibilities, the responsibility of others, the definition of waste, abuse, and fraud and how and where to report it. Appropriate methods of educating recipients, providers, and employees may include but are not limited to newsletters, pamphlets, bulletins, and provider manuals.

(G) The MCOs will maintain a training log for all training pertaining to waste, abuse, and/or fraud in CHIP. The log must include the name and title of the trainer, names of all staff attending the training, and the date and length of the training. The log must be provided immediately upon request to the HHSC-OIG, Office of the Attorney General's (OAG)- Medicaid Fraud Control Unit (MFCU) and OAG - Civil Medicaid Fraud Division (CMFD), and the United States Health and Human Services- Office of Inspector General (HHS-OIG).

(H) Written standards of conduct, and written policies and procedures that include a clearly delineated commitment from the MCOs for detecting, preventing and investigating waste, abuse, and fraud.

(7) The name, title, address, telephone number, and fax number of the assigned officer or director responsible for carrying out the plan;

(A) The person carrying out the plan should be but is not limited to a Compliance Officer, a Manager of Government Programs, Regulatory Compliance Analyst, Director of Quality Integrity or a person in senior management.

(B) When the person that is responsible for carrying out the plan changes, the required information is to be reported to HHSC-OIG within 15 working days of the change.

(8) A description, process flow diagram, or chart outlining the organizational arrangement of the MCO's personnel responsible for investigating and reporting possible acts of waste, abuse, or fraud; and,

(9) Advertising and marketing materials utilized by the MCOs must be complete and accurately reflect the information about the MCO. Marketing materials includes any informational materials targeted to recipients.

(d) Each MCO must satisfy the requirements in paragraphs (1)-(3) of this subsection related to investigations of waste, abuse, and fraud conducted by the MCO's SIU.

(1) On a quarterly basis, submit to the HHSC- OIG a report listing all investigations conducted that resulted in no findings of waste, abuse, or fraud. The report shall include the allegation, the suspected recipient's or provider's CHIP number, the source, the time period in question, and the date of receipt of the identification and or reporting of suspected and/or potential waste, abuse, or fraud.

(2) Maintain a log of all incidences of suspected waste, abuse and fraud, received by the MCO regardless of the source. The log shall contain the subject of the complaint, the source, the allegation, the date the allegation was received, the recipient or providers CHIP number, and the status of the investigation.

(3) The log should be provided at the time of a reasonable request to the HHSC-OIG, OAG-MFCU, OAG-CMFD, and the HHS-OIG. A reasonable request means a request made during hours that the business or premises is open for business.

(e) MCOs must maintain the confidentiality of any patient information relevant to an investigation of waste, abuse, or fraud.

(f) MCOs must retain records obtained as the result of an investigation conducted by the SIU for a minimum period of five years or until all audit questions, appealed hearings, investigations, or court cases are resolved.

(g) Failure of the provider to supply the records requested by the MCO will result in the provider being reported to the HHSC-OIG as refusing to supply records upon request and the provider may be subject to sanction or immediate payment hold.

§370.503. Managed Care Organization's Contracts.

If a Managed Care Organization (MCO) contracts for the investigation of fraudulent claims and other types of programs abuse by recipients and providers under subsection 370.501(e), within 10 working days of executing the contract the MCO shall file with the Health and Human Services Commission, Office of Inspector General (HHSC-OIG):

(1) A copy of the written contract including any and all attachments.

(2) The names, titles, addresses, telephone numbers, and fax numbers of the principals of the entity with which the MCO has contracted; and

(3) A description of the qualifications of the principals of the entity with which the MCO has contracted to perform the contracted responsibilities.

§370.504. Review of Managed Care Organization's Records.

(a) Immediately upon request, the Health and Human Services Commission, Office of Inspector General (HHSC-OIG), Office of the Attorney General-Medicaid Fraud Control Unit (OAG-MFCU) and OAG, Office of the Attorney General- Civil Medicaid Fraud Division (OAG-CMFD), and the United States Health and Human Services, Office of Inspector General (HHS-OIG) may review the records of a Managed Care Organization (MCO) to determine compliance with this subchapter.

(b) Upon receipt of a record review request from any state or federal agency authorized to conduct compliance, regulatory, or program integrity functions, a MCO must:

(1) Provide the records requested by a properly identified agent of any state or federal agency authorized to conduct compliance, regulatory, or program integrity functions on the provider, person, MCO, or the services rendered by the provider or person within 24 hours of the request.

(2) An exception to the 24 hours stated in paragraph (1) of this subsection may be made when the OIG or another state or federal agency representative reasonably believes that the requested records are about to be altered or destroyed or that the request may be completed at the time of the request and/or in less than 24 hours.

(c) The request for record review includes, but is not limited to:

(1) clinical medical patient records;

(2) other records pertaining to the patient;

(3) any other records of services provided to CHIP or other health and human services program recipients and payments made for those services;

(4) documents related to diagnosis, treatment, service, lab results, charting;

(5) billing records, invoices, documentation of delivery items, equipment, or supplies;

(6) radiographs;

(7) business and accounting records with backup support documentation;

(8) statistical documentation;

(9) computer records and data;

(10) contracts with providers and subcontractors.

(d) Failure to produce the records or make the records available for the purpose of reviewing, examining, and securing custody of the records may result in HHSC-OIG imposing sanctions against the MCO as described in 1 TAC (Texas Administrative Code), Chapter 371, Subchapter G, §371.1609, Grounds for Fraud Referral and Administrative Sanction.

§370.505. Recovery of Funds.

(a) Upon completion of the investigation and final disposition of any administrative, civil, or criminal action taken by the state or federal government, the Health and Human Service Commission-Office of Inspector General (HHSC-OIG) will determine and direct the collection of any overpayment.

(b) Overpayments collected as a result of an investigation will be distributed to the Managed Care Organization (MCO) unless HHSC-OIG determines that an alternative distribution is indicated.

(c) If the HHSC-OIG determines that an MCO is not entitled to all or any portion of the distribution of funds collected as a result of an overpayment then HHSC-OIG will provide the MCO with a written explanation indicating the rationale for the alternative distribution of funds.

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

Filed with the Office of the Secretary of State on May 17, 2004.

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Steve Aragón
General Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6576

CHAPTER 380. MEDICAL TRANSPORTATION PROGRAM
SUBCHAPTER B. ELIGIBILITY, PROGRAM SERVICES, PROCESSES, ADDITIONAL TRANSPORTATION CONNECTED WITH AN AUTHORIZED TRIP, LIMITATIONS, AND EXCLUSIONS
1 TAC §380.203, §380.207

The Health and Human Services Commission (HHSC or Commission) proposes to amend Chapter 380, Medical Transportation Program, Subchapter B, Eligibility, Program Services, Processes, Additional Transportation Connected with an Authorized Trip, Limitations, and Exclusions, §380.203, Program Services and §380.207, Program Limitations.

Background and Justification

Section 2.97 of House Bill 2292, 78th Legislature, Regular Session (2003), states that HHSC may not prohibit a recipient of medical assistance from receiving transportation services through the Medical Transportation Program (MTP) to obtain renal dialysis treatment on the basis that the recipient resides in a nursing facility.

Section-by-Section Summary

Sections 380.203 and 380.207 allow for nursing facility residents that are enrolled in the medical assistance program to obtain transportation services for renal dialysis through MTP.

Fiscal Note

Tom Suehs, Deputy Executive Commissioner for Financial Services, has determined that during the first five years the proposed amendments are in effect there will be an estimated fiscal impact to the state for State Fiscal Year 2004 of $104,784.00 in

general revenue and for State Fiscal Year 2005 of $418,926.00 in general revenue. Implementation of the proposed amendments will not result in any fiscal implications for local health and human service agencies. There are no foreseeable fiscal implications for local governments. For local governments operating Medicaid-contracted transportation services, there could be a positive impact

Small and Micro-business Impact Analysis

Mr. Suehs has also determined that there will be no effect on small businesses or micro-businesses to comply with the amendments as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the amendments. There are no anticipated economic costs to persons who are required to comply with the amendments as proposed. There is no anticipated negative impact on local employment.

Public Benefit

Jason Cooke, Associate Commissioner for Medicaid and CHIP, has determined that for each year of the first five years the amendments are in effect, the public will benefit from adoption of the amendments. The anticipated public benefit, as a result of enforcing the amendments, will be to ensure that transportation is provided for renal dialysis services to recipients residing in nursing facilities.

Regulatory Analysis

HHSC has determined that the proposed amendments are not a "major environmental rule," as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. The proposed amendments are not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that the proposed amendments do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under §2007.043, Government Code.

Public Comment

Written comments on the proposal may be submitted to Jennifer Stansbury, Senior Policy Analyst, Texas Health and Human Services Commission, 1100 W. 49th Street, MC-H310, Austin, Texas 78756-3199, within 30 days of publication of this proposal in the *Texas Register*.

Public Hearing

A public hearing has been scheduled for June 24, 2004, from 1:30 to 3:00 p.m. The hearing will be held at the Health and Human Services Commission, Brown-Heatly Building, Public Hearing Room, 4900 N. Lamar Boulevard, Austin, Texas.

Statutory Authority

The amendments are proposed under the Texas Government Code, §531.033, which provides the Commissioner of HHSC with broad rulemaking authority; Human Resources Code, §32.021 and the Texas Government Code, §531.021(a), which provide the Health and Human Services Commission (HHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed rules affect the Human Resource Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by these rules.

§380.203. Program Services.

Medical Transportation Program (MTP) services must be prior authorized by Regional MTP staff. MTP services include the following:

(1) reasonable transportation of a prior authorized MTP recipient to and/or from a prior authorized health care facility where health care needs will be met, which includes transportation to and from renal dialysis services for recipients enrolled in the medical assistance program who are residing in a nursing facility;

(2) special medical transportation to a health care facility when one of the following conditions is met:

(A) the services are allowable and the health care provider will not bill Medicaid or another source for the cost of the services; or

(B) the recipient provides Regional MTP staff with a Health Care Provider's Statement of Need or equivalent for review and the service is determined reasonable.

(3) transportation for an attendant(s); if the health care provider documents the need, the recipient is a minor, or a language or other barrier to communication or mobility exists that necessitates such assistance;

(4) transportation for a service animal when accompanying a recipient;

(5) retroactive reimbursement for up to three months of reasonable transportation, meals and lodging if the recipient is a new recipient to MTP and was eligible under all program requirements. The retroactive reimbursement process will begin on the date of the request for retroactive reimbursement;

(6) advance funds for an eligible child and attendant(s) when lack of transportation funds will prevent the child from traveling to receive health care services; and

(7) reimbursement or advance funds for an eligible child and attendant(s) for meals and lodging when the health care service requires the child to remain overnight. If the child remains overnight for six consecutive months, the recipient or responsible party must provide proof of residency by providing:

(A) copy of federal or state ID (driver's license or identification card); and

(B) copy of a utility bill under the recipient's or responsible party's (if recipient is a child) name; or

(C) if residing with a family member, written verification that the applicant resides in the household.

(8) partial reimbursement or advance funds for a prior authorized MTP recipient and attendant(s) for transportation beyond the approved destination. Partial reimbursement is limited to the amount that would have been paid to the approved destination for transportation permitted under paragraph (1) of this section.

§380.207. Program Limitations.

Recipients are not eligible to receive medical transportation services under the following circumstances:

(1) to and from a day activity, a personal care home or state institution, or a facility participating in another Tile XIX program for which the reimbursement rate structure includes transportation funds, except as specified in §380.203 (1), Program Services;

(2) the intended destination is a nursing facility;

(3) The recipient is an inpatient in a health care facility, except as specified in §380.203 (1), Program Services;

(4) the recipient is under 18 years of age and not accompanied by a parent or legal guardian, unless one of the following conditions exists:

(A) the recipient is aged 15 through 17 years of age and presents the parent's or legal guardian's signed, written consent for the transportation services to the Regional MTP office or the transportation contractor; and/or

(B) the treatment to which the minor is being transported is such that the law extends confidentiality to the minor for this treatment;

(5) the recipient or another person or entity providing care for the recipient receives direct payment of worker's compensation benefits, U. S. Department of Veterans Affairs benefits, or other third-party resources for transportation to health care services on the recipient's behalf;

(6) the recipient is on limited status, unless the provider has made the referral or the recipient requests family planning services;

(7) TICP diagnostic visits and/or cancer or cancer-related treatments that are provided out-of-state;

(8) the recipient and/or attendant intentionally, knowingly, or recklessly boards the vehicle carrying an illegal knife, a club, handgun or other weapon, as defined in Penal Code, §46.01, on or about his or her person;

(9) a third-party, such as a lodging establishment, provides transportation, meals, and/or lodging at no charge for a recipient and attendant, for a particular appointment; or

(10) an attendant does not accompany the recipient on the MTP-requested trip when a Health Care Provider's Statement of Need, Form 3113 or equivalent, is on file stating the recipient requires an attendant(s).

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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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.17

The Texas Department of Housing and Community Affairs (the Department) proposes new §1.17, concerning Alternative Dispute Resolution and Negotiated Rulemaking. The purpose of this section is, in accordance with Chapter 2306.082, Texas Government Code, to implement a policy to encourage the use of appropriate alternative dispute resolution procedures under the Governmental Dispute Resolution Act, Chapter 2009, Texas Government Code, to assist in the resolution of disputes under the Department's jurisdiction and the use of negotiated rulemaking procedures under Chapter 2008, Texas Government Code, for the adoption for Department rules.

Ms. Edwina P. Carrington, Executive Director, has determined that for the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Carrington also has determined that for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of enforcing this section will be a more efficient Alternative Dispute Resolution process. There will be no effect on persons, small businesses or micro-businesses. There are no anticipated economic costs to persons, small businesses or micro-businesses who are required to comply with the section as proposed. The proposed new rule will not have an impact on any local economy.

Comments may be submitted to Chris Wittmayer, General Counsel, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas, 78711-3941 or by email at the following address: chris.wittmayer@tdhca.state.tx.us.

The new section is proposed pursuant to the authority of the Texas Government Code, Chapter 2306.

The new section affects no other code, article or statute.

§1.17. Alternative Dispute Resolution and Negotiated Rulemaking.

(a) Policy. In accordance with §2306.082, Texas Government Code, it is the Department's policy to encourage the appropriate use of Alternative Dispute Resolution ("ADR") procedures to assist in the fair and expeditious resolution of internal and external disputes involving the Department and the use of negotiated rulemaking procedures for the adoption of Department rules, consistent with the Governmental Dispute Resolution Act and the Negotiated Rulemaking Act (Chapters 2009 and 2008, respectively, Texas Government Code). The Department's ADR procedures must conform, to the extent possible, to model guidelines issued by the State Office of Administrative Hearings for the use of ADR by state agencies. (§2306.082(b), Texas Government Code).

(b) Definitions. For purposes of this rule, terms used herein shall have the following meaning:

(1) "Alternative Dispute Resolution" or "ADR"--a procedure or combination of procedures that uses an impartial third party to assist individuals in voluntarily resolving disputes, including procedures described in Sections 154.023-154.027, Civil Practice and Remedies Code. (§2009.003(1), Governmental Dispute Resolution Act). The Governmental Dispute Resolution Act does not grant the Department authority to engage in binding arbitration. (§2009.005(c)).

(2) "Mediation"--a dispute resolution procedure in which an impartial person, the mediator, facilitates communication between the parties to promote resolution of the dispute. The mediator may not impose his or her own judgment on the issues for that of the parties. (§154.023(a) and (b), Civil Practice and Remedies Code).

(3) "Impartial third party"--A person who meets the qualifications and conditions of §2009.053, Governmental Dispute Resolution Act.

(c) Dispute Resolution Coordinator. The Executive Director shall designate a trained person to:

(1) Coordinate the implementation of the Department's policy on ADR and negotiated rulemaking;

(2) Serve as a resource for any training needed to implement procedures for ADR or negotiated rulemaking; and

(3) Collect data concerning the effectiveness of ADR and negotiated rulemaking, as implemented by the Department.

(d) Informal Communications; Ex Parte Policy; Appeals; Education.

(1) The Department encourages informal communications between Department staff and applicants for Department programs, and other interested persons, to exchange information and informally resolve disputes. When applications are pending consideration by the Department, applicants should review the Department's ex parte communications policy to ensure their compliance with the policy.

(2) The Department has promulgated rules in accordance with §2306.0321 and §2306.6715, Texas Government Code, concerning administrative appeals processes. ADR procedures supplement and do not limit any available procedure for the resolution of disputes. (§2009.052(a), Governmental Dispute Resolution Act). Pursuing an ADR procedure does not suspend or delay application, appeal, or other deadlines. For example, if a tax credit applicant desires to appeal a Department decision using the procedures promulgated under §2306.6715 and also desires to pursue an ADR procedure, the applicant may independently pursue the two procedures. Each procedure will proceed independently of the other.

(3) Consistent with this ADR and Negotiated Rulemaking policy, the Department shall endeavor to educate its staff and persons who are subject to the Department's jurisdiction concerning the availability of ADR and negotiated rulemaking procedures to resolve disputes and to adopt rules.

(e) ADR Procedure.

(1) Assessment of the Dispute. In determining whether an ADR procedure is appropriate, the parties to the dispute, including the Department, should consider the following factors:

(A) direct discussions and negotiations between the parties have been unsuccessful or could be improved with the assistance of an impartial third party;

(B) the use of ADR would use less resources and take less time than other available procedures; there is a reasonable likelihood that the use of ADR will result in an agreement to resolve the dispute;

(C) there are potential remedies or solutions that are only available through ADR; and

(D) the need for a final decision with precedential value is less important than other considerations. The parties may also consider additional factors found in the State Office of Administrative Hearings' ADR Model Guidelines for assessing whether a dispute is appropriate for mediation.

(2) Proposing the Use of ADR. Any applicant for Department programs or other interested person may propose the use of an ADR procedure to attempt to resolve a dispute with the Department by submitting a written ADR proposal to the Department's Dispute Resolution Coordinator (fax: (512) 475-3978), with copies sent to any other parties to the dispute.

(3) ADR Proposal. If at any time an applicant for Department programs or other interested person would like to engage in an ADR procedure with the Department, the person may submit by letter a written ADR proposal to the Department's Dispute Resolution Coordinator stating the nature of the dispute, the parties involved, any pertinent deadlines, whether all parties agree to refer the dispute to ADR, proposed times and locations, the preferred type of ADR procedure, and, if known, one or more potential impartial third parties. For example, an ADR proposal may propose that a dispute be mediated using a trained, impartial third party state employee from a state pool of ADR trained employees at no cost to the parties or other qualified mediator agreeable to all parties at the shared cost of the parties; that the mediation take place in person at the Department or other mutually agreeable place or by telephone; and that it be scheduled for three hours on an agreed date within seven days. If an applicant or other interested person is uncertain whether to propose the possible use of ADR or is uncertain about any particular aspect of a possible proposal, they should contact the Department's Dispute Resolution Coordinator to discuss the matter.

(4) Action on ADR Proposal. The Department will review the ADR proposal, discuss it with the interested parties, as appropriate, and assess whether ADR would assist in fairly and expeditiously resolving the dispute. If the parties, including the Department, cannot agree on whether an ADR procedure should be used or on the particulars of the ADR procedure, the Department will notify affected parties of that outcome. The Department will promptly notify all affected parties within five (5) days of receiving an ADR proposal, or as soon as reasonably possible. If the Department determines not to refer the dispute to ADR, the Department shall state its reasons in writing. If the Department determines to refer the dispute to ADR, it will include the date for the selected ADR process in its notice. In referring the case to ADR, the Department will carefully consider the selections in the ADR proposal and follow them as much as is appropriate.

(5) Department Proposal. Independent of any proposal from interested parties outside the Department, the Department may propose using ADR procedures to interested parties to try and resolve a dispute.

(f) Selection of Impartial Third Parties. An impartial third party must possess the qualifications required under §154.052, Civil Practice and Remedies Code (a minimum of 40 classroom hours of training in dispute resolution techniques), is subject to the standards and duties prescribed by §154.053, Civil Practice and Remedies Code, and has the qualified immunity prescribed by §154.055, Civil Practice and Remedies Code, for volunteer third parties not receiving compensation in excess of expenses, if applicable. (§2009.053(d) Governmental Dispute Resolution Act). The selection of an impartial third party is subject to the approval of the parties to the dispute. If the parties do not suggest potential third parties, the Department will provide a list of potential third parties from which to choose. If all parties agree to use an impartial third party who charges for ADR services, then the costs for the impartial third party shall be apportioned equally among all parties, unless otherwise agreed by the parties.

(g) Good faith; Voluntary Agreement; Public Information. All parties participating in an ADR procedure are expected to do so in a good faith effort to reach agreement. All parties participating must have the authority to enter into an agreement to resolve the dispute. The decision to reach agreement is voluntary. If the parties reach a resolution and execute a written agreement, the agreement is enforceable in the same manner as any other written agreement of the same nature with the State. A written agreement to which the Department is a signatory resulting from an ADR procedure must be approved by the appropriate authority and is subject to the Public Information Act, Chapter 552, Texas Government Code.

(h) Confidentiality of Records and Communications. The confidentiality of the communications, records, conduct, and demeanor of an impartial third party and parties in an ADR procedure are governed by §2009.054 of the Governmental Dispute Resolution Act.

(i) Negotiated Rulemaking.

(1) The Negotiated Rulemaking Act, Chapter 2008 of the Texas Government Code, prescribes procedures for negotiated rulemaking including appointment of a convener; publishing notice of proposed negotiated rulemaking and requesting comments on the proposal; appointing a negotiated rulemaking committee; appointing an impartial third party facilitator; and proposing the resulting draft rule for public comment.

(2) Any person or organization that would like for the Department to use negotiated rulemaking for the adoption of a Department rule may submit a proposal to the Department's Dispute Resolution Coordinator. The proposal should identify the rule proposed for negotiated rulemaking; potential participants for the negotiated rulemaking committee, possible third party facilitators, and a timeline for the process. The Department will promptly respond to the proposal. The Department may also on its own propose to use negotiated rulemaking. In determining whether a proposed negotiated rulemaking is appropriate in a particular situation, the Department and interested parties may consider any relevant factors, including:

(A) The number of identifiable interests that would be significantly affected by the proposed rule;

(B) The probability that those interests would be adequately represented in a negotiated rulemaking;

(C) The probable willingness and authority of the representatives of affected interests to negotiate in good faith;

(D) The probability that a negotiated rulemaking committee would reach a unanimous or a suitable general consensus on the proposed rule;

(E) The probability that negotiated rulemaking will not unreasonably delay notice and eventual adoption of the proposed rule;

(F) The adequacy of agency and citizen resources to participate in negotiated rulemaking;

(G) The probability that the negotiated rulemaking committee will provide a balanced representation among all interested and affected parties. (§2008.052(d) Negotiated Rulemaking Act). If the Department decides to proceed with a negotiated rulemaking, it shall follow the process outlined in Chapter 2008 of the Texas Government Code.

(3) The Department may also use less formal procedures such as working groups, information exchanges, or policy dialogues (see State Office of Administrative Hearings, ADR Model Guidelines) facilitated by a Department employee or a third party to seek the input or consensus, as appropriate, of interested persons and organizations when drafting proposed rules for public comment.

(j) Shared Third Parties. The Department may participate in intergovernmental efforts to share qualified government employees to act as impartial third parties and may agree to reimburse the furnishing entity in kind or monetarily for the full or partial cost of providing the qualified, impartial third party. (§2009.053(b), Governmental Dispute Resolution Act).

(k) Board Waiver. The Governing Board of the Department may waive, in its discretion and to the extent of its authority, any one or more of these rules if the Board finds that waiver is appropriate to fulfill the purposes or policies of Chapter 2306, Texas Government Code, or for other good cause, as determined by the Board.

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 May 17, 2004.

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Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 475-4595

CHAPTER 35. MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§35.1 - 35.10

The Texas Department of Housing and Community Affairs (the "Department") proposes new §§35.1 - 35.10, concerning the Multifamily Housing Revenue Bond rules. These sections are proposed new in order to implement changes that will effectively improve the 2005 Private Activity Bond Program.

Edwina P. Carrington, Executive Director, has determined that for the first five-year period the new sections are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Ms. Carrington also has determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be to permit the adoption of new rules for multifamily housing revenue bonds within the State of Texas, thereby enhancing the State's ability to provide decent, safe and sanitary housing for Texans through the multifamily housing revenue bond program administered by the Department. There will be no effect on persons, small businesses or micro-businesses. There are no anticipated economic costs to any person, business or micro-business required to comply with the new sections as proposed. The proposed new sections will not have an impact on any local economy.

The Department will conduct public hearings in Dallas on June 14, 2004, in Austin on June 15, 2004 and in Houston on June 16, 2004 to receive comments and suggestions from the public concerning these proposed Rules. The Department will also accept comments concerning the public input process and how to better inform the public of proposed developments in their neighborhoods specifically the process and content of the public hearings

held for each individual development that receives an allocation of reservation under the Private Activity Bond Program.

Comments may be submitted to Robbye Meyer, Multifamily Finance Division, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas 78711-3941 or email at robbye.meyer@tdhca.state.tx.us no later than 5:00 pm, June 16, 2004.

The proposed new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306.

The proposed new sections affect no other code, article or statute.

§35.1. Introduction.

The purpose of this Chapter 35 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 Developments financed with the issuance of Bonds for the 2005 Private Activity Bond Program Year. The rules and provisions contained in Chapter 35, 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 Qualified Allocation Plan and Rules ("QAP"), in effect for the program year for which the Housing Tax Credit application will be submitted.

§35.2. 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 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).

§35.3. Definitions.

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

(1) Applicant--any Person or Affiliate of a Person who is a member of the General Partner, who files a Pre-Application or full Application with the Department requesting the Department issue Bonds to finance a Development.

(2) Application--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--the Governing Board of the Department.

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

(8) Eligible Tenants--

(A) individuals and families of Extremely Low, Very Low and 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--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--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) Ineligible Building Type--as defined in the Department's QAP and Rules in effect for the program year for which the Bond and Housing Tax Credit applications are submitted.

(12) Institutional Buyer--

(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 1935, as amended (17 CFR Sec. 230.144A).

(13) Low Income--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)--an agreement between the Department and the Development Owner which is binding upon the Development Owner's successors in interest that encumbers the Development with respect to the requirements of law, including this title, the Act and Section 42 of the Code.

(15) Owner--an Applicant that is approved by the Department as qualified to own, construct, acquire, rehabilitate, operate, manage, or maintain a 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--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--any Bonds described by §141(a) of the Code.

(18) Private Activity Bond Program Scoring Criteria--the scoring criteria established by the Department for the Department's Multifamily Housing Revenue Bond Program, §35.6(d) of this title.

(19) Private Activity Bond Program Threshold Requirements--the threshold requirements established by the Department for the Department's Multifamily Housing Revenue Bond Program, §35.6(c) of this title.

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

(21) Proper Site Control--Regarding the legal control of the land to be used for the Development, means the earnest money contract is in the name of the Applicant (principal or member of the General Partner); fully executed by all parties and escrowed by the title company.

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

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

(24) Tenant Income Certification--a certification as to income and other matters executed by the household members of each tenant in the Development, in such form as reasonably may be required by the Department in satisfaction of the criteria prescribed by 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.

(25) 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.

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

(27) Trustee--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).

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

(29) Very Low Income--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.

§35.4. Policy Objectives & Eligible Developments.

The Department will issue Bonds to finance the preservation or construction of decent, safe and affordable housing throughout the State of Texas. Eligible 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.

§35.5. Bond Rating and Investment Letter.

(a) Bond Ratings. All publicly offered Bonds issued by the Department to finance 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 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.

§35.6. 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 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 Development. Upon review of the pre-application, if the 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 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 described in subsection (d) of this section. The Department will score and rank the pre-application 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 Applications 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 Development. If a tie still exists, the Department will grant preference to the pre-application with the lower 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 subsection (c) of this section. The Private Activity Bond Program Threshold Requirements will be posted on the Department's website. After scoring, the 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 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 Development. The Texas Bond Review Board will thereafter assign the lowest lottery number drawn to the highest scored and ranked Application as previously determined by the Department. The criteria by which a Development may be deemed to be eligible or ineligible are explained below in subsection (g) of this section, entitled Evaluation Criteria. The Private Activity Bond Program Scoring Criteria will be posted on the Department's website. The pre-application shall consist of the following information:

(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;

(4) Public Notification Information;

(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; Evidence of good standing from the Comptroller of Public Accounts of the State of Texas for the Applicant and its principals; Corporate resumes and individual resumes of the Applicant and any principals;

(11) 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;

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

(13) A local map showing the location of the proposed Property site;

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

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

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

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

(18) Current market information which includes rental comparisons;

(19) Documentation of local Section 8 utility allowances;

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

(21) Self-Scoring Criteria; and

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

(c) Pre-Application Threshold Requirements.

(1) As the Department reviews the Application, the Department will use the following assumptions, even if not reflected in the Application. Prequalification Assumptions:

(A) Development Feasibility:

(i) Debt Coverage Ratio must be greater than or equal to 1.10;

(ii) Annual Expenses must be at least $3,800 per Unit or $3.75 per square foot;

(iii) Deferred Developer Fees are limited to 80% of Developer's Fees;

(iv) Contractor Fee are limited to 6% of direct costs plus site work cost;

(v) Overhead are limited to 2% of direct costs plus site work cost;

(vi) General Requirements are limited to 6% of direct costs plus site work cost;

(vii) Developer Fees cannot exceed 15% of the project's Total Eligible Basis

(B) Construction Costs Per Unit Assumption. The acceptable range is $47 to $61 per Unit (Acquisition / Rehab developments are exempt from this requirement);

(C) Interest Rate Assumption. 6.00% for 30 year financing and 6.75% for 40 year financing;

(D) Size of Units (Acquisition / Rehab developments are exempt from this requirement);

(i) One bedroom Unit must be greater than or equal to 650 square feet for family and 550 square feet for senior Units.

(ii) Two bedroom Unit must be greater that or equal to 900 square feet for family and 750 square feet for senior Units.

(iii) Three bedroom Unit must be greater than or equal to 1,000 square feet for 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 12/1/04 with option to extend through 3/1/05;

(4) Previous Participation and Authorization to Release Credit Information (located in the 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 Development 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 ($1,000 to TDHCA, $1,500 to Vinson and Elkins and $5,000 to 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 the Appropriate Local Housing Authority;

(17) Organization Chart with evidence of Entity Registration or Reservation with the Secretary of State; and

(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 *(If the QAP and Rules in effect for the program year for which the Bond and Housing Tax Credit applications are submitted reflect a notification process that is different from the process listed below, then the QAP and Rules will override the notification process listed below):*

(A) State Senator and Representative that represents the community containing the development;

(B) Presiding Officer of the governing body of any municipality containing the development and all elected members of that body (Mayor, City Council members);

(C) Presiding Officer of the governing body of the county containing the development and all elected members of that body (County Judge and/or Commissioners);

(D) School District Superintendent of the school district containing the development;

(E) Presiding Officer of the School Board of Trustees of the school district containing the development;

(F) 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 no later than August 9, 2004. A copy of the return letter from the city and county clerks must be provided); and

(G) 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).

(d) Pre-Application Scoring Criteria.

(1) 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. Must be greater than or equal to $60 per square foot (1 point) (Acquisition / Rehab will automatically receive (1 point)).

(2) Size of Units. Average size of all Units combined in the development must be greater than or equal to 950 square foot for family and must be greater than or equal to 750 square foot for elderly (5 points). (Acquisition / Rehab developments will automatically receive 5 points).

(3) Period of Guaranteed Affordability for Low Income Tenants. Add 10 years of affordability after the extended use period for a total affordability period of 40 years (1 point).

(4) Quality and Amenities (maximum 34 points) Acquisition / Rehab will receive double points not to exceed 34 points).

(A) Washer / Dryer Connections (1 point);

(B) Microwave Ovens (in each Unit) (1 point);

(C) Storage Room (outside the Unit) (1 point);

(D) Covered Parking (at least one per Unit) (3 points);

(E) Garages (equal to at least 35% of Units) (5 points);

(F) Ceiling Fans (living rooms and bedrooms) (1 point);

(G) Ceramic Tile Flooring (entry way and all bathroom) (2 points);

(H) 75% or Greater Masonry (includes rock, stone, brick, stucco and cementious board product; excludes EFIS) (5 points);

(I) Playground and Equipment or Covered Community Porch (3 points);

(J) BBQ Grills and Tables (one each per 50 Units) or Walking Trail (minimum length of 1/4 mile) (3 points);

(K) Full Perimeter Fencing and Gated (3 points);

(L) Computers with internet access / Business Facilities (8 hour availability) (2 points);

(M) Game Room or TV Lounge (2 points);

(N) Workout Facilities or Library (with comparable square footage as workout facilities) (2 points).

(5) Tenant Services.

(A) $10.00 per Unit per month (10 points);

(B) $7.00 per Unit per month (5 points);

(C) $4.00 per Unit per month (3 points).

(6) Zoning appropriate for the proposed use or no zoning required (appropriate zoning for the intended use must be in place at the time of application submission date, August 30,2004, in order to receive points) (5 points).

(7) Proper Site Control (as defined in §35.3(21) of this title control through 12/01/04 with option to extend through 03/01/05 and all information correct at the time of application submission date, August 30, 2004, in order to receive points) (5 points).

(8) 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 5:00 PM, October 22, 2004 will be used in scoring).

(A) Texas State Senator and Texas State Representative (maximum +3 to -3 points);

(B) 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 (maximum +3 to -3 points);

(C) 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) (maximum +3 to -3 points);

(D) Local School District Superintendent and Presiding Officer of the Board of Trustees for the School district containing the Development (maximum +3 to -3 points).

(9) Penalties for Missed Deadlines in the Previous Year's Bond and / or Tax Credit program year. (This includes approved and used extensions) (-1 point with maximum 3 point deduction).

(10) Local Political Subdivision Development Funding Commitment that enables additional Units for the Very Low Income (CDBG, HOME or other funds through local political subdivisions) (must be greater than or equal to 2% of the bond amount requested and must provide at least 5% of the total Development Units at or below 30% AMFI or an additional 5% of the total Development Units if the Applicant has chosen category Priority 1B on the residential rental attachment) (2 points).

(11) Proximity to Community Services / Amenities (Community services / amenities within three (3) miles of the site. A map must be included with the Application showing a three (3) mile radius notating where the services / amenities are located) (maximum 12 points)

(A) Grocery Store (1 point);

(B) Pharmacy (1 point);

(C) Convenience store (1 point);

(D) Retail Facilities (Target, Wal-Mart, Home Depot, etc...) (1 point);

(E) Bank / Financial Institution (1 point);

(F) Restaurant (1 point);

(G) Public Recreation Facilities (park, civic center, YMCA) (1 point);

(H) Fire / Police Station (1 point);

(I) Medical Facilities (hospitals, minor emergency, etc...) (1 point);

(J) Public Library (1 point);

(K) Public Transportation (1/2 mile from site) (1 point);

(L) Public School (only one school required for point (1 point).

(12) Proximity to Negative Features (within 300 feet of any part of the Development site boundaries. A map must be included with the application showing where the 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)

(A) Junkyards (5points);

(B) Active Railways (excluding light rail) (5 points);

(C) Interstate Highways / Service Roads (5 points);

(D) Solid Waste / Sanitary Landfills (5 points);

(E) High Voltage Transmission Towers (5 points).

(e) 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 Development, and to begin the process of obtaining firm commitments for financing from each of the financial institutions involved.

(f) 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 Development and the Bond issuance are to be considered, unless the Department directs the Applicant otherwise in writing. The final application must adhere to the Department's QAP and Rules in effect for the program year for which the Bond and Housing Tax Credit applications are submitted. 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 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). The sign must be at least four (4) feet by eight (8) feet in size and be located within twenty (20) feet of, and facing, the main road adjacent to the site. The sign shall be continuously maintained on the site until the day the TDHCA Board takes final action on the Application for the development. The information and lettering on the sign must meet the requirements identified in the Application. 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. 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. In addition (within the 14 days), the Applicant must notify any public official that has changed since the submission of the pre-application and any neighborhood organizations that are known and were not notified at the time of the pre-application submission.

(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 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;

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

(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 Developments, current insurance bills;

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

(27) For existing Developments, current rent rolls;

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

(29) A market 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 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.

(g) Evaluation Criteria. The Department will evaluate the 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 (with the exception of changes to deferred developer's fees and support or opposition point). The Development and the Applicant must satisfy the conditions set out in paragraphs (1) through (6) of this subsection in order for a Development to be considered eligible:

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

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

(4) Any 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 pre-application submission. Any corrective action documentation affecting the Material Non-compliance status score must be submitted to the Department no later than thirty (30) days prior to final 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; or

(B) 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; or

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

(D) neither applicant nor any principals of the applicant have a development under their ownership or control with a Material Non-compliance score of 30 or more; or

(E) 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.

(h) 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.

(i) 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 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 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 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 Development's proposed size and configuration in relation to the housing needs of the community in which the Development is located and the needs of the area, region, and state;

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

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

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

(9) Zoning and other land use considerations;

(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.

(j) 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 §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. 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 procedure, the person may send a proposal to the Department's Dispute Resolution Coordinator (fax: (512) 475-3978). For additional information on the Department's ADR Policy, see the Department's General Administrative Rule on ADR at 10 Texas Administrative Code §1.17.

(k) 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 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.

(l) 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.

§35.7. 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 Development is located for each Development financed from the proceeds of Bonds issued by the Department. For Developments involving new construction, the term of the LURA will be the longer of 30 years, the period of guaranteed affordability or the period for which Bonds are outstanding. For the financing of an existing 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) Development Occupancy. The LURA will specify occupancy restrictions for each 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 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 Development. Development occupancy requirements must be met on or prior to the date on which Bonds are issued unless the 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 Development.

(c) Set Asides.

(1) 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 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 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 Development and must also designate the selected priority for the Development in accordance with §1372.0321, Texas Government Code. Units intended to satisfy set-aside requirements must be distributed evenly throughout the Development, and must include a reasonably proportionate amount of each type of Unit available in the Development.

(3) No tenant qualifying under either of the set-asides shall be denied continued occupancy of a Unit in the 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 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. 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 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 (less than or equal to 80% of Area Median Family Income).

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

(g) Special Needs. At least five percent (5%) of the Units within each 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 will comply with accessibility requirements in the Fair Housing Act Design manual. 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 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 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 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 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 Development. For administrative convenience, the Development Owner may establish the first date that a Tenant Income Certification for the 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.

(C) The Development shall comply with Title 10, Part 1, Chapter 60, Subchapter A.

(2) As part of the verification, such steps may include the following, provided such action meets the requirements of §142(d) of the Code and the gross income of individuals shall be determined in a manner consistent with the determinations of low income families under section 8 of the United States Housing Act of 1937:

(A) obtain pay stubs sufficient to annualize income;

(B) obtain third party written verification of income;

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

(D) obtain an income verification from the Social Security Administration; or

(E) 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 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 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 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 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 Development Site to examine and inspect the Development and to inspect the books and records of the Development Owner pertaining to the 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 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 Departments to the Development Owner from time to time; and

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

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

(9) To prepare and submit the Housing Sponsor Report to the Department no later than March 1st of each year.

§35.8. 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 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 Development.

§35.9. 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 §§35.3 - 35.8 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 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.

§35.10. No Discrimination.

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

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

Filed with the Office of the Secretary of State on May 17, 2004.

TRD-200403313
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 475-4595

PART 6. OFFICE OF RURAL COMMUNITY AFFAIRS

CHAPTER 255. TEXAS COMMUNITY DEVELOPMENT PROGRAM

SUBCHAPTER A. ALLOCATION OF PROGRAM FUNDS

10 TAC §255.10, §255.14

The Office of Rural Community Affairs (Office) proposes amendments to §255.10 and a new §255.14 concerning the allocation of Community Development Block Grant (CDBG) non-entitlement area funds under the Texas Community Development Program (TCDP).

The amendments are being proposed to establish the standards and procedures by which the Office will allocate and distribute 2004 program year funds under the housing infrastructure fund. The new section is being proposed to establish the standards and procedures the Office will follow to provide assistance to an eligible city or county under a new section 108 loan guarantee pilot program. The amendments are being proposed to make changes to the housing infrastructure fund application and selection criteria and to describe the application and selection criteria for a new section 108 loan guarantee pilot program.

Robt. J. "Sam" Tessen, MS, Executive Director of the Office, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Robt. J. "Sam" Tessen, MS, Executive Director of the Office, also has determined that for the period that the section is in effect, the public benefit as a result of enforcing the section will be the equitable allocation of CDBG non-entitlement area funds to eligible units of general local government in Texas. There will be an effect on small businesses or micro-businesses as the new program is being proposed to assist businesses to create or retain jobs. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is an anticipated impact on local employment if new jobs are created or retained under the proposed new pilot program.

Comments on the proposal may be submitted to Jerry Hill, General Counsel, Office of Rural Community Affairs, P.O. Box 12877,

Austin, Texas 78711, telephone : (512) 936-6701. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register*.

The amendments are proposed under the §487.052 of the Government Code, which provides the executive committee with the authority to adopt rules concerning the implementation of the Office's responsibilities.

No other code, article, or statute is affected by the proposed amendments.

§255.10. Housing Fund.

(a)-(g) (No change.)

(h) Selection procedures (housing infrastructure fund).

(1) Each eligible local government may submit one application for funding under the housing infrastructure fund. Two copies of the application must be submitted to the Office and at least one copy of the application must be submitted to the applicant's state planning region.

(2) Upon receipt of an application, the Office staff review the application to determine whether it is complete, if all proposed activities are program eligible, and if the project is financially feasible. If not subject to disqualification, the applicant may correct any deficiencies identified by the Office staff in the timeframe stated in the notification.

(3) After review by Office staff, each application is evaluated by a team of reviewers. Reviewer's scores are averaged for a final team score and applications recommended for funding are forwarded to the executive director of the Office.

(4) The executive director of the Office reviews the funding recommendations for project awards and except for awards exceeding $300,000 announces the contract awards. Awards exceeding $300,000 are submitted to the Executive Committee for approval.

(5) Upon announcement of the contract awards, the Office staff works with recipients to execute the contract agreements. While the award must be based on the information provided in the application, the Office may negotiate any element of the contract with the recipient as long as the contract amount is not increased and the level of benefits described in the application is not decreased.

(i) 2003 program year selection criteria (housing infrastructure fund). The following is an outline of the selection criteria used by the Office for scoring 2003 program year applications under this fund. One hundred seventy points are available.

(1) Financial feasibility (20 points).

(2) Market assessment (30 points).

(3) Affordable housing solutions (30 points).

(4) Organizational capacity (25 points).

(5) Program consideration (35 points).

(6) Project design (10 points).

(7) Community support (10 points).

(8) Rural project (10 points). Project is located in a community with a population of 10,000 persons or less.

(j) 2004 program year selection criteria (housing infrastructure fund). Within the selection criteria described in paragraphs (1) through (9) of this subsection, different factors may be evaluated for single family projects and multi-family projects. These different selection criteria factors will be described in the application guide for the program. The following is an outline of the selection criteria used by the Office for scoring 2004 program year applications under this fund. One hundred seventy (170) points are available. Applications determined not to be financially feasible will be eliminated from funding consideration. Any such application will not be reviewed any further and the applicant will be notified that the application lacked sufficient financial feasibility.

(1) Market assessment (60 points). The market assessment will be scored based on housing market information, realtor information, census data provided, public housing authority waiting lists, project site information, and other information in the application.

(A) Documented market description. Maximum of 6 points for Single Family or Multi-Family.

(B) Documented analysis of market trends. Maximum of 6 points for Single Family or Multi-Family.

(C) Evaluation and understanding of the local housing needs. Maximum of 6 points for Single Family or Multi-Family.

(D) Ability of the market to absorb the proposed number of homes/units. Maximum of 6 points for Single Family or Multi-Family.

(E) Project location in terms of commercial and social services, and appropriateness and general appeal of site. Maximum of 6 points for Single Family or Multi-Family.

(F) An occupancy rate of 90 percent or higher exists in the community where the housing project is located. Maximum of 6 points for Single Family or Multi-Family.

(G) New industry/businesses in the area have created jobs that have increased the need for affordable housing. Maximum of 6 points for Single Family or Multi-Family.

(H) No existing TCDP funded Housing Infrastructure project is located within 50 miles of the proposed project site. Maximum of 6 points for Single Family or Multi-Family.

(I) The market assessment has been prepared by an independent party other than the locality's staff or application preparer. Maximum of 6 points for Single Family or Multi-Family.

(J) Other factors that demonstrate a need for additional housing in the area such as an increase in the cost of housing, lack of affordable housing, and major transportation changes. Maximum of 6 points for Single Family or Multi-Family.

(2) Affordable housing solutions (20 points).

(A) Degree that project includes housing located in stable neighborhoods for the targeted population. This is determined by TCDP during its site visit assessment. Maximum of 5 points for Single Family or Multi-Family.

(B) Affordability of project to individuals with 80%, 60% or 50% area median family income. Maximum of 5 points for Single Family or Multi-Family.

(i) Project encompasses units affordable to families with 80 percent, 60 percent and 50 percent of area median family income - 5 points.

(ii) Project encompasses units affordable to families with 80 percent and 60 percent of area median family income - 3 points.

(iii) Project encompasses units affordable to families with 80 percent of area median family income - 1 point.

(C) Availability of down-payment and closing cost assistance. Maximum of 5 points for Single Family.

(D) Availability of homebuyer counseling services. Maximum of 5 points for Single Family.

(E) Support Services Plan of resident services available to tenants. Maximum of 10 points for Multi-Family.

(3) Organizational capacity (15 points).

(A) Experience and capacity of the developer and applicant (in relation to the scale of the project). Maximum of 10 points for Single Family or Multi-Family.

(B) Readiness to proceed. Score will consider financial commitments, evidence of zoning, options on land, and other evidence that the project will not encounter delays upon receipt of program funds. Maximum of 5 points for Single Family or Multi-Family.

(4) Program consideration and matching funds (20 points).

(A) Program Consideration. Maximum of 10 points for Single Family or Multi-Family.

(i) Descriptions of how proposed project will resolve the identified need and the severity of the need within the jurisdiction - up to 5 points.

(ii) Minimal displacement, relocation, site acquisition, and clearance costs - up to 1 points.

(iii) Adequacy of community infrastructure and services in relation to the project site - up to 2 points.

(iv) Description of applicant's other efforts to provide affordable housing in the community - up to 2 points.

(B) Financial commitment from local government (local contribution). Maximum of 5 points for Single Family or Multi-Family.

(i) Local government has provided a contribution in the amount of 2 percent of the fund grant amount requested - 5 points.

(ii) Local government has provided a contribution in the amount of 1 percent of the fund grant amount requested - 3 points.

(iii) Local government has not provided a contribution - 0 points.

(C) Adequacy of community infrastructure in relation to the project. Maximum of 5 points for Single Family or Multi-Family.

(5) Applicant has not received a previous housing infrastructure fund contract (5 points).

(6) Project design (10 points). Maximum of 10 points for Single Family or Multi-Family.

(A) Maximum of 5 points for creative housing designs that incorporate cost-effectiveness, practicality, and security without compromising comfort, attractiveness, and privacy, as well as a variety of floor plans and elevations.

(B) Maximum of 2 points for housing units that incorporate energy efficient construction and appliances.

(C) Maximum of 2 points for projects that incorporate a main entrance to the proposed subdivision that enhances the visual appeal of the property.

(D) Maximum of 1 point for applications from governing bodies of communities designated as defense economic readjustment zones over other eligible applications for TCDP grants if at least fifty percent (50%) of the grant will be expended for the direct benefit of the readjustment zone and the purpose of the grant is to promote TCDP-eligible economic development in the community or for TCDP-eligible construction, improvement, extension, repair, or maintenance of TCDP-eligible public facilities in the community.

(7) Community support (20 points).

(A) Community awareness of the project as demonstrated by support letters and newspaper articles. Maximum of 10 points for Single Family or Multi-Family.

(B) Financial commitments from other sources (leveraging). Greater weight will be provided for financial commitments from within the community for the project. Maximum of 10 points for Single Family or Multi-Family.

(8) Cost per beneficiary (10 points). Single Family and Multi-Family applications will be considered separately. The beneficiaries used in this determination will be based on the number of units proposed and the assumption that a family of four will occupy a single family unit or multi-family unit.

(A) the TCDP cost per beneficiary is at least 50 percent below the calculated median cost per beneficiary of all eligible applicants within the respective single or multi-family category - (10 points);

(B) the TCDP cost per beneficiary is at or below the calculated median cost per beneficiary of all eligible applicants within the respective single or multi-family category (7 points);

(C) the TCDP cost per beneficiary is below 150 percent of the calculated median cost per beneficiary of all eligible applicants within the respective single or multi-family category (5 points); or

(D) the TCDP cost per beneficiary is 150 percent or greater than the calculated median cost per beneficiary of all eligible applicants within the respective single or multi-family category (2 points).

(9) Rural project (10 points). Project is located in a community with a population of 10,000 persons or less - 10 points.

(k) [(j)] Principal residence requirement (housing infrastructure fund). Each resident must be one that, at the time the mortgage loan is executed, the borrower reasonably expects to become his or her principal residence within a reasonable time (not to exceed 60 days) after the financing is provided. Whether a residence is occupied as a principal residence depends upon all the facts and circumstances of each case, including the good faith of the borrower. A residence that is intended to be used primarily in a trade of business will not satisfy the principal residence requirement. Further, a residence that will be used as an investment property or a recreational home does not satisfy the principal residence requirement.

§255.14. Section 108 Loan Guarantee Pilot Program.

(a) General Provisions. Section 108 is the loan guarantee provision authorized under section 108 of the Housing and Community Development Act (42 United States Code §§5301 et seq.). The loan is made by a private lender to an eligible community. The United States Department of Housing and Urban Development (HUD) guarantees the loan; however, TCDP must pledge the state's current and future Community Development Block Grant nonentitlement area funds to cover any losses. An eligible community would prepare a loan guarantee application for submission to HUD.

(b) Conditions. The following conditions apply under the TCDP Section 108 program:

(1) The Office will not provide a commitment for an application submitted to HUD for a Section 108 guarantee unless the Office has reviewed the application, conducted an underwriting analysis, and specifically recommended its approval;

(2) The Office will charge the eligible community receiving the Section 108 loan a non-refundable loan loss reserve fee at the rate of one percent per annum on the principal amount outstanding. The funds from the one percent fee would be used for any debt service payments the Office would need to pay on account of the loan, or to cover any loan losses, if the recipient does not make its Section 108 loan payments;

(3) The application must be only for an activity eligible under the TCDP;

(4) The Office will require the community to submit adequate information necessary to track all loan repayments made by any third party borrowers such as assisted businesses; and

(5) The Office will monitor compliance with program requirements.

(c) Eligible Activities.

(1) The project must meet a national objective of Housing and Community Development Act:

(A) principally benefit low- and moderate-income persons;

(B) aid in the elimination of slums or blight; or

(C) meet other community development needs of particular urgency which represent an immediate threat to the health and safety of residents of the community.

(2) In addition, the State program is specifically restricting eligibility to economic development activities eligible under the state Community Development Block Grant (CDBG) Program. Other activities eligible under the 24 Code of Federal Regulations Part 570 will not be eligible under the pilot phase of this program.

(d) Terms. The maximum repayment period for a Section 108 guaranteed loan under the TCDP will be twenty years. The TCDP will not establish a funded loss reserve. The Office anticipates entering into a Reimbursement Agreement with the community providing for recovery of amounts required to be paid by the TCDP. Should the TCDP be required to cover any Section 108 loan payments not made by the recipient of the loan guarantee, it would first use funds that have been collected from the additional one percent per annum fee charged on the loan.

(e) Pilot Program Application and Amount. In order to provide eligible communities an additional funding source, the TCDP is authorizing a loan guarantee pilot program consisting of one application up to a maximum of $500,000 for a particular project. Additional information on the selection criteria and underwriting thresholds will be provided in the application guide for applicants interested in being selected as the pilot project under this program.

(f) Application Review and Underwriting Analysis. The Office will review each complete application to make threshold determinations with respect to:

(1) Whether the application meets the Section 108 eligibility requirements;

(2) Whether the use of CDBG Section 108 loan guarantee funds is appropriate to carry out the project proposed in the application;

(3) The strength of commitments from all other public and/or private investments identified in the application;

(4) Whether there is evidence that the permanent jobs created or retained will primarily benefit low-and-moderate income persons; and

(5) The financial feasibility of the business to be assisted, including reviews of appropriate projections of revenues, expenses, debt service and returns on equity investments in the project as described in paragraph (g), Underwriting Analysis and Review, of this subsection. Generally, the project should demonstrate that it would generate a positive net present value of discounted cash flows.

(g) Underwriting Analysis and Review.

(1) Project costs are reasonable. The Office will review a breakdown of all project costs and that each cost element making up the project for reasonableness.

(2) Commitment of all project sources of financing. The Office will review all projected sources of financing necessary to carry out the economic development project to determine whether the proposal is ready to proceed. To the extent practicable, prior to the commitment of Section 108 CDBG funds to the project, the Office will verify that sufficient sources of funds have been identified to finance the project; all participating parties providing those funds have affirmed their intention to make the funds available; and the participating parties have the financial capacity to provide the funds.

(3) Avoid substitution of Section 108 CDBG funds for non-Federal financial support. The Office will review the economic development project to ensure that, to the extent practicable, CDBG funds will not be used to substantially reduce the amount of non-Federal financial support for the activity. The Office will review whether or not the business being assisted has applied for private debt financing from a commercial lending institution and whether that institution has completed all of its financial underwriting and loan approval actions resulting in either a firm commitment of its funds or a decision not to participate in the project.

(4) Financial feasibility of the project. The Office will evaluate the financial viability of the project. A project would be considered financially viable if:

(A) all of the assumptions about the project's market share, projections of revenue, projections of expenses, non-cash expenses, net income, and debt service, including the repayment of the Section 108 guaranteed loan, are determined to be realistic;

(B) it projects positive accumulated cash flow for the life of the project including cash from both operational and financial cash flows;

(C) it projects a debt service coverage ratio of 1.5 and cash flow coverage ratio of 1.25 by the 5th year; and

(D) it projects a return on equity by the 10th year of at least 400 basis points greater than the current rate for 30-year U.S. Treasury Bonds.

(5) Disbursement of Section 108 CDBG funds on a pro rata basis. To the extent practicable, the proceeds should be disbursed on a pro rata basis with other funding sources.

(h) Selection Criteria. Applications meeting threshold requirements of subsection (f) will be scored based on the following:

(1) Community Need (Maximum of 30 points)

(A) Unemployment (maximum 10 points). Five points awarded if the applicant's unemployment rate is higher than the state rate, indicating that the community is economically below the state average. Ten points awarded if the applicant's most recently available unemployment rate is 1.5% over the state rate. (For cities, the most recently available city rate will be used; for counties, the most recently available county or census tract rate, for where the business site is located, whichever is higher, will be used).

(B) Poverty (maximum 10 points). Awarded if the applicant's most recently available annual county poverty rate is higher than the annual state rate, indicating that the community is economically below the state average. Applicants will score 5 points if their rate meets or exceeds the state average and score 10 points if this figure exceeds the state average by at least 15%.

(C) Community Population (more Rural) (maximum 10 points). Points are awarded to applying cities with populations of 5,050 or less and counties with a total population of 35,000 or less, using 2000 census data. For cities: score 5 points if the city is located in a county with a population of 35,000 or less; and score 5 additional points if the population of the city is less than 5,050. For counties: score 5 points if the county population is less than 35,000 and score 5 additional points if the county population is less than 15,350.

(2) Jobs (Maximum of 20 points).

(A) Job Impact (Jobs Created or Retained per Population of Community) (Maximum 10 points). Awarded by taking the Business' total job commitment, created & retained, and dividing by applicant's 2000 unadjusted population. This equals the job impact ratio. Score 5 points if this figure exceeds the median job impact ratio for prior years; and score 10 points if this figure exceeds 200% of the ratio. County applicants should deduct the 2000 census population amounts for all incorporated cities, except in the case where the county is sponsoring an application for a business that is or will be located in an incorporated city. In this case the city's population would be used, rather than the county's.

(B) Cost per Job (Maximum 10 points). Awarded by dividing the amount of Section 108 loan guarantee amount requested by the number of full-time job equivalents to be created and/or retained. Points are then awarded in accordance with the following scale:

(i) Below $15,000--10 points.

(ii) Below $20,000--5 points.

(3) In the event of a tie score and insufficient funds to approve all applications, the following tie breaker criteria will be used.

(A) The tying applications are ranked from lowest to highest based on poverty rate stated on the score sheet. Thus, preference is given to the applicant with the higher poverty rate.

(B) If a tie still exists after applying the first criteria then applications are ranked from lowest to highest based on unemployment rate stated on the score sheet. Thus, preference is then given to the applicant with the higher unemployment rate. 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.

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 May 17, 2004.

TRD-200403296

Robt. J. "Sam" Tessen
Executive Director
Office of Rural Community Affairs
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 936-6710

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 12. COAL MINING REGULATIONS
SUBCHAPTER G. SURFACE COAL MINING AND RECLAMATION OPERATIONS, PERMITS, AND COAL EXPLORATION PROCEDURES SYSTEMS
DIVISION 2. GENERAL REQUIREMENTS FOR PERMITS AND PERMIT APPLICATIONS

16 TAC §12.108

The Railroad Commission of Texas proposes to amend §12.108, relating to Permit Fees. This section addresses fees to be paid to the Commission for the processing of applications for new coal mining permits, permit revisions, and permit renewals, as well as annual fees paid for each acre of land mined.

The Commission proposes to amend subsection (b) to increase the annual per-acre fee to facilitate recovery of additional indirect costs to the Commission of providing various services. Specifically, the proposed amendment increases the annual fee from $300 to $390 for each acre of land in the permit area on which the permittee actually conducted operations for the removal of coal and lignite during a calendar year.

As proposed, the new fee amount would go into effect on September 1, 2004. The per-acre fee for calendar year 2004 would be calculated as follows: for each acre of land on which a permittee actually conducted operations for the removal of coal and lignite during the period January 1, 2004, through August 31, 2004, each permittee would pay to the Commission an annual fee of $300 per acre. For each acre of land on which a permittee actually conducted operations for the removal of coal and lignite during the period September 1, 2004, through December 31, 2004, each permittee would pay to the Commission an annual fee of $390 per acre. Beginning January 1, 2005, the annual $390 per acre fee would apply for each acre of land within the permit area on which a permittee actually conducted operations for the removal of coal and lignite during the calendar year.

Melvin Hodgkiss, Director, Surface Mining and Reclamation Division, has determined that, during each year of the first five years the proposed amendment is in effect, there will be an increase in revenue to the state. Based on the proposed annual fee increase beginning September 1, 2004, the annual revenue for calendar year 2004 would increase by approximately $87,000. This estimated increase is based on an average of 2,900 acres mined annually in the State. Beginning January 1, 2005, the annual $390 per acre fee would apply for each acre of land within

the permit area on which a permittee actually conducted operations for the removal of coal and lignite during the calendar year. For fiscal year 2005 (which begins on September 1, 2004), and for the remaining four years of the first five years the proposed amendment would be in effect, the annual increase in revenue would be $261,000 per fiscal year, based on the $90 per acre increase applied to the average of 2,900 acres mined annually in the State. The increased revenue will be used to pay for the Commission's administration of the State's surface mining program, so the net fiscal impact to the State is zero. There are no fiscal impacts on local governments.

Mr. Hodgkiss has also determined that the public benefit from adoption of the proposed amendment will be sufficient revenue to the State to enable the Commission to continue administering the State's surface mining program. Through the Commission, the Texas mining program administers federal and state statutes and rules that assure continued adherence to environmental protection; protection of the rights of surface land owners from unregulated surface coal mining; and conduct of surface coal mining and reclamation operations in a manner that will prevent unreasonable degradation of land and water resources.

Mr. Hodgkiss has also determined that, during each year of the first five years the proposed amendment is in effect, the annual increased economic cost to operators required to comply with this rule is an additional $90 per acre of land where coal or lignite is removed. The actual economic cost will vary among operators according to the number of acres from which a particular operator removes coal or lignite. 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 permits from the Commission.

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

Comments on the proposed amendment should 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 Docket No. 1-04. Comments will be accepted for 60 days after publication in the *Texas Register*. The Commission encourages all interested 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 Melvin Hodgkiss, Director, Surface Mining and Reclamation Division, at (512) 463-6901. The status of Commission rulemakings in progress is available at http://www.rrc.state.tx.us/rules/proposed.html.

The Commission proposes the amendment under Texas Natural Resources Code, §134.013, which authorizes the Commission to promulgate rules pertaining to surface coal mining operations, and §134.055, which authorizes the Commission to obtain annual fees.

Statutory authority: Texas Natural Resources Code, §134.013 and §134.055.

Cross-reference to statute: Texas Natural Resources Code, §134.013 and §134.055.

Issued in Austin, Texas on May 11, 2004.

§12.108. Permit Fees.

(a) Each application for a surface coal mining and reclamation permit or renewal or revision of a permit shall be accompanied by a fee. The initial application fee and the application fee for renewal of a permit may be paid in equal annual installments during the term of the permit. The fee schedule is as follows:

(1) application for a permit: $5,000.

(2) application for revision of a permit: $500.

(3) application for renewal of a permit: $3,000.

(b) In addition to application fees required by this section, each permittee shall pay to the Commission an annual fee in the amount of $390 [~~$300~~] for each acre of land within the permit area on which the permittee actually conducted operations for the removal of coal and lignite during the calendar year. The total amount of this fee is due and payable not later than March 15th of the year following the year of removal operations. For calendar year 2004 [~~2003~~] only, the annual fee shall be calculated as follows: for each acre of land on which a permittee actually conducted operations for the removal of coal and lignite during the period January 1, 2004 [~~2003~~], through August 31, 2004 [~~2003~~], the permittee shall pay to the Commission an annual fee of $300 [~~$120~~] per acre. For each acre of land on which a permittee actually conducted operations for the removal of coal and lignite during the period September 1, 2004 [~~2003~~], through December 31, 2004 [~~2003~~], the permittee shall pay to the Commission an annual fee of $390 [~~$300~~] per acre.

(c) Fees paid to the Commission under this section shall be deposited in the state treasury and credited to the general revenue fund.

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 May 11, 2004.

TRD-200403186
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 475-1295

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PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 22. PROCEDURAL RULES

SUBCHAPTER B. THE ORGANIZATION OF THE COMMISSION

16 TAC §22.22

The Public Utility Commission of Texas (commission) proposes an amendment to §22.22, relating to Service on the Commission. The proposed amendment changes the recipient of service of all papers or other legal documents served on the commission or any of its members in their official capacity from the General Counsel to Executive Director. Project Number 29587 is assigned to this proceeding.

Ms. Annette Lown Mass, Attorney, Legal & Enforcement Division, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Mass has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be ensuring that the public and interested persons will be made aware of the authorized representative receiving service of all papers or legal documents served on the commission. There will be no adverse economic effect on small businesses or micro- businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Ms. Mass has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Wednesday, July 7, 2004 at 9:30 a.m. The request for a public hearing must be received within 30 days after publication.

Comments on the proposed amendment (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule(s). All comments should refer to Project Number 29587.

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998, Supplement 2004) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

§22.22. Service on the Commission.

(a) The commission's Executive Director[~~General Counsel~~], or the Executive Director's[~~General Counsel's~~] authorized representative, shall have the authority to accept service of all papers or other legal documents served on the commission or any of its members if served in their official capacity and not individually. Pursuant to Texas Government Code §2001.176(b)(2), for a petition initiating judicial review, the commission shall be served a copy of the actual petition.

(1) Preferred method of service. Delivery to the Executive Director[~~General Counsel~~], or the authorized representative, in person, a true copy of the citation with a copy of the petition attached.

(2) Alternative method of service. Mailing to the Executive Director[~~General Counsel~~], by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached.

(b) For appeals filed pursuant to the Public Utility Regulatory Act §39.001(f), parties shall provide a courtesy copy of the appeal to the commission's Executive Director[~~General Counsel~~], simultaneous to completing legal service pursuant to the Texas Rules of Appellate 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.

Filed with the Office of the Secretary of State on May 17, 2004.

TRD-200403308
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 936-7211

SUBCHAPTER E. PLEADINGS AND OTHER DOCUMENTS

16 TAC §22.71

The Public Utility Commission of Texas (commission) proposes an amendment to §22.71(g), relating to Office Hours of the Commission Filing Clerk. The proposed amendment adds a provision explaining the operating hours of the commission's central records division and commission filing clerk. Project Number 29588 is assigned to this proceeding.

Ms. Annette Lown Mass, Attorney, Legal & Enforcement Division, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Mass has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be informing the public of the operating hours of the commission's central records division and commission filing clerk. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Ms. Mass has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Wednesday, July 7, 2004 at 9:30 a.m. The request for a public hearing must be received within 30 days after publication.

Comments on the proposed amendment (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule(s). All comments should refer to Project Number 29588.

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998, Supplement 2004) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

§22.71. Filing of Pleadings, Documents and Other Materials.

(a) - (f) (No change.)

(g) Office hours of Central Records and the commission filing clerk.

(1) The office hours of Central Records are from 9:00 a.m. to 5:00 p.m., Monday through Friday, on working days, except on Fridays, when Central Records will close for all purposes from noon to 1:00 p.m.

(2) With the exception of open meeting days, for the purpose of filing documents, the office hours of the commission filing clerk are from 9:00 a.m. to 5:00 p.m., Monday through Friday, on working days.

(3) [(1)] On open meeting days, the commissioners and the Policy Development Division may file items related to the open meeting on behalf of the commissioners between the hours of 8:00 a.m. and 9:00 a.m. The commissioners and the Policy Development Division shall provide the filing clerk with an extra copy of all documents filed pursuant to this paragraph for public access.

(4) [(2)] Central Records will open at 8:00 a.m. on open meeting days. With the exception of paragraph (3)[(1)] of this subsection, no filings will be accepted between the hours of 8:00 a.m. and 9:00 a.m.

(h) - (j) (No change.)

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

Filed with the Office of the Secretary of State on May 17, 2004.

TRD-200403309
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 936-7211

PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 37. LEGAL

SUBCHAPTER A. RULES OF PRACTICE

16 TAC §37.3

The Texas Alcoholic Beverage Commission proposes new §37.3 governing the service of pleadings in contested administrative cases. State Office of Administrative Hearing rule 1 Tex. Admin. C. §155.55(d) requires the agency to have a specific statute or rule authorizing service of hearing notices and other matters on a respondent's last known address. The proposed rule would allow service on license, permit and certificate holders in this way. The rule also imposes a requirement on license, permit and certificate holders to inform the commission of address changes within seven days.

Lou Bright, General Counsel, has determined that for the first five years the rule is in effect, there will be no fiscal implications for units of state or local government as a result of enforcing the rule. Mr. Bright has determined that the public will benefit by this rule in that it establishes an efficient and reliable method of providing service and notice in contested case hearings, thereby, allowing those hearings to be resolved expeditiously. There is no anticipated fiscal impact on small businesses or individuals as a result of this rule.

Comments may be addressed to Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, P. O. Box 13127, Austin, Texas 78711

This new rule is proposed under the authority of §5.31 of the Texas Alcoholic Beverage Code, which authorizes the commission prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code.

Cross Reference: Section 11.63 of the Alcoholic Beverage Code is affected by this rule.

§37.3. Service of Pleadings and Notice of Hearing.

(a) This rule relates to §11.63 of the Alcoholic Beverage Code.

(b) Service of notices of hearing, pleadings, or other documents related to contested cases shall be by certified mail addressed to the licensee/permittee/certificate holders' last known address as reflected in the commission's records. A certificate of service to such address shall be prima facie evidence of adequate service on the licensee/permittee/certificate holder.

(c) Licensee/permittee/certificate holders and applicants for licenses, permits, or certificates, and their representatives, shall notify the commission in writing of any change of address within seven days of such change. Licensee/permittees shall file their change of address with the Licensing Division of the Texas Alcoholic Beverage Commission. Certificate holders shall file their change of address with the Seller Server Training Section of the Texas Alcoholic Beverage 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 May 17, 2004.

TRD-200403340
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 206-3204

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 75. AIR CONDITIONING AND REFRIGERATION CONTRACTOR LICENSE LAW

16 TAC §75.10, §75.70

The Texas Department of Licensing and Regulation ("Department") proposes amendments to existing rules at 16 Texas Administrative Code, §75.10 and §75.70 regarding the air conditioning and refrigeration contractors licensing program.

Rule 75.10-Definitions is amended at paragraphs (14) and (20) to improve the definitions of "direct supervision" and of "permanent office". Rule 75.70-Responsibilities of the Licensee and the Air Conditioning and Refrigeration Contracting Company is amended to add new subsections (a)(6), (7), and (b)(5), and to amend subsections (f) and (j). New provisions under subsection (a)(6) require a licensee to verify all work for which the licensee has supervisory responsibility. Subsection (a)(7) is added to make it clear to municipalities that a licensee may authorize persons to pull permits. New subsection (b)(5) is added to make it clear that contracting companies may delegate persons to pull permits under the license of the company's license holder. New subsection (b) (6) is added to clarify that the records of an air conditioning and refrigeration contracting company must be maintained for a period of three years after completion of a job. Subsection (f) is amended to make it clear that a subcontracting licensee is responsible to the department for work performed. Subsection (j) is amended to more clearly express that a licensee must have a business relationship-be either employed or contracted-with persons and entities that the licensee allows to use his license.

These rules are necessary to more clearly define requirements licensees must meet regarding supervision and use of the license by contracting companies.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed amendments 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 amendments are in effect, the public benefit will be more clearly defined requirements and responsibilities.

There will be no effect on large, small, or micro-businesses as a result of the proposed amendments. There are no anticipated economic costs to persons 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*.

The amendments are proposed under Texas Occupations Code, Chapters 51 and 1302, 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 Occupations Code, Chapters 51 and 1302. No other statutes, articles, or codes are affected by the proposal.

§75.10. Definitions.

The following words and terms have the following meanings:

(1) - (13) (No change.)

(14) Direct [~~personal~~] supervision--Directing and verifying the design, installation, construction, maintenance, service, repair, alteration, or modification of an air conditioning, refrigeration, process cooling, or process heating product or equipment for compliance with mechanical integrity. Verification may include, but is not limited to:

(A) Personal inspection of a job;

(B) Contacting the customer by mail, e-mail, or telephone to determine if the customer is satisfied with the installation and service provided;

(C) Reviewing a checklist completed by a person who performed some or all of the work on a job; and

(D) Reviewing an inspection report of the job made by a municipal mechanical inspector.

(15) - (19) (No change.)

(20) Permanent office--Any location, which must be identified by a street address, or other data identifying a rural location, from which a person or business entity conducts the business of an air conditioning and refrigeration contracting company. A location not open to the public, or not located within the state, may serve as a permanent office so long as the department and consumers have access to the licensee required by §1302.252 of the Act to be employed in each permanent office. [~~Any business location at which contractual agreements to perform work requiring a license under the Act are arranged and where supervising control for those contracts originate. Temporary construction sites or other locations at which employees of a licensee work under contract to provide service, maintenance and repair work are not permanent offices.~~]

(21) - (23) (No change.)

§75.70. Responsibilities of the Licensee and the Air Conditioning and Refrigeration Contracting Company.

(a) The licensee shall:

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

(4) furnish the Department with his or her permanent mailing address and the name, physical address, and telephone number of the company; [~~and~~]

(5) furnish to the Department copies of assumed name registrations from the Secretary of State and/or County Clerk's office ; [~~.~~]

(6) verify that all work for which he or she has supervisory responsibility is performed so that mechanical integrity of installed products, system or equipment is maintained, and that all maintenance, service, and repair work has been done properly; and

(7) furnish to municipalities a list of authorized agents that may pull permits under the license, and, if subcontracting jobs to other licensed air conditioning and refrigeration contracting companies, furnish a list of agents of those licensed companies that may pull permits under his license.

(b) An Air Conditioning and Refrigeration Contracting Company shall:

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

(3) maintain records on their license holder showing payroll taxes deducted and reported to the Texas Workforce Commission, and either, hours worked each day or documentation showing that the licensee is on salary and works full time for the contracting company; [~~and~~]

(4) furnish a copy of the company's records, specified in paragraph (3) of this subsection, at the request of the Department ; [~~.~~]

(5) furnish to municipalities a list of authorized agents that may pull permits under the license of its license holder, and, if subcontracting jobs to other licensed air conditioning and refrigeration contracting companies, furnish a list of agents of those licensed companies that may pull permits under the license of its license holder; and

(6) make available to the department in Austin, Texas the records relating to the business of the air conditioning and refrigeration contracting company conducted through a permanent office for a period of at least three years after completion of a job.

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

(f) A licensee who subcontracts to perform work requiring a license under the Act for an air conditioning and refrigeration contracting company is responsible to the company and the department [~~customer~~] for the mechanical integrity of all work performed by the subcontractor.

(g) Each air conditioning and refrigeration contracting company shall have a licensee employed full time in each permanent office from which work requiring a license under the Act is contracted and supervised. All work requiring a license under the Act shall be under the direct [~~personal~~] supervision of the licensee for that office.

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

(j) A licensee may not permit a person or any company with which his or her license is not affiliated, and by whom he or she is not employed, or contracted with to use his or her license for any purpose.

(k) - (n) (No change.)

(o) A licensee shall:

(1) (No change.)

(2) if the information is printed on the license:

(A) (No change.)

(B) pay the appropriate revision fee required in §75.80 [~~of this title (relating to Fees)~~]; and

(C) (No change.)

(p) (No change.)

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

Filed with the Office of the Secretary of State on May 17, 2004.

TRD-200403339
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 463-7348

PART 8. TEXAS RACING COMMISSION

CHAPTER 311. OTHER LICENSES
SUBCHAPTER A. LICENSING PROVISIONS
DIVISION 1. OCCUPATIONAL LICENSES

16 TAC §311.5

The Texas Racing Commission proposes an amendment to §311.5, relating to occupational license fees. The proposed amendment provides clarifying language regarding the methods available for payment of license fees.

Paula C. Flowerday, Executive Secretary for the Texas Racing Commission, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the amendment.

Ms. Flowerday has also determined that for each of the first five years the amendment is in effect the anticipated public benefit will be an increased flexibility in the payment options available for a licensee. There is no economic impact to small or micro businesses required to comply with the amendment as proposed. There is no anticipated economic cost to an individual required to comply with the amendment as proposed. The proposal has no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Written comments must be submitted within 30 days after publication of the proposed amendment in the *Texas Register* to Nicole Galwardi, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080, fax (512) 833-6907.

The amendment is proposed under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules relating exclusively to horse and greyhound racing; §5.01 which authorizes the Commission to issue licenses and set conditions for licenses; §7.03 which authorizes the Commission to issue occupational licenses; and Article 7 which authorizes the Commission to require, set conditions and qualifications for, issue, and deny occupational licenses.

The proposed amendment implements Texas Civil Statutes, Article 179e.

§311.5. License Fees.

(a) (No change.)

(b) A license fee paid at a racetrack or at the Commission's headquarters must be paid by a money order, a certified check, a cashier's check, a credit card, or a personal check. The executive secretary may approve payment in cash at a racetrack if the association submits a plan that is approved by the executive secretary. The plan shall provide for the safety and security of the licensing office where the cash will be received and stored and licensing employees who will be responsible for handling and depositing the cash received. A license fee paid through the Texas OnLine portal may be paid by any method approved by the Texas OnLine Authority.

(c) (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 May 14, 2004.

TRD-200403291
Nicole Galwardi
General Counsel
Texas Racing Commission
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 490-4009

TITLE 22. EXAMINING BOARDS

PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 535. GENERAL PROVISIONS

SUBCHAPTER R. REAL ESTATE INSPECTORS

22 TAC §535.217, §535.223

The Texas Real Estate Commission (TREC) proposes amendments to §535.217, concerning dishonest conduct as grounds for disciplinary action, and §535.223, concerning standard inspection reports.

The proposed amendments to §535.217 would require that licensed inspectors disclose to all parties to the transaction and obtain the written consent of the client that the inspector intends to receive a fee or other valuable consideration from a person other than the inspector's client. The amendment would also require that the licensee disclose to and obtain the written consent of the client that the inspector is paying a fee to a service provider or a participant in the transaction. The amendments propose to adopt by reference a Fee or Other Valuable Consideration Disclosure Form for required use by licensed inspectors to comply with the disclosure requirements.

The amendments to §535.223 revise the requirements regarding the use of the standard inspection report form and permit an inspector to use additional space on page two of the form for commentary that may not fit on page one.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the amendments are in effect there will be no fiscal implications for the state as a result of enforcing or administering the amended sections. There are no anticipated fiscal implications for units of local government. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the amendments.

Ms. DeHay also has determined that for each year of the first five years the amendments as proposed are in effect the public benefit anticipated as a result of enforcing the amended sections will be a better informed consumer due to the required written disclosure of fees paid to or by licensed inspectors. There is no anticipated economic cost to persons who are required to comply with the proposed amendments, other than the costs of obtaining a copy of the form, which would be available at no charge through the TREC web site at www.trec.state.tx.us, and available from private printers at an estimated cost of $7.50 per set of 50 copies.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to insure compliance with the provisions of the Act.

The statute affected by this proposal is Texas Occupations Code, Chapter 1102. No other statute, code or article is affected by the proposed amendments.

§535.217. Dishonest Conduct as Grounds for Disciplinary Action.

For the purposes of Texas Occupations Code §1102.302 [~~Civil Statutes, Article 6573a, (the Act), §23(1)~~], the commission deems the following conduct by a licensed inspector to be dishonest and grounds for disciplinary action:

(1) accepting a fee or other valuable consideration in a real estate transaction from a person or entity, other than the inspector's client, without first disclosing to all parties in the real estate transaction that the inspector intends to receive the fee or other valuable consideration, and obtaining the written consent of the inspector's client.

(2) paying a portion of any fee received by the inspector to a service provider or a participant in a real estate transaction, other than the inspector's client, without the written consent of the inspector's client.

(3) The Texas Real Estate Commission adopts by reference the Fee or Other Valuable Consideration Disclosure Form, REI 7B-0, approved by the Commission in 2004 which is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

(4) A licensed inspector must use the Fee or Other Valuable Consideration Disclosure Form or identical terminology in a pre-inspection agreement to comply with paragraphs (1) and (2) of this section. The inspector may select the type and size of the fonts, provided the fonts are no smaller than those used in the Fee or Other Valuable Consideration Disclosure Form.

§535.223. Standard Inspection Reports.

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

(d) When using form REI 7A-0, the inspector may make the following changes.

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

(4) The inspector may select other information to be inserted in the space on the first page of the report and may allocate additional space on page 2 [~~reserved~~] for that purpose; provided the caption "Additional Information Provided By Inspector" is not deleted.

(5) - (10) (No change.)

(e) - (h) (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 May 11, 2004.

TRD-200403193
Loretta DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 465-3900

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TITLE 25. HEALTH SERVICES

PART 2. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

CHAPTER 412. LOCAL AUTHORITY RESPONSIBILITIES

SUBCHAPTER G. MENTAL HEALTH COMMUNITY SERVICES STANDARDS DIVISION 1. GENERAL PROVISIONS

25 TAC §412.303

The Texas Department of Mental Health and Mental Retardation (TDMHMR) proposes an amendment to §412.303, concerning definitions, of Chapter 412, Subchapter G, governing Mental Health Community Services Standards. The amendment to §412.303 would expand the definition of "crisis" to include situations other than those in which the individual believes that he or she presents an immediate danger to self or others or that his or her mental or physical health is at risk of serious deterioration. In addition, this amendment will make the definition of "crisis" synonymous with the definition of "crisis" included in new Chapter 419, Subchapter L, governing Mental Health Rehabilitative Services which is contemporaneously proposed in this issue of the *Texas Register*.

Kevin Nolting, Acting Chief Financial Officer, has determined that for each year of the first five year period that the proposed amendment is in effect, enforcing or administering the proposed amendment does not have foreseeable implications relating to costs or revenues of state or local governments.

It is not anticipated that the proposed amendment will have an adverse economic effect on small businesses or micro-businesses.

It is not anticipated that the proposed amendment will affect a local economy.

Sam Shore, Acting Director of Community Mental Health Services, has determined that for each year of the first five years the proposed amendment is in effect, the public benefit will be the promulgation of clear requirements that better ensure the safety and protection of individuals in psychiatric crisis. It is not anticipated that there will be any additional economic cost to persons required to comply with the proposed amendment.

Comments concerning the proposed amendment may be submitted in writing to Linda Logan, Director, Policy Development, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668; by fax to (512) 206-4750; or by e-mail to policy.co@mhmr.state.tx.us within 30 days of publication.

The amendment is proposed under Texas Health and Safety Code (THSC), §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority; THSC, §571.006, which provides the board with the authority to adopt rules as necessary for the proper and efficient treatment of persons with mental illness; THSC, §534.052(a), which provides the board with the authority to adopt rules and standards necessary to ensure adequate provision of community-based mental health services through the local mental health authority.

The proposed amendment would affect THSC, §§532.015, 534.052 and 571.006.

§412.303. Definitions.

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

(1) - (11) (No change.)

(12) Crisis--A situation in which: [~~an individual believes that because of a mental health condition, he or she presents an immediate danger to self or others or that his or her mental or physical health is at risk of serious deterioration.~~]

(A) because of a mental health condition:

(i) the individual presents an immediate danger to self or others; or

(ii) the individual's mental or physical health is at risk of serious deterioration; or

(B) an individual believes that he or she presents an immediate danger to self or others or that his or her mental or physical health is at risk of serious deterioration.

(13) - (45) (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 May 14, 2004.

TRD-200403285
Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 206-4581

SUBCHAPTER I. MENTAL HEALTH CASE MANAGEMENT SERVICES

25 TAC §§412.401 - 412.417

The Texas Department of Mental Health and Mental Retardation (TDMHMR) proposes new §§412.401 - 412.417 of Chapter 412, Subchapter I governing Mental Health Case Management Services. The repeals of existing §§412.451 - 412.466 of Chapter 412, Subchapter J, governing Service Coordination, are contemporaneously proposed in this issue of the *Texas Register*.

The proposed subchapter describes the requirements for the provision of mental health (MH) case management services. In addition, the proposed subchapter addresses the requirement in Texas Health and Safety Code (THSC) §533.0354 that the provision of mental health services for adults with bipolar disorder, schizophrenia, or clinically severe depression and for children with serious emotional illnesses be accomplished using disease management practices.

The requirements for the provision of MH case management services described in the proposed subchapter are based on TDMHMR's Resiliency and Disease Management model. This model promotes the uniform provision of services that are based on clinical evidence and recognized best practices. In addition, the model promotes effective MH case management services by utilizing individual-specific information that identifies an individual's mental health care needs, matches those needs to a particular type(s) of case management service, and evaluates the effectiveness of the service provided.

Proposed new §412.404 sets forth the general requirements for a provider of MH case management services. Further, the proposed section details a provider's responsibility to ensure that an individual with an assigned case manager has an alternate

case manager acting when the assigned case manager is not available.

Proposed new §412.405 specifies eligibility requirements for an individual to receive MH case management services, including that the individual must qualify for a level-of-care.

Proposed new §412.406 requires a provider to obtain authorization for a type, amount, and duration of MH case management services prior to the delivery of such services. In addition, this proposed section describes the circumstances under which reauthorization for services is required.

The proposed new subchapter describes the two types of MH case management services in §412.407: routine and intensive. In addition, the proposed section describes the responsibilities of a case manager for both types of MH case management services.

For clarification, the proposed new §412.408 prohibits a case manager from providing services to certain family members and describes activities that do not constitute MH case management services.

The proposed new §412.409 describes the circumstances under which a provider must notify the department because the individual may no longer be available or eligible for MH case management services.

To ensure case managers are adequately prepared to understand the complexity of medical and psychosocial interventions that are required to effectively treat mental illness and emotional disturbance, the proposed new §412.410 sets forth the minimum qualifications for case managers and supervisors of case managers.

Proposed new §412.411 describes the training required for staff members providing MH case management services and the training for staff members supervising the provision of MH case management services. This proposed section also sets forth the requirements for the documentation and frequency of staff member training.

The proposed new §412.412 sets forth the requirements for documentation of MH case management services. The requirements vary depending on whether the service provided was routine or intensive and whether it involved face-to-face contact with the individual receiving MH case management services.

The proposed new §412.413 provides examples of activities that may and may not be reimbursed as MH case management services.

The proposed new §412.414 reiterates an individual's right to request a fair hearing based on federal law and regulations. In addition, this proposed section requires the provider to give an individual notice of the right to request a fair hearing in the form and manner prescribed by TDMHMR.

Proposed new §412.415 contains a list of exhibits referenced in the proposed subchapter and how such exhibits may be obtained.

Proposed new §412.416 contains a list of laws and rules cited throughout the proposed subchapter.

Kevin Nolting, Acting Chief Financial Officer, has determined that for each year of the first five year period that the new sections are in effect, enforcing or administering the program provider rules does not have foreseeable implications relating to costs or revenues of state or local government.

It is not anticipated that the new sections will have an adverse economic effect on small businesses or micro-businesses. It is not anticipated that there will be any additional economic cost to persons required to comply with the new sections.

Sam Shore, Acting Director, Community Mental Health Services, has determined that, for each year of the first five years the proposed new sections are in effect, the public benefit expected is the adoption of new rules that are based on the department's Resiliency and Disease Management model, which promotes the provision of high quality and effective community-based mental health services by individual-specific information that identifies an individual's mental health care needs, matches those needs to a particular type(s) of MH case management services, and evaluates the effectiveness of the service provided.

It is not anticipated that the new sections will affect a local economy.

Comments concerning the proposed new sections may be submitted in writing to Linda Logan, Director, Policy Development, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668; by fax to (512) 206-4750; or by e-mail to policy.co@mhmr.state.tx.us within 30 days of publication.

A hearing to accept oral and written testimony from members of the public concerning this and other related proposals has been scheduled for 1:30 p.m., Monday, June 14, 2004, in the department's Central Office Auditorium in Building 2, 909 West 45th Street, Austin, Texas. Persons requiring an interpreter for the deaf or hearing impaired should contact the department's Central Office operator at least 72 hours prior to the hearing at TDD (512) 206-5330. Persons requiring other accommodations for a disability should notify Martha Durham, at least 72 hours prior to the hearing at (512) 206-4541 or at the TDY phone number of Texas Relay, 1-800-735-2988.

The new sections are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Health and Safety Code, §533.0354, which requires the provision of mental health services for adults with bipolar disorder, schizophrenia, or clinically severe depression and for children with serious emotional illnesses be accomplished using disease management practices; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of HHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. HHSC has delegated to TDMHMR the authority to operate the Medicaid program for MH case management services.

The proposed new sections affect the THSC, §533.0354, the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021.

§412.401. Purpose.

This subchapter describes requirements for the provision of mental health case management services (MH case management services) funded by or through the department.

§412.402. Application.

This subchapter applies to providers of MH case management services.

§412.403. Definitions.

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

(1) Adolescent--An individual who is at least 13 years of age, but younger than 18 years of age.

(2) Adult--An individual who is 18 years of age or older.

(3) Business day--Any day except a Saturday, Sunday, or legal holiday listed in the Texas Government Code, §662.021.

(4) Case manager--A person who provides MH case management services.

(5) Case management plan--A written document developed by a case manager, in collaboration with an individual and the individual's LAR or primary caregiver, that identifies services needed by the individual and sets forth a plan for how the individual may gain access to the identified services.

(6) Child--An individual who is at least three years of age, but younger than 13 years of age.

(7) Community-based--Provided in an individual's community.

(8) CMHC or community mental health center--An entity established in accordance with the Texas Health and Safety Code, §534.001, as a community mental health center or a community mental health and mental retardation center.

(9) CSSP or community services specialist--A staff member who, as of August 31, 2004:

(A) has received:

(i) a high school diploma; or

(ii) a high school equivalency certificate issued in accordance with the law of the issuing state; and

(B) had three continuous years of documented full time experience in the provision of MH case management services.

(10) Crisis--A situation in which:

(A) because of a mental health condition:

(i) the individual presents an immediate danger to self or others: or

(ii) the individual's mental or physical health is at risk of serious deterioration; or

(B) an individual believes that he or she presents an immediate danger to self or others or that his or her mental or physical health is at risk of serious deterioration.

(11) Day--A calendar day, unless otherwise specified.

(12) Department--The Texas Department of Mental Health and Mental Retardation or its successor.

(13) Employee--A staff member who receives a W2 Wage and Tax Statement from a provider.

(14) Individual--A person seeking or receiving MH case management services.

(15) IMD or institution for mental diseases--Based on 42 CFR §435.1009, a hospital, nursing facility, or other institution of more than 16 beds that is primarily engaged in providing psychiatric diagnosis, treatment, or care of individuals with mental illness, including medical attention, nursing care, and related services.

(16) LAR or legally authorized representative--A person authorized by law to act on behalf of a child or adolescent with regard to a matter described in this subchapter, and who may be a parent, guardian, or managing conservator.

(17) LOC or level of care--A designation given to the department's standardized packages of mental health services, based on the uniform assessments and the utilization management guidelines, which specify the type, amount, and duration of MH case management services to be provided to an individual.

(18) Life domains--Areas of life in which a child or adolescent has unmet needs, including but are not limited to safety, health, emotional, psychological, social, educational, cultural, and legal.

(19) Mental health (MH) case management services--Services to assist an individual in gaining and coordinating access to necessary care and services appropriate to the individual's needs.

(20) Primary caregiver--A person 18 years of age or older who has actual care, control, and possession of a child or adolescent.

(21) Provider--An entity that has an agreement with the department to provide general revenue-funded MH case management services, Medicaid-funded MH case management services, or both.

(22) QMHP-CS or qualified mental health professional-community services--A staff member who meets the definition of a QMHP-CS set forth in Subchapter G of this chapter (relating to Mental Health Services Standards).

(23) Site-based--Provided at a case manager's work site.

(24) Staff member--Personnel of a provider including a full-time and part-time employee, contractor, and intern, but excluding a volunteer.

(25) Uniform assessments--Assessments promulgated by the department that include the Adult Texas Recommended Authorization Guidelines, the Texas Implementation of Medication Algorithms scales for adults, and the Children and Adolescent Texas Recommended Authorization Guidelines.

(26) Utilization management guidelines--Guidelines promulgated by the department that establish the type, amount, and duration of MH case management services for each LOC.

(27) Wraparound planning--A strength-based, family-centered, community-based planning process approved by the department through which a case management plan is developed.

§412.404. Provider Requirements.

(a) A provider must be a community mental health center (CMHC).

(b) A provider must comply with Subchapter G of this chapter (relating to Mental Health Community Services Standards).

(c) A provider must assign a case manager to an individual within two business days of receiving notification from the department or its designee that the individual has been authorized to receive MH case management services.

(d) A provider must ensure that if an individual's assigned case manager is not available, an alternate case manager will act as the individual's assigned case manager.

(e) A provider must maintain case manager-to-individual ratios sufficient to perform the responsibilities of a case manager in accordance with this subchapter.

(f) A provider shall be responsible for a case manager's compliance with this subchapter.

§412.405. Eligibility for MH Case Management Services.

(a) An individual is eligible for general revenue-funded MH case management services if the individual:

(1) is a resident of the state of Texas;

(2) is an adult with a severe and persistent mental illness, or a child or adolescent with a serious emotional disturbance;

(3) does not have a single diagnosis of mental retardation, pervasive developmental disorder, or substance use disorder; and

(4) qualifies for a LOC that, according to the utilization management guideline, includes MH case management;

(b) An individual is eligible for Medicaid-funded MH case management services if, in addition to the criteria set forth in subsection (a) of this section, the individual is:

(1) eligible for Medicaid;

(2) not an inmate of a public institution, as defined in 42 CFR §435.1009;

(3) not a resident of an intermediate care facility for persons with mental retardation as described in 42 CFR §440.150;

(4) not a resident of an IMD, unless the individual is over 65 years or older and is expected to be discharged from an IMD to a non-institutional setting within 180 days;

(5) not a resident of a Medicaid-certified nursing facility, unless the individual has been determined through a pre-admission screening and annual resident review assessment to be eligible for the specialized service of MH case management services;

(6) not a recipient of case management services under another Medicaid program, e.g. the Home and Community Services (HCS) waiver program or Texas Health Steps; and

(7) not a patient of a general medical hospital.

§412.406. Establishing Type, Amount, and Duration of MH Case Management Services.

(a) The department or its designee will make the initial determination of an individual's LOC using the uniform assessments which are referenced as Exhibit A in §412.415 of this title (relating to Exhibits); and the utilization management guidelines which are referenced as Exhibit B in §419.468 of this title (relating to Exhibits). If the LOC includes MH case management services, the department or its designee will authorize the individual to receive either routine or intensive MH case management services.

(b) A provider must:

(1) ensure that a QMHP-CS administers a uniform assessment to the individual at intervals specified by the department or its designee and applies the utilization management guidelines to obtain a recommended LOC for the individual; and

(2) clinically evaluate the needs of the individual to determine if the amount of MH case management services associated with the recommended LOC is sufficient to meet those needs.

(c) If the provider determines that the amount of MH case management services associated with the recommended LOC is sufficient to meet the individual's needs, the provider must submit to the department or its designee a request for service authorization in accordance with the recommended LOC.

(d) If the provider determines that the amount of MH case management services associated with the recommended LOC is not sufficient to meet the individual's needs, the provider must submit to the department or its designee:

(1) a request for an authorization of an LOC that is sufficient to meet the individual's need or a request for authorization of additional units of service; and

(2) clinical justification for the request.

(e) Upon receipt of a request submitted in accordance with subsection (c) or (d) of this section, the department or its designee will:

(1) review the documentation submitted by the provider;

(2) based on the review of documentation and an evaluation of available resources, authorize or deny an LOC for the individual; and

(3) if applicable, authorize or deny a request for additional units of service.

(f) If the department authorizes an LOC that includes MH case management services in accordance with subsection (e)(2) of this section, the department will authorize the individual to receive either routine or intensive MH case management services.

§412.407. MH Case Management Services.

(a) MH case management services assist an individual in gaining and coordinating access to necessary care and services appropriate to the individual's needs. There are two types of MH case management services:

(1) routine MH case management, for an adult, a child, or adolescent, which is primarily site-based; and

(2) intensive MH case management, for a child or adolescent, which is primarily community-based.

(b) A case manager assigned to an individual who is authorized to receive routine MH case management services must:

(1) meet face-to-face with the individual, and the individual's LAR or primary caregiver if individual is a child or adolescent, within 14 days after the case manager is assigned to the individual in accordance with §412.404(c) of this title (relating to Provider Requirements), or document why the meeting did not occur;

(2) meet face-to-face with the individual upon the request of the individual, the LAR, or the primary caregiver at the case manager's work site or document why the meeting did not occur;

(3) identify the immediate need of the individual and assist the individual in gaining access to a community resource that may address that need;

(4) document the identified need and the assistance given to address the identified need; and

(5) if notified that the individual is in crisis, coordinate with the appropriate providers of emergency services to respond to the crisis, as described in §412.314 of this title (relating to Crisis Services).

(c) A case manager assigned to an individual who is authorized to receive intensive MH case management services must:

(1) meet face-to-face with the individual and the individual's LAR or primary caregiver within seven days after the case manager was assigned to the individual or within seven days after discharge

from an inpatient psychiatric setting, whichever is later or document the reasons the meeting did not occur;

(2) meet face-to-face with the individual and the individual's LAR or primary caregiver in accordance with the individual's case management plan or document why the meeting did not occur;

(3) meet face-to-face with the individual and the individual's LAR or primary caregiver upon notification of a clinically significant change in the individual's functioning, life status, or service needs or document why the meeting did not occur;

(4) meet face-to-face with the individual and the individual's LAR or primary caregiver at the request of the individual, the LAR or primary caregiver or document why the meeting did not occur;

(5) gather information about the individual's strengths and service needs across life domains from relevant sources, including:

(A) the individual;

(B) the individual's LAR or primary caregiver;

(C) other agencies and organizations providing services to the individual;

(D) the individual's clinical record; and

(E) other sources identified by the LAR or primary caregiver;

(6) utilize wraparound planning to develop a case management plan that addresses the individual's unmet needs across life domains and that includes:

(A) a prioritized list of the individual's unmet needs;

(B) a description of the objective and measurable outcomes for each of the unmet needs;

(C) a description of the actions the individual, the case manager, and other designated people will take to achieve those outcomes;

(D) a list of the necessary services and service providers;

(E) a description of the MH case management services to be provided by the case manager; and

(F) a statement of the maximum period of time between face-to-face contacts with the individual, and the individual's LAR or primary caregiver, determined in accordance with the utilization management guidelines;

(7) assist the individual in gaining access to the needed services and service providers including:

(A) making referrals to potential service providers;

(B) initiating contact with potential service providers;

(C) arranging initial meetings and non-routine appointments;

(D) arranging transportation to ensure the individual's attendance;

(E) advocating with service providers; and

(F) providing relevant information to service providers;

(8) monitor the individual's progress toward the outcomes set forth in the case management plan including;

(A) gathering information from the individual, current service providers, and other resources;

(B) reviewing pertinent documentation, including the individual's clinical records, and assessments;

(C) ensuring the MH case management plan was implemented as agreed upon;

(D) ensuring needed services were provided;

(E) determining if progress toward the desired outcomes was made;

(F) identifying barriers to accessing services or to obtain maximum benefit from services;

(G) advocating for the modification of services to address the changes in the needs or status of the individual;

(H) identifying emerging unmet service needs;

(I) determining if the MH case management plan needs to be modified to address the individual's unmet service needs more adequately; and

(J) revising the MH case management plan as necessary to address the individual's unmet service needs.

(9) upon notification that the individual is in crisis, coordinate with the appropriate providers of emergency services to respond to the crisis, as described in §412.314 of this title.

§412.408. Service Limitations.

(a) A case manager may not provide MH case management services to his or her child, parent, spouse, mother-in-law, father-in-law, son-in-law, daughter-in-law, stepchild, stepparent, grandchild, or sibling.

(b) The following activities do not constitute MH case management services:

(1) performing an activity that does not assist an individual in gaining or coordinating access to needed services, such as:

(A) merely accompanying an individual to:

(i) a social or recreational event or other entertainment; or

(ii) locations to conduct the individual's personal affairs (e.g. shopping, interviewing for a job, visiting friends or relatives, getting a haircut, or finding housing);

(B) merely helping the individual with domestic or financial affairs, such as cleaning house or balancing a checkbook;

(2) performing an activity that is an integral and inseparable part of a service other than MH case management services, such as:

(A) conducting skills training;

(B) arranging a medical referral resulting from a physician's appointment;

(C) providing counseling or therapy;

(D) providing crisis services described in the Mental Health Community Services Standards §412.314 of this title (relating to Crisis Services);

(E) developing a treatment plan for services other than MH case management; and

(F) administering an assessment for a service other than MH case management;

(3) providing medical or nursing services, such as:

(A) taking the temperature or vital signs of an individual;

(B) consulting between medical professionals; and

(C) refilling an individual's prescription;

(4) performing pre-admission or intake activities;

(5) providing services to the LAR or primary caregiver of the individual, such as:

(A) assisting the person to access services to address their own needs;

(B) teaching parenting skills; and

(C) helping the person find employment;

(6) transporting the individual, the individual's LAR or primary caregiver;

(7) monitoring the individual's general health status when such information is not required to gain access or coordinate needed services such as:

(A) inquiring about the individual's general well-being;

(B) monitoring the individual's self-administration of medications; and

(C) monitoring the physical safety of the individual;

(8) performing outreach activities to inform the public of MH case management services that are available or to locate individuals who are potentially Medicaid eligible;

(9) performing quality oversight of a service provider, such as determining provider compliance with rules or regulation; and

(10) conducting utilization review activities; and

(11) authorizing services.

§412.409. Notification and Terminations.

(a) The provider must notify the department or its designee if the provider has reason to believe:

(1) the individual no longer meets the eligibility criteria for MH case management services as set forth in §412.405 of this title (relating to Eligibility for MH Case Management Services);

(2) the LAR of a child or adolescent has refused MH case management services on behalf of the child or adolescent;

(3) the adult has refused MH case management services;

(4) the provider cannot locate the individual and the provider has documented multiple attempts to locate the individual over a period of two consecutive months;

(5) the individual has died; or

(6) the individual has established or intends to establish residency outside of the provider's service area.

(b) The department or its designee will terminate MH case management services:

(1) to an individual, if the department or its designee determines that any one of the conditions described in subsection (a)(1) - (5) of this section exists; or

(2) to an individual who is not eligible for Medicaid, if the department or its designee determines that there are insufficient resources to provide MH case management services to the individual.

§412.410. Staff Qualifications.

(a) A case manager for an adult must be:

(1) a QMHP-CS or a CSSP;

(2) an employee of the provider; and

(3) trained in accordance with §412.411 of the title (relating to Staff Training).

(b) A case manager for a child or adolescent must be:

(1) a QMHP-CS;

(2) an employee of the provider; and

(3) trained in accordance with §412.411 of the title.

(c) The provider may require additional education and experience for a case manager.

(d) A staff member who supervises the provision of MH case management services must:

(1) meet the requirements set forth in subsection (b)(1) - (3) of this section; and

(2) have experience providing MH case management services.

§412.411. Staff Training.

(a) A staff member who provides MH case management services or supervises the provision of MH case management services must receive training and demonstrate competency in the following areas:

(1) the nature of mental illness and serious emotional disturbance;

(2) the dignity and rights of an individual;

(3) interacting with an individual who has a special physical need such as a hearing or visual impairment;

(4) responding to an individual's language and cultural needs through knowledge of customs, beliefs, and values of various, racial, ethnic, religious, and social groups;

(5) identifying, preventing, and reporting abuse and neglect;

(6) the requirements of this subchapter;

(7) the uniform assessments;

(8) the utilization management guidelines;

(9) developing and implementing a case management plan;

(10) identifying an individual in crisis;

(11) appropriate actions to take in managing a crisis;

(12) co-occurring psychiatric and substance use disorders, as described in Chapter 411, Subchapter N of this title (relating to Standards for Services to Persons with Co-Occurring Psychiatric and Substance Use Disorders);

(13) the developmental needs of children, adolescents, and adults;

(14) the wraparound planning process approved by the department, if the case manager is providing intensive MH case management services to a child or adolescent;

(15) health and human services available to children as described in Texas Government Code §531.0244, if the case manager is providing intensive MH case management to a child or adolescent;

(16) the availability of resources within the local community; and

(17) strategies for advocating effectively for individuals.

(b) The provider must document the training, competencies, and experience in the personnel record of each person who received the training described in this section.

§412.412. Documentation of MH Case Management Services.

(a) A case manager must document the provision of MH case management services as follows:

(1) if the service involves face-to-face contact with the individual, document:

(A) the date of the contact;

(B) start and stop time of the contact;

(C) a description of the MH case management service provided;

(D) the individual's response to the services being provided;

(E) if the individual is receiving intensive MH case management services, the progress or lack of progress in addressing the individual's outcomes as identified in the case management plan; and

(F) the case manager's signature and credentials including the title "case manager;"

(2) if the service does not involve face-to-face contact with the individual, document:

(A) the date(s) of the service;

(B) a description of the MH case management service provided;

(C) if the service involves face-to-face or telephone contact, the person with whom the contact was made;

(D) the outcome of the service; and

(E) a case manager's signature and credentials including the title "case manager."

(b) The provider must retain documentation in compliance with applicable federal and state laws, rules, and regulations.

§412.413. Medicaid Reimbursement.

(a) A provider may file a claim for Medicaid MH case management services, if a billable event occurs. A billable event is a face-to-face contact between an individual who is eligible for Medicaid and a case manager who provides an MH case management service:

(1) during the contact; and

(2) in accordance with §412.407 of this title (relating to MH Case Management Services).

(b) A unit of service for MH case management services is 15 continuous minutes.

(c) The department will not reimburse a provider for Medicaid MH case management services if:

(1) the individual who was provided the service did not meet the eligibility requirements set forth in §412.405 of this title (relating to Recipient Eligibility for MH Case Management Services) at the time the service was provided;

(2) the service provided was an integral and inseparable part of another service;

(3) the service was provided by a person who was not qualified in accordance with §412.410(a) of this title (related to Staff Qualifications);

(4) the service provided was not the type, amount and duration authorized by the department or its designee; or

(5) the service was not provided or documented in accordance with this subchapter.

(d) The department will not reimburse a provider for Medicaid MH case management services for coordination activities that are included in the provision of:

(1) rehabilitative crisis intervention services, as defined in §419.457 of this title (relating to Crisis Intervention Services); or

(2) psychosocial rehabilitation services, as defined in §419.459 of this title (relating to Psychosocial Rehabilitation Services).

§412.414. Fair Hearings.

(a) Any Medicaid eligible individual whose request for eligibility for MH case management services is denied or is not acted upon with reasonable promptness, or whose MH case management services have been terminated, suspended, or reduced by the department is entitled to a fair hearing in accordance with Texas Administrative Code, Title 1, Chapter 357 (relating to Medicaid Fair Hearings).

(b) A provider must, in the form and manner described by the department, give a Medicaid eligible individual notice of the right to request a fair hearing.

§412.415. Exhibits.

The following exhibits are referenced in this subchapter. For information about obtaining copies of the exhibits contact Behavioral Health Services, P.O. Box 12668, Austin, TX 78711-2668:

(1) Exhibit A:

(A) Adult Texas Recommended Authorization Guidelines;

(B) Texas Implementation of Medication Algorithms Scales for Adults; and

(C) Child and Adolescent Texas Recommended Authorization Guidelines.

(2) Exhibit B:

(A) Adult Utilization Management Guidelines; and

(B) Child and Adolescent Utilization Management Guidelines.

§412.416. References.

The following laws and rules are referenced in this subchapter:

(1) Texas Administrative Code, Title 1, Chapter 357;

(2) Texas Government Code §531.0244 and §662.021;

(3) Texas Health and Safety Code, §534.001 and §591.003(13);

(4) Chapter 411, Subchapter N of this title (relating to Standards for Services to Persons with Co-Occurring Psychiatric and Substance Use Disorders);

(5) Subchapter G of this chapter (relating to Mental Health Community Services Standards);

(6) Chapter 419, Subchapter L of this title (relating to Mental Health Rehabilitative Services); and

(7) 42 CFR §435.1009 and §440.150.

§412.417. Distribution.

(a) This subchapter shall be distributed to:

(1) members of the Texas Department of Mental Health and Mental Retardation Board or the applicable council;

(2) executive, management, and program staff of the department;

(3) executive directors of all community mental health centers; and

(4) advocates and advocacy organizations.

(b) The executive director of each community mental health center is responsible for disseminating copies of this subchapter to:

(1) all appropriate staff; and

(2) any individual, family member, employee, or other person desiring a copy.

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 May 14, 2004.

TRD-200403283
Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 206-4581

SUBCHAPTER J. SERVICE COORDINATION

25 TAC §§412.451 - 412.466

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

The Texas Department of Mental Health and Mental Retardation (TDMHMR) proposes the repeal of §§412.451 - 412.466 of Chapter 412, Subchapter J, governing Service Coordination. New §§412.401 - 412.417 of Chapter 412, Subchapter I, governing Mental Health Case Management Services, is contemporaneously proposed in this issue of the *Texas Register*.

The repeals would allow for the adoption of new rules governing the provision of mental health case management services funded by or through the department.

Kevin Nolting, Acting Chief Financial Officer, has determined that for each year of the first five-year period that the proposed repeal is in effect, there will not be foreseeable implications relating to costs or revenues of state or local government.

Sam Shore, Acting Director, Community Mental Health Services, has determined that, for each year of the first five years the proposed repeal is in effect, the public benefit expected is the adoption of new rules that are based on the department's Resiliency and Disease Management model, which promotes the provision of high quality and effective community-based mental health services by individual-specific information that identifies an individual's mental health care needs, matches those needs to a particular type(s) of mental health case management services, and evaluates the effectiveness of the service provided. It is not anticipated that there will be any additional economic cost to persons required to comply with the proposed repeal.

It is not anticipated that the proposed repeal will affect a local economy.

It is not anticipated that the proposed repeal will have an adverse effect on small businesses or micro-businesses because the proposed repeal does not place requirements on small businesses or micro-businesses.

Written comments on the proposed repeal may be sent to Linda Logan, Director, Policy Development, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668, within 30 days of publication.

The repeal is proposed under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board (board) with broad rulemaking authority; the Texas Health and Safety Code, §533.0354, which requires the provision of mental health services for adults with bipolar disorder, schizophrenia, or clinically severe depression and for children with serious emotional illnesses be accomplished using disease management practices; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the Medicaid program for mental health case management.

The proposed repeal would affect the Texas Health and Safety Code, §533.0354; the Texas Government Code, §531.021(a); and the Texas Human Resources Code, §32.021.

§412.451. Purpose.
§412.452. Application.
§412.453. Definitions.
§412.454. Organizational Structure.
§412.455. Eligibility.
§412.456. Assessing the Need for Service Coordination.
§412.457. Local Authority Responsibilities.
§412.458. Caseloads.
§412.459. Quality Management.
§412.460. Termination of Service Coordination.
§412.461. Minimum Qualifications.
§412.462. Staff Training.

§412.463. Documentation of Service Coordination.

§412.464. Fair Hearings.

§412.465. References.

§412.466. Distribution.

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 May 14, 2004.

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Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 206-4581

SUBCHAPTER L. SERVICE COORDINATION FOR INDIVIDUALS WITH MENTAL RETARDATION

25 TAC §§412.551 - 412.565

The Texas Department of Mental Health and Mental Retardation (department) proposes new §§412.551 - 412.565 of new Chapter 412, Subchapter L, governing service coordination for individuals with mental retardation.

The new rules describe the provision of service coordination to individuals in the mental retardation priority population who live in the community. Currently, Chapter 412, Subchapter J, addresses service coordination for individuals living in the community in either the mental retardation priority population or the mental health priority population. As a result of significant changes being made to the mental health service array, the department has developed separate rules to address service coordination for the two populations. New Chapter 412, Subchapter I, governing mental health case management services, is proposed contemporaneously in this issue of the *Texas Register*, and addresses the provision of case management services (formerly referred to as service coordination) to individuals in the mental health priority population.

The provision of service coordination, as described in the proposed new rules, will not differ substantively from the manner in which service coordination currently is provided to individuals in the mental retardation priority population who are living in the community. Many of the requirements in the existing sections that are not addressed in the new sections have been applicable only to persons in the mental health priority population.

The provision in the existing subchapter that service coordination be provided by an employee of the mental retardation authority (MRA) for the local service area in which the individual resides is retained in new §412.559(a). Minor changes have been made to the minimum qualifications for an MRA employee who will be providing service coordination, including deletion of a provision permitting certification as a licensed chemical dependency counselor or a physician's assistant to be the sole qualification for providing service coordination. In addition, new §412.559(b)(2) clarifies the qualifications of an MRA employee who will provide service coordination if the employee has either a high school diploma or equivalent, but does not have a college degree. In addition, new §412.559(d) permits an MRA, at its discretion, to permit an employee who was authorized by the MRA to provide service coordination prior to April 1, 1999 (the original effective date of the current subchapter), to continue to provide service coordination without meeting the minimum qualifications described in subsection (b).

In a provision that is not described in the existing subchapter, new §412.462(b) states that if an MRA decides to deny, involuntarily reduce, or terminate service coordination for a non-Medicaid-eligible individual, then the MRA must notify the individual or legally authorized representative (LAR) in writing of the decision and provide an explanation of the procedure for the individual or LAR to request a review by the MRA as required by §401.464 of this title (relating to Notification and Appeals Process).

Kevin Nolting, Acting Chief Financial Officer, has determined that, for each year of the first five year period that the proposed new sections are in effect, there are no foreseeable fiscal implications relating to costs or revenues of state or local government. The department does not anticipate that the proposed new sections will have an adverse effect on small or micro-businesses. The department does not anticipate that there will be any additional economic cost to persons required to comply with the proposed new sections. The department does not anticipate that the proposed new sections will affect a local economy.

Barry Waller, Acting Director, Community Mental Retardation Services, has determined that, for each year of the first five-year period the proposed new sections are in effect, the public benefit expected is the promulgation of rules which clearly describe the provision of service coordination to individuals in the department's mental retardation priority population who live in the community.

Comments concerning the proposed new sections must be submitted in writing to Linda Logan, Director, Policy Development, by mail to P.O. Box 12668, Austin, Texas 78711, by fax to (512) 206-4744, or by e-mail to policy.co@mhmr.state.tx.us within 30 days of publication of this notice.

The new sections are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code (TGC), §531.021(a), and the Texas Human Resources Code (THRC), §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and THRC, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to provide service coordination to Medicaid-eligible individuals in the mental retardation priority population.

The proposed new sections affect TGC, §531.021(a); THSC, Title 7, Subchapter D (Persons with Mental Retardation Act); and THRC, §32.021(a) and (c).

§412.551. Purpose.

This subchapter describes requirements for service coordination delivered by the mental retardation authority (MRA) to an individual in the mental retardation priority population (MR priority population) who desires services.

§412.552. Application.

This subchapter applies to all mental retardation authorities (MRAs).

§412.553. Definitions.

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

(1) Actively involved person--For an individual who lacks the ability to provide legally adequate consent and who does not have a legally authorized representative (LAR), a person whose significant and ongoing involvement with the individual is determined by the individual's designated MRA to be supportive of the individual based on the person's:

(A) observed interactions with the individual;

(B) knowledge of and sensitivity to the individual's preferences, values, and beliefs;

(C) availability to the individual for assistance or support; and

(D) advocacy for the individual's preferences, values, and beliefs.

(2) CARE--The department's Client Assignment and Registration System, a database into which an MRA, state MR facility, or state MH facility enters demographic and other data about an individual who has requested services and supports (or on whose behalf services and supports have been requested) or who is receiving services and supports.

(3) Department--The Texas Department of Mental Health and Mental Retardation or its successor.

(4) Designated MRA--As indicated in CARE, the MRA responsible for assisting an individual and LAR or actively involved person to access mental retardation services and supports.

(5) Duration--The specified period of time during which service coordination is provided to an individual.

(6) Frequency--The number of times during a specified period that an individual is contacted by a person providing service coordination.

(7) General revenue--Funds appropriated by the Texas Legislature for use by the department.

(8) HCS Program--A Medicaid waiver program operated by the department.

(9) ICF/MR--An intermediate care facility for persons with mental retardation or a related condition.

(10) ICF/MR Program--The Intermediate Care Facilities for Persons with Mental Retardation Program, which provides Medicaid-funded residential services to individuals with mental retardation or a related condition.

(11) Institution for mental diseases (IMD)--As defined in §419.373 of this title (relating to Definitions), a hospital of more than 16 beds that is primarily engaged in providing psychiatric diagnosis, treatment, and care of individuals with mental diseases, including medical care, nursing care, and related services.

(12) Individual--A person who is or is believed to be a member of the mental retardation priority population.

(13) LAR (legally authorized representative)--A person authorized by law to act on behalf of an individual with regard to a matter described in this subchapter, and who may be a parent, guardian, or managing conservator of a child, or the guardian of an adult.

(14) Local service area--A geographic area composed of one or more Texas counties.

(15) Mental retardation--Consistent with Texas Health and Safety Code (THSC), §591.003, significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

(16) MRA (mental retardation authority)--As defined in THSC, §531.002, an entity to which the Texas Mental Health and Mental Retardation Board delegates its authority and responsibility within a specified region for planning, policy development, coordination, and resource development and allocation, and for supervising and ensuring the provision of mental retardation services to persons in one or more local service areas.

(17) Mental retardation priority population or MR priority population--Those individuals who:

(A) have mental retardation;

(B) have a pervasive developmental disorder (PDD);

(C) have a related condition and are eligible for services in a Medicaid program operated by the department;

(D) are nursing facility residents and eligible for specialized services for mental retardation or a related condition pursuant to §1919(e)(7) of the Social Security Act; or

(E) are children eligible for early childhood intervention (ECI) services provided in accordance with 40 TAC Chapter 108 (relating to Early Childhood Intervention Services).

(18) Parent Case Management Program--A program that utilizes experienced, trained parents of individuals with disabilities to provide case management for other families.

(19) Partners in Policy Making--A leadership training program administered by the Texas Planning Council for Developmental Disabilities for self-advocates and parents.

(20) Permanency planning--A philosophy and planning process that focuses on the outcome of family support for an individual under 22 years of age by facilitating a permanent living arrangement in which the primary feature is an enduring and nurturing parental relationship.

(21) Person-directed planning--A philosophy and planning process that empowers an individual and, on the individual's behalf, an LAR or actively involved person, to direct the development of a plan of services and supports.

(22) PDD (pervasive developmental disorder)--As described in the most current edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM), a severe and pervasive impairment in the developmental areas of reciprocal social interaction skills or communication skills, or the presence of stereotyped behaviors, interests, and activities manifested during the developmental period, usually before 10 years of age.

(23) Plan of services and supports--A written plan that:

(A) describes the desired outcomes identified by the individual, or LAR or actively involved person on behalf of the individual; and

(B) describes the services and supports (including service coordination services) to be provided to the individual, with specifics concerning frequency and duration.

(24) Related condition--As defined in the Code of Federal Regulations, Title 42, §435.1009, a severe and chronic disability that:

(A) is attributable to:

(i) cerebral palsy or epilepsy; or

(ii) any other condition, other than mental illness, found to be closely related to mental retardation because the condition results in impairment of general intellectual functioning or adaptive behavior similar to that of persons with mental retardation, and requires treatment or services similar to those required for those persons with mental retardation;

(B) is manifested before the person reaches 22 years of age;

(C) is likely to continue indefinitely; and

(D) results in substantial functional limitation in three or more of the following areas of major life activity:

(i) self-care;

(ii) understanding and use of language;

(iii) learning;

(iv) mobility;

(v) self-direction; and

(vi) capacity for independent living.

(25) Service coordination--Assistance in accessing medical, social, educational, and other appropriate services and supports that will help an individual achieve a quality of life and community participation acceptable to the individual (and LAR on the individual's behalf) as follows:

(A) crisis prevention and management--linking and assisting the individual and LAR or actively involved person to secure services and supports that will enable them to prevent or manage a crisis;

(B) monitoring--ensuring that the individual receives needed services, evaluating the effectiveness and adequacy of services, and determining if identified outcomes are meeting the individual's needs and desires as indicated by the individual and LAR or actively involved person;

(C) assessment--identifying the individual's needs and the services and supports that address those needs as they relate to the nature of the individual's presenting problem and disability; and

(D) service planning and coordination--identifying, arranging, advocating, collaborating with other agencies, and linking for the delivery of outcome-focused services and supports that address the individual's needs and desires as indicated by the individual and LAR or actively involved person.

(26) Subaverage general intellectual functioning--Consistent with THSC, §591.003, measured intelligence on standardized general intelligence tests of two or more standard deviations (not including standard error of measurement adjustments) below the age-group mean for the tests used.

(27) State MH facility (state mental health facility)--A state hospital or state center with an inpatient psychiatric component operated by the department.

(28) State MR facility (state mental retardation facility)--A state school or a state center with a mental retardation residential component operated by the department.

(29) THSC--The Texas Health and Safety Code.

(30) TxHmL Program or Texas Home Living Program--A Medicaid waiver program operated by the department.

(31) Waiver services--Home and community-based services provided through a Medicaid waiver program approved by Centers for Medicare and Medicaid Services (CMS) as described in §1915(c) of the Social Security Act.

§412.554. Eligibility.

(a) To be eligible for service coordination, an individual must be a member of the MR priority population and must meet at least one of the following criteria:

(1) have two or more documented needs that require services and supports other than service coordination;

(2) be in the process of enrolling in:

(A) the HCS Program; or

(B) the ICF/MR Program;

(3) be in the process of enrolling in, or currently enrolled in the TxHmL Program;

(4) be seeking admission to a state MR facility;

(5) be transitioning from an ICF/MR, including a state MR facility, to community-based mental retardation services and supports other than another ICF/MR or a nursing facility licensed in accordance with THSC, Chapter 242; or

(6) be transitioning from a state MH facility to community-based mental retardation services and supports other than in an ICF/MR or a nursing facility licensed in accordance with THSC, Chapter 242.

(b) Service coordination may be funded by:

(1) personal funds or third-party insurance other than Medicaid;

(2) Medicaid targeted case management; or

(3) general revenue.

(c) Service coordination funded by Medicaid targeted case management:

(1) may be provided only to an individual who is a Medicaid recipient and:

(A) who meets at least one of the criteria described in subsection (a)(1), (2), (3), (4), or (5) of this section; or

(B) who resides in a nursing facility licensed in accordance with THSC, Chapter 242, and who has been determined through a preadmission screening and annual resident review (PASARR) assessment to require specialized services; and

(2) may not be provided to an individual:

(A) who is not a Medicaid recipient;

(B) who resides in an institution for mental diseases (IMD); or

(C) who is receiving waiver services through any waiver program except the TxHmL Program.

§412.555. Assessing an Individual's Need for Service Coordination.

(a) If an individual is eligible for service coordination and the individual or LAR or actively involved person desires service coordination, then the designated MRA must use the Service Coordination

Assessment--Mental Retardation Services form to determine the individual's need for service coordination.

(b) If the designated MRA determines an individual needs service coordination, the MRA must develop a plan of services and supports as described in §412.556(a) of this title (relating to MRA's Responsibilities).

(c) A copy of the Service Coordination Assessment--Mental Retardation Services form may be obtained by contacting the Office of Long Term Services and Supports, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711 or by accessing the department's website at www.mhmr.state.tx.us.

§412.556. MRA's Responsibilities.

(a) Developing a plan of services and supports.

(1) If the MRA determines an individual needs service coordination, the MRA must develop a plan of services and supports for the individual using a person-directed planning process that is consistent with the department's *Person Directed Planning and Family Directed Planning Guidelines for Individuals with Mental Retardation*.

(2) The plan of services and supports must include a component that addresses the individual's service coordination needs, which:

(A) is based on the results from the assessment performed in accordance with §412.555(a) of this title (relating to Assessing an Individual's Need for Service Coordination);

(B) describes one or more of the elements of service coordination (as defined) needed; and

(C) identifies the frequency (which must be at least every 90 calendar days) and duration of service coordination to be provided.

(b) Provision of service coordination.

(1) The MRA must ensure that service coordination:

(A) is provided to the individual in accordance with the individual's plan of services and supports; and

(B) is not provided by a staff person who is a member of the individual's family.

(2) The MRA may provide crisis prevention and management to the individual without having first identified the need for such services in the individual's plan of services and supports.

(c) Reviewing the plan of services and supports. The MRA must ensure that the plan of services and supports of each individual receiving service coordination is reviewed quarterly to determine the appropriateness and effectiveness of the services and supports provided by all community providers and to ensure that the needs of the individual are being addressed.

(d) Minimum contact. The MRA must ensure that the staff person providing service coordination meets face-to-face with the individual at least every 90 calendar days. This contact must involve at least one of the four elements of service coordination (as defined).

(e) Individuals enrolled in the TxHmL Program. In addition to the requirements in this subchapter, the MRA must ensure service coordination is provided to individuals enrolled in the TxHmL Program in accordance with the requirements contained in Chapter 419, Subchapter N of this title (relating to Texas Home Living (TxHmL) Program).

§412.557. Caseloads.

The MRA is responsible for determining the number of cases per staff person who provides service coordination based on factors such as individuals' needs, the frequency and duration of contacts, and travel time.

§412.558. Termination of Service Coordination.

The MRA must terminate service coordination for an individual if:

(1) the individual no longer meets the eligibility criteria for service coordination as set forth in §412.554 of this title (relating to Eligibility); or

(2) the individual or the LAR no longer desires service coordination.

§412.559. Minimum Qualifications.

(a) Service coordination may be provided only by an employee of the MRA.

(b) Except as provided by subsection (d) of this section, a staff person providing service coordination must have:

(1) a bachelor's or advanced degree from an accredited college or university with a major in a social, behavioral, or human service field including, but not limited to, psychology, social work, medicine, nursing, rehabilitation, counseling, sociology, human development, gerontology, educational psychology, education, and criminal justice; or

(2) a high school diploma or a certificate recognized by a state as the equivalent of a high school diploma and:

(A) two years of paid experience as a case manager in a state or federally funded Parent Case Management Program or have graduated from Partners in Policy Making; and

(B) personal experience as an immediate family member of an individual with mental retardation.

(c) The MRA, at its discretion, may require additional education and experience for staff who provide service coordination.

(d) At the discretion of the MRA, a staff person who was authorized by an MRA to provide service coordination prior to April 1, 1999, may provide service coordination without meeting the minimum qualifications described in subsection (b) of this section.

§412.560. Staff Training.

(a) An MRA must ensure that the following staff receive training as described in subsection (b) of this section within the first 90 days of performing their service coordination duties:

(1) staff who provide service coordination; and

(2) staff who supervise or oversee the provision of service coordination.

(b) Training must address:

(1) appropriate MRA policies, procedures, and standards;

(2) the MRA's performance contract/memorandum requirements regarding service coordination and case management;

(3) plan of services and supports development and implementation;

(4) person-directed planning consistent with the department's *Person Directed Planning and Family Directed Planning Guidelines for Individuals with Mental Retardation*;

(5) permanency planning;

(6) crisis prevention and management, monitoring, assessment, and service planning and coordination;

(7) community support services availability and management; and

(8) advocacy for individuals.

(c) The MRA must document the training provided in accordance with this section in the personnel record of each staff person providing, supervising, or overseeing service coordination.

§412.561. Documentation of Service Coordination.

(a) The MRA must document the required contacts described in the individual's plan of services and supports, including:

(1) the date of contact;

(2) the description of the element(s) of service coordination provided;

(3) the progress or lack of progress in achieving goals or outcomes;

(4) the person with whom the contact occurred; and

(5) the staff who provided the contact and his or her professional discipline, if applicable.

(b) The MRA must ensure that service coordination activities are documented in the individual's record.

(c) The MRA must identify the appropriate service code in CARE for all individuals receiving service coordination.

(d) The MRA must retain documentation in compliance with applicable federal and state laws, rules, and regulations.

§412.562. Review Process.

(a) Medicaid-eligible individuals. Any Medicaid-eligible individual whose request for eligibility for service coordination is denied or is not acted upon with reasonable promptness, or whose service coordination has been terminated, suspended, or reduced by the department is entitled to a fair hearing in accordance with 1 TAC Chapter 357 (relating to Medical Fair Hearings).

(b) Non-Medicaid-eligible individuals. If an MRA decides to deny, involuntarily reduce, or terminate service coordination for a non-Medicaid-eligible individual, the MRA must notify the individual or LAR in writing of the decision and provide an explanation of the procedure for the individual or LAR to request a review by the MRA as required by §401.464 of this title (relating to Notification and Appeals Process).

§412.563. Subchapter Supersedes Chapter 412, Subchapter J.

For individuals with mental retardation seeking or receiving service coordination, this subchapter supersedes Chapter 412, Subchapter J (relating to Service Coordination), upon the effective date of this subchapter.

§412.564. References.

References are made to the following state and federal statutes and Texas Administrative Code:

(1) Social Security Act, §1915(c) and §1919(e)(7);

(2) Code of Federal Regulations (CFR), Title 42, §435.1009;

(3) THSC, Chapter 242, §531.002, and §591.003;

(4) 1 TAC Chapter 357 (relating to Medical Fair Hearings);

(5) 40 TAC Chapter 108 (relating to Early Childhood Intervention Services);

(6) Chapter 412, Subchapter J of this title (relating to Service Coordination);

(7) §401.464 of the title (relating to Notification and Appeals Process); and

(8) Chapter 419, Subchapter N of this title (relating to Texas Home Living (TxHmL) Program).

§412.565. Distribution.

(a) This subchapter shall be distributed to:

(1) members of the Texas MHMR Board;

(2) executive, management, and program staff of Central Office;

(3) executive directors of MRAs; and

(4) advocates and advocacy organizations.

(b) The executive director of each MRA must ensure that copies of this subchapter are distributed to:

(1) all appropriate staff; and

(2) any individual, family member, employee, or other person desiring a copy.

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 May 14, 2004.

TRD-200403277
Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 206-4516

CHAPTER 419. MEDICAID STATE OPERATING AGENCY RESPONSIBILITIES
SUBCHAPTER D. HOME AND COMMUNITY-BASED SERVICES (HCS) PROGRAM

25 TAC §419.155

The Texas Department of Mental Health and Mental Retardation (department) proposes amendments to §419.155 (relating to Eligibility Criteria) of Chapter 419, Subchapter D, governing Home and Community-Based Services (HCS) Program.

Currently, the financial eligibility criteria in §419.155(b)(4) excludes applicants and individuals under the age of 19 years receiving foster care services from the Department of Family and Protective Services when the foster care payment exceeds Level II. The proposed amendments would 1) remove the payment restriction; 2) extend the age to under 20 years because young adults may receive foster care services under certain conditions; and 3) clarify that the residence in which the applicant or individual resides is a foster family home or foster group home in which the primary caregiver is a foster parent living in the home.

The proposed amendments would also add an eligibility requirement that an applicant not be enrolled in the HCS Program and another Medicaid 1915(c) waiver program simultaneously. The proposed language is consistent with the language in the waiver approved by CMS. Additionally, the amendments would change

the reference to the Texas Department of Protective and Regulatory Services (TDPRS) to Texas Department of Family and Protective Services (TDFPS).

Kevin Nolting, Acting Chief Financial Officer, has determined that, for each year of the first five year period that the proposed amendments are in effect, there are no foreseeable implications relating to costs or revenues of state or local government. The department does not anticipate that the proposed amendments will have an adverse effect on small or micro-businesses. The department does not anticipate that there will be any additional economic cost to persons required to comply with the proposed amendments. The department does not anticipate that the proposed amendments will affect a local economy.

Barry Waller, Acting Director, Community Mental Retardation Services, has determined that, for each year of the first five-year period the proposed amendments are in effect, the public benefit expected is the promulgation of Medicaid waiver program rules that extend program eligibility to children who receive foster care services from TDFPS when the foster care payments for their care exceed TDFPS payment Level II.

Comments concerning the proposed amendments must be submitted in writing to Linda Logan, Director, Policy Development, by mail to P.O. Box 12668, Austin, Texas 78711, by fax to (512) 206-4744, or by e-mail to policy.co@mhmr.state.tx.us within 30 days of publication of this notice.

The amendments are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the HCS Program.

The proposed amendments affect Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a) and (c).

§419.155. Eligibility Criteria.

(a) An applicant or individual is eligible for HCS program services if he or she:

(1) (No change.)

(2) meets one of the following criteria:

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

(C) qualifies for the ICF/MR LOC I as defined in §419.238 of this title (relating to Level of Care Criteria I) or ICF/MR VIII LOC as defined in §419.239 of this title (relating to ICF/MR Level of Care VIII Criteria) in ICF/MR Program rules at Chapter 419, Subchapter E, as determined by the department according to §419.159 of this title (relating to Level of Care Determination), and has been determined by the department or TDHS:

(i) - (ii) (No change.)

(iii) to be inappropriately placed in a Medicaid certified nursing facility based on an annual resident review conducted in accordance with the requirements of Texas Administrative Code, Title 40, §19.2500; [~~and~~]

(3) has an approved IPC for which the IPC cost does not exceed 125% of the annual ICF/MR reimbursement rate paid to a small ICF/MR, as defined in 1 TAC §355.456 (relating to Rate Setting Methodology) for the individual's level of need as it would be assigned under §419.240 of this title (relating to Level of Need) or 125% of the estimated annualized per capita cost for ICF/MR services, whichever is greater; and[~~.~~]

(4) is not enrolled in another Medicaid 1915(c) waiver program.

(b) An applicant or individual is financially eligible for the HCS Program if he or she:

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

(4) is under 20 years of age and:

(A) financially the responsibility of the Texas Department of Family and Protective Services (TDFPS) in whole or in part; and

(B) is being cared for in a foster home or group home:

(i) that is licensed or certified and supervised by TDFPS or a licensed public or private nonprofit child placing agency; and

(ii) in which a foster parent is the primary caregiver residing in the home;

[~~(4) is under age 19 and financially the responsibility of the Texas Department of Protective and Regulatory Services (TDPRS), in whole or in part (not to exceed Level II foster care payment), and being cared for in a family foster home licensed or certified and supervised by:~~]

[~~(A) TDPRS; or~~]

[~~(B) a licensed public or private nonprofit child placing agency; or~~]

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

(c) - (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 May 14, 2004.

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Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
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For further information, please call: (512) 206-4516

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SUBCHAPTER L. MEDICAID REHABILITATIVE SERVICES

25 TAC §§419.451 - 419.466

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of

the Texas Department of Mental Health and Mental Retardation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Mental Health and Mental Retardation (department) proposes the repeal of §§419.451 - 419.466 of Chapter 419, Subchapter L, governing Medicaid rehabilitative services. New §§419.451 - 419.470 of Chapter 419, Subchapter L, governing mental health rehabilitative services, which would replace the repealed rules, are contemporaneously proposed in this issue of the *Texas Register*.

The repeal would allow for the adoption of new rules governing mental health rehabilitative services.

Kevin Nolting, Acting Chief Financial Officer, has determined that for each year of the first five-year period that the proposed repeal is in effect, there will not be foreseeable implications relating to costs or revenues of state or local government.

Sam Shore, Acting Director, Community Mental Health Services, has determined that, for each year of the first five years the proposed repeal is in effect, the public benefit expected is the adoption of new rules that are based on the department's Resiliency and Disease Management model, which promotes the provision of high quality and effective community-based mental health services by individual-specific information that identifies an individual's mental health care needs, matches those needs to a particular type(s) of rehabilitative services, and evaluates the effectiveness of the service provided. It is not anticipated that there will be any additional economic cost to persons required to comply with the proposed repeal.

It is not anticipated that the proposed repeal will affect a local economy.

It is not anticipated that the proposed repeal will have an adverse effect on small businesses or micro-businesses because the proposed repeal does not place requirements on small businesses or micro-businesses.

Written comments on the proposed repeal may be sent to Linda Logan, Director, Policy Development, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668, within 30 days of publication.

The repeal is proposed for repeal under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board (board) with broad rulemaking authority; the Texas Health and Safety Code, §533.0354, which requires the provision of mental health services for adults with bipolar disorder, schizophrenia, or clinically severe depression and for children with serious emotional illnesses be accomplished using disease management practices; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the Medicaid program for mental health rehabilitative services.

The proposed repeal would affect the Texas Health and Safety Code, §533.0354; the Texas Government Code, §531.021(a); and the Texas Human Resources Code, §32.021.

§419.451. Purpose.

§419.452. Application.

§419.453. Definitions.

§419.454. Eligibility of Individuals for Rehabilitative Services Reimbursed by Medicaid.

§419.455. Rehabilitative Services: General Requirements.

§419.456. Community Support Services.

§419.457. Day Programs for Acute Needs.

§419.458. Day Programs for Skills Training.

§419.459. Day Programs for Skills Maintenance.

§419.460. Rehabilitative Treatment Plan Oversight.

§419.461. Documentation Requirements.

§419.462. Medicaid Reimbursement.

§419.463. Medicaid Provider Participation Requirements.

§419.464. Fair Hearings.

§419.465. References.

§419.466. Distribution.

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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Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
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For further information, please call: (512) 206-4581

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SUBCHAPTER L. MENTAL HEALTH REHABILITATIVE SERVICES

25 TAC §§419.451 - 419.470

The Texas Department of Mental Health and Mental Retardation (TDMHMR) proposes new §§419.451 - 419.470 of Chapter 419, Subchapter L governing mental health rehabilitative services. The repeal of existing §§419.451 - 419.466 of Chapter 419, Subchapter L, governing Medicaid rehabilitative services which the new sections will replace, are proposed contemporaneously in this issue of the *Texas Register*.

The proposed subchapter describes the requirements for the provision of mental health (MH) rehabilitative services that are reimbursed by Medicaid. In addition, the proposed subchapter addresses the requirement in Texas Health and Safety Code (THSC) §533.0354 that the provision of mental health services for adults with bipolar disorder, schizophrenia, or clinically severe depression and for children with serious emotional illnesses be accomplished using disease management practices.

The requirements for the provision of MH rehabilitative services that are described in the proposed subchapter are based on TDMHMR's Resiliency and Disease Management model. This model promotes the uniform provision of services that are based on clinical evidence and recognized best practices. In addition,

the model promotes effective MH rehabilitative services by utilizing individual-specific information that identifies an individual's mental health care needs, matches those needs to a particular type(s) of rehabilitative service, and evaluates the effectiveness of the service provided.

Proposed new §419.454 describes general requirements for providers of MH rehabilitative services including the reiteration of a provider's responsibility to comply with Chapter 412, Subchapter G, governing Mental Health Community Services Standards. In addition, §419.454 includes provisions regarding a provider's subcontracting for the delivery of MH rehabilitative services and providing services at the same time and on the same day. Further, this proposed section includes prohibitions about unlawful discrimination and retaliation based on an individual's refusal of a service.

Proposed new §419.455 describes the eligibility criteria an individual must meet in order to receive MH rehabilitative services.

Proposed new §419.456 requires that a provider obtain authorization for a type, amount, and duration of MH rehabilitative services prior to the delivery of any type of MH rehabilitative service except for crisis services. In addition, this proposed section describes the circumstances under which reauthorization is required and the requirements for the development, review, and revision of a treatment plan.

The proposed new subchapter describes the following six types of MH rehabilitative services in §§419.457 - 419.462, respectively: crisis intervention services, medication training and support services, psychosocial rehabilitation services, rehabilitative counseling and psychotherapy, skills training and development services, and day programs for acute needs. In addition, each proposed section describing the type of service includes conditions with which a provider must comply in delivering the service (e.g. where the service may be delivered and what type of staff member may deliver the service).

Proposed new §419.463 describes the requirements for the documentation of MH rehabilitative services including the specific documentation required for each type of MH rehabilitative service as well as the frequency of documentation.

Proposed new §419.464 describes the training required for staff members providing MH rehabilitative services and the training for staff members supervising the provision of MH rehabilitative services. This proposed section also sets forth the requirements for the documentation and frequency of staff member training.

Proposed new §419.465 sets forth the requirement that a provider may only bill for MH rehabilitative services that are provided face-to-face. In addition, this proposed section describes activities that may not be billed by a provider because the cost of conducting such activities are included in the reimbursement rate. Further, §419.465 describes activities which are not reimbursed by TDMHMR.

Proposed new §419.466 describes the qualifications an entity must meet in order to become a provider of MH rehabilitative services and the general areas of compliance of a provider.

Proposed new §419.467 reiterates an individual's right to request a fair hearing based on federal law and regulations. In addition, this proposed section requires the provider to give an individual notice of the right to request a fair hearing in the form and manner prescribed by TDMHMR.

Proposed new §419.468 contains a list of exhibits referenced in the proposed subchapter and how such exhibits may be obtained.

Proposed new §419.469 contains a list of laws and rules cited throughout the proposed subchapter.

Kevin Nolting, Acting Chief Financial Officer, has determined that for each year of the first five year period that the proposed new sections are in effect, enforcing or administering the proposed sections does not have foreseeable implications relating to costs or revenues of state or local governments.

It is not anticipated that the new sections will have an adverse economic effect on small businesses or micro-businesses.

Sam Shore, Acting Director, Community Mental Health Services, has determined that for each year of the first five years the proposed new sections are in effect, the public benefit will be a uniform approach to service delivery that is based on clinical evidence and that results in more effective MH rehabilitative services for adults with severe mental illness and for children and adolescents with serious emotional disturbance. It is not anticipated that there will be any additional economic cost to persons required to comply with the proposed new sections.

It is not anticipated that the proposed new sections will affect a local economy.

Comments concerning the proposed new sections may be submitted in writing to Linda Logan, Director, Policy Development, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668; by fax to (512) 206-4750; or by e-mail to policy.co@mhmr.state.tx.us within 30 days of publication.

A hearing to accept oral and written testimony from members of the public concerning this and other related proposals has been scheduled for 1:30 p.m., Monday, June 14, 2004, in the department's Central Office Auditorium in Building 2, 909 West 45th Street, Austin, Texas. Persons requiring an interpreter for the deaf or hearing impaired should contact the department's Central Office operator at least 72 hours prior to the hearing at TDD (512) 206-5330. Persons requiring other accommodations for a disability should notify Martha Durham, at least 72 hours prior to the hearing at (512) 206-4541 or at the TDY phone number of Texas Relay, 1-800-735-2988.

The new sections are proposed under THSC, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; THSC, §533.0354, which requires the provision of mental health services for adults with bipolar disorder, schizophrenia, or clinically severe depression and for children with serious emotional illnesses be accomplished using disease management practices, Texas Government Code, §531.021(a), and Texas Human Resources Code, §32.021(a), which provide Health and Human Services Commission with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of HHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. HHSC has delegated to TDMHMR the authority to operate the MH rehabilitative services Medicaid program.

The proposed new sections affect THSC, §532.015(a) and §533.0354, Texas Government Code, §531.021(a), and Texas Human Resources Code, §32.021.

§419.451. Purpose.

The purpose of this subchapter is to describe the requirements for the provision of mental health rehabilitative services reimbursed by Medicaid.

§419.452. Application.

This subchapter applies to Medicaid providers of mental health rehabilitative services.

§419.453. Definitions.

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

(1) Adolescent--An individual who is at least 13 years of age, but younger than 18 years of age.

(2) Adult--An individual who is 18 years of age or older.

(3) Advanced practice nurse--A staff member who is a registered nurse approved by the Texas State Board of Nurse Examiners to practice as an advanced practice nurse, in accordance with Texas Occupations Code, Chapter 301. The term is synonymous with "advanced nurse practitioner."

(4) Arrangement--A contract between a Medicaid provider and a person or entity for the provision of MH rehabilitative services that are reimbursed by Medicaid.

(5) Authorization period--The duration period for which the Medicaid provider has obtained authorization in accordance with §419.456(a) of this title (relating to Service Authorization and Treatment Plan).

(6) Business day--Any day except a Saturday, Sunday, or legal holiday listed in Texas Government Code, §662.021.

(7) CFR--The Code of Federal Regulations.

(8) Child--An individual who is at least three years of age, but younger than 13 years of age.

(9) CSSP or community services specialist--A staff member who, as of August 30, 2004:

(A) has received:

(i) a high school diploma; or

(ii) a high school equivalency certificate issued in accordance with the law of the issuing state; and

(B) has had three continuous years of documented full time experience in the provision of MH rehabilitative services.

(10) Crisis--A situation in which:

(A) because of a mental health condition:

(i) the individual presents an immediate danger to self or others; or

(ii) the individual's mental or physical health is at risk of serious deterioration; or

(B) an individual believes that he or she presents an immediate danger to self or others or that his or her mental or physical health is at risk of serious deterioration.

(11) CSU or crisis stabilization unit--A crisis stabilization unit licensed under Chapter 577, of the Texas Health and Safety Code and Chapter 134 of this title (relating to Private Psychiatric Hospitals and Crisis Stabilization Units Licensing Rules).

(12) Day--Calendar day, unless otherwise specified.

(13) Department--The Texas Department of Mental Health and Mental Retardation or its successor.

(14) Face-to-face--Within the physical presence of another person.

(15) Group--A service delivery modality involving two to eight individuals (for adults) or two to six individuals (for children and adolescents) and at least one staff member.

(16) Individual--A person seeking or receiving MH rehabilitative services.

(17) IMD or institution for mental diseases--Based on 42 CFR §435.1009, a hospital, nursing facility, or other institution of more than 16 beds that is primarily engaged in providing diagnosis, treatment, or care of individuals with mental illness, including medical attention, nursing care, and related services.

(18) In-vivo--The individual's natural environment (e.g. the individual's residence, work place, or school).

(19) LAR or legally authorized representative--A person authorized by law to act on behalf of a child or adolescent with regard to a matter described in this subchapter, and who may be a parent, guardian, or managing conservator.

(20) LOC or level of care--A designation given to the department's standardized packages of MH rehabilitative services, based on the uniform assessment and utilization management guidelines, which specify the type, amount, and duration of MH rehabilitative services to be provided to an individual.

(21) Licensed marriage and family therapist--An individual who is licensed as a licensed marriage and family therapist by the Texas State Board of Examiners of Marriage and Family Therapists in accordance with Texas Occupations Code, Chapter 502.

(22) Licensed medical personnel--A staff member who is:

(A) a physician;

(B) a physician assistant;

(C) an RN;

(D) an LVN; or

(E) a pharmacist.

(23) Licensed professional counselor--A person who is licensed as a licensed professional counselor by the Texas State Board of Examiners of Professional Counselors in accordance with Texas Occupations Code, Chapter 503.

(24) LPHA or licensed practitioner of the healing arts--A staff member who is:

(A) a physician;

(B) a licensed professional counselor;

(C) a licensed clinical social worker (formally a licensed master social worker-advanced clinical practitioner) as determined by the Texas State Board of Social Work Examiners in accordance with Texas Occupations Code, Chapter 505;

(D) a psychologist;

(E) an advanced practice nurse recognized by the Board of Nurse Examiners for the State of Texas as a clinical nurse specialist in psych/mental health or nurse practitioner in psych/mental health; or

(F) a licensed marriage and family therapist.

(25) LVN or vocational nurse--A person who is licensed as a vocational nurse by the Texas Board of Nurse Examiners in accordance with Texas Occupations Code, Chapter 301 or, prior to February 1, 2004, was licensed as a licensed vocational nurse by the Texas Board of Nurse Examiners in accordance with Texas Occupations Code, Chapter 302.

(26) Master's level professional--A staff member who has completed a master's degree that is a prerequisite for licensure as one of the professionals listed in the definition of LPHA and is actively pursuing such licensure.

(27) Medical necessity--The need for a service that:

(A) is reasonable and necessary for the diagnosis or treatment of a mental health disorder or a mental health and substance use disorder in order to improve or maintain an individual's level of functioning;

(B) is in accordance with professionally accepted clinical guidelines and standards of practice in behavioral health care;

(C) is furnished in the most appropriate and least restrictive setting in which the service can be safely provided;

(D) is provided at the most appropriate level and supply that is safe for the individual; and

(E) could not be omitted without adversely affecting the individual's mental or physical health or the quality of care rendered.

(28) Medicaid provider--An entity with which the department has a provider agreement to provide MH rehabilitative services that are reimbursed by Medicaid.

(29) Mental health (MH) rehabilitative services--Services that are reimbursed by Medicaid and are:

(A) individualized age-appropriate training and instructional guidance that address an individual's functional deficits due to severe and persistent mental illness or serious emotional disturbance;

(B) designed to improve or maintain the individual's ability to remain in the community as a fully integrated and functioning member of that community; and

(C) consist of the following services:

(i) crisis intervention services;

(ii) medication training and support services;

(iii) psychosocial rehabilitation services which consist of the following component services:

(I) independent living services;

(II) coordination services;

(III) employment related services;

(IV) housing related services; and

(V) medication related services;

(iv) rehabilitative counseling and psychotherapy;

(v) skills training and development services; and

(vi) day programs for acute needs which consist of the following component services;

(I) psychiatric nursing services;

(II) pharmacological instruction;

(III) symptom management training; and

(IV) functional skills training.

(30) Nursing services--Services provided or delegated by an RN acting within the scope of his or her practice, as described in Texas Occupations Code, Chapter 301.

(31) On-site--A location operated by the Medicaid provider or a person or entity under arrangement with the Medicaid provider at which MH rehabilitative services are provided, such as a clinic, clubhouse, or office.

(32) Pharmacist--A person who is licensed as a pharmacist by the Texas State Board of Pharmacy in accordance with Texas Occupations Code, Chapter 558.

(33) Physician--A staff member who is:

(A) licensed as a physician by the Texas State Board of Medical Examiners in accordance with Texas Occupations Code, Chapter 155; or

(B) authorized to perform medical acts under an institutional permit at a Texas postgraduate training program approved by the Accreditation Council on Graduate Medical Education, the American Osteopathic Association, or the Texas State Board of Medical Examiners.

(34) Physician assistant--A person who is licensed as a physician assistant by the Texas State Board of Physician Assistant Examiners in accordance with Texas Occupations Code, Chapter 204.

(35) Primary caregiver--A person 18 years of age or older who has actual care, control, and possession of a child or adolescent.

(36) Problem solving--The use of specific steps and strategies to analyze and evaluate a problematic situation in order to determine a course of action to resolve the problematic situation.

(37) Psychologist--A person who is licensed as a psychologist by the Texas State Board of Examiners of Psychologists in accordance with Texas Occupations Code, Chapter 501.

(38) QMHP-CS or qualified mental health professional-community services--A staff member who meets the definition of a QMHP-CS set forth in Chapter 412, Subchapter G of this title (relating to Mental Health Community Services Standards).

(39) RN or registered nurse--A staff member who is licensed as a registered nurse by the Texas State Board of Nurse Examiners in accordance with Texas Occupations Code, Chapter 301.

(40) Staff member--Personnel of a Medicaid provider including a full-time and part-time employee, contractor, and intern, but excluding a volunteer.

(41) Therapeutic team--A group of mental health professionals working together in a coordinated manner for the purpose of providing comprehensive mental health services to an individual.

(42) Uniform assessment--An assessment promulgated by the department that includes the Adult Texas Recommended Authorization Guidelines, the Texas Implementation of Medication Algorithms Scales for Adults, and the Children and Adolescent Texas Recommended Authorization Guidelines.

(43) Utilization management guidelines--Guidelines promulgated by the department that establish the type, amount, and duration of MH rehabilitative services for each LOC.

§419.454. General Requirements for Providers of MH Rehabilitative Services.

(a) Compliance with MH community standards. In addition to complying with this subchapter, a Medicaid provider must also comply with Chapter 412, Subchapter G of this title (relating to Mental Health Community Services Standards) in the provision of MH rehabilitative services, as described in §412.304(a)(5) and (b)(4) of this title (relating to Responsibility for Compliance).

(b) Service provision under arrangement.

(1) A Medicaid provider may choose to have any MH rehabilitative service provided by a person or entity under arrangement.

(2) A Medicaid provider must ensure that if MH rehabilitative services are provided under arrangement, then the person or entity delivering the MH rehabilitative services under arrangement complies with all applicable federal and state laws, rules, and regulations, and any provider manuals and policy clarification letters promulgated by the department.

(c) Services provided same time and same day.

(1) A Medicaid provider is prohibited from providing more than one MH rehabilitative service to an individual at the same time and on the same day.

(2) A Medicaid provider is not prohibited from providing an MH rehabilitative service to a child or adolescent's LAR or primary caregiver at the same time and on the same day the child or adolescent is receiving another MH rehabilitative service.

(d) Prohibitions against discrimination and retaliation.

(1) A Medicaid provider may not unlawfully discriminate against an individual based on race, color, national origin, religion, sex, age, disability, co-occurring disorder or political affiliation. A Medicaid provider may not deny MH rehabilitative services to an individual based on sexual orientation.

(2) A Medicaid provider must ensure that an individual's refusal of any service offered by the Medicaid provider, does not preclude the individual from accessing a needed MH rehabilitative service.

§419.455. Eligibility.

An individual is eligible for MH rehabilitative services if:

(1) the individual:

(A) is a resident of the state of Texas;

(B) is eligible for Medicaid;

(C) if an adult, has a severe and persistent mental illness or, if a child or adolescent, has a serious emotional disturbance;

(D) qualifies for a LOC;

(E) is not an inmate of a public institution as defined in 42 CFR §435.1009;

(F) is not a resident of an intermediate care facility for persons with mental retardation as described in 42 CFR §440.150;

(G) is not a resident in an IMD;

(H) is not a resident in a Medicaid-certified nursing facility unless the individual has been determined through a pre-admission screening and annual resident review assessment to be eligible for the specialized service of MH rehabilitative services; and

(I) is not a patient in a general medical hospital; and

(2) a determination that there is a medical necessity for MH rehabilitative services for the individual has been made by:

(A) an employee of the department; or

(B) an employee or a contractor of an entity designated to make such determinations on behalf of the department.

§419.456. Service Authorization and Treatment Plan.

(a) Prerequisites to provision of services.

(1) Except as provided for crisis intervention services in subsection (b) of this section, prior to a Medicaid provider providing MH rehabilitative services to an individual the provider must:

(A) obtain authorization from the department or its designee for the type(s), amount, and duration of MH rehabilitative service to be provided to the individual in accordance with the uniform assessment which is referenced as Exhibit A in §419.468 of this title (relating to Exhibits); and the utilization management guidelines which are referenced as Exhibit B in §419.468 of this title; and

(B) in collaboration with the individual, develop a treatment plan for the individual in accordance with §412.315(b) of this title (relating to Assessment and Treatment Planning) that also includes a list of the type(s) of MH rehabilitative services authorized in accordance with subparagraph (A) of this paragraph.

(2) A Medicaid provider must develop the treatment plan required by paragraph (1)(B) of this subsection within ten days after the date it obtains authorization from the department or its designee for the type(s), amount, and duration of MH rehabilitative services.

(b) Authorization and treatment plan requirements for crisis intervention services.

(1) An LPHA must, within two business days after the provision of the crisis intervention services:

(A) determine whether there is a medical necessity for the crisis intervention services; and

(B) if a determination is made that there is a medical necessity for crisis intervention services, authorize such services.

(2) A Medicaid provider is not required to develop a treatment plan for the provision of crisis intervention services.

(c) Reauthorization of MH rehabilitative services.

(1) Prior to the expiration of the authorization period or of the depletion of the amount of services authorized, the Medicaid provider must make a determination of whether the individual continues to need MH rehabilitative services.

(2) If the determination is that the individual continues to need MH rehabilitative services, the Medicaid provider must:

(A) request another authorization from the department or its designee for the same type and amount of MH rehabilitative service previously authorized; or

(B) if the Medicaid provider determines that the type or amount of MH rehabilitative services previously authorized is inappropriate to address the individual's needs, submit a request to the department or its designee, with documented clinical reasons for such

request, to change the type or amount of MH rehabilitative services previously authorized.

(d) Review of treatment plan.

(1) The Medicaid provider must review a treatment plan as follows to determine if the plan adequately addresses the needs of the individual:

(A) at least every 90 days;

(B) as clinically indicated; and

(C) at the request of the individual or the LAR or primary caregiver of a child or adolescent.

(2) At the time the treatment plan is reviewed, the Medicaid provider must:

(A) solicit input from the individual and the LAR or primary caregiver of a child or adolescent about whether they are satisfied with the services provided; and

(B) document such input.

(e) Revisions to the treatment plan. If, after review of the treatment plan the Medicaid provider determines that the treatment plan does not adequately address the needs of the individual, the Medicaid provider must, as appropriate:

(1) revise the content of the treatment plan; or

(2) request authorization for a change in the type or amount of the MH rehabilitative services authorized.

§419.457. Crisis Intervention Services.

(a) Description. Crisis intervention services are interventions provided in response to a crisis in order to reduce symptoms of severe and persistent mental illness or serious emotional disturbance and to prevent admission of an individual to a more restrictive environment. Crisis intervention services include:

(1) an assessment of dangerousness of the individual to self or others;

(2) the coordination of emergency care services in accordance with §412.314 of this title (relating to Crisis Services);

(3) behavior skills training to assist the individual in reducing stress and managing symptoms;

(4) problem-solving;

(5) reality orientation to help the individual identify and manage their symptoms of mental illness; and

(6) providing guidance and structure to the individual in adapting to and coping with stressors.

(b) Conditions. Crisis intervention services:

(1) may be provided to a child, an adolescent, or an adult;

(2) must be provided one-to-one;

(3) may be provided on-site or in-vivo;

(4) must be provided by a QMHP-CS;

(5) may not be provided to an individual who is currently admitted to a CSU;

(6) may be provided to an individual without first obtaining authorization from the department or its designee in accordance with §419.456 of this title (relating to Service Authorization and Treatment Plan); and

(7) may be provided without a treatment plan described in §419.456 of this title.

§419.458. Medication Training and Support Services.

(a) Description. Medication training and support services are training based on curricula promulgated by the department, which is referenced as Exhibit C in §419.468 of this title (relating to Exhibits), to assist an individual in:

(1) understanding the nature of an adult's severe and persistent mental illness or a child or adolescent's serious emotional disturbance;

(2) understanding the role of the individual's prescribed medications in reducing symptoms and increasing or maintaining the individual's functioning;

(3) identifying and managing the individual's symptoms and potential side-effects of the individual's medication;

(4) learning the contraindications of the individual's medication;

(5) understanding the overdose precautions of the individual's medication; and

(6) learning self-administration of the individual's medication.

(b) Conditions. Medication training and support services:

(1) may be provided to:

(A) a child or adolescent;

(B) the LAR or primary caregiver of a child or adolescent; or

(C) an adult;

(2) may be provided one-to-one or in a group;

(3) may be provided on-site or in-vivo;

(4) must be provided by a QMHP-CS or licensed medical personnel; and

(5) may not be provided to an individual who is currently admitted to a CSU.

(c) Frequency and duration. The provision of medication training and support services must be in accordance with the amount and duration for which the Medicaid provider has obtained authorization in accordance with §419.456 of this title (relating to Service Authorization and Treatment Plan).

§419.459. Psychosocial Rehabilitation Services.

(a) Description. Psychosocial rehabilitation services are social, educational, vocational, behavioral, and cognitive interventions that address deficits in the individual's ability to develop and maintain social relationships, occupational or educational achievement, and independent living skills that are the result of a severe and persistent mental illness in adults. Psychosocial rehabilitation services may also address the impact of co-occurring disorders upon the individual's ability to reduce symptomology and increase daily functioning. Psychosocial rehabilitation services consist of the following component services:

(1) independent living services;

(2) coordination services;

(3) employment related services;

(4) housing related services; and

(5) medication related services.

(b) Conditions.

(1) Psychosocial rehabilitative services:

(A) may only be provided an adult;

(B) may be provided one-to-one or in a group;

(C) may be provided on-site or in-vivo; and

(D) except as required in paragraph (2) of this subsection, must be provided by a member of the individual's therapeutic team who is:

(i) licensed medical personnel;

(ii) a QMHP-CS; or

(iii) a CSSP; and

(E) may not be provided to an individual who is currently admitted to a CSU;

(2) Medication related services, as described in subsection (c)(5) of this section, must be provided by licensed medical personnel who are members of the individual's therapeutic team.

(3) As part of the provision of coordination services described in subsection (c)(2) of this section, a QMHP-CS must conduct ongoing uniform assessments at intervals specified by the department to determine the type, amount, and duration of MH rehabilitative services.

(c) Components of psychosocial rehabilitation services.

(1) Independent living services are services to assist an individual in acquiring the most immediate, fundamental functional skills needed to enable the individual to reside in the community and avoid more restrictive levels of treatment. Such independent services include training in symptom management, personal hygiene, nutrition, food preparation, exercise, and community integration activities.

(2) Coordination services are services to assist an individual in gaining and coordinating access to necessary care and services appropriate to the needs of the individual. Such coordination services include:

(A) assessment of the individual to determine the individual's need for services (e.g., medical, educational, social, or substance use services), which includes the administration of the uniform assessment;

(B) treatment planning with the individual to develop goals and identify a course of action to respond to the assessed needs;

(C) referral to the appropriate medical, social, educational, substance use providers or other programs and services;

(D) referral to support services and advocacy groups; and

(E) monitoring and follow-up to ensure that the treatment plan developed in accordance with §412.315(b) and (c) of this title (relating to assessment and treatment planning) is implemented effectively and adequately addresses the needs of the individual.

(3) Employment related services are services to provide supports and skills training that are not job-specific and focus on developing skills to reduce or manage the symptoms of mental illness that interfere with an individual's ability to make vocational choices or obtain or retain employment. Such employment services include:

(A) instruction in dress, grooming, socially acceptable behaviors, and etiquette necessary to obtain and retain employment;

(B) training in task focus, maintaining concentration, task completion, and planning and managing activities to achieve outcomes;

(C) instruction in obtaining appropriate clothing, arranging transportation, utilizing public transportation, accessing and utilizing available resources related to obtaining employment, and accessing employment-related programs and benefits (e.g., unemployment, workers compensation, and Social Security);

(D) interventions or supports provided on or off the job site to reduce behaviors or symptoms of mental illness that interfere with job performance or that interfere with the development of skills that would enable the individual to obtain or retain employment; and

(E) interventions designed to develop natural supports on or off the job site to compensate for skill deficits that interfere with job performance.

(4) Housing related services are services to develop an individual's ability to manage the symptoms of the individual's mental illness that interfere with the individual's ability to obtain or maintain tenure in independent integrated housing. Such services include:

(A) skills training related to:

(i) home maintenance and cleanliness;

(ii) problem solving with the individual's landlord and neighbors; and

(iii) maintaining appropriate interpersonal boundaries; and

(B) supportive contacts with the individual to reduce or manage the behaviors or symptoms related to the individual's mental illness that interfere with maintaining independent integrated housing.

(5) Medication related services provide training regarding an individual's medications in order to increase the individual's compliance with medication treatment. Such services include training in:

(A) the self-administration of the individual's medication;

(B) the importance of the individual taking the medications as prescribed;

(C) determining the effectiveness of the individual's medications; and

(D) identifying side-effects of the individual's medications.

(d) Frequency and duration. The provision of psychosocial rehabilitative services must be in accordance with the amount and duration for which the Medicaid provider has obtained authorization in accordance with §419.456 of this title (relating to Service Authorization and Treatment Plan).

§419.460. Rehabilitative Counseling and Psychotherapy.

(a) Description. Rehabilitative counseling and psychotherapy is cognitive behavior therapy focused on the reduction or elimination of an individual's symptoms of severe and persistent mental illness and increasing the individual's ability to perform activities of daily living.

(b) Conditions. Rehabilitative counseling and psychotherapy:

(1) may only be provided to an individual who is 21 years of age or older;

(2) may be provided one-to-one or in a group;

(3) may be provided on-site or in-vivo; and

(4) must be provided by:

(A) an LPHA; or

(B) a master's level professional working under the supervision of an LPHA in accordance with rules adopted by the applicable licensing board; and

(5) may not be provided to an individual who is currently admitted to a CSU.

(c) Frequency and duration. The provision of rehabilitative counseling and psychotherapy must be in accordance with the amount and duration for which the Medicaid provider has obtained authorization in accordance with §419.456 of this title (relating to Service Authorization and Treatment Plan).

§419.461. Skills Training and Development Services.

(a) Description.

(1) Skills training and development services is training provided to an individual or the LAR or primary caregiver of a child or adolescent. Such training:

(A) addresses severe and persistent mental illness or serious emotional disturbance and symptom-related problems that interfere with the individual's functioning and living, working, and learning environment;

(B) provides opportunities for the individual to acquire and improve skills needed to function as appropriately and independently as possible in the community; and

(C) facilitates the individual's community integration and increase his or her community tenure.

(2) Skills training and development services include teaching an individual the following skills:

(A) skills for managing daily responsibilities (e.g. paying bills, attending school and performing chores);

(B) communication skills (e.g., effective communication and recognizing or change problematic communication styles);

(C) pro-social skills (e.g., replacing problematic behaviors with behaviors that are socially acceptable);

(D) problem-solving skills;

(E) assertiveness skills (e.g., resisting peer pressure, replacing aggressive behaviors with assertive behaviors, and expressing one's own opinion acceptably);

(F) social skills (e.g. selection of appropriate friends and activities);

(G) stress reduction (e.g., progressive muscle relaxation, deep breathing exercises, guided imagery, and selected visualization);

(H) anger management skills (e.g., identification of antecedents to anger, calming down, stopping and thinking before acting, handling criticism, avoiding and disengaging from explosive situations);

(I) skills to manage the symptoms of mental illness and to recognize and modify unreasonable beliefs, thoughts and expectations;

(J) skills to identify and utilize community resources and informal supports;

(K) skills to identify and utilize acceptable leisure time activities (e.g., identifying pleasurable leisure time activities that will foster acceptable behavior); and

(L) independent living skills (e.g. money management, accessing and using transportation, grocery shopping, maintaining housing, maintaining a job, and decision making).

(3) Skills training and development services include training an LAR or primary caregiver to assist the child or adolescent in learning the skills described in paragraph (2) of this subsection.

(b) Conditions. Skills training and development services:

(1) may be provided to:

(A) a child or adolescent;

(B) the LAR or primary caregiver of a child or adolescent; or

(C) an adult;

(2) must be provided one-to-one to a child or adolescent, except that the LAR or primary caregiver may be present;

(3) must be provided one-to-one to the LAR or primary caregiver, except that the child or adolescent may be present;

(4) may be provided one-to-one or in a group to an adult;

(5) may be provided on-site or in vivo;

(6) for a child or adolescent must be provided according to curricula approved by the department which is referenced as Exhibit D in §419.468 of this title (relating to Exhibits);

(7) for an adult, must be provided by a QMHP-CS or a CSSP;

(8) for a child or adolescent, must be provided by a QMHP-CS,

(9) for an LAR or primary caregiver of a child or adolescent, must be provided by a QMHP-CS; and

(10) may not be provided to an individual who is currently admitted to a CSU.

(c) Frequency and Duration. The provision of skills training and development services must be in accordance with the amount and duration for which the Medicaid provider has obtained authorization in accordance with §419.456 of this title (relating to Service Authorization and Treatment Plan).

§419.462. Day Programs for Acute Needs.

(a) Description. Day programs for acute needs provide short-term, intensive treatment to an individual who requires multidisciplinary treatment in order to stabilize acute psychiatric symptoms or prevent admission to a more restrictive setting. Day programs for acute needs:

(1) are provided in a highly structured and safe environment with constant supervision;

(2) ensure an opportunity for frequent interaction between an individual and staff members; and

(3) are services that are goal-oriented and focus on:

(A) reality orientation;

(B) symptom reduction and management;

(C) appropriate social behavior;

(D) improving peer interactions;

(E) improving stress tolerance; and

(F) the development of coping skills.

(4) Day programs for acute needs consist of the following component services:

(A) psychiatric nursing services;

(B) pharmacological instruction;

(C) symptom management training; and

(D) functional skills training.

(b) Conditions.

(1) Day programs for acute needs:

(A) may only be provided to adults;

(B) may be provided in a setting with any number of individuals;

(C) may be provided on-site or in a short-term, crisis-resolution oriented residential treatment setting that is not:

(i) a general medical hospital;

(ii) a psychiatric hospital; or

(iii) an IMD;

(D) except as provided by paragraphs (2) and (3) of this subsection must be provided by a QMHP-CS or a CSSP; and

(E) must, at all times:

(i) have a sufficient number of staff members to ensure safety and program adequacy; and

(ii) at a minimum include:

(I) one RN for every 16 individuals at the day program's location;

(II) one physician to be available by phone, with a response time not to exceed 15 minutes;

(III) two staff members who are QMHP-CSs or CSSPs at the day program's location;

(IV) one additional QMHP-CS who is not assigned full time to another day program, to be physically available, with a response time not to exceed 30 minutes; and

(V) additional QMHP-CSs or CSSPs at the day program's location sufficient to maintain a ratio of one staff member to every four individuals.

(2) Psychiatric nursing services, as described in subsection (c)(1) of this section, must be provided by an RN at the day program's location.

(3) Pharmacological instruction, as described in subsection (c)(2) of this section, must be provided by licensed medical personnel.

(c) Components of day programs for acute needs.

(1) Psychiatric nursing services consist of:

(A) a nursing assessment;

(B) the coordination of medical activities (e.g., referrals to specialists and scheduling medical laboratory tests);

(C) the administration of medication;

(D) laboratory specimen collections and screenings (e.g., the Abnormal Involuntary Movement Scale);

(E) emergency medical interventions as ordered by a physician; and

(F) other nursing services.

(2) Pharmacological instruction is training to an individual that addresses medication issues related to the crisis precipitating the provision of day programs for acute needs. Such medication issues include:

(A) the role of the individual's medications in stabilizing acute psychiatric symptoms or preventing admission to a more restrictive setting;

(B) the identification of substances that reduce the effectiveness of the individual's medications;

(C) appropriate interventions to reduce side-effects of the medications and increase the individual's compliance with medication treatment; and

(D) the self-administration of the individual's medication.

(3) Symptom management training assists an individual in recognizing and reducing the acuity of her or his symptoms and includes training the individual on:

(A) the identification of thoughts, feelings, or behaviors that indicate the onset of acute psychiatric symptoms;

(B) ways to avoid florid occurrences;

(C) techniques for developing an internal locus of control regarding symptoms;

(D) developing coping strategies to address the symptoms;

(E) identification of external circumstances that trigger the onset of the acute psychiatric symptoms; and

(F) relapse prevention strategies;

(4) Functional skills training assists an individual in acquiring the most immediate, fundamental functional skills needed to enable the individual to reside in the community and avoid more restrictive levels of treatment and includes training the individual on:

(A) personal hygiene;

(B) nutrition;

(C) food preparation;

(D) exercise; and

(E) integrating into community activities.

(d) Frequency and duration. The provision of day programs for acute needs must be in accordance with the amount and duration for which the Medicaid provider has obtained authorization in accordance with §419.456 of this title (relating to Service Authorization and Treatment Plan).

§419.463. Documentation Requirements.

(a) General documentation. A Medicaid provider must document the following for all MH rehabilitative services:

(1) the name of the individual to whom the service was provided;

(2) the type of service provided;

(3) the specific skill(s) trained on and the method used to provide the training;

(4) the date the service was provided;

(5) the begin and end time of the service;

(6) the location where the service was provided;

(7) the signature of the staff member providing the service and a notation as to whether the staff member is an LPHA, QMHP-CS, or CSSP; and

(8) any pertinent event or behavior relating to the individual's treatment which occurs during the provision of the service.

(b) Service documentation. In addition to the requirements described in subsection (a) of this section, a Medicaid provider must document the following:

(1) for crisis intervention services:

(A) the documentation required by §412.314(c) of this title (relating to Documentation of Crisis Services); and

(B) the outcome of the individual's crisis;

(2) for medication training and support services and skills training and development services, the name of the primary caregiver or LAR to whom the service was provided, if applicable;

(3) for psychosocial rehabilitative coordination services:

(A) a description of the coordination service provided;

(B) if the service involves face-to-face or telephone contact, the person with whom the contact was made; and

(C) the outcome of the service;

(4) for MH rehabilitative services other than crisis intervention services and day programs for acute needs:

(A) a summary of the activities that occurred;

(B) the modality of service provision (i.e. one-to-one or group);

(C) the treatment plan goal(s) that was the focus of the service; and

(D) the progress or lack of progress in achieving treatment plan goal(s);

(5) for day programs for acute needs, the progress or lack of progress in stabilizing the individual's acute psychiatric symptoms;

(c) Frequency of Documentation.

(1) For day programs for acute needs, the documentation required by subsections (a) and (b)(1) of this section must be made daily.

(2) For MH rehabilitative services other than day programs for acute needs, the documentation required by subsections (a) and (b)(2), (3) and (4) of this section must be made after each face-to-face contact that occurs to provide the MH rehabilitative service.

(3) A Medicaid provider must retain documentation in compliance with applicable federal and state laws, rules, and regulations.

§419.464. Staff Member Training.

(a) Training of staff members. A Medicaid provider must provide training to a staff member to ensure competency in the provision of MH rehabilitative services. Such training must be provided in accordance with the following:

(1) A staff member who provides MH rehabilitative services or supervises the provision of MH rehabilitative services must receive training and demonstrate competency in the following areas:

(A) the requirements of this subchapter and of Chapter 412, Subchapter G of this title (relating to the Mental Health Community Services Standards);

(B) the nature of severe and persistent mental illness and serious emotional disturbances;

(C) the dignity and rights of an individual in accordance with Chapter 404, Subchapter E of this title (relating to Rights of Persons Receiving Mental Health Services);

(D) identifying, preventing, and reporting abuse, neglect, and exploitation in accordance with Chapter 414, Subchapter L of this title (relating to Abuse, Neglect, and Exploitation in Local Authorities and Community Centers);

(E) interacting with an individual who has a special physical need such as a hearing or visual impairment;

(F) responding to an individual's language and cultural needs through knowledge of customs, beliefs, and values of various, racial, ethnic, religious, and social groups;

(G) the uniform assessment;

(H) the utilization management guidelines;

(I) developing and implementing an individualized treatment plan;

(J) identifying an individual in crisis;

(K) appropriate actions to take in managing a crisis;

(L) skills training techniques;

(M) the treatment of co-occurring psychiatric and substance use disorders as described in Chapter 411, Subchapter N of this title (relating to Standards for Services to Persons with Co-Occurring Psychiatric and Substance Use Disorders);

(N) the availability of resources within the local community; and

(O) strategies for effectively advocating for an individual.

(2) A staff member who routinely provides or supervises the provision of MH rehabilitative services to a child or adolescent must receive training and demonstrate competency in the following areas:

(A) the aspects of a child's growth and development (including physical, emotional, cognitive, educational and social) and the treatment needs of child and of an adolescent; and

(B) the department's approved skills training curricula which is referenced as Exhibit D in §419.468 of this title (relating to Exhibits).

(3) A staff member who supervises the provision of rehabilitative services must be a QMHP-CS.

(b) Frequency. A staff member must receive the training required by subsection (a) of this section before assuming responsibilities in providing or supervising the provision of MH rehabilitative services.

(c) Documentation of training. A Medicaid provider must document that a staff member has successfully completed the training described in subsection (a) of this section.

§419.465. Medicaid Reimbursement.

(a) Billable and non-billable activities.

(1) A Medicaid provider may only bill for MH rehabilitative services that are provided face-to-face to:

(A) an individual; or

(B) the LAR or primary caregiver of a child or adolescent.

(2) The cost of the following activities are included in the Medicaid MH rehabilitative services reimbursement rate(s) and may not be directly billed by the Medicaid provider:

(A) developing and revising the treatment plan and interventions that are appropriate to an individual's needs;

(B) staffing and team meetings to discuss the provision of MH rehabilitative services to a specific individual;

(C) monitoring and evaluating outcomes of interventions, including contacts with a person other than the individual;

(D) documenting the provision of MH rehabilitative services;

(E) a staff member traveling to and from a location to provide MH rehabilitative services;

(F) all services provided within a day program for acute needs that are delivered by a staff member, including services delivered in response to a crisis or an episode of acute psychiatric symptoms; and

(G) administering the uniform assessment.

(b) Non-reimbursable activities.

(1) The department will not reimburse a Medicaid provider for any combination of MH rehabilitative services, other than crisis intervention services, delivered in excess of 8 hours per individual per day. In addition the department will not reimburse a Medicaid provider for more than:

(A) two hours per individual per day of medication training and support services;

(B) four hours per individual per day of psychosocial rehabilitation services;

(C) four hours per individual per day of rehabilitative counseling and psychotherapy;

(D) four hours per individual per day of skills training and development services; and

(E) six hours per individual per day of day programs for acute needs.

(2) The department will not reimburse a Medicaid provider for:

(A) except for crisis intervention services authorized in accordance with §419.456(b) of this title (relating to Service Authorization and Treatment Plan), an MH rehabilitative service that is not included in the individual's treatment plan;

(B) an MH rehabilitative service that is not authorized in accordance with §419.456 of this title;

(C) an MH rehabilitative service provided in excess of the amount authorized in accordance with §419.456(a)(1) of this title;

(D) an MH rehabilitative service provided outside of the duration authorized in accordance with §419.456(a)(1) of this title;

(E) a psychosocial rehabilitative services provided to an individual receiving MH case management services in accordance with Chapter 412, Subchapter I of this title (relating to Mental Health Case Management);

(F) an MH rehabilitative service that is not documented in accordance with §419.463 of this title (relating to Documentation Requirements);

(G) an MH rehabilitative service provided to an individual who does not meet the eligibility criteria as described in §419.455 of this title (relating to Eligibility);

(H) an MH rehabilitative service provided to an individual who is not present, awake, and participating during such service;

(I) psychiatric nursing services as described in §419.462(c)(1) of this title (relating to Day Programs for Acute Needs), medication training and support services, and medication related services as described in section §419.459(c)(5) of this title (relating to Psychosocial Rehabilitation Services), that are incidental to another service such as an office visit with a physician;

(J) a medical evaluation, examination, or treatment that is otherwise reimbursable as a separate and distinct Medicaid-covered benefit;

(K) an individual's room and board;

(L) a service provided in an inpatient hospital setting;

(M) a service provided to an individual with a single diagnosis of substance use disorder, mental retardation, or pervasive developmental disorder;

(N) an activity that does not involve achieving the goals that are listed in an individual's treatment plan. Examples of such activities include:

(i) merely accompanying an individual to:

(I) a social or recreational event or other entertainment; or

(II) locations to conduct the individual's personal affairs (e.g. shopping, interviewing for a job, visiting friends or relatives, getting a haircut, or finding housing);

(ii) merely helping the individual with domestic or financial affairs, such as cleaning house or balancing a checkbook;

(O) having a casual conversation with an individual about the individual's interests or general well-being that is not related to service provision or identification of the individual's needs;

(P) assisting the individual in obtaining or maintaining Medicaid eligibility;

(Q) training in areas that are not generally recognized to address deficits due to the severe and persistent mental illness or serious emotional disturbance. Examples of such areas include:

(i) cardiopulmonary resuscitation;

(ii) first aid;

(iii) defensive driving; and

(iv) recreational activities such as swimming, horseback riding, and piano lessons;

(R) educational services such as:

(i) remedial instruction and tutoring related to academics;

(ii) preparation for taking a high school equivalency exam; and

(iii) formal academic classes;

(S) job specific vocational services such as:

(i) training on a job specific task;

(ii) seeking employment for an individual;

(iii) assisting an individual in completing an application for employment; and

(iv) prompting an individual to perform a job task when such prompting is not related to a deficit caused by the mental illness;

(T) an activity provided as an integral and inseparable part of a service other than an MH rehabilitative service. Examples of such activities include:

(i) pharmacological management by a physician;

(ii) a service incidental to a physician's visit;

(iii) a referral or medical consultation between medical personnel;

(iv) substance use disorder counseling;

(v) development of a treatment plan; and

(vi) administration of an assessment;

(U) a service that specifically addresses an individual's substance use without addressing the impact of the use on the individual's severe and persistent mental illness or serious emotional disturbance;

(V) nursing services except as provided in accordance with §419.462 of this title;

(W) requesting a refill of an individual's medication, filling an individual's pill pack, unlocking an individual's medication box, or obtaining or delivering an individual's medication;

(X) any type of counseling or psychotherapy provided to an individual except for that provided in accordance with §419.460 of this title (relating to Rehabilitative Counseling and Psychotherapy);

(Y) admission and pre-admission activities such as:

(i) determination of an individual's eligibility for MH rehabilitative services;

(ii) obtaining demographic information, information about the individual's finances and information about the individual's insurance benefits; and

(iii) completion of admission documentation;

(Z) any services provided to a person other than the individual, (e.g. school personnel) except for the services provided to an LAR or primary caregiver in accordance with §419.458 of this title (relating to Medication Training and Support Services) and §419.461 of this title (relating to Skills Training and Development Services);

(AA) any skills training provided to an LAR or primary caregiver that does not address the individual's skill deficits such as:

(i) instruction regarding basic parenting skills;

(ii) guidance on how to advocate for a child or adolescent; and

(iii) teaching on how to cope with stress;

(BB) skills training provided concurrently with academic instruction;

(CC) monitoring of an individual that is not an integral and inseparable part of the provision of an MH rehabilitative service. Examples of such monitoring include:

(i) assessing the individual's general well-being;

(ii) assessing the individual's general medical condition;

(iii) monitoring the self-administration of medications;

(iv) supervising a child or adolescent; and

(v) preventing an individual from hurting self or others;

(DD) outreach activities to inform the public of MH rehabilitative services that are available or to locate individuals who are potentially Medicaid eligible;

(EE) recreational activities; or

(FF) services provided in transit unless the specific skill being addressed is an identified deficit in accessing or using public transportation.

§419.466. Medicaid Provider Participation Requirements.

(a) Qualifications. To become a Medicaid provider of MH rehabilitative services, an entity must:

(1) be established as a community mental health center in accordance with Texas Health and Safety Code, §534.001, that:

(A) provides services comparable to MH rehabilitative services and the services described in the Texas Health and Safety Code, §534.053(a)(1) - (7);

(B) is in compliance with Chapter 412, Subchapter G of this title (relating to Mental Health Community Services Standards);

(C) conducts criminal history clearances on all contractors delivering MH rehabilitative services and all employees and applicants of the Medicaid provider to whom an offer of employment is made and ensures that individuals do not come in contact with and are not provided services by an employee or contractor of the Medicaid provider (or employee or contractor of contractors delivering MH rehabilitative services under a contract with the Medicaid provider) who has a conviction for any of the criminal offenses listed in §414.504(g) of this title (relating to Pre-employment and Pre-assignment Clearance) or for any criminal offense that the Medicaid provider has determined to be a contraindication to employment; and

(D) have a Medicaid provider agreement with the department to provide MH rehabilitative services that are reimbursed by Medicaid; or

(2) be a corporation incorporated or registered to do business in the state of Texas that:

(A) has completed an application evidencing that it:

(i) provides services comparable to MH rehabilitative services and the services described in the Texas Health and Safety Code, §534.053(a)(1) - (7);

(ii) is in compliance with Chapter 412, Subchapter G of this title;

(iii) has demonstrated a history of providing, as well as the capacity to continue to provide, services to individuals required to submit to mental health treatment:

(I) under the Texas Code of Criminal Procedure, Article 17.032 (relating to Release on Personal Bond of Certain Mentally Ill Defendants), or Article 42.12 §11(d) (relating to Community Supervision); and

(II) under the Texas Health and Safety Code, Chapter 573 (relating to Emergency Detention) and Chapter 574 (relating to Court Ordered Mental Health Services);

(iv) conducts criminal history clearances on all contractors delivering MH rehabilitative services and all employees and applicants of the corporation to whom an offer of employment is made and ensures that individuals do not come in contact with and are not provided services by an employee or contractor of the corporation (or employee or contractor of contractors delivering MH rehabilitative services under a contract with the corporation) who has a conviction for any of the criminal offenses listed in §414.504(g) of this title or for any criminal offense that the corporation has determined to be a contraindication to employment;

(B) has had its application information confirmed by an on-site visit by the department;

(C) has had its application approved by the department; and

(D) has signed a Medicaid provider agreement with the department to provide MH rehabilitative services that are reimbursed by Medicaid.

(b) Compliance. A Medicaid provider must:

(1) comply with all applicable federal and state laws, rules, and regulations, and any Medicaid provider manuals and policy clarification letters promulgated by the department;

(2) document and bill for reimbursement of MH rehabilitative services in the manner and format prescribed by the department;

(3) allow the department access to all individuals and individuals' records;

(4) maintain capacity to provide those services that are described in the Texas Health and Safety Code, §534.053(a)(1) - (7); and

(5) maintain capacity to provide services to individuals required to submit to mental health treatment:

(A) under the Texas Code of Criminal Procedure, Article 17.032 (relating to Release on Personal Bond of Certain Mentally Ill Defendants), or Article 42.12 §11(d) (relating to Community Supervision); and

(B) under the Texas Health and Safety Code, Chapter 573 (relating to Emergency Detention) and Chapter 574 (relating to Court Ordered Mental Health Services).

§419.467. Fair Hearings.

(a) Right to request a fair hearing. Any individual whose request for eligibility for MH rehabilitative services is denied or is not acted upon with reasonable promptness, or whose MH rehabilitative services have been terminated, suspended, or reduced by the department is entitled to a fair hearing in accordance with Texas Administrative Code, Title 1, Chapter 357 (relating to Medical Fair Hearings).

(b) Notice. The Medicaid provider must, in the form and manner prescribed by the department, give an individual notice of the right to request a fair hearing.

§419.468. Exhibits.

The following exhibits are referenced in this subchapter. For information about obtaining copies of the exhibits contact Behavioral Health Services, P.O. Box 12668, Austin, TX 78711-2668:

(1) Exhibit A:

(A) Adult Texas Recommended Authorization Guidelines;

(B) Texas Implementation of Medication Algorithms Scales for Adults; and

(C) Child and Adolescent Texas Recommended Authorization Guidelines.

(2) Exhibit B:

(A) Adult Utilization Management Guidelines; and

(B) Child and Adolescent Utilization Management Guidelines.

(3) Exhibit C:

(A) Adult Patient/Family Education Program; and

(B) Child and Adolescent-Patient/Family Education Program Adult.

(4) Exhibit D: Department's approved skills training curricula for children and adolescents.

§419.469. References.

The following laws and rules are referenced in this subchapter:

(1) Texas Administrative Code, Title 1, Chapter 357 (relating to Medical Fair Hearings);

(2) Texas Civil Statutes, Article 4514, §8, and Articles 4512c-1, §§4495b, 4512g, and 1528f;

(3) Human Resources Code, Chapter 50;

(4) Texas Health and Safety Code, Chapters 134, 241, 573, 574, and 577; §§534.001, 533.035(a), and 534.053(a)(1) - (7);

(5) Texas Code of Criminal Procedure, Article 17.032 and Article 42.12, Section 11(d);

(6) Texas Government Code, §662.021;

(7) Texas Occupations Code, Chapters 155, 204, 301, 302, 501, 502, 503, 505, and 588;

(8) 42 CFR, §435.1009 and §440.150;

(9) Chapter 404, Subchapter E of this title (relating to Rights of Persons Receiving Mental Health Services);

(10) Chapter 411, Subchapter N of this title (relating to Standards for Services to Persons with Co-Occurring Psychiatric and Substance Use Disorders);

(11) Chapter 412, Subchapter G of this title (relating to Mental Health Community Services Standards);

(12) Chapter 412, Subchapter I of this title (relating to Mental Health Case Management);

(13) Chapter 414, Subchapter L of this title (relating to Abuse, Neglect, and Exploitation in Local Authorities and Community Centers); and

(14) Section 414.504(g) of this title (relating to Pre-employment and Pre-Assignment Clearance) of Chapter 414, Subchapter K of this title (relating to Criminal History Clearances).

§419.470. Distribution.

(a) This subchapter shall be distributed to:

(1) members of the Texas Department of Mental Health and Mental Retardation Board or the applicable council;

(2) executive, management, and program staff of the department;

(3) chief executive officers of all Medicaid providers; and

(4) advocates and advocacy organizations.

(b) The chief executive officer of each Medicaid provider must provide a copy of this subchapter to all persons and entities delivering MH rehabilitative services under arrangement.

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 May 14, 2004.

TRD-200403281
Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 206-4581

SUBCHAPTER N. TEXAS HOME LIVING (TxHmL) PROGRAM

25 TAC §419.556

The Texas Department of Mental Health and Mental Retardation (department) proposes amendments to §419.556 (relating to Eligibility Criteria) of Chapter 419, Subchapter N, governing Texas Home Living (TxHmL) Program.

Currently, the financial eligibility criteria in §419.556(b)(3) excludes applicant and individuals under the age of 19 years receiving foster care services from the Department of Family and Protective Services when the foster care payment exceeds Level II. The proposed amendments would 1) remove the payment restriction; 2) extend the age to under 20 years because young adults may receive foster care services under certain conditions; and 3) clarify that the residence in which the applicant or individual resides is a foster family home or foster group home in which the primary caregiver is a foster parent living in the home. The proposed amendments would also change the reference to the Texas Department of Protective and Regulatory Services (TDPRS) to Texas Department of Family and Protective Services (TDFPS).

Kevin Nolting, Acting Chief Financial Officer, has determined that, for each year of the first five year period that the proposed amendments are in effect, there are no foreseeable implications relating to costs or revenues of state or local government. The department does not anticipate that the proposed amendments will have an adverse effect on small or micro-businesses. The department does not anticipate that there will be any additional economic cost to persons required to comply with the proposed amendments. The department does not anticipate that the proposed amendments will affect a local economy.

Barry Waller, Acting Director, Community Mental Retardation Services, has determined that, for each year of the first five-year period the proposed amendments are in effect, the public benefit expected is the promulgation of Medicaid waiver program rules that extend program eligibility to children who receive foster care services from TDFPS when the foster care payments for their care exceed TDFPS payment Level II.

Comments concerning the proposed amendments must be submitted in writing to Linda Logan, Director, Policy Development, by mail to P.O. Box 12668, Austin, Texas 78711, by fax to (512) 206-4744, or by e-mail to policy.co@mhmr.state.tx.us within 30 days of publication of this notice.

The amendments are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the TxHmL Program.

The proposed amendments affect Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a) and (c).

§419.556. Eligibility Criteria.

(a) (No change.)

(b) An applicant or individual is financially eligible for the TxHmL Program if he or she:

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

(3) is under 20 years of age and:

(A) financially the responsibility of the Texas Department of Family and Protective Services (TDFPS) in whole or in part; and

(B) is being cared for in a foster home or group home:

(i) that is licensed or certified and supervised by TDFPS or a licensed public or private nonprofit child placing agency; and

(ii) in which a foster parent is the primary caregiver residing in the home;

[~~(3) is under age 19 and financially the responsibility of the Texas Department of Protective and Regulatory Services (TDPRS), in whole or in part (not to exceed Level II foster care payment), and being cared for in a family foster home licensed or certified and supervised by:~~]

[~~(A) TDPRS; or~~]

[~~(B) a licensed public or private nonprofit child placing agency;~~]

(4) is currently receiving Medicaid for Youth Transitioning Out of Foster Care (Transitional Medicaid) because he or she formerly received foster care through TDFPS [~~TDPRS~~] and was under the financial responsibility of TDFPS [~~TDPRS~~]; or

(5) (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 May 14, 2004.

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Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
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For further information, please call: (512) 206-4516

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 111. CONTROL OF AIR POLLUTION FROM VISIBLE EMISSIONS AND PARTICULATE MATTER

SUBCHAPTER B. OUTDOOR BURNING

30 TAC §111.209

The Texas Commission on Environmental Quality (TCEQ or commission) proposes an amendment to §111.209.

The amended section and corresponding revisions to the Texas state implementation plan will be submitted to the United States Environmental Protection Agency.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

A bill from the 77th Legislature, 2001 amended Texas Occupations Code, §801.361, Disposal of Animal Remains. This bill allowed the burning of animal remains if the burning occurred in a county with a population of less than 10,000, on property owned by the veterinarian, and the veterinarian did not charge for disposal. This bill did not allow the burning of medical waste associated with animal remains.

This rulemaking implements a subsequent amendment to Texas Occupations Code, §801.361. Senate Bill (SB) 216, 78th Legislature, 2003, amended Texas Occupations Code, §801.361, by allowing veterinarians to burn animal remains and associated medical waste. Associated medical waste includes: animal waste, blood, gloves, sleeves, newspapers, and plastic bags, but does not include sharps. SB 216 also changes the conditions under which a veterinarian may burn waste. The proposed amendment revises paragraph (3) by replacing the current language with a reference to amended Texas Occupations Code, §801.361. This would provide an exception to the prohibition of outdoor burning by veterinarians in accordance with Texas Occupations Code, §801.361.

In compliance with House Bill 3061, 78th Legislature, 2003, this rule has been developed in cooperation with and was approved by the Texas Animal Health Commission on December 2, 2003. The commission simultaneously proposes in this issue of the *Texas Register* the amendment to 30 TAC §330.4, Permit Required.

SECTION DISCUSSION

The proposed amendment to §111.209, Exception for Disposal Fires, is necessary to make the burning revisions provided by SB 216 consistent with TCEQ rules. The proposed amendment revises paragraph (3) by removing the current language and replacing it with a reference to amended Texas Occupations Code, §801.361. This amendment will modify the exception to the prohibition of outdoor burning relating to burning by veterinarians to make it consistent with Texas Occupations Code, §801.361.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jan Washburn, Program Specialist in the Grants and Strategic Planning Section, determined that for the first five-year period the proposed amendment is in effect, there will be no fiscal implications for the agency or any other unit of state government. The amendment implements the legislative directive of SB 216, 78th Legislature, 2003, which took effect September 1, 2003. Current rule language allows veterinarians to burn or bury animal remains under three conditions: 1) the property is owned by the veterinarian; 2) the activity occurs only in counties with a population of less than 10,000; and 3) the veterinarian does not charge for the burning or burial. The proposed rule will allow veterinarians to burn or bury medical waste associated with the remains of an animal, as well. However, this activity must now occur on property that is outside the corporate boundaries of a municipality or within the corporate boundaries of a municipality as a result of an annexation that occurred on or after September 1, 2003, and the veterinarian may charge for the disposal. Ms. Washburn also determined that there will be no fiscal impact to units of local government as a result of the proposed amendment.

PUBLIC BENEFITS AND COSTS

Ms. Washburn also determined that for the first five years the proposed amendment is in effect, the anticipated public benefit will be minimal as the amendment will only apply to property outside the corporate boundaries of a municipality. This rule is expected to benefit veterinarians because they may dispose of animals on their own property, which will save them approximately $25 to $250 per animal.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Ms. Washburn also determined that there will be no significant fiscal implications to small or micro-businesses as a result of implementation of the proposed amendment for the first five years it is in effect. The proposed amendment will allow veterinarians to dispose of medical waste associated with the animal by burning or burying, which may be a benefit to those businesses. However, the veterinarian's property must now be outside the corporate boundaries of a municipality or within the corporate boundaries of a municipality as a result of an annexation that occurred on or after September 1, 2003. This may exclude some veterinarians in counties of less than 10,000 from burning or burying animals who were previously allowed to burn or bury before SB 216, 78th Legislature, 2003 was enacted.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. The proposed amendment to §111.209 is only intended to make existing commission rules consistent with the new legislative changes made to the Texas Occupations Code, and the proposed rule will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Therefore, the proposed amendment does not qualify as a "major environmental rule." Furthermore, the analysis required by §2001.0225(c) does not apply because the proposed rule does not meet any of the four applicable requirements of a major environmental rule. The proposed rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. The rule is proposed specifically to make commission rules consistent with SB 216 and does not exceed the requirements of that bill. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed an assessment of whether the proposed rule constitutes a takings under Texas Government Code, Chapter 2007. The specific purpose of the proposed rule is to make existing commission rules consistent with the new legislative changes made to the Texas Occupations Code by SB 216. The proposed rule will substantially advance this purpose by replacing existing language with a reference to the Texas Occupations Code amended by SB 216. Promulgation and enforcement of the proposed rule will be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed rule will not affect private real property rights because it will not burden, restrict, or limit an owner's property rights which would otherwise exist in the absence of the regulation. The proposed rule will actually expand the allowable uses of a veterinarian's private real property except those veterinarians in a municipality that is within a county of 10,000 or fewer people. The proposed rule does not meet the definition of a takings under Texas Government Code, §2007.002(5).

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et.seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rule in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found that the proposed rulemaking is consistent with the applicable CMP goals and policies.

The CMP goals applicable to the proposed rule include: to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas; to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; to ensure and enhance planned public access to and enjoyment of the coastal zone in a manner that is compatible with private property rights and other uses of the coastal zone; and to balance these competing interests.

CMP policy applicable to the proposed rule is 31 TAC §501.14(q), which states that TCEQ rules under Texas Health and Safety Code, Chapter 382, governing emissions of air pollutants, shall comply with regulations in Code of Federal Regulations, Title 40, adopted in accordance with Clean Air Act, 42 United States Code Annotated, §§7401, *et seq*, to protect and enhance air quality in the coastal area so as to protect coastal natural resources areas and promote the public health, safety, and welfare.

Promulgation and enforcement of the rule will not violate or exceed any standards identified in the applicable CMP goals and policies. The proposed rule is consistent with these CMP goals and policies. The rule does not create or have a direct or significant adverse effect on any coastal natural resource areas.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on June 24, 2004, at 10:00 a.m. at the Texas Commission on Environmental Quality complex in Building C, Room 131E, located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2004-003-330-WS. Comments must be received by 5:00 p.m., June 28, 2004. For further information, please contact Phil Harwell of the Policy and Regulations Division at (512) 239-1517 or Emily Barrett of the Policy and Regulations Division at (512) 239-3546.

STATUTORY AUTHORITY

The amendment is proposed under Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.012, which provides the commission the authority to develop a comprehensive plan for the state's air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.018, which authorizes the

commission to control outdoor burning; and §382.085, which prohibits unauthorized air emissions; and Texas Water Code, §5.103, which authorizes the commission to adopt rules.

The proposed amendment implements Texas Health and Safety Code, §382.002, concerning Policy and Purpose; §382.011, concerning General Powers and Duties; §382.012, concerning State Air Control Program; §382.017, concerning Rules; §382.018, concerning Outdoor Burning of Waste and Combustible Material; Texas Water Code, §5.103, concerning Rules; and Texas Occupations Code, §801.361, concerning Disposal of Animal Remains.

§111.209. Exception for Disposal Fires.

Outdoor burning shall be authorized for the following. [~~:~~]

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

(3) Veterinarians in accordance with Texas Occupations Code, §801.361, Disposal of Animal Remains. [~~Animal remains burning by a veterinarian if the burning is conducted on property owned by the veterinarian; the property is in a county with a population of less than 10,000; and the veterinarian does not charge for the burning. Animal remains refer to an animal that dies in the care of the veterinarian and does not include any other type of medical waste.~~]

(4) - (6) (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 May 14, 2004.

TRD-200403268
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 239-6087

CHAPTER 330. MUNICIPAL SOLID WASTE

SUBCHAPTER A. GENERAL INFORMATION

30 TAC §330.4

The Texas Commission on Environmental Quality (TCEQ or commission) proposes an amendment to §330.4.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

A bill from the 77th Legislature, 2001, amended Texas Occupations Code, §801.361, Disposal of Animal Remains. This bill allowed the burning or burying of animal remains if the disposal occurred in a county with population of less than 10,000, the burning or burying occurred on property owned by the veterinarian, and the veterinarian did not charge for disposal. This bill did not allow the burning or burying of medical waste associated with animal remains.

This rulemaking implements Senate Bill (SB) 216, 78th Legislature, 2003. This bill amended Texas Occupations Code, §801.361, and took effect September 1, 2003. Section 801.361 now allows a veterinarian to dispose of animal remains and medical waste associated with the animal by burial or burning if certain conditions are met. The veterinarian must conduct these activities on property owned by the veterinarian that is outside the corporate boundaries of a municipality or within the corporate boundaries of a municipality as a result of an annexation that occurs on or after September 1, 2003. Further, SB 216 stipulates that §801.361 prevails over any other law that authorizes a government entity to prohibit or restrict outdoor burning or abate a public nuisance.

In compliance with House Bill 3061, 78th Legislature, 2003, this rule has been developed in cooperation with and was approved by the Texas Animal Health Commission on December 2, 2003. The commission simultaneously proposes in this issue of the *Texas Register* the amendment to 30 TAC §111.209, Exception for Disposal Fires.

SECTION DISCUSSION

The commission proposes to amend §330.4(c), (g), and (x) in order to conform with current formatting standards. In proposed subsection (c) "MSWLF" will be revised to "MSW landfill facility." In subsection (g) the titles of §§330.150 - 330.159 are proposed to be listed individually, and the title of the subchapter in which these sections are contained, "Operational Standards for Solid Waste Processing and Experimental Sites" is removed. The proposed amendment to subsection (x) replaces "RCRA" with "The Resource Conservation and Recovery Act."

The commission proposes to revise §330.4(y) to refer to amended Texas Occupations Code, §801.361. Section 801.361 allows a veterinarian to burn or bury the remains of an animal and medical waste associated with the animal on property owned by the veterinarian without having to seek approval from the TCEQ for this activity. The veterinarian-owned property must now be outside the corporate boundaries of any municipality or within the corporate boundaries of a municipality as a result of an annexation that occurs on or after September 1, 2003. Existing language in §330.4(y) that conflicts with amended Texas Occupations Code §801.361, will be removed. Additionally, new language has been added to §330.4(y) that stipulates that veterinarians who dispose by burning under this section must comply only with §111.209(3). Paragraphs (1) - (9) of this subsection will be removed.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jan Washburn, Program Specialist in the Grants and Strategic Planning Section, determined that for the first five-year period the proposed amendment is in effect, there will be no fiscal implications for the agency or any other unit of state government. The amendment implements the legislative directive of SB 216, 78th Legislature, 2003, which took effect September 1, 2003. Current rule language allows veterinarians to burn or bury animal remains under three conditions: 1) the property is owned by the veterinarian; 2) the activity occurs only in counties with a population of less than 10,000; and 3) the veterinarian does not charge for the burning or burial. The proposed rule will allow veterinarians to burn or bury medical waste associated with the remains of an animal, as well. However, this activity must now occur on property that is outside the corporate boundaries of a municipality or within the corporate boundaries of a municipality as a result of an annexation that occurred on or after September 1, 2003, and the veterinarian may now charge for the disposal. Ms. Washburn also determined that there will be no fiscal impact to units of local government as a result of the proposed amendment.

PUBLIC BENEFITS AND COSTS

Ms. Washburn determined that for the first five years the proposed amendment is in effect, the anticipated public benefit will be minimal as the amendment will only apply to property outside the corporate boundaries of a municipality. This rule is expected to benefit veterinarians because they may dispose of animals on their own property, which will save them approximately $25 to $250 per animal.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Ms. Washburn determined that there will be no significant fiscal implications to small or micro-businesses as a result of implementation of the proposed amendment for the first five years it is in effect. The proposed amendment will allow veterinarians to dispose of medical waste associated with the animal by burning or burying, which may be a benefit to those businesses. However, the veterinarian's property must now be outside the corporate boundaries of a municipality or within the corporate boundaries of a municipality as a result of an annexation that occurred on or after September 1, 2003. This may exclude some veterinarians in counties of less than 10,000 from burning or burying animals who were previously allowed to burn or bury before SB 216, 78th Legislature, 2003 was enacted.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rulemaking proposes to amend §330.4(y) by removing existing language that conflicts with amended Texas Occupations Code, §801.61, and by adding language that stipulates that veterinarians burning under Texas Occupations Code, §801.361 must comply only with §111.209(3). This proposal does not qualify as a major environmental rule because it does not have as its specific intent the protection of the environment or the reduction of risk to human health from environmental exposure. The specific intent of this amendment is to incorporate the changes made by SB 216 into the municipal solid waste permitting exemption for the disposal of animal remains and associated medical waste by veterinarians.

In addition, a draft regulatory impact assessment is not required because the proposed rule does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The proposed rule does not exceed a standard set by federal law because there is no corresponding federal standard. The proposal does not exceed an express requirement of state law because it is in direct response to SB 216, and does not exceed the requirements of this bill. This proposal does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. This proposal does not adopt a rule solely under the general powers of the agency, but rather under specific state law, namely Texas Health and Safety Code, §361.011 and §361.024. The commission invites public comment on the draft regulatory analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission performed an assessment of this proposed rule in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the proposed rulemaking is to implement SB 216. The proposed rule implements the provisions of SB 216, which modified the requirements applicable to veterinarians who wish to dispose of animal remains and associated medical waste by burying or burning without obtaining a TCEQ permit or registration. The proposed rule will substantially advance this stated purpose by modifying §330.4 to conform to the statute. The proposed rule does not affect real property because it refers to a statute that specifies the conditions under which a veterinarian may dispose of animal remains and associated medical waste without TCEQ authorization. Therefore, the proposed rule will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will it affect any action/authorization identified in §505.11. Therefore, the proposed rule is not subject to the Coastal Management Program.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on June 24, 2004, at 10:00 a.m. at the Texas Commission on Environmental Quality complex in Building C, Room 131E, located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2004-003-330-WS. Comments must be received by 5:00 p.m., June 28, 2004. For further information, please contact Wayne Harry of the Waste Permits Division at (512) 239-6619 or Emily Barrett of the Policy and Regulations Division at (512) 239-3546.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; and TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under this code and other laws of this state. The commission also takes this action under Texas Health and Safety Code, §361.011 and §361.024, which provide the commission with the authority to adopt rules necessary to carry out its powers and duties under the Texas Solid Waste Disposal Act.

The proposed amendment implements Texas Occupations Code, §801.361, as amended by SB 216, 78th Legislature, 2003.

§330.4. Permit Required.

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

(c) A separate permit is not required for the storage or processing of the following types of MSW: grease trap wastes; grit trap wastes; or septage that contains free liquids if the waste is treated/processed at a permitted Type I MSW landfill facility [MSWLF]. Any person who intends to conduct such activity under this subsection shall comply with the notification requirements of §330.8 of this title (relating to Notification Requirements).

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

(g) A permit amendment is not required to establish a waste-separation/recycling facility established in conjunction with a permitted MSW site, or composting facility at an existing permitted MSW site if owned by the permittee of the existing site. Facilities exempted from a permit amendment under this subsection shall be registered with the executive director in accordance with §330.65 of this title (relating to Registration for Solid Waste Management Facilities). Failure to operate such registered facilities in accordance with the requirements established in §§330.150 - 330.159 of this title (relating to General; Overloading and Breakdown; Sanitation; Water Pollution Control; Ventilation and Air Pollution Control; Litter Control; Safety; Fire Protection; Employee Sanitation Facilities; and Facility Completion and Closure Procedures [Operational Standards for Solid Waste Processing and Experimental Sites]) may be grounds for the revocation of the registration.

(h) - (n) (No change.)

(o) Submission of a Soil and Liner Evaluation Report [(SLER)] and/or a Flexible Membrane Liner Evaluation Report [(FMLER)] required by §330.206 of this title (relating to Soil and Liner Evaluation Report and Flexible Membrane Liner Evaluation Report) for a liner design which meets all design and operational requirements of §§330.50 - 330.65 of this title and §§330.200 - 330.206 of this title (relating to Groundwater Protection Design and Operation) shall not require a permit amendment or modification.

(p) - (w) (No change.)

(x) A major permit amendment, as defined by §305.62 of this title, is required to reopen a Type I, Type I-AE, Type IV, or Type IV-AE MSW facility permitted by the commission or any of its predecessor or successor agencies that has either stopped accepting waste, or only accepted waste in accordance with an emergency authorization, for a period of five years or longer. The MSW facilities covered by this subsection may not be reopened to accept waste again unless the permittee demonstrates compliance with all applicable current state, federal, and local requirements, including the requirements of The Resource Conservation and Recovery Act [RCRA], Subtitle D and the implementing Texas state regulations. If an MSW facility was subject to a contract of sale on January 1, 2001, the scope of any public hearing held on the permit amendment required by this subsection is limited to land use compatibility, as provided by §330.51(a) of this title (relating to Permit Application for Municipal Solid Waste Facilities) and §330.61 of this title (relating to Land-Use Public Hearing). This subsection does not apply to any MSW facility that has received a permit but never received waste, or that received an approved Subtitle D permit modification before September 1, 2001.

(y) A permit or registration is not required for veterinarians performing activities as authorized by Texas Occupations Code, §801.361, Disposal of Animal Remains. Disposal by burning under this section must comply only with §111.209(3) of this title (relating to Exception for Disposal Fires). [disposal of the remains from an animal that dies in the care of a veterinarian licensed by the Texas State Board of Veterinary Medical Examiners where all of the following occur:]

[(1) the veterinarian disposes of the remains of an animal and the remains do not include any other type of medical waste;]

[(2) the veterinarian does not charge for the disposal;]

[(3) the disposal is on property owned by the veterinarian;]

[(4) the disposal occurs in a county with a population of less than 10,000;]

[(5) the waste disposal does not contribute to a nuisance and does not endanger the public health or the environment;]

[(6) the veterinarian complies with the deed recordation and notification requirements in §330.7 and §330.8 of this title;]

[(7) the animal carcasses are covered with at least two feet of soil within 24 hours of disposal in accordance with §330.136(b)(2) of this title;]

[(8) uncontrolled access is prevented; and]

[(9) the disposal complies with §111.209 of this title (relating to Exceptions for Disposal Fires).]

(z) - (aa) (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 May 14, 2004.

TRD-200403269
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 239-6087

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER L. MOTOR FUEL TAX--PRIOR TO JANUARY 1, 2004

34 TAC §3.171

The Comptroller of Public Accounts proposes an amendment to §3.171, concerning records required; information required. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are renumbered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §§153.004, 153.018, 153.117, 153.219, and 153.309.

§3.171. Records Required; Information Required.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [~~(a)~~] Records required.

(1) A distributor of gasoline or a supplier of diesel fuel, as those terms are defined in Tax Code, §153.001, shall keep the shipping document that relates to each receipt for distribution of gasoline or diesel fuel, and shall also keep records that show the number of gallons of:

(A) all gasoline or diesel fuel inventories on hand on the first day of each month;

(B) all gasoline or diesel fuel that the distributor or supplier refined, compounded, or blended;

(C) all gasoline or diesel fuel that the distributor or supplier purchased or received, showing the name and location of the seller, the date of each purchase or receipt, and the amount of motor fuels tax paid or if no tax was paid, the basis for the nonpayment of the motor fuels tax;

(D) all gasoline or diesel fuel that the distributor or supplier sold, distributed, or used, showing the name and location of the purchaser, the date of each sale, distribution, or use, and the amount of motor fuels tax assessed, or if no tax was assessed, the basis for not assessing the motor fuels tax;

(E) all diesel fuel that the supplier sold tax free, separately identifying sales of dyed and undyed fuel, showing the purchaser's aviation fuel dealer permit number, dyed diesel fuel bonded user permit number, agricultural bonded user permit number, or, when sold by signed statement, end user number or agricultural user exemption number;

(F) all gasoline and diesel fuel that the distributor or supplier exported from Texas including the destination state or country for each load;

(G) all gasoline and diesel fuel that the distributor or supplier imported into Texas including the origin state or country for each load; and

(H) all gasoline or diesel fuel that the distributor or supplier lost by fire, theft, or accident;

(2) A dealer, as that term is defined in the Tax Code, §153.001, shall keep the shipping document that relates to each receipt or distribution of gasoline or diesel fuel and shall also keep records that show the number of gallons of:

(A) all gasoline or diesel fuel inventories on hand on the first day of each month;

(B) all gasoline or diesel fuel that the dealer purchased or received, showing the name and location of the seller, the date of each purchase or receipt, the amount of motor fuels tax paid, or if no tax was paid, the basis for the nonpayment of the motor fuels tax;

(C) all gasoline that the dealer sold, distributed, or used, showing the date of the sale, distribution, or use;

(D) all diesel fuel that the dealer sold, distributed, or used showing the date of the sale, distribution, or use and individual invoices issued covering deliveries into fuel supply tanks of motor vehicles described under the definition of "interstate trucker" in the Tax Code, §153.001, in accordance with the Tax Code, §153.220; and

(E) all gasoline or diesel fuel that the dealer lost by fire, theft, or accident.

(3) A permitted liquefied gas dealer must keep records showing the number of gallons of:

(A) all liquefied gas that the dealer sold or delivered for taxable purposes; and

(B) individual invoices that the dealer issued recording taxable sales and deliveries in accordance with the Tax Code, §153.309.

(4) An aviation fuel dealer, as that term is defined in the Tax Code, §153.001, shall keep the shipping document relating to each receipt or distribution of gasoline or diesel fuel, and shall also keep records showing the number of gallons of:

(A) all gasoline or diesel fuel inventories on hand on the first day of each month;

(B) all gasoline or diesel fuel that the dealer purchased or received, showing the name and location of the seller, the date of each purchase or receipt, the amount of motor fuels tax paid, or if no tax was paid, the basis for the nonpayment of the motor fuels tax;

(C) all gasoline or diesel fuel that the dealer sold, distributed, or used in aircraft or aircraft servicing equipment, showing the name of the purchaser or user, the date of each sale, distribution or use, and the registration or "N" number of the airplane or a description or number of the aircraft servicing equipment in which the gasoline or diesel fuel was used; and

(D) all gasoline or diesel fuel that the dealer lost by fire, theft, or accident.

(5) An interstate trucker, as that term is defined in the Tax Code, §153.001, shall keep records of:

(A) the total miles that the interstate trucker traveled in all states and countries by all vehicles traveling into or from Texas and the total quantity of gasoline, diesel fuel, or liquefied gas consumed in those vehicles; and

(B) the total miles that the interstate trucker traveled in Texas and the total quantity of gasoline, diesel fuel, or liquefied gas delivered into the fuel supply tanks of motor vehicles and into storage facilities in Texas.

(6) A jobber, as that term is defined in the Tax Code, §153.001, shall keep the shipping document relating to each receipt or distribution of gasoline or diesel fuel, and shall also keep records that show the number of gallons of:

(A) all gasoline or diesel fuel inventories on hand on the first day of each month;

(B) all gasoline or diesel fuel that the jobber purchased or received, showing the name and location of the seller, the date of each purchase or receipt, and the amount of motor fuels tax paid;

(C) all gasoline or diesel fuel that the jobber sold, distributed, or used, showing the name and location of the purchaser, the date of each sale, distribution, or use, and the amount of motor fuels tax assessed; and

(D) all gasoline or diesel fuel that the jobber lost by fire, theft, or accident.

(7) A dyed diesel fuel bonded user, an agricultural bonded user, or other user with nonhighway equipment who files a claim for refund shall keep the shipping document that relates to each receipt of gasoline or diesel fuel, and shall also keep records that show the number of gallons of dyed diesel fuel and the number of gallons of undyed diesel fuel that are in each of the following categories:

(A) all diesel fuel inventories on hand on the first day of each month;

(B) all diesel fuel that the user purchased or received, showing the name of the seller and the date of each purchase or receipt;

(C) all diesel fuel that the user delivered into the fuel supply tanks of motor vehicles;

(D) all diesel fuel that the user used for other purposes, showing the purpose for which used; and

(E) all diesel fuel that the user lost by fire, theft, or accident.

(8) A common or contract carrier that transport motor fuel in Texas shall keep the shipping document that relates to each shipment of gasoline or diesel fuel, and shall also keep records that show:

(A) the date of transportation;

(B) the name of the seller or consignor;

(C) the name of the purchaser or consignee;

(D) the means of transportation;

(E) the quantity and kind of motor fuel that the carrier transported;

(F) the destination state or country of motor fuel that the carrier exported outside of Texas;

(G) the origin state or country of motor fuel that the carrier imported into Texas;

(H) the import verification number when that number is required by §3.187 of the title (relating to Documentation and Reporting of Imports and Exports, Import Verification Number, Export Sales by Distributors and Suppliers, and Diversion Number); and

(I) the diversion number when that number is required by §3.187 of this title;

(9) A person who claims a deduction or exclusion authorized by law must keep records that substantiate the claim When records regarding the amount and applicability of any deductions or exclusions from the motor fuels tax are insufficient, the comptroller may estimate deductions or exclusions based on any records available or may disallow all deductions and exclusions. No exclusions for loss by fire, accident, or theft will be allowed unless accompanied by fire department, environmental regulatory agency, or police department reports that verify the fire, accident, or theft.

(c) [~~(b)~~] Failure to keep adequate records.

(1) If any person who is required by this section to keep accurate records of receipts and purchases of gasoline or diesel fuel, fails to keep those records, the comptroller may estimate the tax liability based on any information available including, but not limited to, the records of the person's suppliers or distributors.

(2) If any person who is required by this section to keep accurate records of sales, distributions, or uses of gasoline or diesel fuel, fails to keep those records, the comptroller may estimate the tax liability of that person, if any, based on any information available including, but not limited to, the records of the person's purchasers or distributees.

(3) The comptroller may suspend any permit or license the comptroller has issued to a person if the person fails to keep the records required by this section.

(4) Records may be written, kept on microfilm, or stored on data processing equipment.

(d) [~~(c)~~] Information required.

(1) The comptroller may require any person who must hold a permit or registration under Tax Code, Chapter 153, to furnish information that the comptroller needs to:

(A) identify any person who applies for a motor fuels permit, uses a signed statement to purchase tax-free diesel fuel, or transports motor fuel in Texas by truck as a common or contract carrier, or any person who is required to file a return;

(B) determine the amount of bond, if any, required to commence or continue business;

(C) determine possible successor liability; and

(D) determine the amount of tax the person is required to remit, if any.

(2) The information required may include, but is not limited to, the following:

(A) name of the actual owner of the business;

(B) name of each partner in a partnership;

(C) names of officers and directors of corporations and other organizations;

(D) all trade names under which the owner operates;

(E) mailing address and actual locations of all business outlets;

(F) license numbers, title numbers, and other identification of business vehicles;

(G) identification numbers assigned by other governmental agencies, including social security numbers, federal employers identification numbers, and drivers license numbers;

(H) names of diesel fuel suppliers or gasoline distributors with whom the supplier, distributor, or dealer will transact business;

(I) names and last known addresses of former owners of the business.

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 May 13, 2004.

TRD-200403236
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 475-0387

34 TAC §3.172

The Comptroller of Public Accounts proposes an amendment to §3.172, concerning transit company affidavit. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are renumbered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §153.102(b) and §153.202(b).

§3.172. Transit Company Affidavit.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [~~(a)~~] Application for exemption. In order to purchase gasoline or diesel fuel at a reduced tax rate, a transit company must submit to the comptroller an affidavit stating:

(1) that the business holds a franchise from a political subdivision or is owned or operated by a political subdivision;

(2) that the rates charged by the business are regulated by the subdivision; and

(3) that any gasoline or diesel fuel purchased by the business at a reduced tax rate shall be used exclusively in its transit carriers that are designed to carry 12 or more passengers.

(c) [~~(b)~~] Exemption certificate. After review and approval of the affidavit, the comptroller shall issue to that transit company an exemption certificate which may be reproduced for suppliers or distributors. No fuel may be sold at a reduced rate unless a copy of the exemption certificate is presented to the supplier or distributor. The exemption certificate issued to the transit company by the comptroller shall be valid until cancelled by the company or revoked by the comptroller.

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 May 13, 2004.

TRD-200403237
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 475-0387

34 TAC §3.173

The Comptroller of Public Accounts proposes an amendment to §3.173, concerning refunds on gasoline and diesel fuel tax. The amendment incorporates legislative changes in House Bill 2425, 78th Legislature, 2003, which amended Tax Code, Chapter 153. The proposed amendment adds subsections (e)(8)(E) and (e)(9)(H) to provide that air conditioning and heating systems of a motor vehicle is not a power take-off system. The proposed amendment also adds subsection (e)(15) to provide guidelines for a motor fuel tax exemption on the volume of water, fuel ethanol, or biodiesel blended with taxable petroleum diesel fuel as described under Tax Code, 153.203.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are renumbered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a

result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §§153.119(d), 153.222(d), 153.203(a)(11), and 153.203(b).

§3.173. Refunds on Gasoline and Diesel Fuel Tax.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [~~(a)~~] Exclusive use. Exclusive use by a public school district or commercial transportation company means use of fuel only in motor vehicles or other equipment that:

(1) the public school district operates; or

(2) a person under contract with the public school district own and/or operates to provide transportation services for the public school district and uses in performance of the contract.

(c) [~~(b)~~] Refunds. A person may file a claim for refund of taxes paid on gasoline or diesel fuel used off the highway, for certain resale, for export from Texas, for loss caused by fire, theft, or accident, and for the provision of transportation services to public school districts.

(d) [~~(c)~~] Time limitation. A claim for refund must be filed before the expiration of the following time limitations, as provided by Tax Code, §153.121 and §153.224:

(1) one year from the first day of the calendar month that follows:

(A) purchase;

(B) tax exempt sale;

(C) use, if withdrawn from one's own storage for one's own use;

(D) export from Texas; or

(E) loss by fire, theft, or accident; or

(2) four years from the first day of the calendar month that follows the overpayment of tax for motor fuel acquired prior to October 1, 1997, when the overpayment is the result of:

(A) the same taxpayer who makes multiple payments of the tax directly to the comptroller on the same motor fuel, or pays tax on motor fuel that did not exist (e.g., a taxpayer reports and pays the tax on 10,000 gallons of fuel in a particular reporting period. The taxpayer later files an amended report for the same period, or a report for another period, and reports and pays tax again on the same fuel. Essentially, the taxpayer paid the tax on 20,000 gallons when only 10,000 gallons existed.); or

(B) a typographical error or transposed number that caused more tax to be paid than was due; or

(C) a misplaced decimal point that caused more tax to be paid than was due; or

(3) four years from the first day of the calendar month that follows the due date of the report on which an overpayment of tax was made for motor fuel acquired on or after October 1, 1997, by a permitted distributor, supplier, dyed diesel fuel bonded user, or agricultural bonded user who determines that taxes were erroneously reported or that more taxes were paid than were due because of a mistake of fact or law. The distributor, supplier, dyed diesel fuel bonded user or agricultural bonded user must establish the credit by filing an amended tax report for the period in which the error occurred and tax payment made to the comptroller.

(e) [~~(d)~~] Filing forms and documentation. Each type of claim for refund must be filed on a form that the comptroller furnishes, and documentation of the identification of each vehicle or type of equipment in which the fuel was used and other information to fully substantiate the claim must be maintained. For refund purposes, the original invoice may be a copy of the original impression if the copy has been stamped "Customer Original Invoice," "Original for Tax Purposes," or similar wording. If a copy is so stamped, the original and all other copies must then be stamped "Not Good for Tax Purposes" or similar wording. Invoices of original impression submitted in support of refund claims must be without the above wording stamped or imprinted. Refund claims must further comply with the following requirements:

(1) Refund claim for export from Texas by non-permitted purchaser. A claim for refund can be filed only on gasoline or diesel fuel exported in quantities of 100 gallons or more. Invoices that reflect that the tax was assessed, and documentation that the fuel was exported, must be maintained. Proof of export must be one of the following:

(A) proof of export that United States Customs officials have certified, if the fuel was exported to a foreign country;

(B) proof of export that a port of entry official of the state of importation has certified, if the state of importation maintains ports of entry;

(C) proof from the taxing officials of the state into which the fuel was imported that shows that the exporter has accounted for the fuel on that state's tax reports;

(D) other proof that the fuel has been reported to the state into which the gasoline or diesel fuel was imported; or

(E) a common or contract carrier's transporting documents (see §3.182 of this title (relating to Motor Fuel Transporting Documents)) that list the consignor and consignee, the points of origin and destination, the number of gallons shipped or transported, the date of export, and the kind of fuel exported;

(2) Refund claim for sale to the federal government by dealer or jobber. For the purposes of this section, the federal government is any department, board, bureau, agency, corporation, or commission that the United States government has created or wholly owns. Gasoline and diesel fuel may be sold tax-free to the federal government for its exclusive use. Evidence that sales were made to the federal government must be maintained and consist of:

(A) a United States tax exemption certificate--Standard Form 1094; or

(B) copies of the invoice(s) when a United States National credit card--Standard Form 149, was used for the purchase, which invoice must include the license plate number or official vehicle

designation, if fuel is delivered into the fuel supply tank of a motor vehicle; or

(C) a copy of a contract between the dealer or jobber and the federal government that the sales invoices or purchase vouchers under the contract support;

(3) Refund claim for loss by fire, theft, or accident. A tax refund may be claimed for a loss of 100 gallons or more that fire, theft, or accident has caused. The claimant must maintain records of the incident that establishes that the exact quantity of fuel that has been claimed as lost was actually lost, and that the loss resulted from that incident. The time limitation prescribed in subsection (d)(1)[(c)(1)] of this section is determined by the date of the first incident of a multiple incident loss that totals 100 gallons or more. A claim for refund for loss by fire, theft, or accident shall be accompanied by fire department, police department, or regulatory agency reports as appropriate.

(A) If the incident is a drive-away theft at a retail outlet (i.e., theft occurs when a person delivers gasoline or diesel fuel into the fuel supply tank(s) of a motor vehicle at a retail outlet without payment for the fuel), the following documentation shall be maintained:

(i) a police department report or evidence that the incident of drive-away theft has been or will be taken as a deduction on the federal income tax return during the same or the subsequent reporting period; and

(ii) separate report for each incident that the employee(s) who witnessed the event prepared and signed. The report must include the date and time of occurrence, type of fuel, number of gallons, outlet location, and, if the theft is reported to a police department, the police case number.

(B) If the accidental loss was incurred through a leak in a line or storage tank, the minimum proof required is:

(i) a statement by the person who actually dug up or otherwise examined the hole or leak. Such statement should articulate the extent of the leak, the date of the examination, and the person's name and title; and

(ii) a statement of the actual loss as determined by computing the measured inventory next preceding the discovery of the accidental leak, plus motor fuel salvaged from the leaky tank or line, if any, less intervening withdrawals for sale or use.

(C) Claimants who are permitted distributors or suppliers must claim a loss on line 5 of the monthly Texas Fuels Tax Report. If the claim is for a drive-away theft, the claimant must also maintain the documentation and meet the requirements provided in subparagraph (A) of this subsection. If the claim is for loss by leakage, the claimant must also maintain the documentation provided in subparagraph (B) of this subsection.

(D) Dealers and jobbers must take inventory on the first of each month and promptly correct the inventory for any loss that has occurred in the preceding month. If inventories have not been accurately or timely measured, or if complete records have not been kept of all withdrawals for sale or use as required by law, a refund claim cannot be honored for payment;

(4) Refund claim for gasoline or diesel fuel used off highway. A claim for refund on fuel used solely for off-highway purposes must list each off-highway vehicle or piece of equipment and the total number of gallons used. Documentation that shows that the state tax was assessed and a schedule that lists the number of gallons of gasoline, dyed diesel fuel, and undyed diesel fuel used in both on- and off-highway vehicles and equipment must be maintained.

(5) Refund claim for gasoline or diesel fuel used by a lessor of off-highway equipment. The lessor of off-highway equipment who claims a refund of state fuel tax must maintain documentation that shows that the state tax was assessed and paid, a list of each piece of off-highway equipment, and a schedule of the number of gallons of gasoline, dyed diesel fuel, and undyed diesel fuel used in both on-highway and off-highway vehicles and equipment. A lessor who claims a refund of state fuel tax may include a separate refueling, fuel reimbursement, or fuel service charge on the invoice, if the invoice contains a statement that the fuel charge does not include state motor fuel taxes.

(6) Refund claim for incidental highway use. A refund claim may be filed by a person who used gasoline or undyed diesel fuel in motor vehicles incidentally on the highway, when the incidental travel on the public highway is infrequent, unscheduled, and insignificant to the total operation of the motor vehicle.

(A) A record that shows the date and miles traveled during each highway trip must be maintained.

(B) 1/4 gallon for each mile of incidental highway travel shall be deducted from the number of gallons claimed;

(7) Refund claim for sales by diesel fuel dealer or jobber for off-highway use. Diesel fuel dealers or jobbers who have paid state tax to their suppliers, or dealers who have made tax included purchases from jobbers, and thereafter made tax-free sales on which refund claims are filed must maintain copies of invoices issued on each tax-free sale. The invoices must have the names and addresses of the dealers stamped or preprinted on the invoices and must also include:

(A) the purchaser's name;

(B) date of delivery;

(C) number of gallons delivered;

(D) type or description of the vehicle into which the delivery was made (e.g., railway engines, motorboat, refrigeration unit, stationary engine, off-highway equipment, or nonhighway farm machinery that has traveled between multiple farms or ranches as allowed in §3.183 of this title (relating to On-Highway Travel of Farm Machinery));

(E) a statement on the invoices that no tax was collected; and

(F) signature of the purchaser.

(8) Refund claim for fuel used in gasoline-powered motor vehicles equipped with power take-off or auxiliary power units. A person who files a refund claim for gasoline used in the operation of power take-off or auxiliary power units must use one of the following methods in determination of the amount of gasoline used:

(A) direct measurement method. The use of a metering device, as defined by §3.176 of this title (relating to Metering Devices Used to Claim Refund of Tax on Fuel Used in Power Take-Off and Auxiliary Power Units), is an acceptable method for determination of fuel usage. A person who files a refund claim for gasoline used to propel motor vehicles with approved measuring or metering devices that measure or meter the fuel used in stationary operations must maintain records on each vehicle so equipped, and the records must reflect:

(i) the miles driven as shown by any type of odometer;

(ii) the gallons delivered to each vehicle; and

(iii) the gallons used as recorded by the meter or other measuring device;

(B) gasoline-powered ready mix concrete trucks and solid waste refuse trucks equipped with power take-off or auxiliary power units. Operators of gasoline-powered ready mix concrete trucks and solid waste refuse trucks that are equipped with power take-off or auxiliary power units that are mounted on the motor vehicle and use the fuel supply tank of the motor vehicle may claim refund on 30% of the total gasoline used in this state by each vehicle. Records that reflect the following information must be maintained:

(i) each motor vehicle so equipped;

(ii) the miles that each vehicle has traveled, as any type of odometer has recorded;

(iii) the gallons delivered to each vehicle; and

(iv) the date of delivery;

(C) proposed alternate methods. Proposals for the use of methods that this section does not specifically cover to determine the amount of gasoline used in power take-off operations or auxiliary power units may be submitted to the comptroller for approval;

(D) accurate mileage records must be kept regardless of the method used;

(E) Refund claims for fuel used to operate the air conditioning and heating systems of a gasoline-powered motor vehicle. Beginning September 1, 2003, motor vehicle air conditioning and heating systems are no longer considered power take-off systems. A person may file a claim for refund of state taxes paid on gasoline used in the operation of an air conditioning or heating system prior to September 1, 2003. A claim for refund must be postmarked within one year from the date of use (e.g., fuel used July 2003 must be postmarked no later than August 1, 2004).

(9) Refund claims for fuel used in diesel-powered motor vehicles equipped with power take-off or auxiliary power units. Permitted suppliers and agricultural bonded users who use diesel fuel in motor vehicles that are equipped with power take-off or auxiliary power units that are mounted on the vehicle and use the fuel supply tank of the vehicle may claim a tax credit for the fuel used in power take-off operations or by the auxiliary power unit. Dyed diesel fuel bonded users and other end users who are required to buy tax-paid diesel fuel for use in motor vehicles that are equipped with a power take-off or auxiliary power unit that is mounted on the vehicle may claim tax refund for fuel used in power take-off operations or by the auxiliary power unit. A person who files a refund claim or tax credit for diesel fuel that is used in the operation of power take-off or auxiliary power units must use one of the following methods to determine the amount of diesel fuel used:

(A) direct measurement method. The use of a metering device, as defined by §3.176 of this title (relating to Metering Devices Used to Claim Refund of Tax on Fuel Used in Power Take-off and Auxiliary Power Units), to measure fuel used in the power take-off or auxiliary power unit is an acceptable method for determination of fuel usage. A person who files a refund claim for diesel fuel that is used to propel motor vehicles with approved measuring or metering devices that measure or meter the fuel used in stationary operations must maintain records on each vehicle so equipped, and the records must reflect:

(i) the miles traveled as any type of odometer has recorded;

(ii) the gallons delivered to each vehicle; and

(iii) the gallons used, as the meter or other measuring device has recorded;

(B) diesel-powered ready mix concrete trucks and solid waste refuse trucks that are equipped with power take-off or auxiliary power units. Operators of diesel fuel-powered ready mix concrete trucks and solid waste refuse trucks that are equipped with power take-off or auxiliary power units that are mounted on the motor vehicle and use the fuel supply tank of the motor vehicle may claim refund on 30% of the total diesel fuel used in this state by each vehicle. Records that reflect the following information must be maintained:

(i) each motor vehicle so equipped;

(ii) the miles that each vehicle has traveled, as any type of odometer has recorded;

(iii) the gallons delivered to each vehicle; and

(iv) the date of delivery;

(C) mileage factor method. The nontaxable use may be determined by computing the taxable use at 1/4 gallon for each mile traveled, as the odometer or hubmeter has recorded and subtracting that amount from the total fuel delivered into the motor vehicle fuel supply tanks. The remainder will be considered nontaxable, and a tax credit or tax refund may be claimed on that quantity of fuel.

(D) two tank method. A motor vehicle may be equipped with two fuel tanks and an automatic switching device that a spring-activated air release parking brake operates, and that switches from one tank that is designated for highway use to another tank that is not so designated when the vehicle is stationary. The highway tank and the not-for-highway tank may not be connected by crossover line or equalizer line of any kind. The tax paid on the fuel delivered to the tank designated not-for-highway use may be taken as a tax credit or claimed as a tax refund. All fuel delivered into the fuel supply tanks of a vehicle that is equipped with an automatic switching device must be invoiced as taxable. Separate invoices must be issued for deliveries of fuel into each tank. A notation that indicates that fuel was delivered into the tank designated not-for-highway use must be made on invoices;

(E) fixed percentage method. In lieu of the use of one of the previously mentioned methods, the owner or operator of a motor vehicle that is equipped with a power take-off or auxiliary power unit that is mounted on the vehicle may claim a credit or refund of the tax paid on 5.0% of the total taxable diesel fuel used in this state by each vehicle so equipped;

(F) proposed alternate methods. Proposals for the use of methods not specifically covered by this section to determine the amount of diesel fuel used in power take-off operations or auxiliary power units may be submitted to the comptroller for approval;

(G) accurate mileage records must be kept regardless of the method used;

(H) Refund claims for fuel used to operate the air conditioning and heating systems of a diesel-powered motor vehicle. Beginning September 1, 2003, motor vehicle air conditioning and heating systems are no longer considered power take-off systems. A person may file a claim for refund of state taxes paid on diesel fuel used in the operation of an air conditioning or heating system prior to September 1, 2003. A claim for refund must be postmarked within one year from the date of use (e.g., fuel used July 2003 must be postmarked no later than August 1, 2004).

(10) Refund claims by federal agencies on tax-paid purchases. A federal government agency may file a claim for refund on state taxes paid on gasoline and diesel fuel that such agency has used exclusively. Records that the agency maintains must include the following information:

(A) original purchase invoice(s) that shows that the state tax was assessed, and that a United States tax exemption certificate-Standard Form 1094 supports; or

(B) original purchase invoice(s) that shows that the state tax was assessed and is stamped with the imprint of a United States national credit card--Standard Form 149, issued to the agency that purchased the fuel;

(11) Refund claims for sales of gasoline or diesel fuel to a Texas public school district for its exclusive use, or to a commercial transportation company that provides public school transportation services to a Texas public school district and that the company uses exclusively to provide those services. The seller of gasoline or diesel fuel on which the tax has been paid may file for refund of the tax on sales to public school districts for the district's exclusive use, and on sales to commercial transportation companies that provide public school transportation services to a public school district exclusively. Sellers who file for refund must maintain copies of invoices that have been issued on each such tax- free sale. The invoice(s) must have the name and address of the seller stamped or preprinted on the invoice, and include:

(A) the purchaser's name;

(B) date of delivery;

(C) number of gallons delivered;

(D) type of fuel delivered;

(E) statement on the invoice that no tax was collected; and

(F) signature of the purchaser;

(12) Refund claims by public school districts on tax-paid purchases. A Texas public school district may file a claim for refund of state taxes paid on gasoline and diesel fuel that the district has used exclusively. Records that the district maintains must include original invoices that show that the tax was assessed;

(13) Refund claims by commercial transportation companies on tax-paid purchases. A commercial transportation company may file a claim for refund of state taxes paid on gasoline and diesel fuel that has been used to provide public school transportation services exclusively for a Texas public school district. Records that the company maintains must include original invoices that show that the state tax was assessed.

(14) Refund claims on sales by dealers of undyed kerosene from a blocked pump. A retail dealer who purchased undyed kerosene and paid the state tax to its supplier, or a retail dealer who purchased tax-included kerosene from a jobber, and thereafter makes a tax- free sale of undyed kerosene for a non-taxable use from a blocked pump, may file a claim for refund. A blocked pump is a fuel pump at a fixed location that cannot (because, for example, of its distance from a road surface, or the length of its delivery hose) be used to dispense fuel directly into the fuel supply tank of a diesel-powered highway vehicle or is locked by the dealer after each sale and unlocked by the dealer in response to a request to purchase undyed kerosene for a nonhighway use. A blocked pump must display a legible and conspicuous notice that states, "UNDYED KEROSENE, NONTAXABLE USE ONLY, FOR HEATING, COOKING, LIGHTING AND SIMILAR NONHIGHWAY USE." The invoice that the dealer has issued to the purchaser must include a notice that states "UNDYED KEROSENE, NONTAXABLE USE ONLY, FOR HEATING, COOKING, LIGHTING AND SIMILAR NONHIGHWAY USE, NO STATE MOTOR FUELS TAX COLLECTED." The dealer must maintain records that include the original purchase invoices that show that the state tax was paid on the undyed kerosene and sales invoices that show that no state tax was collected.

(15) Refund Claim for Water, Fuel Ethanol, and Biodiesel Mixtures. The ultimate consumer who has paid tax on the percentage of product that is water, fuel ethanol, or biodiesel may file a claim for refund of taxes that have been paid on only the volume of water, fuel ethanol, or biodiesel that is blended with taxable diesel fuel. Taxable diesel fuel includes emulsifiers, blending agents, or additives. The refund claim must be supported with purchase invoice(s) described in §3.203 of this title (relating to Diesel Fuel Tax Exemption for Water, Fuel Ethanol, and Biodiesel Mixtures) that identify the volume of water, fuel ethanol, or biodiesel on which state tax was paid.

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 May 13, 2004.

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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 475-0387

34 TAC §3.174

The Comptroller of Public Accounts proposes an amendment to §3.174, concerning incidental highway travel by bonded users. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are renumbered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §§153.209, 153.219, 153.221, and 153.222.

§3.174. Incidental Highway Travel by Bonded Users.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [~~(a)~~] Definition. "Incidental travel" on the public highway means those infrequent and unscheduled trips that are insignificant to the total operation of the motor vehicle.

(c) [~~(b)~~] Requirements. Bonded diesel users are required to remit the tax due on diesel fuel used for incidental travel of motor vehicles at a rate of 1/4 gallon per mile traveled on the public highway.

(d) [~~(c)~~] Records. Bonded diesel users shall maintain a record showing the date and miles traveled on each on-highway trip in addition to the other records required of a bonded user.

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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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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34 TAC §3.175

The Comptroller of Public Accounts proposes an amendment to §3.175, concerning liquefied gas tax decal. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are renumbered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §§153.302, 153.3021, 153.303, 153.305, and 153.307

§3.175. Liquefied Gas Tax Decals.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [~~(a)~~] Use of decal. A person operating a motor vehicle that is required to be licensed in Texas for use on the public highways of Texas and is powered by natural gas, methane, ethane, propane, butane, or a mixture of those gases, including a motor vehicle equipped to use liquefied gas interchangeably with another motor fuel, must:

(1) obtain from the comptroller a liquefied gas decal; and

(2) prepay the liquefied gas tax to the comptroller on an annual basis; or

(3) if a motor vehicle dealer, pay the liquefied gas tax to a permitted liquefied gas dealer when the fuel is delivered into the fuel supply tanks of each motor vehicle; or

(4) if an interstate trucker registered under a multistate tax agreement, pay the liquefied gas tax to a permitted liquefied gas dealer when the fuel is delivered into the fuel supply tanks of motor vehicles described under the definition of "interstate trucker" in the Tax Code, §153.001, that display a current multistate tax agreement decal.

(c) [~~(b)~~] Application. Each person must submit an annual application to the comptroller for each vehicle. Applications for the following year should be submitted during the month of expiration of the current decal. An ending odometer reading must be provided on the renewal application. In the absence of an ending odometer reading, the previous year's mileage of the motor vehicle will be presumed to be at least 15,000 miles.

(d) [~~(c)~~] Exceptions.

(1) The liquefied gas tax does not apply to sales to public school districts and counties in this state, or to commercial transportation companies providing transportation services to public school districts in this state and holding valid letters of exception from the comptroller.

(2) A public school district, commercial transportation company providing transportation services to a public school district and holding a valid letter of exception from the comptroller, or a county in this state operating a motor vehicle powered by liquefied gas is not required to prepay the liquefied gas tax and obtain a decal for the motor vehicle.

(e) [~~(d)~~] Rate schedule.

(1) The following rate schedule (based on mileage driven the previous year) applies.
Figure: 34 TAC §3.175(e)(1)

(2) A special use liquefied gas tax decal and tax is required for the following types of vehicles described as follows: Class T: Transit carrier vehicles operated by a transit company, $444.

(f) [~~(e)~~] New or newly converted vehicles. A liquefied gas tax decal for a Class A-F motor vehicle shall be initially issued on the basis of estimated miles that will be driven during the one-year period following the date the decal is issued.

(g) [~~(f)~~] Display of decal.

(1) The decal shall be affixed to the inside, lower right corner of the windshield (passenger side) of the vehicle.

(2) Invalid liquefied gas tax decals shall be removed before installing a new decal or transferring ownership of the motor vehicle.

(h) [(g)] Special use vehicles. Vehicles required to be licensed for highway use but whose main purpose, design, and use is off the highway may renew a liquefied gas decal for a rate less than the mileage indicated on the odometer if a record or log indicating the miles traveled on the highway by the vehicle is maintained and attached to the renewal application.

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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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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34 TAC §3.176

The Comptroller of Public Accounts proposes an amendment to §3.176, concerning metering devices used to claim refund of tax on fuel used in power take-off and auxiliary power units. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are relettered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the amendment will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the amendment is in effect, the public benefit anticipated as a result of enforcing the amended rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Bryant K. Lomax, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §153.119 and §153.222.

§3.176. Metering Devices Used To Claim Refund of Tax on Fuel Used in Power Take-Off and Auxiliary Power Units (Tax Code, §153.119 and §153.222).

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [(a)] Metering devices. The comptroller will accept the use of metering devices as a basis for determining the quantity of gasoline or diesel fuel consumed in the operation of auxiliary power units or power take-off equipment mounted on a motor vehicle.

(c) [(b)] Design specifications. The meters shall be designed to separately measure the fuel used to propel the motor vehicle from the fuel used in the power take-off or auxiliary power unit.

(1) the metering device, or a model thereof, must be tested for accuracy and proper performance by the Texas Engineering Experiment Station, Texas A&M University, or other testing agency approved by the comptroller, and provided that the test has clearly established that the metering device operates within the acceptance tolerances for allowable error or departure from true performance set forth in the National Bureau of Standards, U.S. Department of Commerce Handbook 44, latest edition for slow-flow meters;

(2) The metering device must be designed so that the gasoline or diesel fuel will flow through and be recorded by the metering device only when the motor vehicle's spring-loaded air-parking brake or other approved air-parking brake, or hydraulic parking brake is engaged, or when any hydraulic power take-off unit which can be operated only when the motor vehicle is stationary and is engaged, and providing that said gasoline or diesel fuel will at all times by-pass the metering device and flow through a by-pass line when the air brakes, hydraulic brakes, or hydraulic power take-off units described above are disengaged, or when such motor vehicle is propelled in any manner by such fuels; and

(3) The metering device must be installed on the motor vehicle and maintained by the owner or operator thereof in a manner in which it will operate at all times within the maintenance tolerances set forth in Handbook 44 for slow-flow meters.

(d) [(c)] Disallowance of tax credit or refunds. It is expressly provided that tax credits or tax refunds may be disallowed on gasoline or diesel fuel measured and recorded by any metering device, the operation of which is not maintained within the maintenance tolerance stated herein, or any case where the owner or operator fails to keep the records of the miles traveled and fuel consumed in each such motor vehicle as set out below:

(1) a complete record of the total miles traveled by each motor vehicle equipped with such metering device as shown by the speedometer or odometer readings accurately maintained;

(2) the total gallons of gasoline or diesel fuel used therein shall be kept for a period of four years open to inspection; and

(3) each claim for tax credit or tax refund shall be supported by such mileage and fuel consumption record together with the beginning and ending meter readings recorded on such metering device.

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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Comptroller of Public Accounts
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34 TAC §3.177

The Comptroller of Public Accounts proposes an amendment to §3.177, concerning separate liquefied gas tax permits required. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are relettered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the amendment will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the amendment is in effect, the public benefit anticipated as a result of enforcing the amended rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Bryant K. Lomax, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §§153.304, 153.306, 153.308, and 153.309.

§3.177. Separate Liquefied Gas Tax Permits Required.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [~~(a)~~] Dealer's permit required. Liquefied gas interstate truckers that are registered under a multistate tax agreement and that maintain bulk storage of liquefied gas for delivery into motor vehicles described under the definition of "interstate trucker" in the Tax Code, §153.001, must secure a separate liquefied gas dealer's permit.

(c) [~~(b)~~] Delivery of liquefied gas.

(1) Liquefied gas delivered into the fuel supply tanks of motor vehicles described under the definition of "interstate trucker" in the Tax Code, §153.001, and displaying a current multistate tax agreement decal is a taxable delivery of liquefied gas.

(2) Liquefied gas delivered into the fuel supply tank of motor vehicles licensed in the state of Texas and displaying a current liquefied gas tax decal is not a taxable delivery.

(d) [~~(c)~~] Report. Taxable deliveries of liquefied gas must be reported on the Texas Liquefied Gas Dealer Report in the same reporting period in which the taxable delivery was made.

(e) [~~(d)~~] Interstate trucker permit required. As of July 1, 1995, a permitted liquefied gas dealer who operates a motor vehicle described under the definition of "interstate trucker" in the Tax Code, §153.001, must secure a separate liquefied gas interstate trucker's permit.

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

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Martin Cherry
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Comptroller of Public Accounts
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34 TAC §3.178

The Comptroller of Public Accounts proposes an amendment to §3.178, concerning trip permit in lieu of interstate trucker permit. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are relettered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the amendment will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the amendment is in effect, the public benefit anticipated as a result of enforcing the amended rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Bryant K. Lomax, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §153.109, and §153.212.

§3.178. Trip Permit in Lieu of Interstate Trucker Permit.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [~~(a)~~] Who may qualify. A person entering Texas for commercial purposes with a motor vehicle that by weight or number of axles qualifies that person as an interstate trucker must purchase a temporary trip permit in lieu of the required interstate trucker permit if no more than five entries into the state are made during a calendar year.

(c) [~~(b)~~] Qualified motor vehicles. A motor vehicle qualifies if it is operated for commercial purposes and:

(1) has two axles and a registered gross weight in excess of 26,000 pounds; or

(2) has three or more axles, regardless of weight; or

(3) is used in combination and the registered gross weight of the combination exceeds 26,000 pounds.

(d) [~~(c)~~] Conditions.

(1) A trip permit must be obtained before entering into Texas.

(2) The trip permit is valid for 20 days from date of purchase.

(3) The trip permit is acceptable for one entry into the state.

(e) [~~(d)~~] Procedures.

(1) A remittance for the trip permit shall be made to the Texas state treasurer in the amount of $50.

(2) The remittance may be in the form of a cashier's check or a money order delivered by mail or wire service to the Texas comptroller's office, Austin.

(3) The receipt from the cashier's check or money order shall be marked "trip permit" and carried in the vehicle for which the tax payment is made.

(f) [~~(e)~~] Limitations. Persons who make more than five entries must obtain an interstate trucker permit.

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

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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

34 TAC §3.180

The Comptroller of Public Accounts proposes an amendment to §3.180, concerning signed statements for purchasing diesel fuel tax free. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are relettered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the amendment will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the amendment is in effect, the public benefit anticipated as a result of enforcing the amended rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Bryant K. Lomax, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §153.205

§3.180. Signed Statements for Purchasing Diesel Fuel Tax Free.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [~~(a)~~] Signed statement numbers. A person who wants to use a signed statement to purchase dyed diesel fuel tax free for use in nonagricultural, nonhighway equipment must apply to the comptroller for an End User Number. A person who wants to use a signed statement to purchase dyed or undyed diesel fuel tax free for exclusive use in agricultural, nonhighway equipment must apply to the comptroller for an Agricultural Exemption Number. A person cannot use a signed statement to purchase tax-free diesel fuel unless the person holds an End User Number or Agricultural Exemption Number that the comptroller has issued.

(c) [~~(b)~~] End User Number. A person may purchase dyed diesel fuel tax free for nonagricultural, nonhighway use by providing the seller with a signed statement that meets the requirements in paragraph (1) and subject to the limitations that are stated in paragraph (2) and (3) of this subsection. Copies of the blank signed statements are available for inspection at the office of the Texas Register. Copies may be obtained from the Comptroller of Public Accounts, P.O. Box 13528, Austin, Texas 78711-3528 or requested by calling 512/463-4600, or our toll-free number 1-800-252-1383. (From a Telecommunication Device for the Deaf (TDD) only, call 512/463-4621 or 1-800-248-4099 toll free) Taxpayers may download copies at www.window.state.tx.us.

(1) The signed statement must include the purchaser's end user number and must specify that:

(A) all diesel fuel purchased is of the type that may not legally be used on the public highway;

(B) all dyed diesel fuel will be used by the buyer and will not be resold; and

(C) none of the dyed diesel fuel will be delivered into the fuel supply tanks of motor vehicles operated on public highways.

(2) A person may buy, and a supplier may sell, dyed diesel fuel tax free using a signed statement subject to the following limitations:

(A) not more than 7,400 gallons may be purchased or sold in a single delivery; or

(B) not more than 10,000 gallons may be purchased or sold to a purchaser during a calendar month. The purchase, sale, or delivery that causes the 10,000 gallon limit to be exceeded during a calendar month is not taxable. Any subsequent purchase or sale, or delivery made during the same calendar month is taxable.
Figure: 34 TAC §3.180(c)(2)(B)

(3) A person who uses dyed diesel fuel exclusively in the original production of oil and gas, or to increase the production of oil and gas, must obtain a letter of exception that authorizes the person to exceed the 10,000 gallon limit. Examples of uses that may occur in the original production or to increase production of oil and gas include the use of dyed diesel fuel to drill, fracture, perforate, squeeze cement, acidize, log, plug back, complete, plug and abandon, install a casing liner, pull or reset a casing liner, swab, drill out a plug, jet, pack gravel or workover, and fuel that is used in a hot oil treatment of a formation. Oil and gas production does not include maintaining the site, mowing, painting, gauging tanks, changing pumps, performing rod or tubing jobs, fishing for rods or tubing, repairing a tubing leak, changing a packer or anchor, performing hot oil or water treatment on casing, tubing or flow lines, and transporting. A person who uses dyed diesel fuel exclusively in the original production or to increase the production of oil and gas, may buy, and a supplier may sell, dyed diesel fuel tax free by using a letter of exception and a signed statement, subject to the following limitations:

(A) not more than 7,400 gallons may be purchased or sold in a single delivery; or

(B) not more than 25,000 gallons may be purchased or sold during a calendar month. The purchase or sale that causes the 25,000 gallon limit to be exceeded during a calendar month is not taxable. Any subsequent purchase or sale made during the same calendar month is taxable.

(d) [~~(c)~~] Agricultural Exemption Number. A person may purchase dyed or undyed diesel fuel tax free for use exclusively in agricultural, nonhighway equipment by providing the seller with a signed statement that meets the requirements that are stated in paragraph (1) of this subsection and subject to the limitations that are stated in this subsection. Copies of the blank signed statements are available for inspection at the office of the Texas Register. Copies may be obtained from the Comptroller of Public Accounts, P.O. Box 13528, Austin, Texas 78711-3528 or requested by calling 512/463-4600, or our toll-free number 1-800-252-1383. (From a Telecommunication Device for the Deaf (TDD) only, call 1-800-248-4099 toll free. In Austin, the local TDD number is 463-4621.) Taxpayers may download copies at www.window.state.tx.us.

(1) The signed statement must include the purchaser's Agricultural Exemption Number and must specify that:

(A) all dyed or undyed diesel fuel purchased will be used exclusively in agricultural, nonhighway equipment;

(B) all dyed or undyed diesel fuel will be used by the buyer and will not be resold; and

(C) none of the dyed or undyed diesel fuel will be delivered into the fuel supply tanks of motor vehicles operated on public highways.

(2) A person may buy, and a supplier may sell, dyed or undyed diesel fuel tax free using a signed statement subject to the following limitations:

(A) not more than 7,400 gallons may be purchased or sold in a single delivery; or

(B) not more than 25,000 gallons may be purchased or sold to a purchaser during a calendar month. The purchase, sale, or delivery that causes the 25,000 gallon limit to be exceeded during a calendar month is not taxable. Any subsequent purchase, sale, or delivery made during the same calendar month is taxable.

(e) [~~(d)~~] A division of a corporation may also use a signed statement to buy diesel fuel tax free if the division:

(1) meets all of the requirements as set out in subsection (c) or (d) [~~subsections (b) or (c)~~] of this section;

(2) does not resell the fuel;

(3) consumes the fuel; and

(4) maintains separate storage apart from other corporate divisions.

(f) [~~(e)~~] The signed statement remains in effect until:

(1) it is revoked in writing by either the buyer or seller; or

(2) the comptroller notifies the supplier in writing that the buyer may no longer make tax-free purchases.

(g) [~~(f)~~] The signed statement must be signed by the buyer or the buyer's authorized representative.

(h) [~~(g)~~] A permitted jobber may purchase dyed diesel fuel using a signed statement under subsection (c) [~~(b)~~] of this section only if the fuel is for the jobber's own use and not for resale. A permitted jobber may not sell diesel fuel tax free by accepting a signed statement.

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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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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34 TAC §3.182

The Comptroller of Public Accounts proposes an amendment to §3.182, concerning motor fuel transporting documents. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are relettered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the amendment will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the amendment is in effect, the public benefit anticipated as a result of enforcing the amended rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Bryant K. Lomax, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §§153.004, 153.103, and 153.204.

§3.182. Motor Fuel Transporting Documents.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [(~~a~~)] Manifest requirements. The transportation of motor fuel as cargo shall be recorded on a cargo manifest or shipping document that is issued at the time the motor fuel is delivered into a cargo tank. The manifest or shipping document shall accompany the cargo until the motor fuel is resold or removed from the cargo tank, and shall be retained for four years for audit purposes.

(c) [(~~b~~)] Information required. The cargo manifest or shipping document shall be issued in not less than duplicate and shall contain the following information:

(1) the type of motor fuel being transported, and if dyed diesel fuel is being transported, a notice that states "Dyed Diesel Fuel, Nontaxable Use Only, Penalty for Taxable Use";

(2) the name and the federal employer identification number or social security number of the carrier. If the federal identification number or social security number of the carrier is not printed on the cargo manifest or shipping document, that information must be in the records of the terminal or bulk plant operator and made available for review when requested;

(3) the quantity of motor fuel in gross gallons;

(4) the temperature and quantity in temperature adjusted gallons when the fuel is loaded at a terminal for export or import or when the sale of gasoline or diesel fuel must comply with §3.190 of this title (relating to Temperature Adjustment Conversion Table);

(5) the percentage of ethanol or methanol contained in the motor fuel;

(6) the types and percentages of cosolvents contained in the motor fuel, if methanol has been added;

(7) the date of loading or movement;

(8) the name and physical address or Terminal Code Number assigned by the United States Internal Revenue Service of the terminal or bulk plant at which the cargo was loaded;

(9) the destination of the cargo;

(10) the name of the seller, consignor, or shipper;

(11) the name, federal employer identification number, permit number if applicable, and physical address of the purchaser or consignee (the federal identification number, permit number, and physical address of the purchaser or consignee must be in the records of the terminal or bulk plant operator and available for review if not printed on the shipping document);

(12) the method of transportation:

(A) if by truck, the license or unit number;

(B) if by barge or boat, the name of the vessel;

(C) if by railway, the rail car number and initial;

(13) the name of the person responsible for payment of the tax, if different from the permitted supplier or distributor. If this information is not printed on the manifest or shipping document, it must be in the records of the terminal operator and made available for review when requested;

(14) the amount of delivery fee assessed under Water Code, §27.3574; and

(15) any other information the comptroller deems necessary for the proper administration of Tax Code, Chapter 153.

(d) [(~~c~~)] Waybills or bill of lading. If a carrier transports motor fuel for which a waybill is required under the regulations of the Texas Railroad Commission, or a bill of lading is required under the regulations of the United States Department of Transportation, or if other similar documentation is required by another regulatory agency, these documents may be used in lieu of the manifest or shipping document prescribed in this section, so long as the waybill, bill of lading, or similar document lists the information described in subsection (c) [(~~b~~)] of this section.

(e) [(~~d~~)] Delivery of cargo manifest or shipping document. One copy of the transporting document shall be delivered to the purchaser at the time of fuel delivery, and the seller shall retain one copy. If a common carrier or contract carrier delivers the fuel, the carrier must also retain one copy.

(1) If the cargo is being loaded at different locations, a notation of the fuel loaded at each location must be made on the cargo manifest, or a separate manifest that covers the fuel or blend material loaded at each location must be issued.

(2) If the cargo is being off-loaded at various locations, then at the time the off-loading is accomplished, a notation of the fuel off-loaded shall be made on the required cargo manifest, or a customer invoice that indicates the location and amount of motor fuel that has been off-loaded at each place shall be prepared. If invoices are used instead of notations on the manifest, the invoices must be attached or cross referenced to the manifest for record purposes. The cargo manifest or a copy of the customer invoice shall be retained with the transporting vehicle until the motor fuel is removed from the cargo tank.

(3) A cargo manifest is not required on motor fuel that an end user purchases on a signed statement and transports in the user's own cargo tank.

(4) If the delivery fee assessed under Water Code, §26.3574, is not shown on the cargo manifest, it must be shown on the invoice that covers the delivery, and be cross referenced to the manifest for record purposes.

(f) [(~~e~~)] Deliveries at different locations. Deliveries to the same purchaser at different locations may be construed to be single deliveries and qualify for temperature adjustment if the total of all deliveries to that customer is 5,000 gallons or more, and if:

(1) the fuel off-loaded at different locations is the same product type (gasoline or diesel fuel);

(2) the delivery is accomplished from the same cargo tank;

(3) proper notations are made on the cargo manifest or customer invoices, or delivery tickets are prepared and kept with the cargo manifest; and

(4) the off-loading occurs within a reasonable time that allows for transit from one location to another.

(g) [(f)] Separate deliveries. Deliveries from more than one cargo tank are presumed to be separate deliveries. This presumption may be overcome if:

(1) the seller is unable to make the requested delivery in a single cargo tank;

(2) the delivery of all the requested fuel was completed within a reasonable time (usually within 24 hours);

(3) the customer would have been able to accept the entire amount requested at one time; and

(4) the customer has previously requested deliveries of 5,000 or more gallons of the type of requested fuel, or the customer has changed business operations and now requires deliveries of 5,000 or more gallons of the type of requested fuel.

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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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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34 TAC §3.183

The Comptroller of Public Accounts proposes an amendment to §3.183, concerning on-highway travel of farm machinery. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are relettered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the amendment will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the amendment is in effect, the public benefit anticipated as a result of enforcing the amended rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Bryant K. Lomax, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §153.119 and §153.222

§3.183. On-Highway Travel of Farm Machinery.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [(a)] Owners or operators of multiple farms, ranches, or similar tracts of land in the same vicinity may move farm tractors, combines, and similar self-propelled farm machinery over the public highways for the purpose of transferring the base of operation of the machinery.

(c) [(b)] Gasoline and diesel fuel used for travel on the highway for any purpose other than for moving the machinery from one tract of land to another to change base of operation shall be considered taxable.

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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Chief Deputy General Counsel
Comptroller of Public Accounts
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34 TAC §3.184

The Comptroller of Public Accounts proposes an amendment to §3.184, concerning assignment of refund claims for tax-paid gasoline exported from Texas. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are relettered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the amendment will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the amendment is in effect, the public benefit anticipated as a result of enforcing the amended rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Bryant K. Lomax, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §153.104 and §153.119

§3.184. Assignment of Refund Claims for Tax-Paid Gasoline Exported from Texas.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [~~(a)~~] Persons qualifying. A nonpermitted person or permitted person who is not eligible to purchase gasoline tax free, residing or maintaining a place of business outside the State of Texas and who purchases 100 gallons or more of gasoline and immediately exports the entire quantity, may assign his right to claim a refund to the permitted distributor from whom the gasoline was purchased or to any permitted distributor who has paid the tax on the gasoline either directly or through another permitted distributor in Texas.

(c) [~~(b)~~] Conditions. When the distributor has secured from the purchaser proof of export required by the comptroller, the distributor may file for refund of the tax paid on the gasoline exported or take credit equal to the gallons exported on any monthly report filed with the comptroller within one year from the first day of the month following the date of delivery to the exporter of the gasoline.

(d) [~~(c)~~] Documentation.

(1) Properly executed assignment of all right to claim tax refund made to the permitted distributor making the sale and claiming tax refund or credit.

(2) Proof of export of tax-paid gasoline including one of the following forms of evidence which shall be secured by the distributor claiming tax refund or credit:

(A) proof of export certified by a United States customs officer if the gasoline is exported from this state to a foreign country;

(B) proof of export certified by port of entry of state of importation if ports of entry are maintained;

(C) proof from the tax officials of the state into which the gasoline was imported that the gasoline has been accounted for by the exporter on that state's tax reports; or

(D) other proof that the gallons have been accounted for to the state into which the gasoline was imported.

(e) [~~(d)~~] When required. An assignment of the right to claim a tax refund on tax-paid gasoline exported from Texas should be executed on sales by the distributor. The proof of export should be retained by the distributor if a credit is taken for assigned export sales on monthly gasoline reports. If refund claims are filed, the proof of export must be submitted with the claim for refund.

(f) [~~(e)~~] Assignment form. The assignment form must be substantially in the form set out as follows.
Figure: 34 TAC §3.184(f)

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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Chief Deputy General Counsel
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34 TAC §3.185

The Comptroller of Public Accounts proposes an amendment to §3.185, concerning diesel tax prepaid user permit. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are renumbered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §153.210.

§3.185. Diesel Tax Prepaid User Permit.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [~~(a)~~] Those who qualify for an agricultural bonded user permit may obtain a diesel tax prepaid user permit instead, if they satisfy the requirements for a diesel tax prepaid user permit.

(c) [~~(b)~~] To qualify for a diesel tax prepaid user permit, an applicant must:

(1) use at least 51% of all the diesel fuel purchased by the applicant for agricultural nonhighway purposes;

(2) not own or operate diesel-powered passenger cars or light trucks that are not within the weight classes listed in subsection (f)[~~(e)~~] of this section; and

(3) have bulk diesel storage tank(s) used only by the applicant.

(d) [~~(c)~~] Use for an agricultural nonhighway purpose means use in nonhighway agricultural equipment, such as a tractor or combine, on a farm or ranch. Use for an agricultural nonhighway purpose does not include use in processing, packaging, or marketing of agricultural products by entities other than the original producer of the agricultural products. A farm or ranch is one or more tracts of land used, either in whole or in part, in the production of crops, livestock, and/or other agricultural products held for sale in the regular course of business. A feed lot, dairy farm, poultry farm, commercial orchard, commercial

nursery, timber operation or similar commercial agricultural operation is a farm or ranch. Timber operations include the production of timber, land preparation, planting, maintenance, and gathering of trees that are commonly grown for commercial timber. An agricultural use includes wildlife management as defined by the Tax Code, §23.51(7). A home garden is not a farm or ranch.

(e) [(d)] An application for a diesel tax prepaid user permit must be made to the comptroller for each vehicle. Permits must be renewed every 12 months.

(f) [(e)] The cost of the permit shall be determined according to the following schedule:
Figure: 34 TAC §3.185 (f)

(g) [(f)] Following are the requirements for a nonrefundable credit.

(1) If the cost of the annual permit is greater than the amount of tax due on the diesel fuel actually consumed during the permit year, a nonrefundable credit equal to the difference may be claimed, provided the required renewal date of the permit is October 1, 1995, or later.

(2) The credit may only be applied against the cost of renewal or purchase of a new diesel tax prepaid user permit for the following year, and the credit is valid for one year beginning with the required renewal date of the permit.

(3) The odometer of the vehicle for which a diesel tax prepaid user permit is held must be maintained in working order. If not, a credit claim cannot be approved.

(h) [(g)] A claim for a nonrefundable credit must be filed on a form that the comptroller furnishes.

(1) A distribution log must be submitted with an application for renewal of a diesel tax prepaid user permit. The distribution log must reflect the following information:

(A) the date of each delivery of diesel fuel into the fuel supply tank of the motor vehicle for which the permit is held;

(B) the number of gallons delivered;

(C) the odometer reading of the motor vehicle at the time of delivery; and

(D) the state license plate number or vehicle identification number of the motor vehicle.

(2) Purchase invoices for diesel fuel delivered into the fuel supply tank of a motor vehicle for which a diesel tax prepaid user permit is held from other than one's own storage, must contain:

(A) the name of the seller;

(B) the name of the purchaser;

(C) the date of delivery;

(D) the number of gallons delivered;

(E) the odometer reading of the motor vehicle at the time of delivery;

(F) the state license plate number or vehicle identification number of the motor vehicle; and

(G) the signature of the recipient.

(3) Records pertaining to odometer repair or replacement.

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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34 TAC §3.187

The Comptroller of Public Accounts proposes an amendment to §3.187, concerning documentation and reporting of imports and exports, import verification numbers, export sales by distributors and suppliers, and diversion numbers. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are renumbered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §153.018.

§3.187. Documentation and Reporting of Imports and Exports, Import Verification Numbers, Export Sales by Distributors and Suppliers, and Diversion Numbers.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [(a)] Imports.

(1) Imports. Motor fuel imported into Texas by or for a seller constitutes an import by that seller. Motor fuel imported into Texas by or for a purchaser constitutes an import by that purchaser.

(2) Import Verification Number. An importer must obtain from the comptroller an import verification number for each load of

gasoline or diesel fuel imported into Texas by truck. An import verification number must be obtained within 72 hours before or after the gasoline or diesel fuel enters Texas. The importer must write the import verification number on the shipping document issued for that fuel.

(3) Documentation. An importer must possess a shipping document created by the terminal or bulk plant where the fuel was loaded (see §3.182 of this title (relating to Motor Fuel Transporting Documents)) for motor fuel imported by any means into Texas.

(c) [~~(b)~~] Exports and export sales.

(1) Exports. Motor fuel exported from Texas by or for a seller constitutes an export by that seller. Motor fuel exported from Texas by or for a purchaser constitutes an export by that purchaser. A permitted distributor or a permitted supplier exports motor fuel when the distributor or supplier ships motor fuel to a point outside the state:

(A) through facilities that the permittee operates;

(B) through delivery by the permittee as consignor to a common or contract carrier, an ocean- going vessel (including ship, tanker, or boat), or a barge, for shipment to a consignee at the out-of-state point; or

(C) through delivery by the permittee to a customs or forwarding agent, for shipment forthwith outside the state.

(2) Export sales. A permitted distributor or permitted supplier makes an export sale when he sells motor fuel in Texas to a non-Texas permitted purchaser who then, prior to any other sale or use in Texas, sends or transports the motor fuel outside the state by a common or contract carrier, an ocean-going vessel (including ship, tanker, or boat), or a barge.

(A) If the purchaser fails to provide or refuses to divulge the final destination of the fuel, which thereby prevents the proper reporting of the fuel export, then the seller shall collect Texas tax at the time of the sale in Texas.

(B) A permitted distributor or supplier who makes an export sale will not be liable for tax on motor fuel that the purchaser diverts provided that the seller has obtained, at the time of sale, documentation from the purchaser that shows that the fuel is to be delivered to a destination outside Texas.

(C) When both parties to the transaction in Texas are permitted distributors or permitted suppliers, the transaction will be reported as a distributor-to-distributor or supplier-to-supplier tax-free sale in Texas, followed by an export or export sale. The last Texas permitted distributor or supplier who holds legal title shall report the export or export sale.

(3) Documentation.

(A) Shipping document. An exporter must possess a shipping document created by the terminal or bulk plant where the fuel was loaded (see §3.182 of this title relating to Motor Fuel Transporting Documents) for motor fuel exported by any means from Texas.

(B) Common or contract carriers. The documents for the distributor's or supplier's records, in addition to other records required, must be supported by a bill of lading issued by the common or contract carrier, ocean-going vessel, or barge listing the consignor and consignee, the points of origin and destination, the number of gallons shipped or transported, the date of export, and the kind of fuel exported.

(C) Proof of export. The comptroller may request proof of export from the distributor or supplier to verify that the motor fuel was exported from Texas. This proof may consist of:

(i) proof of export that a U.S. customs office has certified, if the fuel was exported from this state to a foreign country;

(ii) proof of export that a port of entry of the state of importation has certified, if ports of entry are maintained by that state;

(iii) proof from the tax officials of the state into which the motor fuel was imported, which shows that the exporter has accounted for the motor fuel on the state's tax reports; or

(iv) other proof that the fuel has been reported to the state into which the motor fuel was imported.

(d) [~~(c)~~] Diversion Number. An importer or exporter who diverts the delivery of a load of gasoline or diesel fuel being transported by truck from the destination state or country that is preprinted on the shipping document that has been issued for that fuel to another state or country must obtain a diversion number from the comptroller. A diversion number must be obtained within 72 hours before or after the diversion. The importer, exporter, or common or contract carrier must write the diversion number on the shipping document issued for that fuel.

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 May 13, 2004.

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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

34 TAC §3.189

The Comptroller of Public Accounts proposes an amendment to §3.189, concerning proof of resale. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are renumbered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §§153.103, 153.105(c), 153.204, and 153.206(f).

§3.189. Proof of Resale.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [~~(a)~~] Definition. "Resale" of a gasoline and diesel fuel means to purchase the fuel with the intent of selling the fuel to consumers or others.

(c) [~~(b)~~] Conditions. Any person other than a permitted distributor or permitted supplier purchasing 5,000 gross gallons or more in a single delivery, or in lesser quantities where required by city ordinance, must furnish the seller with a signed statement stating that the fuel purchased is for resale in order to qualify for temperature adjustment. The statement must contain the following information:

(1) the date signed;

(2) the name and address of the seller;

(3) the name and address of the purchaser;

(4) a statement that the fuel purchased is for resale; and

(5) the type of fuel covered by the statement.

(d) [~~(c)~~] Retention. The seller must retain the statement in his files.

(e) [~~(d)~~] Effect. The statement relieves the seller of the responsibility of furnishing additional proof that purchases are for resale when taken in good faith and remains in effect until the statement is revoked in writing by either the purchaser, the seller, or the comptroller.

(f) [~~(e)~~] Statement form. The statement must be substantially in the form set out below or contain information necessary to substantiate resale and the requirements of subsection (c)[~~(b)~~] of this section.
Figure: 34 TAC §3.189 (f)

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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Martin Cherry
Chief Deputy General Counsel
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For further information, please call: (512) 475-0387

34 TAC §3.190

The Comptroller of Public Accounts proposes an amendment to §3.190, concerning temperature adjustment conversion table. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are renumbered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §153.103 and §153.204.

§3.190. Temperature Adjustment Conversion Table.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [~~(a)~~] Basis for temperature adjustment. For purposes of computation of tax, sales of gasoline and diesel fuel, when purchased for resale in single deliveries of 5,000 gallons or more, must be temperature adjusted in volume to 60 degrees Fahrenheit based on the gross metered gallons.

(c) [~~(b)~~] Temperature adjustment method. For the purpose of conversion of actual gasoline and diesel fuel volume to equivalent volume at 60 degrees Fahrenheit, Table 6B of revised ASTM-API-IP Petroleum Measurement Tables may be used in lieu of any conversion table which the comptroller may issue.

(d) [~~(c)~~] Metering.

(1) All sales or deliveries of gasoline or diesel fuel into cargo tanks must be metered except:

(A) deliveries by a person into his own cargo tank when the volume does not require temperature correction and the cargo tank is equipped with a meter to accurately measure in gallons the sale or delivery from the cargo tank;

(B) when deliveries are made as provided by §3.182 of this title (relating to Motor Fuel Transporting Documents);

(C) deliveries by a person from his own storage facility into his own cargo tank with a capacity of less than 5,000 gallons or into a compartmentalized tank from which no single delivery in excess of 5,000 gallons will be made. The capacity must be documented and determined by an independent party using generally accepted industry measurement standards; and

(D) imported diesel fuel and gasoline that is transported in a cargo tank measured according to the conditions stated in subparagraph (C) of this subsection. When delivery of imported fuel must comply with the Texas Tax Code, §153.103 for gasoline and §153.204 for

diesel fuel, the temperature may be taken at the time of loading or at the time of unloading, as determined by the seller and purchaser.

(2) All permitted distributors of gasoline and suppliers of diesel fuel must compute and pay tax based on gross gallons metered except as provided by the Texas Tax Code, §153.103, for gasoline and the Texas Tax Code, §153. 204, for diesel fuel or the number of gallons delivered into a measured cargo tank as authorized by paragraphs (1)(C) and (1)(D) of this subsection.

(e) [~~(d)~~] Temperature. The temperature of gasoline or diesel fuel sold or delivered under the provisions of the Texas Tax Code, §153.103 or §153.204, must be taken and recorded on the cargo manifest at the time of loading of the product. The temperature may be taken by either in-line thermometers or other devices designed to accurately measure the temperature of the delivered fuel at the time of loading.

(f) [~~(e)~~] Testing and accuracy of meters and thermometers or other devices designed to accurately measure the temperature of fuel. Meters must be tested each 90 days or after 5 million gallons throughput, whichever occurs first. The accuracy of any meter being used must be maintained within of 1% of correct volume during all loading or unloading operations. The tests of meters shall be determined by the methods provided by the American Society of Mechanical Engineers-American Petroleum Institute for the Installation, Proving and Operation of Meters in Liquid Hydrocarbon Service. Thermometers or other devices designed to accurately measure the temperature of fuel must be tested each 90 days and must conform to standards set by the American Society of Mechanical Engineers-American Petroleum Institute or National Bureau of Standards.

(g) [~~(f)~~] Records. A record of all tests must be maintained, open for examination by the comptroller, for a period of four years.

(h) [~~(g)~~] Posting of results. The results of the most recent tests on all meters and thermometers or temperature measuring devices being used must be posted in a conspicuous place at each terminal where the tests are required.

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 May 13, 2004.

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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

34 TAC §3.193

The Comptroller of Public Accounts proposes an amendment to §3.193, concerning bad debt deductions. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are renumbered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §§153.1195, 153.2225, and 153.409.

§3.193. Bad Debt Deductions.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [~~(a)~~] Bad debt credit.

(1) A permitted gasoline distributor or diesel fuel supplier may take credit against taxes to be remitted to the comptroller for bad debt on sales.

(2) To establish bad debt credit, a distributor's or supplier's records must show:

(A) date of sale(s);

(B) name and address of purchaser;

(C) invoices reflecting the tax was assessed;

(D) taxes paid by the distributor or supplier;

(E) all payments or credits applied to the account of the purchaser; and

(F) uncollected amounts designated as a bad debt in the distributor's or supplier's records.

(3) To determine the amount of bad debt allowance for tax, all payments or credits in reduction of a customer's account must be applied ratably between motor fuel and other goods sold to that customer, and the credit allowed will be the tax on the number of gallons represented by the motor fuel portion of the bad debt.

(4) The following information must be submitted with the distributor's or supplier's report on which the credit is claimed:

(A) name and address of the purchaser;

(B) Texas taxpayer number or federal identification number or social security number, if available;

(C) beginning and ending dates of sales on which the bad debt is being taken;

(D) number of gallons and dollar amount of bad debt; and

(E) the fuel type (gasoline or diesel fuel).

(c) [~~(b)~~] Credit card sales.

(1) A credit card is defined as any card, plate, key, or like device by which credit is extended to and charged to the purchaser's account.

(2) Sales of fuel into the supply tank of a motor vehicle or motorboat when payment is made through the use and acceptance of a credit card may not be taken as a bad debt credit.

(3) All credit sales to commercial or agricultural customers at locations not open to the general public are subject to the bad debt credit.

(d) [~~(c)~~] Penalty and interest.

(1) If an account is collected which has been written off as a bad debt, interest will accrue from the date the credit was taken.

(2) Penalty will be imposed if the recovered bad debt is not reported and tax is not paid to the state during the reporting period in which the recovery is made or if the comptroller determines that the taxpayer knew or should reasonably have known that the debt was collectible at the time the credit was taken.

(e) [~~(d)~~] Collection of 100% penalty on certain bad checks.

(1) A permitted gasoline distributor or diesel fuel supplier may notify the comptroller of a customer that has issued a check for insufficient funds as payment of a debt or obligation that included the tax on gasoline and/or diesel fuel. Before notifying the comptroller of such an occurrence, the distributor or supplier must have complied with the provisions of subsection (b)(2)-(4) [~~(a)(2)-(4)~~] of this section. When notifying the comptroller of such an occurrence, the distributor or supplier must furnish the comptroller with a photocopy of both sides of the returned check.

(2) The issuer of a bad check identified under paragraph (1) of this subsection may receive a written warning from the comptroller for the first occurrence. The comptroller may assess a penalty equal to 100% of the gasoline and/or diesel fuel tax amount included in the bad check. If assessed, this penalty will be imposed in addition to penalties, interest, and collection actions authorized by the Tax Code.

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 May 13, 2004.

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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 475-0387

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34 TAC §3.196

The Comptroller of Public Accounts proposes an amendment to §3.196, concerning reports, due dates, bonding requirements, and qualifications for annual filers. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are renumbered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §§153.118, 153.218, 153.221, and 153.310.

§3.196. Reports, Due Dates, Bonding Requirements, and Qualifications for Annual Filers.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [~~(a)~~] Reports required.

(1) Interstate truckers as defined by the Tax Code, §153.001(12), and bonded users of diesel fuel as defined by the Tax Code, §153.209, having an average quarterly tax liability of $600 or less have the option of filing quarterly or annual reports. After the method of reporting has been selected, it cannot be changed without permission from the comptroller unless the tax liability for a year exceeds $2,400. If the tax liability during a year exceeds $2,400, a report must be filed for all previous quarters of that year. Future reports must be filed on a quarterly basis.

(2) Interstate truckers and bonded users of diesel fuel having an average quarterly tax liability of more than $600 must file quarterly reports.

(3) Liquefied gas dealers as defined by the Tax Code, §153.304, and liquefied gas interstate truckers as defined by the Tax Code, §153.306, must file annual reports.

(c) [~~(b)~~] Due dates.

(1) The due date for all annual reports is January 25th.

(2) Annual filers may receive a refund for credit gallons accrued during quarterly periods whose due date is not more than one year before the date the annual report was filed.

(A) If the report is filed by the due date, a request for refund must be made on the annual report.

(B) If the annual report is not filed by the due date, quarterly reports for the periods within one year must be filed with the request. The quarterly reports filed shall be assigned the same postmark date as the annual report.

(d) [~~(c)~~] Bonding requirements. Bonded users of diesel fuel reporting annually will be required to post security in the amount of two times the annual tax liability on taxable uses of diesel fuel. The

minimum bond is $10,000. The bond may be waived if it is determined that it is not necessary to protect the state.

(e) [~~(d)~~] Qualifications.

(1) Interstate truckers who obtain permits during the calendar year must file quarterly reports until they are notified that they have the option to file annually.

(2) The annual report for a permit holder going out of business or whose permit is cancelled during the year is due on or before the 25th day of the month following the calendar quarter in which business ceased.

(3) Interstate truckers and diesel fuel users will be notified each March of any filing status change based on the previous year's operation.

(f) [~~(e)~~] Exemptions. Subsections (b), (c), and (e)[~~(a), (b), and (d)~~] of this section do not apply to interstate truckers who are registered under a multistate tax agreement. Reports, due dates and bonding requirements are determined by the multistate tax agreement for interstate truckers registered under the multistate agreement.

(g) [~~(f)~~] Liquefied gas reports. Permitted liquefied gas dealers who are also liquefied gas interstate truckers registered under a multistate tax agreement must file their liquefied gas dealer report with the same frequency that they report their interstate trucker operations under the multistate tax agreement.

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

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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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34 TAC §3.200

The Comptroller of Public Accounts proposes an amendment to §3.200, concerning transportation services for public school districts. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are renumbered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §§153.104, 153.203, and 153.3021.

§3.200. Transportation Services for Public School Districts.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [~~(a)~~] Application. To purchase gasoline or diesel fuel less the state tax and not prepay the liquefied gas tax for vehicles equipped to use liquefied gas, a commercial transportation company providing transportation services to a public school district in Texas must submit to the comptroller an affidavit stating:

(1) that the company has contracted with a specific public school district to provide transportation services (other than charter trips) for the school district;

(2) that motor fuel purchased tax free will be used exclusively by the company to provide the transportation services for the school district; and

(3) the vehicle identification number and vehicle license plate number for each vehicle equipped to use liquefied gas to furnish transportation services exclusively to public school districts.

(c) [~~(b)~~] Exception letter. After review and approval of the affidavit, the comptroller shall issue to the company a letter of exception specifying gasoline and/or diesel fuel used to provide transportation services to a public school district. The letter of exception may be reproduced for diesel fuel suppliers and gasoline distributors. An exception letter shall be issued to the company for specific vehicles operated on liquefied gas which letter may be furnished inspectors when a liquefied gas-powered bus is undergoing a safety inspection and to liquefied gas dealers when purchasing liquefied gas to be placed into the fuel supply tank of the bus.

(d) [~~(c)~~] Records required. A commercial transportation company providing transportation services to a public school district shall keep records (separately for tax-free and tax-paid fuels) showing:

(1) the number of gallons of gasoline, diesel fuel, and liquefied gas on hand on the first day of each month;

(2) the number of gallons of gasoline, diesel fuel, and liquefied gas purchased or received, showing the name of the seller and the date of each purchase;

(3) the date and number of gallons of gasoline, diesel fuel, and liquefied gas delivered into the fuel supply tanks of vehicles used to furnish transportation services to public school districts;

(4) the date and number of gallons of gasoline, diesel fuel, and liquefied gas delivered into the fuel supply tanks of vehicles used to furnish transportation services other than to public school districts;

(5) the date and number of miles traveled to provide transportation services to the public school district, including starting point, destination, purpose of trip, beginning and ending odometer readings, vehicle identification number, and the vehicle license plate number;

(6) the date and number of miles traveled to provide transportation services other than to public school district(s), including the beginning and ending odometer readings, vehicle identification number, and vehicle license plate number.

(e) [(d)] Taxable use. A commercial transportation company forfeits its right to purchase fuel tax free if:

(1) the fuel is sold other than to a public school district which the commercial transportation company has entered into a contract to provide transportation services; or

(2) the fuel is used in a vehicle for any purpose other than providing transportation services to a public school district.

(f) [(e)] Cancellation or completion of contract. A commercial transportation company shall report to the comptroller within five days of the cancellation or completion of a contract with a public school district:

(1) the total number of gallons of tax-free gasoline and/or diesel fuel on hand in storage tanks and in the fuel supply tanks of motor vehicles, and remit the tax due on the ending tax free inventory; and/or

(2) in the case of a liquefied gas vehicle, obtain a liquefied gas tax decal for previously excepted vehicles used to provide transportation services under the canceled/completed contract.

(g) [(f)] Charter trips. A commercial transportation company that charters for special events on a round-trip basis for a public school district may claim a refund for the fuel used in the vehicle.

(1) The refund shall be computed by starting the trip with a full fuel supply tank or tanks, maintaining records of the fuel delivered into the fuel supply tank or tanks of the vehicle during the trip, and filling the fuel supply tank or tanks upon arrival back at the starting destination. The number of gallons delivered into the fuel supply tank or tanks after the start of the trip will be the number of gallons on which a refund may be claimed.

(2) The records required by subsection (d)(5)[(c)(5)] of this section shall also be maintained for each charter trip.

(3) The commercial transportation company shall keep a copy of the billing to the school district for the trip.

(h) [(g)] Refunds. A commercial transportation company providing transportation services to a public school district may file a claim for refund of state taxes paid on gasoline and diesel fuel used for such transportation purposes.

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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Martin Cherry
Chief Deputy General Counsel
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For further information, please call: (512) 475-0387

34 TAC §3.202

The Comptroller of Public Accounts proposes an amendment to §3.202, concerning common and contract carrier registration, reports, due dates, and administrative remedies. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are renumbered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §153.003.

§3.202. Common and Contract Carrier Registration, Reports, Due Dates, and Administrative Remedies.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [(a)] Registration. A common or contract carrier transporting gasoline or diesel fuel by truck in Texas is required to register with the comptroller (see §3.171 of this title (relating to Records Required; Information Required)).

(c) [(b)] Report required. Every calendar quarter a common or contract carrier must report to the comptroller information relating to the interstate and intrastate transportation of gasoline and diesel fuel by truck. A common or contract carrier that does not receive a report form or does not receive the correct report form from the comptroller is not relieved of the responsibility of filing the report.

(d) [(c)] Due date. The common or contract carrier report is due on the 25th day of the month following the end of each calendar quarter. The due date for the quarter ending September 30, 2000 is extended to January 25, 2001. Common or contract carriers must report information regarding the interstate and intrastate transportation of gasoline and diesel fuel by truck during September 2000 on the fourth quarter 2000 report, which is due on or before January 25, 2001.

(e) [(d)] Administrative remedies for violation of Tax Code, Chapter 153, Subchapter A.

(1) The comptroller may assess a penalty not to exceed $200 against a common or contract carrier that fails to register or provide registration information to the comptroller.

(2) The comptroller may assess a penalty not to exceed $200 against a common or contract carrier that fails to file a report.

Each calendar quarter that a common or contract carrier fails to file a report with the comptroller is a separate violation.

(3) The comptroller may assess a penalty not to exceed $25 for each unreported truck load of gasoline or diesel fuel transported in Texas against a common or contract carrier that fails to file a report detailing the carrier's transportation of gasoline or diesel fuel by truck.

(4) The comptroller will send notice to the common or contract carrier that a penalty is being assessed. The common or contract carrier may request a redetermination within 30 days of the date of the notice under the terms of §§1.1-1.42 of this title (relating to Rules of Practice and Procedure).

(5) An oral hearing at the office of the Comptroller of Public Accounts in Austin, Texas, may be requested.

(6) The standard of proof in an administrative hearing pursuant to this section is by a preponderance of the evidence, unless otherwise provided by statute.

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

Filed with the Office of the Secretary of State on May 13, 2004.

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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 475-0387

34 TAC §3.203

The Comptroller of Public Accounts proposes an amendment to §3.203, concerning diesel fuel tax exemption for water, fuel ethanol, and biodiesel mixtures. The amendment incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to provide for the repeal of Tax Code, Chapter 153, and to add Tax Code, Chapter 162, to replace the repealed chapter.

Subsection (a) is amended to clarify the date through which the current rule is applicable and to provide reference to the new motor fuel subchapter of the Texas Administrative Code that becomes effective January 1, 2004. Other subsections are renumbered as applicable.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code §111.102, 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 §153.203 (a)(11) and §153.203(b).

§3.203. Diesel Fuel Tax Exemption for Water, Fuel Ethanol, and Biodiesel Mixtures.

(a) This rule applies only to motor fuel transactions that take place prior to January 1, 2004. Motor fuel transactions that occur on or after January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter S.

(b) [~~(a)~~] Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Water-based diesel fuel--a combination of water, petroleum diesel fuel, emulsifier, and seasonal additives (when necessary) into an emulsion that is suitable or used for the propulsion of a diesel-powered motor vehicle.

(2) Fuel ethanol--alcohol that is made from agricultural products and bioethanol that is made from cellulosic biomass materials.

(3) Biodiesel--a petroleum diesel fuel substitute that is manufactured from vegetable oils, animal fats, or recycled greases combined with alcohol (ethanol or methanol) in the transesterification process.

(c) [~~(b)~~] Diesel fuel tax exception. The tax imposed on the first sale or use of diesel fuel in this state does not apply to the volume of water, fuel ethanol, or biodiesel that is blended with taxable diesel fuel, when the finished product is clearly identified on the retail pump, storage tank, and sales invoice as a combination of diesel fuel and water, fuel ethanol, or biodiesel.

(d) [~~(c)~~] Invoice documentation.

(1) The volume of water, fuel ethanol, or biodiesel that is combined with taxable diesel fuel must be identified on the sales invoice on each sales transaction after the water, fuel ethanol, or biodiesel is first blended with taxable diesel fuel, and must continue to be identified on sales invoices until the blended product is sold to the ultimate consumer.

(2) A sales invoice must:

(A) identify a water-based diesel fuel, ethanol blended diesel fuel, or biodiesel by a commonly accepted commercial or industry name for the blended product;

(B) list the volume in gallons (rounded to the nearest whole gallon) or the percentage (rounded to the nearest tenth of one percent) of the blended product that is water, fuel ethanol, or biodiesel;

(C) list the volume in gallons (rounded to the nearest whole gallon) or the percentage (rounded to the nearest tenth of one percent) of the blended product that is taxable diesel fuel. Taxable diesel fuel includes emulsifiers and additives, but not water, fuel ethanol, or biodiesel; and

(D) list the basis of calculating the tax (if a taxable sale) as either $0.20 for each gallon of taxable diesel fuel in the blended product or a ratable tax rate based on the percent of taxable diesel in the blended product. For example, the invoice for the sale of 100 gallons that is a blend of 20% water and 80% taxable diesel fuel may list: state diesel fuel tax of $0.20 per gallon on 80 gallons, or state diesel fuel tax of $0.16 per gallon on 100 gallons of water-based diesel fuel.

(e) [~~(d)~~] Notice required on storage tank and retail pump.

(1) A notice must be posted in a conspicuous location on each storage tank and retail pump from the time that the water, fuel ethanol, or biodiesel is first blended with taxable diesel fuel until the blended product is sold to the ultimate consumer, and state the volume percentage of water, fuel ethanol, or biodiesel that is blended with petroleum diesel fuel.

(2) The notice must:

(A) identify the product by the common industry name or commercial name of the blended product,

(B) state the percentage (rounded to the nearest tenth of one percent) of the finished blended product that is water, fuel ethanol, or biodiesel, and

(C) state the percentage (rounded to the nearest tenth percent of one percent) of the finished blended product that is taxable diesel fuel. Taxable diesel fuel includes emulsifiers and additives, but not water, fuel ethanol, or biodiesel.

(f) [~~(e)~~] Refund of diesel tax paid. The ultimate consumer who has paid tax on the percentage of product that is water, fuel ethanol, or biodiesel may file a claim for refund of taxes that have been paid on the volume of water, fuel ethanol, or biodiesel that is blended with taxable diesel fuel as provided by §3.173 of this title (relating to Refunds on Gasoline and Diesel Fuel Tax). The refund claim must be supported with purchase invoice(s) as described in subsection (d)[~~(c)~~] of this section. The total volume of diesel fuel that is purchased is presumed to be taxable diesel fuel if the purchase invoice does not meet the requirements of subsection (d)[~~(c)~~] of this section.

(g) [~~(f)~~] Commercial motor vehicles licensed under the International Fuel Tax Agreement (IFTA).

(1) A water-based diesel fuel, ethanol blended diesel fuel, or biodiesel fuel that is delivered into the fuel supply tank(s) of a motor vehicle that is licensed under the IFTA is presumed to be used in the jurisdiction in which it was purchased. This presumption may be overcome if it is shown that the total amount of water-based diesel fuel, ethanol blended diesel fuel, or biodiesel fuel that is purchased in a jurisdiction is greater than the amount of total diesel fuel used in that jurisdiction by all diesel-powered motor vehicles that the IFTA licensee operates.

(2) In calculating the IFTA fleet average mile-per-gallon, the total gallons of diesel fuel that are consumed includes the total gallons of water-based diesel fuel, ethanol blended diesel fuel, or biodiesel.

(3) An IFTA licensee who overpays the tax on a water-based diesel fuel, ethanol blended diesel fuel, or biodiesel fuel by way of an IFTA tax return may request a refund. A refund claim must be supported with purchase invoice(s) as described in subsection (d)[~~(c)~~] of this section. The total volume of diesel fuel that is purchased is presumed to be taxable diesel fuel if the purchase invoice(s) do not meet the requirements of subsection (d)[~~(c)~~] of this section.

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

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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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SUBCHAPTER S. MOTOR FUEL TAX

34 TAC §3.744

The Comptroller of Public Accounts proposes a new §3.744, concerning liquefied gas tax decal. The new rule incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to add Tax Code, Chapter 162, relating to motor fuel taxes and the repeal of Tax Code, Chapter 153. The new rule provides a liquefied gas decal rate schedule, sets out exceptions to liquefied gas tax, discusses the display of decals, and provides guidance for refunds of prepaid liquefied gas tax.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas, 78711.

The new rule is proposed 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 Tax Code, Title 2.

The new rule implements the Tax Code, §§162.302, 162.3021, 162.305, 162.307, 162.309, and 162.311.

§3.744. Liquefied Gas Tax Decal. (Tax Code, §§162.302, 162.3021, 162.305, 162.307, 162.309, and 162.311).

(a) Effective date. This rule applies only to motor fuel transactions that take place on or after January 1, 2004. Motor fuel transactions that occur prior to January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter L.

(b) Use of decal. Except as provided in subsections (c), (d), and (g), a person who operates a motor vehicle that is required to be licensed in Texas for use on the public highways of Texas and that is powered by natural gas, methane, ethane, propane, butane, or a mixture of those gases, including a motor vehicle equipped to use liquefied gas interchangeably with another motor fuel, must:

(1) obtain from the comptroller a liquefied gas decal; and

(2) prepay the liquefied gas tax to the comptroller on an annual basis.

(c) Motor Vehicle Dealer. A motor vehicle dealer registered under Transportation Code, Chapter 503, must pay the liquefied gas tax to a licensed liquefied gas dealer when the fuel is delivered into

the fuel supply tanks of each motor vehicle that display a motor vehicle dealer decal and that is held for resale.

(d) Interstate trucker. An interstate trucker registered under a multistate tax agreement (International Fuel Tax Agreement), must pay the liquefied gas tax to a licensed liquefied gas dealer when the fuel is delivered into the fuel supply tanks of motor vehicles that have two axles and a registered gross weight in excess of 26,000 pounds; have three or more axles, or are used in combination and the registered gross weight of the combination exceeds 26,000 pounds, and that display current multistate tax agreement (International Fuel Tax Agreement) decals.

(e) Vehicle registered in another state. A liquefied gas tax decal cannot be issued to a motor vehicle registered in a state other than Texas. Owners of such vehicles must pay tax to a licensed liquefied gas dealer on fuel delivered into the fuel supply tanks.

(f) Application. Each person purchasing liquefied gas for use in a liquefied gas powered motor vehicle must submit an annual application to the comptroller for each vehicle.

(1) Initial application. An applicant initially applying for a liquefied gas tax decal for a Class A- F motor vehicle must purchase a decal based on an estimate of miles that will be driven during the next one-year period.

(2) Renewal. The applicant must produce an ending odometer reading on the renewal application. In the absence of an ending odometer reading, the previous year's mileage will be presumed to be at least 15,000 miles. Applications for the upcoming year should be submitted during the month of expiration of the current decal.

(A) The liquefied gas tax does not apply to miles traveled outside the state. A record of miles traveled by the motor vehicle outside Texas must be maintained and submitted with the renewal each year. The record must include the date(s) of travel, beginning and ending odometer readings and destination.

(B) Special use vehicles. Vehicles required to be licensed for highway use but whose main purpose, design, and use is off the highway may renew a liquefied gas decal for a rate less than the mileage indicated on the odometer if a record or log indicating the miles traveled on the highway by the vehicle is maintained and attached to the renewal application.

(g) Exceptions.

(1) School district transportation and county exceptions. The liquefied gas tax does not apply to liquefied gas sold to public school districts and counties in this state, or to commercial transportation companies providing transportation services to public school districts in this state. These transportation companies must obtain letters of exception from the comptroller, as discussed in §3.758 of this title (relating to Transportation Services for Texas Public School Districts).

(2) Decal not required. A public school district, a commercial transportation company providing transportation services to a public school district and holding a valid letter of exception from the comptroller, or a county in this state operating a motor vehicle powered by liquefied gas is not required to prepay the liquefied gas tax and obtain a decal for the motor vehicle.

(h) Rate schedule.

(1) The following rate schedule (based on mileage driven the previous year) applies.
Figure: 34 TAC §3.744(h)(1)

(2) Transit company. A special use liquefied gas tax decal and tax is required for the following type of vehicles: Class T: Transit carrier vehicles operated by a transit company, $444.

(i) Display of decal. The decal shall be affixed to the inside, lower right corner of the windshield (passenger side) of the vehicle. An expired or invalid liquefied gas tax decals shall be removed before installing a new decal or transferring ownership of the motor vehicle.

(j) Refunds; transfer of decal. If a motor vehicle bearing a liquefied gas tax decal is sold, transferred, destroyed, or the liquefied gas carburetor system (regulator or fuel supply tank) is removed from the motor vehicle the owner is entitled to a refund of the unused portion of the advanced taxes paid for the decal year. The owner must submit to the comptroller the liquefied gas tax decal with an affidavit identifying the motor vehicle and circumstances for requesting a refund. The comptroller shall refund that portion of the tax payment that corresponds to the number of complete months remaining in the decal year.

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 May 14, 2004.

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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

34 TAC §3.747

The Comptroller of Public Accounts proposes a new §3.747, concerning trip permit in lieu of interstate trucker license. The new rule incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to add Tax Code, Chapter 162, relating to motor fuel taxes and the repeal of Tax Code, Chapter 153. The new rule provides qualification for a trip permit, conditions for trip permit use, procedures for obtaining trip permit, and limitations on the use of trip permits.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas, 78711.

The new rule is proposed 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 Tax Code, Title 2.

The new rule implements Tax Code, §§162.003, 162.106, 162.110, 162.207, and 162.211

§3.747. Trip Permit in Lieu of Interstate Trucker License. (Tax Code, §§162.003, 162.106, 162.110, 162.207, and 162.211)

(a) This rule applies only to motor fuel transactions that take place on or after January 1, 2004. Motor fuel transactions that occur prior to January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter L.

(b) Who may qualify. A person entering Texas for commercial purposes with a motor vehicle that has two axles and a registered gross weight in excess of 26,000 pounds; or has three or more axles, or is used in combination and the registered gross weight of the combination exceeds 26,000 pounds, may purchase a temporary trip permit in lieu of the required interstate trucker license or registration under a multistate tax agreement (International Fuel Tax Agreement) if no more than five entries into the state are made during a calendar year.

(c) Conditions.

(1) A trip permit must be obtained before or at the time of entry into Texas.

(2) The trip permit is valid for 20 days from date of purchase.

(3) The trip permit may be used for only one entry into the state.

(d) Procedures.

(1) A fee of $50 for the trip permit shall be paid to the Texas comptroller.

(2) The fee may be paid in the form of a cashier's check or a money order delivered by mail or wire service to the Texas comptroller's office, Austin.

(3) The receipt from the cashier's check or money order shall be marked "trip permit" and, identify the motor vehicle by license plate number or the manufacture's vehicle identification number.

(4) The receipt must be carried in the vehicle for which the tax payment is made.

(e) Limitations. Persons who make more than five entries in a calendar year must obtain an interstate trucker license or register under a multistate tax agreement (International Fuel Tax Agreement).

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

Filed with the Office of the Secretary of State on May 14, 2004.

TRD-200403272
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 475-0387

34 TAC §3.748

The Comptroller of Public Accounts proposes a new §3.748, concerning signed statements for purchasing dyed diesel fuel tax free. The new rule incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to add Tax Code, Chapter 162, relating to motor fuel taxes and the repeal of Tax Code, Chapter 153. The new rule provides registration for end user numbers, sets out the content of a signed statement, and describes the limitations on the use of signed statements.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas, 78711.

The new rule is proposed 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 Tax Code, Title 2.

The new rule implements Tax Code, §162.206.

§3.748. Signed Statements for Purchasing Dyed Diesel Fuel Tax Free. (Tax Code, §162.206)

(a) This rule applies only to motor fuel transactions that take place on or after January 1, 2004. Motor fuel transactions that occur prior to January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter L.

(b) End User Number. A person who wants to use a signed statement to purchase dyed diesel fuel tax free for use in nonhighway equipment must apply to the comptroller for an End User Number. The comptroller will issue to a qualified applicant an End User Number with a prefix of DD (for non-agriculture off road equipment) or AG (for agriculture off road equipment) depending on the manner in which the applicant will use the dyed diesel fuel. A person cannot use a signed statement to purchase tax-free dyed diesel fuel unless the person holds an End User Number issued by the comptroller.

(c) Signed Statement. A person with a valid End User Number may purchase dyed diesel fuel tax free for nonhighway use by providing the seller with a signed statement subject to the limitations that are stated in paragraphs (2), (3) and (4) of this subsection. Copies of the blank signed statements are available for inspection at the office of the Texas Register. Copies may be obtained from the Comptroller of Public Accounts, P.O. Box 13528, Austin, Texas 78711-3528 or requested by calling 512/463-4600, or our toll-free number 1-800-252-1383. (From a Telecommunication Device for the Deaf (TDD) only, call 512/463-4621 or 1-800-248-4099 toll free) Taxpayers may download copies at www.window.state.tx.us.

(1) The signed statement must include the purchaser's End User Number, must be signed by the buyer or the buyer's authorized representative, and must specify that:

(A) only dyed diesel fuel will be purchased using the signed statement;

(B) all dyed diesel fuel will be used by the buyer and will not be resold; and

(C) none of the dyed diesel fuel will be delivered into the fuel supply tanks of motor vehicles operated on public highways.

(2) A person issued an End User Number beginning with DD may buy, and a licensed diesel fuel supplier, permissive supplier, or

distributor may sell, dyed diesel fuel tax free using a signed statement subject to the following limitations:

(A) not more than 7,400 gallons of dyed diesel fuel may be purchased or sold in a single delivery; or

(B) not more that 10,000 gallons of dyed diesel fuel may be purchased or sold to a purchaser during a month. The purchase, sale, or delivery that causes the 10,000 gallon limit to be exceeded during a month is not taxable. Any subsequent purchase, sale, or delivery made during the same month is taxable.

(3) A person who has been issued an end user number beginning with DD and who uses the dyed diesel fuel exclusively in the original production of oil and gas, or to increase the production of oil and gas, must obtain a letter of exception authorizing the person to exceed the 10,000 gallon limit. Examples of uses that may occur in the original production or to increase production of oil and gas include the use of dyed diesel fuel to drill, fracture, perforate, squeeze cement, acidize, log, plug back, complete, plug and abandon, install a casing liner, pull or reset a casing liner, swab, drill out a plug, jet, pack gravel or workover, and perform a hot oil treatment on a formation. Oil and gas production does not include maintaining the site, mowing, painting, gauging tanks, changing pumps, performing rod or tubing jobs, fishing for rods or tubing, repairing a tubing leak, changing a packer or anchor, performing hot oil or water treatment on casing, tubing or flow lines, and transporting. A person who uses dyed diesel fuel exclusively in the original production of oil and gas or to increase the production of oil and gas, may buy, and a licensed diesel fuel supplier, permissive supplier, or distributor may sell, dyed diesel fuel tax free by using a letter of exception and a signed statement, subject to the following limitations:

(A) not more than 7,400 gallons of dyed diesel fuel may be purchased or sold in a single delivery; or

(B) not more than 25,000 gallons of dyed diesel fuel may be purchased or sold to a purchaser during a calendar month. The purchase, sale, or delivery that causes the 25,000 gallon limit to be exceeded during a calendar month is not taxable. Any subsequent purchase, sale, or delivery made during the same calendar month is taxable.

(4) A person who has been issued an end user number beginning with AG and who uses dyed diesel fuel exclusively for an agricultural purpose as described in Tax Code, §162.001, may buy, and a diesel fuel licensed supplier, permissive supplier, or distributor may sell, dyed diesel fuel tax free using a signed statement subject to the following limitations:

(A) not more that 7,400 gallons of dyed diesel fuel may be purchased or sold in a single delivery; or

(B) not more than 25,000 gallons of dyed diesel fuel may be purchased or sold to an end user during a calendar month. The purchase, sale, or delivery that causes the 25,000 gallon limit to be exceeded during a calendar month is not taxable. Any subsequent purchase, sale, or delivery made during the same calendar month is taxable.

Figure: 34 TAC §3.748 (c)(4)(B)

(d) A person who exceeds the limitations in subsection (c) shall be required to obtain a dyed diesel fuel bonded user license.

(e) A separate operating division of a corporation may apply for and receive an End User Number to buy dyed diesel fuel tax free using a signed statement if the division:

(1) does not resell the fuel;

(2) consumes the fuel; and

(3) maintains separate storage apart from other corporate divisions.

(f) The signed statement remains in effect until:

(1) it is revoked in writing by either the buyer or seller; or

(2) the comptroller notifies the supplier or distributor in writing or by means of electronic transmission that the buyer may no longer make tax-free purchases.

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 May 14, 2004.

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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

34 TAC §3.753

The Comptroller of Public Accounts proposes new §3.753, concerning diesel fuel tax exemption for water, fuel ethanol, biodiesel, and biodiesel mixtures. The new rule incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to add Tax Code, Chapter 162, relating to motor fuel taxes and the repeal of Tax Code, Chapter 153. The new rule provides an exception from the motor fuels tax on biodiesel or to the volume of water, ethanol, or biodiesel blended with taxable diesel fuel. The new rule provides definitions, invoice documentation requirements, storage tank and retail pump labeling requirements, refund procedures, and reporting requirements of interstate commercial carriers licensed under the International Fuel Tax Agreement.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

The new rule is proposed 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 Tax Code, Title 2.

The amendment implements Tax Code, §§162.003, 162.204, and 162.227.

§3.753. Diesel Fuel Tax Exemption for Water, Fuel Ethanol, Biodiesel, and Biodiesel Mixtures.(Tax Code, §§162.003, 162.204, and 162.227).

(a) This rule applies only to motor fuel transactions that take place on or after January 1, 2004. Motor fuel transactions that occur prior to January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter L.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Water-based diesel fuel--a combination of water, petroleum diesel fuel, emulsifier, and seasonal additives (when necessary) into an emulsion that is suitable or used for the propulsion of a diesel-powered motor vehicle.

(2) Fuel ethanol--alcohol that is made from agricultural products and bioethanol that is made from cellulosic biomass materials.

(3) Biodiesel--a fuel comprised of monoalkyl esters of long chain fatty acids generally derived from vegetable oils or fats, designated B100, and meeting the requirements of ASTM D 6751.

(4) Biodiesel Blend--a blend of biodiesel fuel meeting ASTM D 6751 with petroleum based diesel fuel, designated Bxx where xx represents the volume percentage of biodiesel fuel in the blend. (Example: B20 is 20% biodiesel and 80% petroleum diesel)

(c) Diesel fuel tax exception. The tax imposed on the first sale or use of diesel fuel in this state does not apply to biodiesel or to the volume of water, fuel ethanol, or biodiesel that is blended with taxable diesel fuel, when the finished product is clearly identified on the retail pump, storage tank, and sales invoice as biodiesel or a combination of diesel fuel and water, fuel ethanol, or biodiesel.

(d) Invoice documentation.

(1) The volume of biodiesel must be identified on the sales invoice on each sales transaction, and must continue to be identified on sales invoices until the blended product is sold to the ultimate consumer.

(2) The volume of water, fuel ethanol, or biodiesel that is combined with taxable diesel fuel must be identified on the sales invoice on each sales transaction after the water, fuel ethanol, or biodiesel is first blended with taxable diesel fuel, and must continue to be identified on sales invoices until the blended product is sold to the ultimate consumer.

(3) A sales invoice must:

(A) identify a water-based diesel fuel, ethanol blended diesel fuel, biodiesel, or biodiesel blend by a commonly accepted commercial or industry name for the blended product;

(B) list the volume in gallons (rounded to the nearest whole gallon) or the percentage (rounded to the nearest tenth of one percent) of the blended product that is water, fuel ethanol, or biodiesel;

(C) list the volume in gallons (rounded to the nearest whole gallon) or the percentage (rounded to the nearest tenth of one percent) of the blended product that is taxable diesel fuel. Taxable diesel fuel includes emulsifiers and additives, but not water, fuel ethanol, or biodiesel; and

(D) list the basis of calculating the tax (if a taxable sale) as either $0.20 for each gallon of taxable diesel fuel in the blended product or a ratable tax rate based on the percent of taxable diesel in the blended product. For example, the invoice for the sale of 100 gallons that is a blend of 20% water and 80% taxable diesel fuel may list: state diesel fuel tax of $0.20 per gallon on 80 gallons, or state diesel fuel tax of $0.16 per gallon on 100 gallons of water-based diesel fuel.

(e) Notice required on storage tank and retail pump.

(1) A notice must be posted in a conspicuous location on each storage tank and retail pump from which biodiesel is stored or sold until sold to the ultimate consumer.

(2) A notice must be posted in a conspicuous location on each storage tank and retail pump from the time that the water, fuel ethanol, or biodiesel is first blended with taxable diesel fuel until the blended product is sold to the ultimate consumer, and state the volume percentage of water, fuel ethanol, or biodiesel that is blended with petroleum diesel fuel.

(3) The notice must:

(A) identify the product by the common industry name or commercial name of the blended product,

(B) state the percentage (rounded to the nearest tenth of one percent) of the finished blended product that is water, fuel ethanol, or biodiesel, and

(C) state the percentage (rounded to the nearest tenth percent of one percent) of the finished blended product that is taxable diesel fuel. Taxable diesel fuel includes emulsifiers and additives, but not water, fuel ethanol, or biodiesel.

(f) Refund of diesel tax paid. The ultimate consumer who has paid tax on biodiesel or on the percentage of product that is water, fuel ethanol, or biodiesel may file a claim for refund of taxes that have been paid on biodiesel or on the volume of water, fuel ethanol, or biodiesel that is blended with taxable diesel fuel as provided by §3.742 of this title (relating to Refunds on Gasoline and Diesel Fuel Tax). The refund claim must be supported with purchase invoice(s) as described in subsection (d) of this section. The total volume of diesel fuel that is purchased is presumed to be taxable diesel fuel if the purchase invoice does not meet the requirements of subsection (d) of this section.

(g) Commercial motor vehicles licensed under the International Fuel Tax Agreement (IFTA).

(1) A water-based diesel fuel, ethanol blended diesel fuel, biodiesel, or biodiesel blend that is delivered into the fuel supply tank(s) of a motor vehicle that is licensed under the IFTA is presumed to be used in the jurisdiction in which it was purchased. This presumption may be overcome if it is shown that the total amount of water-based diesel fuel, ethanol blended diesel fuel, biodiesel, or biodiesel blend that is purchased in other IFTA jurisdictions is greater than the amount of total diesel fuel used in other IFTA jurisdictions by all diesel-powered motor vehicles that the IFTA licensee operates.

(2) In calculating the IFTA fleet average mile-per-gallon, the total gallons of diesel fuel that are consumed includes the total gallons of water-based diesel fuel, ethanol blended diesel fuel, biodiesel, or biodiesel blend.

(3) An IFTA licensee who overpays the tax on a water-based diesel fuel, ethanol blended diesel fuel, biodiesel, or biodiesel blend by way of an IFTA tax return may request a refund from the comptroller. A refund claim must be supported with purchase invoice(s) as described in subsection (d) of this section. The total volume of diesel fuel that is purchased is presumed to be taxable diesel fuel if the purchase invoice(s) do not meet the requirements of subsection (d) of this section.

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

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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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34 TAC §3.758

The Comptroller of Public Accounts proposes new §3.758, concerning transportation services for Texas public school districts. The new rule incorporates legislative changes in House Bill 2458, 78th Legislature, 2003, to add Tax Code, Chapter 162, relating to motor fuel taxes and the repeal of Tax Code, Chapter 153. The new rule prescribes the application, exception letter, record requirements, refunds, and method to compute taxable use by a commercial transportation company providing transportation services for a public school district in Texas.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

The new rule is proposed 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 Tax Code, Title 2.

The amendment implements Tax Code, §§162.104, 162.125, 162.204, 162.227, and 162.3041.

§3.758. Transportation Services for Texas Public School Districts.(Tax Code, §§162.104, 162.125, 162.204, 162.227, and 162.3041).

(a) Effective date. This rule applies only to motor fuel transactions that take place on or after January 1, 2004. Motor fuel transactions that occur prior to January 1, 2004, will be governed by sections in Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter L.

(b) Application. To purchase gasoline or diesel fuel less the state tax and not prepay the liquefied gas tax for vehicles equipped to use liquefied gas, a commercial transportation company that provides transportation services to a public school district in Texas must submit to the comptroller an affidavit stating:

(1) that the company has contracted with a specific public school district to provide transportation services (other than charter trips) for the school district;

(2) that motor fuel purchased tax free will be used exclusively by the company to provide the transportation services for the school district; and

(3) the vehicle identification number and vehicle license plate number for each vehicle equipped to use liquefied gas to furnish transportation services exclusively to public school districts in Texas.

(c) Exception letter. After review and approval of the affidavit, the comptroller shall issue to the company a letter of exception specifying that the company may purchase tax free gasoline and/or diesel fuel used to provide transportation services to a public school district in Texas. The letter of exception may be reproduced for licensed suppliers and licensed distributors. An exception letter shall be issued to the company for specific vehicles operated using liquefied gas. The letter may be furnished to inspectors when a liquefied gas-powered bus is undergoing a safety inspection and to liquefied gas dealers when the company purchases liquefied gas tax free to be placed into the fuel supply tank of the bus.

(d) Records required. A commercial transportation company providing transportation services to a Texas public school district shall keep separate records for tax-free and tax-paid fuels. Both sets of records must show:

(1) the number of gallons of gasoline, diesel fuel, and liquefied gas on hand on the first day of each month;

(2) the number of gallons of gasoline, diesel fuel, and liquefied gas purchased or received, showing the name of the seller and the date of each purchase;

(3) the date and number of gallons of gasoline, diesel fuel, and liquefied gas delivered into the fuel supply tanks of vehicles used to furnish transportation services to public school districts;

(4) the date and number of gallons of gasoline, diesel fuel, and liquefied gas delivered into the fuel supply tanks of vehicles used to furnish transportation services other than to public school districts;

(5) the date and number of miles traveled to provide transportation services for the public school district, including starting point, destination, purpose of trip, beginning and ending odometer readings, vehicle identification number, and the vehicle license plate number;

(6) the date and number of miles traveled to provide transportation services for customers other than public school district(s), including the beginning and ending odometer readings, vehicle identification number, and vehicle license plate number of the vehicle so used.

(e) Taxable use. A commercial transportation company forfeits its right to purchase fuel tax free if:

(1) the fuel is sold, other than to a Texas public school district for which the commercial transportation company provides transportation services; or

(2) the fuel is used in a vehicle for any purpose other than providing transportation services for a Texas public school district.

(f) Cancellation or completion of contract. A commercial transportation company shall report the following to the comptroller within five days of the cancellation or completion of a contract with a Texas public school district:

(1) the total number of gallons of tax-free gasoline and/or diesel fuel on hand in storage tanks and in the fuel supply tanks of motor vehicles, and remit the tax due on the ending tax-free inventory; and/or

(2) in the case of a liquefied gas vehicle, obtain a liquefied gas tax decal for previously excepted vehicles used to provide transportation services under the canceled/completed contract.

(g) Charter trips. A commercial transportation company that charters round-trip transportation to special events for a Texas public school district may claim a refund for the fuel used in the charter vehicle.

(1) The refund shall be computed by starting the trip with a full fuel supply tank or tanks, maintaining records of the fuel delivered into the fuel supply tank or tanks of the vehicle during the trip, and filling the fuel supply tank or tanks upon arrival back at the origination point. The number of gallons delivered into the fuel supply tank or tanks after the start of the trip will be the number of gallons upon which the charter company may claim a tax refund.

(2) The records required by subsection (d)(5) of this section shall also be maintained for each charter trip.

(3) The commercial transportation company shall keep a copy of the billing to the school district for the trip.

(h) Refunds. A commercial transportation company providing transportation services to a Texas public school district may file a claim for refund of state taxes paid on gasoline and diesel fuel used exclusively for such transportation purposes.

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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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 421. STANDARDS FOR CERTIFICATION

37 TAC §421.5

The Texas Commission on Fire Protection (TCFP) proposes an amendment to §421.5, concerning definitions in Chapter 421, entitled Standards for Certification. The amendment is proposed concurrently with proposed amendments to §§423.5, 423.7, 423.205, 423.207, 423.305, 423.307, 429.5, 429.7, 431.5 and 431.7, published elsewhere in this issue of the *Texas Register*. This group of amendments revises the process by which course requirements for certification are determined, and changes how courses may be combined to meet those requirements.

The amendment to §421.5 deletes the definition of accredited training, as the proposed new process makes it obsolete. In the definition of approved training, the amendment deletes references to hours of National Fire Academy (NFA) courses used to meet certification requirements, and replaces it with the introduction of two lists of courses (A-List and B-List). In the definition of college credits, the word *regionally* is added to the term *accredited institution*, NFA open learning program colleges are added to those institutions whose courses are accepted by the TCFP, and which courses are applicable for Fire Science college credit and higher levels of certification is clarified. A definition of *commission-recognized training* is also added. The definition of *National Fire Academy credit hours* is revised by adding the word *semester* to read *semester credit hours*, and references to credit hours is deleted.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendment is in effect there will be no significant fiscal impact on state or local governments. Mr. Soteriou has also determined that for each of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the amendments will be a more standardized, efficient, and simplified process that TCFP uses to determine course combinations to meet fire fighter certification requirements. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendment.

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 amendment is proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum standards for appointment as fire protection personnel. Texas Government Code, §419.008 and §419.022 are affected by the proposed amendment.

§421.5. Definitions.

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

[(1) Accredited training--A curriculum or training program which carries written approval from the commission, credit hours that appear on an official transcript from an accredited college or university and any fire service training received from a nationally recognized source, i.e., the National Fire Academy.]

(1) [(2)] Admission to employment--An entry level full-time employee of a local government entity in one of the categories of fire protection personnel.

(2) [(3)] Appointment--the designation or assignment of a person to a discipline regulated by the commission. The types of appointments are:

(A) permanent appointment--the designation or assignment of certified fire protection personnel or certified part time fire protection employees to a particular discipline (See Texas Government Code, §419.032); and

(B) probationary or temporary appointment--the designation or assignment of an individual to a particular discipline, except for head of a fire department, for which the individual has passed the commission's certification and has met the medical requirement of §423.1(b), if applicable, but has not yet been certified. (See Texas Government Code, §419.032.)

(3) [~~(4)~~] Approved training--Any training [~~which will be~~] used for a higher [~~toward any~~] level of certification must be approved by [~~submitted to~~] the commission and assigned to either the A-List or the B-List [~~for approval prior to the commencement of the training~~] . The training submission must be in a manner specified by the commission and contain all information requested by the commission. The commission will not grant credit twice for the same subject content or course. Inclusion on the A-List or B-List does not preclude the course approval process as stated elsewhere in the Standards Manual. [~~The hours of instruction in National Fire Academy courses used towards higher levels of certification may be satisfied by interactive computer-based National Fire Academy courses as long as they are supervised and verified by a certified instructor.~~]

(4) [~~(5)~~] Assigned/work--A fire protection personnel or a part-time fire protection employee shall be considered "assigned/working" in a position, any time the individual is receiving compensation and performing the duties that are regulated by the Texas Commission on Fire Protection certification and has been permanently appointed, as defined in this section, to the particular discipline.

(5) [~~(6)~~] Assistant fire chief--The officer occupying the first position subordinate to the head of a fire department.

(6) [~~(7)~~] Auxiliary fire fighter--A volunteer fire fighter.

(7) [~~(8)~~] Benefits--Benefits shall include, but are not limited to, inclusion in group insurance plans (such as health, life, and disability) or pension plans, stipends, free water usage, and reimbursed travel expenses (such as meals, mileage, and lodging).

(8) [~~(9)~~] Class hour--Defined as not less than 50 minutes of instruction, also defined as a contact hour; a standard for certification of fire protection personnel.

(9) [~~(10)~~] Code--The official legislation creating the commission.

(10) [~~(11)~~] College credits--Credits earned for studies satisfactorily completed at a regionally [~~an~~] accredited institution of higher education and including National Fire Academy (NFA) open learning program colleges, or courses recommended for college credit by the American Council on Education (ACE) or [~~and~~]delivered through the National Emergency Training Center (both EMI and NFA) [~~residency~~] programs [~~and recommended for college credit by the American Council on Education (ACE)~~]. A course of study satisfactorily completed and identified on an official transcript from a college or in the ACE National Guide that is primarily related to Fire Service, Emergency Medicine, Emergency Management, or Public Administration is defined as applicable for Fire Science college credit, and is acceptable for higher levels of certification.

(11) [~~(12)~~] Commission--Texas Commission on Fire Protection.

(12) Commission-recognized training--A curriculum or training program which carries written approval from the commission, or credit hours that appear on an official transcript from an accredited college or university, or any fire service training received from a nationally recognized source, i.e., the National Fire Academy.

(13) - (28) (No change.)

(29) National Fire Academy semester credit hours--[~~For the purpose of determining the number of hours to credit for National Fire Academy courses both resident and hand off~~]. The number of hours credited for attendance of National Fire Academy courses is determined as recommended in the most recent edition of the "National Guide to Educational Credit for Training Programs," American Council on Education (ACE). [~~For courses that have not been evaluated by ACE, commission staff will review and determine credit.~~]

(30) - (43) (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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CHAPTER 423. FIRE SUPPRESSION

The Texas Commission on Fire Protection (TCFP) proposes amendments to §§423.5, 423.7, 423.205, 423.207, 423.305, and 423.307, concerning minimum standards for intermediate and advanced structure fire protection personnel certification, minimum standards for intermediate and advanced aircraft rescue fire fighting personnel certification, and minimum standards for intermediate and advanced marine fire protection personnel certification, in Chapter 423, entitled Fire Suppression. The amendments are proposed concurrently with proposed amendments to §§421.5, 429.5, 429.7, 431.5 and 431.7, published elsewhere in this issue of the *Texas Register*. This group of amendments revises the process by which course requirements for different levels of certification are determined, and changes the method by which courses may be combined to meet those requirements.

The proposed amendments delete references to hours of National Fire Academy (NFA) courses which are used to meet certification requirements, and replaces it with the introduction of two lists of courses (A-List and B-List). The amendments also provide different options for acceptable combinations of courses from the two lists and from college courses in fire science or fire protection, depending on which level and type of certification is being pursued.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, 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. Soteriou 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 a more standardized, efficient, and simplified process that the TCFP uses to determine course combinations to meet fire fighter certification requirements. 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.

SUBCHAPTER A. MINIMUM STANDARDS FOR STRUCTURE FIRE PROTECTION PERSONNEL CERTIFICATION

37 TAC §423.5, §423.7

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum educational standards for appointment as fire protection personnel.

Texas Government Code, §419.008 and §419.022 are affected by the proposed amendments.

§423.5. Minimum Standards for Intermediate Structure Fire Protection Personnel Certification.

(a) Applicants for Intermediate Structure Fire Protection Personnel Certification must complete the following requirements:

(1) hold as a prerequisite a Basic Structure Fire Protection Personnel Certification as defined in §423.3 of this title (relating to Minimum Standards for Basic Structure Fire Protection Personnel Certification); and

(2) acquire a minimum of four years of fire protection experience and complete the training [~~courses~~] listed in one of the following options:

(A) Option 1--Successfully complete six semester hours of fire science or fire technology from an approved Fire Protection Degree Program and submit documentation as required by the commission that the courses comply with subsections (b)[~~(c)~~] and (c)[~~(d)~~] of this section; or

(B) Option 2--Completion of coursework from either the A-List or the B-List courses. Acceptable combinations of courses are as follows: two A-List courses; or eight B-List courses; or one A-List course and four B-List courses. (See the exception outlined in subsection (c) of this section).[~~Complete a minimum of 96 hours of instruction in any National Fire Academy courses~~]; or

(C) Option 3--Completion of coursework from either the A-List or the B-List courses in combination with college courses in fire science or fire protection. Acceptable combinations of courses are three semester hours meeting the requirements of Option 1 with either one A-List course or four B-List courses (See the exception outlined in subsection (c) of this section). [~~Successfully complete three semester hours of college courses listed in Option 1 and a minimum of 48 hours in any National Fire Academy courses.~~]

[~~(D) Option 4--Successfully complete any combination of courses that lead to International Fire Service Accreditation Congress (IFSAC) certification that total 96 recommended hours or more in the commission curricula. Evidence of completion of the appropriate courses shall be a certification from the commission or a valid documentation from another jurisdiction of accreditation from IFSAC. Option 4 may not be combined with any of the above options to obtain this certification. See exception outlined in subsection (d) of this section.~~]

[~~(b) College level courses from both the upper and lower division may be used to satisfy the education requirement for Intermediate Structure Fire Protection Personnel Certification.~~]

(b) [~~(c)~~]Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's Certification Curriculum Manual or for experience in the fire service, may not be counted toward this level [~~higher levels~~] of certification.

(c) [~~(d)~~]The training required in this section must be in addition to any training used to qualify for any lower level of Structure Fire Protection Personnel Certification. Repeating a course or a course of similar content cannot be used towards this level [~~higher levels~~] of certification.

§423.7. Minimum Standards for Advanced Structure Fire Protection Personnel Certification.

(a) Applicants for Advanced Structure Fire Protection Personnel certification must complete the following requirements:

(1) hold as a prerequisite an Intermediate Structure Fire Protection Personnel Certification as defined in §423.5 of this title (relating to Minimum Standards for Intermediate Structure Fire Protection Personnel Certification); and

(2) acquire a minimum of eight years of fire protection experience and complete the training [~~courses~~] listed in one of the following options:

(A) Option 1--Successfully complete six semester hours of fire science or fire technology from an approved Fire Protection Degree Program and submit documentation as required by the commission that the courses comply with subsections (b) [~~(c)~~] and (c)[~~(d)~~] of this section; or

(B) Option 2--Completion of coursework from either the A-List or the B-List courses. Acceptable combinations of courses are as follows: two A-List courses; or eight B-List courses; or one A-List course and four B-List courses. (See the exception outlined in subsection (c) of this section).[~~Complete a minimum of 96 hours of instruction in any National Fire Academy courses~~]; or

(C) Option 3--Completion of coursework from either the A-List or the B-List courses in combination with college courses in fire science or fire protection. Acceptable combinations of courses are three semester hours meeting the requirements of Option 1 with either one A-List course or four B-List courses (See the exception outlined in subsection (c) of this section). [~~Successfully complete three semester hours of college courses listed in Option 1 and a minimum of 48 hours in any National Fire Academy courses.~~]

[~~(D) Option 4--Successfully complete any combination of courses that lead to International Fire Service Accreditation Congress (IFSAC) certification that total 96 recommended hours or more in the commission curricula. Evidence of completion of the appropriate courses shall be a certification from the commission or a valid documentation from another jurisdiction of accreditation from IFSAC. Option 4 may not be combined with any of the above options to obtain this certification. See exception outlined in subsection (d) of this section.~~]

[~~(b) College level courses from both the upper and lower division may be used to satisfy the education requirement for Advanced Structure Fire Protection Personnel Certification.~~]

(b) [~~(c)~~]Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's Certification Curriculum

Manual or for experience in the fire service, may not be counted toward this level [~~higher levels~~] of certification.

(c) [~~(d)~~] The training required in this section must be in addition to any training used to qualify for any lower level of Structure Fire Protection Personnel Certification. Repeating a course or a course of similar content cannot be used towards this level [~~higher levels~~] of certification.

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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SUBCHAPTER B. MINIMUM STANDARDS FOR AIRCRAFT RESCUE FIRE FIGHTING PERSONNEL

37 TAC §423.205, §423.207

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum educational standards for appointment as fire protection personnel.

Texas Government Code, §419.008 and §419.022 are affected by the proposed amendments.

§423.205. Minimum Standards for Intermediate Aircraft Rescue Fire Fighting Personnel Certification.

(a) Applicants for Intermediate Aircraft Rescue Fire Fighting Personnel Certification must complete the following requirements:

(1) hold as a prerequisite a Basic Aircraft Rescue Fire Fighting Personnel Certification as defined in §423.203 of this title (relating to Minimum Standards for Basic Aircraft Rescue Fire Fighting Personnel Certification); and

(2) acquire a minimum of four years of fire protection experience and complete the training [~~courses~~] listed in one of the following options:

(A) Option 1--Successfully complete six semester hours of fire science or fire technology from an approved Fire Protection Degree Program and submit documentation as required by the commission that the courses comply with subsections (b) [~~(c)~~] and (c) [~~(d)~~] of this section; or

(B) Option 2--Completion of coursework from either the A-List or the B-List courses. Acceptable combinations of courses are as follows: two A-List courses; or eight B-List courses; or one A-List course and four B-List courses. (See the exception outlined in subsection (c) of this section). [~~Complete a minimum of 96 hours of instruction in any National Fire Academy courses~~]; or

(C) Option 3--Completion of coursework from either the A-List or the B-List courses in combination with college courses in fire science or fire protection. Acceptable combinations of courses are three semester hours meeting the requirements of Option 1 with either one A-List course or four B-List courses (See the exception outlined in subsection (c) of this section). [~~Successfully complete three semester hours of college courses listed in Option 1 and a minimum of 48 hours in any National Fire Academy courses.~~]

[~~(D) Option 4--Successfully complete any combination of courses that lead to International Fire Service Accreditation Congress (IFSAC) certification that total 96 recommended hours or more in the commission curricula. Evidence of completion of the appropriate courses shall be a certification from the commission or a valid documentation from another jurisdiction of accreditation from IFSAC. Option 4 may not be combined with any of the above options to obtain this certification. See exception outlined in subsection (d) of this section.~~]

[~~(b) College level courses from both the upper and lower division may be used to satisfy the education requirement for Intermediate Aircraft Rescue Fire Fighting Personnel Certification.~~]

(b) [~~(c)~~] Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's Certification Curriculum Manual or for experience in the fire service, may not be counted toward this level [~~higher levels~~] of certification.

(c) [~~(d)~~]The training required in this section must be in addition to any training used to qualify for any lower level of Aircraft Rescue Fire Fighting Certification. Repeating a course or a course of similar content cannot be used towards this level [~~higher levels~~] of certification

§423.207. Minimum Standards for Advanced Aircraft Rescue Fire Fighting Personnel Certification.

(a) Applicants for Advanced Aircraft Rescue Fire Fighting Personnel certification must complete the following requirements:

(1) hold as a prerequisite an Intermediate Aircraft Rescue Fire Fighting Personnel Certification as defined in §423.205 of this title (relating to Minimum Standards for Intermediate Aircraft Rescue Fire Fighting Personnel Certification); and

(2) acquire a minimum of eight years of fire protection experience and complete the training [~~courses~~] listed in one of the following options:

(A) Option 1--Successfully complete six semester hours of fire science or fire technology from an approved Fire Protection Degree Program and submit documentation as required by the commission that the courses comply with subsections (b) [~~(c)~~] and (c) [~~(d)~~] of this section; or

(B) Option 2--Completion of coursework from either the A-List or the B-List courses. Acceptable combinations of courses are as follows: two A-List courses; or eight B-List courses; or one A-List course and four B-List courses. (See the exception outlined in subsection (c) of this section). [~~Complete a minimum of 96 hours of instruction in any National Fire Academy courses~~]; or

(C) Option 3--Completion of coursework from either the A-List or the B-List courses in combination with college courses in fire science or fire protection. Acceptable combinations of courses are three semester hours meeting the requirements of Option 1 with either one A-List course or four B-List courses (See the exception outlined in subsection (c) of this section). [~~Successfully complete three semester hours of college courses listed in Option 1 and a minimum of 48 hours in any National Fire Academy courses.~~]

[(D) Option 4--Successfully complete any combination of courses that lead to International Fire Service Accreditation Congress (IFSAC) certification that total 96 recommended hours or more in the commission curricula. Evidence of completion of the appropriate courses shall be a certification from the commission or a valid documentation from another jurisdiction of accreditation from IFSAC. Option 4 may not be combined with any of the above options to obtain this certification. See exception outlined in subsection (d) of this section.]

[(b) College level courses from both the upper and lower division may be used to satisfy the education requirement for Advanced Aircraft Rescue Fire Fighting Personnel Certification.]

(b) [(c)] Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's Certification Curriculum Manual or for experience in the fire service, may not be counted toward this level [higher levels] of certification.

(c) [(d)]The training required in this section must be in addition to any training used to qualify for any lower level of Aircraft Rescue Fire Fighting Personnel Certification. Repeating a course or a course of similar content cannot be used towards this level [higher levels] of certification.

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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For further information, please call: (512) 239-4921

SUBCHAPTER C. MINIMUM STANDARDS FOR MARINE FIRE PROTECTION PERSONNEL

37 TAC §423.305, §423.307

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum educational standards for appointment as fire protection personnel.

Texas Government Code, §419.008 and §419.022 are affected by the proposed amendments.

§423.305. Minimum Standards For Intermediate Marine Fire Protection Personnel Certification.

(a) Applicants for Intermediate Marine Fire Protection Personnel Certification must complete the following requirements:

(1) hold as a prerequisite a Basic Marine Fire Protection Personnel Certification as defined in §423.303 of this title (relating to Minimum Standards for Basic Marine Fire Protection Personnel Certification)[.] ;and

(2) acquire a minimum of four years of fire protection experience and complete the training [courses] listed in one of the following options:

(A) Option 1--Successfully complete six semester hours of fire science or fire technology from an approved Fire Protection Degree Program and submit documentation as required by the commission that the courses comply with subsections (b) [(c)] and (c) [(d)] of this section; or

(B) Option 2--Completion of coursework from either the A-List or the B-List courses. Acceptable combinations of courses are as follows: two A-List courses; or eight B-List courses; or one A-List course and four B-List courses. (See the exception outlined in subsection (c) of this section). [Complete a minimum of 96 hours of instruction in any National Fire Academy courses]; or

(C) Option 3--Completion of coursework from either the A-List or the B-List courses in combination with college courses in fire science or fire protection. Acceptable combinations of courses are three semester hours meeting the requirements of Option 1 with either one A-List course or four B-List courses (See the exception outlined in subsection (c) of this section). [Successfully complete three semester hours of college courses listed in Option 1 and a minimum of 48 hours in any National Fire Academy courses.]

[(D) Option 4--Successfully complete any combination of courses that lead to International Fire Service Accreditation Congress (IFSAC) certification that total 96 recommended hours or more in the commission curricula. Evidence of completion of the appropriate courses shall be a certification from the commission or a valid documentation from another jurisdiction of accreditation from IFSAC. Option 4 may not be combined with any of the above options to obtain this certification. See exception outlined in subsection (d) of this section.]

[(b) College level courses from both the upper and lower division may be used to satisfy the education requirement for Intermediate Marine Fire Protection Personnel Certification.]

(b) [(c)] Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's Certification Curriculum Manual or for experience in the fire service, may not be counted towards this level [higher levels] of certification.

(c) [(d)] The training required in this section must be in addition to any training used to qualify for any lower level of Marine Fire Protection Personnel Certification. Repeating a course or a course of similar content cannot be used towards this level [higher levels] of certification.

§423.307. Minimum Standards For Advanced Marine Fire Protection Personnel Certification.

(a) Applicants for Advanced Marine Fire Protection Personnel certification must complete the following requirements:

(1) hold as a prerequisite an Intermediate Marine Fire Protection Personnel Certification as defined in §423.305 of this title (relating to Minimum Standards for Intermediate Marine Fire Protection Personnel Certification) [.] ; and

(2) acquire a minimum of eight years of fire protection experience and complete the training [courses] listed in one of the following options:

(A) Option 1--Successfully complete six semester hours of fire science or fire technology from an approved Fire Protection Degree Program and submit documentation as required by the commission that the courses comply with subsections (b) [(c)] and (c) [(d)] of this section; or

(B) Option 2--Completion of coursework from either the A-List or the B-List courses. Acceptable combinations of courses

are as follows: two A-List courses; or eight B-List courses; or one A-List course and four B-List courses. (See the exception outlined in subsection (c) of this section). [~~Complete a minimum of 96 hours of instruction in any National Fire Academy courses~~]; or

(C) Option 3--Completion of coursework from either the A-List or the B-List courses in combination with college courses in fire science or fire protection. Acceptable combinations of courses are three semester hours meeting the requirements of Option 1 with either one A-List course or four B-List courses (See the exception outlined in subsection (c) of this section). [~~Successfully complete three semester hours of college courses listed in Option 1 and a minimum of 48 hours in any National Fire Academy courses.~~]

[~~(D) Option 4--Successfully complete any combination of courses that lead to International Fire Service Accreditation Congress (IFSAC) certification that total 96 recommended hours or more in the commission curricula. Evidence of completion of the appropriate courses shall be a certification from the commission or a valid documentation from another jurisdiction of accreditation from IFSAC. Option 4 may not be combined with any of the above options to obtain this certification. See exception outlined in subsection (d) of this section.~~]

[~~(b) College level courses from both the upper and lower division may be used to satisfy the education requirement for Advanced Marine Fire Protection Personnel Certification.~~]

(b) [~~(c)~~] Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's Certification Curriculum Manual or for experience in the fire service, may not be counted towards this level [~~higher levels~~] of certification.

(c) [~~(d)~~]The training required in this section must be in addition to any training used to qualify for any lower level of Marine Fire Protection Personnel Certification. Repeating a course or a course of similar content cannot be used towards this level [~~higher levels~~] of certification.

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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CHAPTER 427. TRAINING FACILITY CERTIFICATION
SUBCHAPTER A. ON-SITE CERTIFIED TRAINING PROVIDER

37 TAC §427.3

The Texas Commission on Fire Protection (TCFP) proposes an amendment to §427.3, concerning facilities in Subchapter A, entitled On-Site Certified Training Provider, of Chapter 427, entitled Training Facility Certification.

The amendment to §427.3 clarifies in paragraph (5) that the most current edition of NFPA (National Fire Protection Association) 1403, entitled *Standard on Live Fire Training Evolutions in Structures* shall be used when conducting interior live fire training in accordance with a new rule being proposed concurrently (new §435.16, entitled Live Fire Training Evolutions).

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendment is in effect there will be no significant fiscal impact on state or local governments. Mr. Soteriou has also determined that for each of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be a more clear understanding of what standards are to be used when conducting interior live fire training, resulting in greater safety for trainees and instructors involved in live fire evolutions during fire fighter training. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendment.

Comments on the proposal 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 amendment is proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.028(3), which provides TCFP with the authority to set conditions under which training facilities operate.

Texas Government Code, §419.008 and §419.028(3) are affected by the proposed amendment.

§427.3. Facilities.

The following minimum resources, applicable to the curricula, are required for certification as a certified on-site training facility. These facilities may be combined or separated utilizing one or more structures. In either event the facilities must be available and used by the instructor and trainees.

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

(5) A structure suitable for interior live fire training and meeting the requirements of the basic curriculum pertaining to the particular discipline(s) which the training facility is approved to teach, shall be available for use by the instructors to teach interior live fire training. The most current edition of NFPA 1403, Standard on Live Fire Training Evolutions in Structures shall be used when conducting interior live fire training in accordance with §435.16 of this title, relating to Live Fire Training Evolutions.

[~~(A) NFPA 1403, Standard on Live Fire Training Evolutions shall be used as a guide when conducting interior live fire training.~~]

[~~(B) A Personal Alert Safety System (PASS) shall be provided for all students and instructors participating in live fire training and shall meet the requirements in §435.9 of this title (relating to PASS devices). Section 435.9 applies whether the PASS is provided by the academy or the trainee.~~]

[~~(C) A Personnel Accountability System that complies with §435.13 of this title shall be utilized.~~]

[~~(D) The facility shall utilize an Incident Management System that complies with §435.11, §435.15 and §435.17 of this title during live fire training.~~]

(6) - (7) (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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CHAPTER 429. MINIMUM STANDARDS FOR FIRE INSPECTORS

The Texas Commission on Fire Protection (TCFP) proposes new §§429.11, 429.201, 429.203, 429.205, 429.207, 429.209, and 429.211 and amendments to existing §§429.1, 429.3, 429.5, 429.7, and 429.9, concerning minimum standards for basic, intermediate, advanced, and master levels of certification as a fire inspector, and International Fire Service Accreditation Congress (IFSAC) seals for fire inspectors in Texas, in Chapter 429, entitled Minimum Standards for Fire Inspectors. Also included in this proposal are two new subchapter designations for Chapter 429. New Subchapter A, entitled Minimum Standards for Fire Inspector Certification Based on Requirements in Effect Prior to January 1, 2005, is comprised of existing §§429.1, 429.3, 429.5, 429.7, 429.9, and new §429.11. New Subchapter B, entitled Minimum Standards for Fire Inspector Certification, is comprised of new §§429.201, 429.203, 429.205, 429.207, 429.209, and 429.211.

The proposed amendments to existing §§429.1, 429.3, 429.5, 429.7, and 429.9; and proposed new §§429.11, 429.201, 429.203, 429.205, 429.207, 429.209, and 429.211 divide the inspector certification process into two tracks. Subchapter A covers the certification requirements as they currently exist. The rule changes in this subchapter add statements that the applicants for inspector certification shall complete fire inspection training that is based on curricula in place before January 1, 2005.

A new track has been created in new Subchapter B with new proposed rules which will govern curricula in place after January 1, 2005. The requirements in the new track for Basic Fire Inspector Certification add the option of holding an IFSAC seal as an Inspector I, Inspector II or a Plans Examiner I; and remove any reference to a minimum number of hours of instruction in a National Fire Academy program.

The requirements in the new track for Intermediate Fire Inspector certification provide that applicants must hold a Basic Fire Inspector certification, and must have acquired four years experience appointed as a fire inspector.

The requirements in the new track for Advanced Fire Inspector certification provide that applicants must hold an Intermediate Fire Inspector certification, must have acquired eight years experience appointed as a fire inspector, must have completed the TCFP approved Fire Inspector III and Plans Examiner II courses and successfully passed the examination.

The requirements in the new track for Master Fire Inspector certification provide that applicants must hold an Advanced Fire Inspector certification, must have acquired a twelve years experience appointed as a fire inspector, must have 60 college semester hours or an associate degree, which includes at least 18 college semester hours in fire science subjects.

The requirements in the new track for the granting of IFSAC seals as a Fire Inspector I, Fire Inspector II, and Plans Examiner I make a distinction between: 1-a) those applicants either holding a TCFP Fire Inspector certification prior to January 1, 2005, or 1-b) who have passed the applicable state examination prior to January 1, 2005; and 2) those who pass the applicable state examination on or after January 1, 2005. Those in group 1-a may be granted an IFSAC seal as an Inspector I or Inspector II by making application to the TCFP and paying the applicable fees. Those in group 1-a may also apply to test for Plans Examiner I, and upon successful completion of the examination, by applying to the TCFP for an IFSAC seal and paying the applicable fees. Those in group 1-b may either apply for an IFSAC seal for Inspector I or Inspector II, or may apply to test for Plans Examiner I, and upon successful completion of the examination, may apply for an IFSAC seal.

Those in group 2 may be granted an IFSAC seal for Inspector I, Inspector II, and/or Plans Examiner I by applying to TCFP and meeting TCFP requirements regarding completion of approved courses, and passing a commission examination, applicable to the particular IFSAC seal for Inspector I, Inspector II, or Plans Examiner I.

Other amendments to §429.5 and §429.7 are proposed to revise the process by which course requirements for different levels of certification are determined, and changes the method by which courses may be combined to meet those requirements. The amendments to these two rules delete references to hours of National Fire Academy (NFA) courses used to meet certification requirements, and replaces it with the introduction of two lists of courses (A-List and B-List); and also provide different options for acceptable combinations of courses from the two lists and from college courses in fire science or fire protection, depending on which level and type of certification is being pursued.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendments and new rules are in effect there will be no significant fiscal impact on state or local governments. Mr. Soteriou has also determined that for each of the first five years the proposed amendments and new rules are in effect, the public benefit anticipated as a result of enforcing the amendments and new rules will be the assurance that personnel receiving the applicable certification will be uniquely qualified to perform the related functions. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendments and new rules.

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.

SUBCHAPTER A. MINIMUM STANDARDS FOR FIRE INSPECTOR CERTIFICATION BASED ON REQUIREMENTS IN EFFECT PRIOR TO JANUARY 1, 2005

37 TAC §§429.1, 429.3, 429.5, 429.7, 429.9, 429.11

The amendments and new rule are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum educational standards for appointment as fire protection personnel.

Texas Government Code, §419.008 and §419.022 are affected by the proposed amendments and new rule.

§429.1. Minimum Standards for Fire Inspection Personnel.

(a) Subchapter A of this chapter will expire on December 31, 2010.

(b) [~~(a)~~] Fire protection personnel of a governmental entity who are appointed to fire code enforcement duties must be certified, as a minimum, as a basic fire inspector as specified in §429.3 of this title (relating to Minimum Standards for Basic Fire Inspector Certification) within one year of initial appointment to such position.

(c) [~~(b)~~] Prior to being appointed to fire code enforcement duties, all personnel must complete a commission approved basic fire inspection training program and successfully pass the commission examination pertaining to that curriculum.

(d) [~~(c)~~] Individuals holding any level of fire inspector certification shall be required to comply with the continuing education requirements of §441.13 of this title (relating to Continuing Education Requirements for Fire Inspection Personnel).

(e) [~~(d)~~] Code enforcement is defined as the enforcement of laws, codes, and ordinances of the authority having jurisdiction pertaining to fire prevention.

§429.3. Minimum Standards for Basic Fire Inspector Certification.

(a) Training programs that are intended to satisfy the requirements of this section must meet the curriculum, competencies, and hour requirements of this section. All applicants for certification must meet the examination requirements of this section.

(b) In order to be certified by the commission as a Basic Fire Inspector an individual must complete a commission approved fire inspection training program and successfully pass the commission examination as specified in Chapter 439 of this title (relating to Examinations for Certification). An approved basic fire inspection training program shall consist of one or any combination of the following:

(1) completion of the commission approved Basic Fire Inspector Curriculum, dated prior to January 1, 2005 [~~as specified in Chapter 4 of the commission's Certification Curriculum Manual, as approved by the commission in accordance with Chapter 443 of this title (relating to Certification Curriculum Manual)~~]; or

(2) successful completion of an out-of-state training program which has been submitted to the commission for evaluation and found to meet the minimum requirements as listed in the commission approved Basic Fire Inspector Curriculum as specified in Chapter 4 of the commission's Certification Curriculum Manual; or

(3) successful completion of the following college courses: Fundamentals of Fire Protection, 3 semester hours; Fire Protection Systems, 3 semester hours; Fire Prevention, 3 semester hours; Building Code, 3 semester hours; Building Construction, 3 semester hours; Hazardous Materials, 3 semester hours; Fundamentals of Speech, 3 semester hours; Total semester hours, 21*. *NOTE: Building Code and Building Construction may be combined into a single three semester hour class. If this is the case, the total semester hours may be reduced to 18. Hazardous Materials I or II may be used to satisfy the requirements of Hazardous Materials; or

(4) successful completion of a minimum of 226 hours of instruction in a National Fire Academy program for fire inspection. The program must include the basic course, Fire Inspection Principles, and any combination of the following courses or its predecessor:

(A) Fire Prevention Specialist II; or

(B) Plans Review for Inspectors; or

(C) Code Management: A Systems Approach; or

(D) Management of Fire Prevention Programs; or

(E) Strategic Analysis of Fire Prevention Programs.

(c) National Fire Academy courses of equal or greater class hours that replace a course discontinued by the National Fire Academy may be used towards requirements for certification in place of the discontinued course.

(d) A person who holds or is eligible to hold a certificate upon employment as a part-time fire inspector may be certified as a fire inspector, of the same level of certification, without meeting the applicable examination requirements.

§429.5. Minimum Standards for Intermediate Fire Inspector Certification.

(a) Applicants for Intermediate Fire Inspector Certification holding the prerequisite Basic Fire Inspector certification based on the curricula in place before January 1, 2005, must meet the following requirements:

[~~(1) hold as a prerequisite a Basic Fire Inspector Certification as defined in §429.3 of this title (relating to Minimum Standards for Basic Fire Inspector Certification);~~]

(1) [~~(2)~~] acquire a minimum of four years of fire protection experience and complete the training [~~courses~~] listed [~~contained~~] in one of the following options:

(A) Option 1--Successfully complete six semester hours of fire science or fire technology from an approved Fire Protection Degree Program and submit documentation as required by the commission that the courses comply with subsections (b) [~~(c)~~] and (c) [~~(d)~~] of this section; or

(B) Option 2--Completion of coursework from either the A-List or the B-List courses. Acceptable combinations of courses are as follows: two A-List courses; or eight B-List courses; or one A-List course and four B-List courses. (See the exception outlined in subsection (c) of this section). [~~Complete a minimum of 96 hours of instruction in any National Fire Academy courses~~]; or

(C) Option 3--Completion of coursework from either the A-List or the B-List courses in combination with college courses in fire science or fire protection. Acceptable combinations of courses are three semester hours meeting the requirements of Option 1 with either one A-List course or four B-List courses (See the exception outlined in subsection (c) of this section). [~~Successfully complete three semester hours of college courses listed in Option 1 and a minimum of 48 hours in any National Fire Academy courses.~~]

[~~(D) Option 4--Successfully complete any combination of courses that lead to International Fire Service Accreditation Congress (IFSAC) certification that total 96 recommended hours or more in the commission curricula. Evidence of completion of the appropriate courses shall be a certification from the commission or a valid documentation from another jurisdiction of accreditation from IFSAC. Option 4 may not be combined with any of the above options to obtain~~

this certification. See exception outlined in subsection (d) of this section.]

[(b) College level courses from both the upper and lower division may be used to satisfy the education requirement for Intermediate Fire Inspector Certification.]

(b) [(c)] Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's Certification Curriculum Manual or for experience in the fire service, may not be counted toward this level [higher levels] of certification.

(c) [(d)] The training required in this section must be in addition to any training used to qualify for any lower level of Fire Inspector Certification. Repeating a course or a course of similar content cannot be used towards this level [higher levels] of certification.

§429.7. Minimum Standards for Advanced Fire Inspector Certification.

(a) Applicants for Advanced Fire Inspector certification holding the prerequisite Basic Fire Inspector certification based on the curricula in place before January 1, 2005 must complete the following requirements:

(1) hold as a prerequisite an Intermediate Fire Inspector Certification as defined in §429.5 of this title (relating to Minimum Standards for Intermediate Fire Inspector Certification); and

(2) acquire a minimum of eight years of fire protection experience and complete the training [courses] listed in one of the following options:

(A) Option 1--Successfully complete six semester hours of fire science or fire technology from an approved Fire Protection Degree Program and submit documentation as required by the commission that the courses comply with subsections (b) [(c)] and (c) [(d)] of this section; or

(B) Option 2--Completion of coursework from either the A-List or the B-List courses. Acceptable combinations of courses are as follows: two A-List courses; or eight B-List courses; or one A-List course and four B-List courses. (See the exception outlined in subsection (c) of this section). [Complete a minimum of 96 hours of instruction in any National Fire Academy courses]; or

(C) Option 3--Completion of coursework from either the A-List or the B-List courses in combination with college courses in fire science or fire protection. Acceptable combinations of courses are three semester hours meeting the requirements of Option 1 with either one A-List course or four B-List courses (See the exception outlined in subsection (c) of this section). [Successfully complete three semester hours of college courses listed in Option 1 and a minimum of 48 hours in any National Fire Academy courses.]

[(D) Option 4--Successfully complete any combination of courses that lead to International Fire Service Accreditation Congress (IFSAC) certification that total 96 recommended hours or more in the commission curricula. Evidence of completion of the appropriate courses shall be a certification from the commission or a valid documentation from another jurisdiction of accreditation from IFSAC. Option 4 may not be combined with any of the above options to obtain this certification. See exception outlined in subsection (d) of this section.]

[(b) College level courses from both the upper and lower division may be used to satisfy the education requirement for Advanced Fire Inspector Certification.]

(b) [(c)] Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's Certification Curriculum Manual or for experience in the fire service, may not be counted toward this level [higher levels] of certification.

(c) [(d)] The training required in this section must be in addition to any training used to qualify for any lower level of Fire Inspector Certification. Repeating a course or a course of similar content cannot be used towards this level [higher levels] of certification.

§429.9. Minimum Standards for Master Fire Inspector Certification.

(a) Applicants for Master Fire Inspector Certification must complete the following requirements:

(1) hold as a prerequisite an Advanced Fire Inspector Certification as defined in §429.7(a) of this title (relating to Minimum Standards for Advanced Fire Inspector Certification); and

(2) acquire a minimum of 12 years of fire protection experience, and 60 college semester hours or an associate degree, which includes at least 18 college semester hours in fire science subjects.

(b) College level courses from both the upper and lower division may be used to satisfy the education requirement for Master Fire Inspector Certification.

§429.11. International Fire Service Accreditation Congress (IFSAC) Seal.

(a) Individuals who hold commission Fire Inspector certification prior to January 1, 2005, may be granted International Fire Service Accreditation Congress (IFSAC) seals for Inspector I and Inspector II by making application to the commission for the IFSAC seals and paying applicable fees.

(b) Individuals who hold commission Fire Inspector certification prior to January 1, 2005, may apply to test for Plans Examiner I. Upon successful completion of the examination an IFSAC seal for Plans Examiner I may be granted by making application to the commission for the IFSAC seal and paying the applicable fee.

(c) Individuals who pass the applicable state examination based on the curriculum in place prior to January 1, 2005, may be granted IFSAC seals for Inspector I and Inspector II by making application to the commission for the IFSAC seals and paying applicable fees.

(d) Individuals who pass the applicable state examination based on the curriculum in place prior to January 1, 2005, may apply to test for Plans Examiner I. Upon successful completion of the examination an IFSAC seal for Plans Examiner I may be granted by making application to the commission for the IFSAC seal and paying the applicable fee.

(e) Individuals who pass the applicable commission examination(s) as specified in Chapter 439 of this title (relating to Examinations for Certification) pertaining to Chapter 4 of the commission's Certification Curriculum Manual, as approved by the commission in accordance with Chapter 443 of this title (relating to Certification Curriculum Manual), on or after January 1, 2005, must follow the guidelines of Subchapter B of this chapter.

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

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SUBCHAPTER B. MINIMUM STANDARDS FOR FIRE INSPECTOR CERTIFICATION

37 TAC §§429.201, 429.203, 429.205, 429.207, 429.209, 429.211

The new rules are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum educational standards for appointment as fire protection personnel.

Texas Government Code, §419.008 and §419.022 are affected by the proposed new rules.

§429.201. Minimum Standards for Fire Inspector Personnel--New Track.

(a) Fire protection personnel of a governmental entity who are appointed to fire code enforcement duties must be certified, as a minimum, as a basic fire inspector as specified in §429.203 of this title (relating to Minimum Standards for Basic Fire Inspector Certification--New Track) within one year of initial appointment to such position.

(b) Prior to being appointed to fire code enforcement duties, all personnel must complete a commission approved basic fire inspection training program and successfully pass the commission examination pertaining to that curriculum.

(c) Individuals holding any level of fire inspector certification shall be required to comply with the continuing education requirements in §441.13 of this title (relating to Continuing Education Requirements for Fire Inspection Personnel).

(d) Code enforcement is defined as the enforcement of laws, codes, and ordinances of the authority having jurisdiction pertaining to fire prevention.

§429.203. Minimum Standards for Basic Fire Inspector Certification--New Track.

(a) In order to be certified as a basic fire inspector an individual must:

(1) possess valid documentation of accreditation from the International Fire Service Accreditation Congress as an Inspector I, Inspector II, and Plans Examiner I ; or

(2) complete a commission-approved Basic Fire Inspector program and successfully pass the commission examination(s) as specified in Chapter 439 of this title (relating to Examinations for Certification). An approved basic fire inspection training program shall consist of one or any combination of the following:

(A) completion of the commission-approved Basic Fire Inspector Curriculum, as specified in Chapter 4 of the commission's Certification Curriculum Manual, as approved by the commission in accordance with Chapter 443 of this title (relating to Certification Curriculum Manual); or

(B) successful completion of an out-of-state training program which has been submitted to the commission for evaluation and found to meet the minimum requirements as listed in the commission approved Basic Fire Inspector Curriculum as specified in Chapter 4 of the commission's Certification Curriculum Manual; or

(C) successful completion of the following college courses: Fundamentals of Fire Protection, 3 semester hours; Fire Protection Systems, 3 semester hours; Fire Prevention, 3 semester hours; Building Code, 3 semester hours; Building Construction, 3 semester hours; Hazardous Materials, 3 semester hours; Fundamentals of Speech, 3 semester hours; Total semester hours, 21*. *NOTE: Building Code and Building Construction may be combined into a single three semester hour class. If this is the case, the total semester hours may be reduced to 18. Hazardous Materials I or II may be used to satisfy the requirements of Hazardous Materials; or

(D) successful completion of a National Fire Academy program for fire inspection. The program must include the basic course, Fire Inspection Principles I, and two of the following courses or their predecessor:

(i) Fire Prevention Specialist II; or

(ii) Plans Review for Inspectors; or

(iii) Code Management: A Systems Approach; or

(iv) Management of Fire Prevention Programs; or

(v) Strategic Analysis of Fire Prevention Programs.

(b) National Fire Academy courses of equal or greater class hours that replace a course discontinued by the National Fire Academy may be used towards requirements for certification in place of the discontinued course.

(c) A person who holds or is eligible to hold a certificate upon employment as a part-time fire inspector may be certified as a fire inspector, of the same level of certification, without meeting the applicable examination requirements.

§429.205. Minimum Standards for Intermediate Fire Inspector Certification--New Track.

Applicants for Intermediate Fire Inspector certification holding a prerequisite Basic Fire Inspector certification as defined in §429.203 of this title (relating to Minimum Standards for Basic Fire Inspector Certification--New Track) must have acquired four (4) years experience appointed as a fire inspector.

§429.207. Minimum Standards for Advanced Fire Inspector Certification--New Track.

Applicants for Advance Fire Inspector Certification must complete the following requirements:

(1) hold as a prerequisite an Intermediate Fire Inspector certification as defined in §429.205 of this title (relating to Minimum Standards for Intermediate Fire Inspector Certification--New Track);

(2) acquire as a minimum eight (8) years experience appointed as a fire inspector; and

(3) complete the Commission approved Fire Inspector III and Plans Examiner II courses, as specified in Chapter 4 of the commission's Certification Curriculum Manual and successfully pass the examinations in accordance with Chapter 439 of this title (relating to Examination for Certification).

§429.209. Minimum Standards for Master Fire Inspector Certification--New Track.

(a) Applicants for Master Fire Inspector Certification must complete the following requirements:

(1) hold as a prerequisite an Advanced Fire Inspector certification as defined in §429.207 of this title (relating to Minimum Standards for Advanced Fire Inspector Certification--New Track); and

(2) acquire a minimum of 12 years experience appointed as a fire inspector, and 60 college semester hours or an associate degree, which includes at least 18 college semester hours in fire science subjects.

(b) College level courses from both the upper and lower division may be used to satisfy the education requirement for Master Fire Inspector Certification.

§429.211. International Fire Service Accreditation Congress (IFSAC) Seal--New Track.

(a) Individuals who hold commission Fire Inspector certification prior to January 1, 2005, may be granted International Fire Service Accreditation Congress (IFSAC) seals for Inspector I and Inspector II by making application to the commission for the IFSAC seals and paying applicable fees.

(b) Individuals who hold commission Fire Inspector certification prior to January 1, 2005, may apply to test for Plans Examiner I. Upon successful completion of the examination an IFSAC seal for Plans Examiner I may be granted by making application to the commission for the IFSAC seal and paying the applicable fee.

(c) Individuals who pass the applicable state examination prior to January 1, 2005, may be granted IFSAC seals for Inspector I and Inspector II by making application to the commission for the IFSAC seals and paying applicable fees.

(d) Individuals who pass the applicable state examination prior to January 1, 2005, may apply to test for Plans Examiner I. Upon successful completion of the examination an IFSAC seal for Plans Examiner I may be granted by making application to the commission for the IFSAC seal and paying the applicable fee.

(e) Individuals who pass the applicable section of the state examination on or after January 1, 2005, may be granted IFSAC(s) for Inspector I, Inspector II, and/or Plans Examiner I by making application to the commission for the IFSAC seal(s) and paying the applicable fee(s), provided they meet the following provisions:

(1) To receive the IFSAC Inspector I seal, the individual must:

(A) Complete the Inspector I section of a commission-approved course; and

(B) Pass the Inspector I section of a commission examination.

(2) To receive the IFSAC Inspector II seal, the individual must:

(A) Complete the Inspector II section of a commission-approved course;

(B) Document possession of an IFSAC Inspector I seal or a passing score on the corresponding section of a commission examination; and

(C) Pass the Inspector II section of a commission examination.

(3) To receive the IFSAC Plans Examiner I seal, the individual must:

(A) Complete the Plans Examiner I section of a commission-approved course; and

(B) Pass the Plans Examiner I section of a commission examination.

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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CHAPTER 431. FIRE INVESTIGATION

The Texas Commission on Fire Protection (TCFP) proposes amendments to §431.5 and §431.7, the repeal of existing §431.205, and new §§431.205, 431.207, 431.209, and 431.211, concerning minimum standards for intermediate and advanced structure fire protection personnel certification, minimum standards for intermediate and advanced aircraft rescue fire fighting personnel certification, minimum standards for intermediate and advanced marine fire protection personnel certification, and minimum standards for intermediated, advanced and master fire investigator certification, in Chapter 423, entitled Fire Suppression. The amendments to §431.5 and 431.7 are proposed concurrently with proposed amendments to §§421.5, 423.5, 423.7, 423.204, 423.207, 423.305, 423.307, 429.5, and 429.7, published elsewhere in this issue of the *Texas Register*.

The repeal and new rules revise the process for fire investigator certification at the Intermediate, Advanced, and Master levels, and sets requirements for granting an International Fire Service Accreditation Congress (IFSAC) seal as a fire investigator.

The proposed amendments to §431.5 and §431.7 revise the process by which course requirements for different levels of certification are determined, and changes the method by which courses may be combined to meet those requirements. The amendments delete references to hours of National Fire Academy (NFA) courses which are used to meet certification requirements, and replaces it with the introduction of two lists of courses (A-List and B-List). The amendments also provide different options for acceptable combinations of courses from the two lists and from college courses in fire science or fire protection, depending on which level and type of certification is being pursued.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed repeal, new rules, and amendments are in effect there will be no significant fiscal impact on state or local governments. Mr. Soteriou has also determined that for each of the first five years the proposed repeal, new rules, and amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be a more standardized, efficient, and simplified process that the TCFP uses to determine course combinations to meet fire fighter certification requirements. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed repeal, new rules, and 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.

SUBCHAPTER A. MINIMUM STANDARDS FOR ARSON INVESTIGATOR CERTIFICATION

37 TAC §431.5, §431.7

The repeal, new rules, and amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum standards for appointment as fire protection personnel.

Texas Government Code, §419.008 and §419.022 are affected by the proposed amendments.

§431.5. Minimum Standards for Intermediate Arson Investigator Certification.

(a) Applicants for Intermediate Arson Investigator Certification must complete the following requirements:

(1) hold as a prerequisite a Basic Arson Investigator Certification as defined in §431.3 of this title (relating to Minimum Standards for Basic Arson Investigator Certification); and

(2) acquire a minimum of four years of fire protection experience and complete the requirements listed in one of the following options:

(A) Option 1--Successfully complete six semester hours of fire science or fire technology from an approved Fire Protection Degree Program and submit documentation as required by the commission that the courses comply with subsections (b) [(c)] and (c) [(d)] of this section; or

(B) Option 2--Completion of coursework from either the A-List or the B-List courses. Acceptable combinations of courses are as follows: two A-List courses; or eight B-List courses; or one A-List course and four B-List courses. (See the exception outlined in subsection (c) of this section). [Complete a minimum of 96 hours of instruction in any National Fire Academy courses]; or

(C) Option 3--Completion of coursework from either the A-List or the B-List courses in combination with college courses in fire science or fire protection. Acceptable combinations of courses are three semester hours meeting the requirements of Option 1 with either one A-List course or four B-List courses (See the exception outlined in subsection (c) of this section). [Successfully complete three semester hours of college courses listed in Option 1 and a minimum of 48 hours in any National Fire Academy courses.] ; or

[(D) Option 4--Successfully complete any combination of courses that lead to International Fire Service Accreditation Congress (IFSAC) certification that total 96 recommended hours or more in the commission curricula. Evidence of completion of the appropriate courses shall be a certification from the commission or a valid documentation from another jurisdiction of accreditation from IFSAC. Option 4 may not be combined with any of the above options to obtain this certification. See exception outlined in subsection (d) of this section; or]

(D) [(E)] Option 4 [5]--Hold current Intermediate Peace Officer certification from the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) with four additional law enforcement courses applicable for fire investigations. See exception outlined in subsection (d) of this section.

[(b) College level courses from both the upper and lower division may be used to satisfy the education requirement for Intermediate Arson Investigator Certification.]

(b) [(c)] Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's Certification Curriculum Manual or for experience in the fire service, may not be counted toward this level [higher levels] of certification.

(c) [(d)] The training required in this section must be in addition to any training used to qualify for any lower level of Arson Investigator Certification. Repeating a course or a course of similar content cannot be used towards this level [higher levels] of certification.

§431.7. Minimum Standards for Advanced Arson Investigator Certification.

(a) Applicants for Advanced Arson Investigator certification must complete the following requirements:

(1) hold as a prerequisite an Intermediate Arson Investigator Certification as defined in §431.5 of this title (relating to Minimum Standards for Intermediate Arson Investigator Certification); and

(2) acquire a minimum of eight years of fire protection experience and complete the requirements listed in one of the following options:

(A) Option 1--Successfully complete six semester hours of fire science or fire technology from an approved Fire Protection Degree Program and submit documentation as required by the commission that the courses comply with subsections (b) [(c)] and (c) [(d)] of this section; or

(B) Option 2--Completion of coursework from either the A-List or the B-List courses. Acceptable combinations of courses are as follows: two A-List courses; or eight B-List courses; or one A-List course and four B-List courses. (See the exception outlined in subsection (c) of this section). [Complete a minimum of 96 hours of instruction in any National Fire Academy courses]; or

(C) Option 3--Completion of coursework from either the A-List or the B-List courses in combination with college courses in fire science or fire protection. Acceptable combinations of courses are three semester hours meeting the requirements of Option 1 with either one A-List course or four B-List courses (See the exception outlined in subsection (c) of this section). [Successfully complete three semester hours of college courses listed in Option 1 and a minimum of 48 hours in any National Fire Academy courses.]; or

(D) Option 4--Advanced Arson for Profit or Complex Arson Investigative Techniques (Bureau of Alcohol, Tobacco, [and] Firearms , and Explosives resident or field course, 80 hours); or

[(E) Option 5--Successfully complete any combination of courses that lead to International Fire Service Accreditation Congress (IFSAC) certification that total 96 recommended hours or more in the commission curricula. Evidence of completion of the appropriate courses shall be a certification from the commission or a valid documentation from another jurisdiction of accreditation from IFSAC. Option 5 may not be combined with any of the above options to obtain this certification. See exception outlined in subsection (d) of this section; or]

(E) [(F)] Option 5 [6]--Hold current Advanced Peace Officer certification from the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) with four additional law

enforcement courses applicable for fire investigations. See exception outlined in subsection (d) of this section.

[~~(b) College level courses from both the upper and lower division may be used to satisfy the education requirement for Advanced Arson Investigator Certification.~~]

(b) [~~(c)~~] Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's Certification Curriculum Manual or for experience in the fire service, may not be counted toward this level [~~higher levels~~] of certification.

(c) [~~(d)~~] The training required in this section must be in addition to any training used to qualify for any lower level of Arson Investigator Certification. Repeating a course or a course of similar content cannot be used towards this level [~~higher levels~~] of certification.

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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SUBCHAPTER B. MINIMUM STANDARDS FOR FIRE INVESTIGATOR CERTIFICATION

37 TAC §431.205

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

The repeal, new rules, and amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum standards for appointment as fire protection personnel.

Texas Government Code, §419.008 and §419.022 are affected by the proposed amendments.

§431.205. International Fire Service Accreditation Congress (IFSAC) Certification.

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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37 TAC §§431.205, 431.207, 431.209, 431.211

The repeal, new rules, and amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum standards for appointment as fire protection personnel.

Texas Government Code, §419.008 and §419.022 are affected by the proposed amendments.

§431.205. Minimum Standards for Intermediate Fire Investigator Certification.

(a) Applicants for Intermediate Fire Investigator must complete the following requirements:

(1) hold as a prerequisite a Basic Fire Investigator Certification as defined in §431.203 of this title (relating to Minimum Standards for Fire Investigator Certification); and

(2) acquire a minimum of four years of fire protection experience and complete the training listed in one of the following options:

(A) Option 1--Successfully complete six semester hours of fire science or fire technology from an approved Fire Protection Degree Program and submit documentation as required by the commission that the courses comply with subsections (b) and (c) of this section; or

(B) Option 2--Completion of coursework from either the A-List or the B-List courses. Acceptable combinations of courses are as follows: two A-List courses; or eight B-List courses; or one A-List and four B-List courses. (See the exception outlined in subsection (c) of this section.); or

(C) Option 3--Completion of coursework from either the A-List or the B-List courses in combination with college courses in fire science or fire protection. Acceptable combinations of courses are three semester hours meeting the requirements of Option 1 with either one A-List course or four B-List courses. (See the exception outlined in subsection (c) of this section.)

(b) Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's Certification Curriculum Manual or for experience in the fire service, may not be counted toward this level of certification.

(c) The training required in this section must be in addition to any training used to qualify for any lower level of Fire Investigator Certification. Repeating a course or a course of similar content cannot be used towards this level of certification.

§431.207. Minimum Standards for Advanced Fire Investigator Certification.

(a) Applicants for Advanced Fire Investigator must complete the following requirements:

(1) hold as a prerequisite an Intermediate fire Investigator Certification as defined in §431.203 of this title (relating to Minimum Standards for Fire Investigator Certification; and

(2) acquire a minimum of eight years of fire protection experience and complete the training listed in one of the following options:

(A) Option 1--Successfully complete six semester hours of fire science or fire technology from an approved Fire Protection Degree Program and submit documentation as required by the commission that the courses comply with subsections (b) and (c) of this section; or

(B) Option 2--Completion of coursework from the either A-List or the B-List courses. Acceptable combinations of courses are as follows: two A-List courses; or eight B-List courses; or one A-List and four B-List courses. (See the exception outlined in subsection (c) of this section.); or

(C) Option 3--Completion of coursework from either the A-List the B-List courses in combination with college courses in fire science or fire protection. Acceptable combinations of courses are three semester hours meeting the requirements of Option 1 with either one A-List course or four B-List courses. (See the exception outlined in subsection (c) of this section.)

(b) Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's Certification Curriculum Manual or for experience in the fire service, may not be counted toward this level of certification.

(c) The training required in this section must be in addition to any training used to qualify for any lower level of Fire Investigator Certification. Repeating a course or a course of similar content cannot be used towards this level of certification.

§431.209. Minimum Standards for Master Fire Investigator Certification.

(a) Applicants for Master Fire Investigator Certification must complete the following requirements:

(1) hold as a prerequisite an Advanced Fire Investigator Certification as defined in §431.207 of this title (relating to Minimum Standards for Advanced Fire Investigator Certification); and

(2) acquire a minimum of twelve years of fire protection experience, and sixty college semester hours or an associate degree, which includes at least eighteen college semester hours in fire science subjects.

(b) College level courses from both the upper and lower division may be used to satisfy the education requirement for Master Fire Investigator Certification.

§431.211. International Fire Service Accreditation Congress (IFSAC) Seals-Fire Investigator.

(a) Individuals holding current commission Fire Investigator certification may be granted an International Fire Service Accreditation Congress (IFSAC) Seal as a Fire Investigator by making application to the commission for the IFSAC seal and paying applicable fees.

(b) Individuals completing a commission approved basic fire investigator program and passing the applicable state examination may be granted an IFSAC Seal as a Fire Investigator by making application to the commission for the IFSAC seal and paying applicable fees

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

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CHAPTER 435. FIRE FIGHTER SAFETY

37 TAC §435.5, §435.16

The Texas Commission on Fire Protection (TCFP) proposes an amendment to §435.5, concerning TCFP recommendations, and new rule §435.16, concerning live fire training evolutions, in Chapter 435, entitled Fire Fighter Safety.

The amendment to §435.5 clarifies the recommendation of the TCFP that all employing entities use the publication NFPA (National Fire Protection Association) 1500, *Fire Department Occupational Safety and Health Program* as a guide for all fire protection operations. Proposed new §435.16 sets out requirements for fire departments and certified training facilities that conduct live fire training evolutions, including a standard operating procedure for live fire training evolutions which meets the requirements of NFPA 1403 with certain exceptions. Those exceptions include all sections of NFPA 1403 which pertain to NFPA 1975, Standards on Station/Work Uniforms for Fire and Emergency Services; and NFPA sections which are determined to be beyond the scope of a fire service instructor and should be left to the authority having jurisdiction. The proposed new rule also states the level of certification that instructors, instructors-in-charge, and safety officers shall hold if participating in live fire training evolutions.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendment and new rule are in effect there will be no significant fiscal impact on state or local governments. Mr. Soteriou has also determined that for each of the first five years the proposed amendment and new rule are in effect, the public benefit anticipated as a result of enforcing the amendment and new rule will be a more clear understanding of what standards are to be used when conducting interior live fire training, resulting in greater safety for trainees and instructors involved in live fire evolutions during fire fighter training. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendment and new rule.

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 amendment and new rule are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.028(3), which provides the TCFP with the authority to set conditions under which training facilities operate.

Texas Government Code, §419.008 and §419.028(3) are affected by the proposed amendment and new rule.

§435.5. Commission Recommendations.

The commission recommends that all employing entities use as a guide, for all fire protection operations, the following publication [~~publications~~] NFPA 1500 *Fire Department Occupational Safety and Health Program.* [~~:~~]

[~~(1) NFPA 1403 "Live Fire Training Evolutions";~~]

[~~(2) (NFPA 1500 "Fire Department Occupational Safety and Health Program."~~]

§435.16. Live Fire Training Evolutions.

(a) The fire department shall develop, maintain and use a standard operating procedure for those live fire training evolutions conducted by the fire department. If a certified training facility conducts a live fire training evolution, the facility shall develop, maintain, and use a standard operating procedure for those live fire training evolutions.

(b) Instructors.

(1) All instructors participating in live fire evolutions shall hold as a minimum, a basic fire service instructor certification from the commission.

(2) The instructor-in-charge and the safety officer shall hold, as a minimum, an intermediate fire instructor certification from the commission.

(c) The standard operating procedures shall meet the requirements of the National Fire Protection Association 1403, Standard on Live Fire Training Evolutions with the following exceptions:

(1) all sections pertaining to the National Fire Protection Association 1975, Standard on Station/Work Uniforms for Fire and Emergency Services; and

(2) the following identified sections, which are determined to be beyond the scope of a fire service instructor and should be left to the decision of the authority having jurisdiction:

(A) all sections pertaining to the training center burn building being evaluated and documented annually by a licensed professional engineer with burn building experience and expertise; and

(B) all sections pertaining to the training center burn building being evaluated every five years and the removal and reinstallation of a representative area of thermal linings (if any) to inspect the hidden conditions behind the linings: and

(C) all sections pertaining to the training center burn building requiring the engineer performing core sampling of solid concrete slabs and walls; and

(D) all sections pertaining to oil separators.

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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CHAPTER 439. EXAMINATIONS FOR CERTIFICATION
SUBCHAPTER A. EXAMINATIONS FOR ON-SITE DELIVERY TRAINING

37 TAC §439.5

The Texas Commission on Fire Protection (TCFP) proposes an amendment to §439.5, concerning procedures in Chapter 439, entitled Examinations for Certification.

The amendment to §439.5 adds to the types of certification examinations in subsection (b) (in which the TCFP has the authority to prescribe the content) an examination based on Chapter 4 of the Certification Curriculum Manual, entitled *Basic Fire Inspector Curriculum*. This new examination may consist of three sections: Inspector I, Inspector II, and Plans Examiner I.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendment is in effect there will be no significant fiscal impact on state or local governments. Mr. Soteriou has also determined that for each of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be the assurance that those persons receiving Fire Inspector and Plans Examiner certifications have passed a TCFP examination that would indicate mastery of the skills required in the applicable National Fire Protection Association standard. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendment.

Comments on the proposal 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 amendment is proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum educational standards for appointment as fire protection personnel.

Texas Government Code, §419.008 and §419.022(a)(5) are affected by the proposed amendment.

§439.5. Procedures.

(a) Procedures for conducting written and/or performance examinations are determined by the commission.

(b) The commission shall prescribe the content of any certification examination that tests the knowledge and/or skill of the examinee concerning the discipline addressed by the examination.

(1) An examination based on Chapter 1, "Basic Fire Suppression Curriculum" as identified in the Certification Curriculum Manual may consist of four sections: Fire Fighter I, Fire Fighter II, First Responder Awareness, and First Responder Operations.

(2) An examination based on Chapter 4, "Basic Fire Inspector Curriculum" as identified in the Certification Curriculum Manual may consist of three sections: Inspector I, Inspector II, and Plans Examiner I.

(3) [~~(2)~~] All other state examinations consist of only one section.

(c) - (t) (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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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 9. TEXAS DEPARTMENT ON AGING

CHAPTER 260. AREA AGENCY ON AGING ADMINISTRATIVE REQUIREMENTS

40 TAC §260.11

The Texas Department on Aging proposes an amendment to §260.11, concerning Ombudsman Services.

The amendment is necessary to simplify and remove unnecessary language, remove references to certain program procedures, eliminate references to program performance measures that are now included in the proposed rule, remove direct statements from federal requirements where they are referenced in the rule, reference the risk assessment process that will be implemented for AAAs to determine the level of facility coverage, and include updated names for the Department and other organizations in accordance with the Department's merging into the Department of Aging and Disability Services.

Nila Pedersen, Chief Accountant, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for individuals required to comply with the rule as proposed.

Ms. Pedersen also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be an updated rule. There will be no effect on small or micro businesses. There will be no effect to individuals required to comply with the section as proposed. There will be no effect to state or local government.

Comments on the proposal may be submitted to Gary Jessee, Director Office of AAA Support and Operations, Texas Department on Aging, P.O. Box 12786, Austin, Texas 78711. All comments must be written and delivered via mail, in person, or facsimile. E-mail and verbal comments cannot be accepted. All comments must be received within 30 calendar days following the date of publication of the proposed rules in the *Texas Register*.

The amendment is proposed under Texas Government Code, §2161.003, which provides the Texas Department on Aging with the authority to promulgate rules governing the operation of the Department.

The amendment also implements or affects Texas Human Resources Code, Subchapters C and D, and §101.022(b) and §101.022(d). The amendment implements Titles III and VII of the Older Americans Act of 1965, as amended, 42 U.S.C.A., §§3001, et seq. (West 2002).

§260.11. Ombudsman Services.

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

(1) Advocacy--Actions by or on the behalf of individuals and groups to ensure that they receive the benefits and services to which they may be entitled, and to ensure that their rights guaranteed by law are protected and enforced.

[~~(2) Advocacy plan--An action plan developed to address the needs and quality of care issues of residents that are developed at the state, regional and individual nursing home levels.~~]

(2) [~~(3)~~] Assisted Living Facility--An establishment, including a board and care home, that furnishes, in one or more facilities, food and shelter to four or more persons who are unrelated to the proprietor of the establishment and provides personal care services under the scope of Health and Safety Code, Chapter 247.

[~~(4) Board--The Board on Aging of the Texas Department on Aging.~~]

(3) [~~(5)~~] Certified staff ombudsman--An individual who has successfully completed the required certification training as prescribed by the Office and who has been recommended by the local ombudsman entity and approved by the State Long-Term Care Ombudsman to serve as an advocate for long-term care facility residents and who has been hired by the local ombudsman entity as paid staff to participate in the administration of the ombudsman program. A certified staff ombudsman shall be a representative of the Office.

(4) [~~(6)~~] Certified volunteer ombudsman--An individual who has successfully completed the required certification training as prescribed by the Office and who has been recommended by a local ombudsman entity and approved by the State Long-Term Care Ombudsman to serve as an advocate for long-term care facility residents and participate in the ombudsman program. A certified volunteer ombudsman shall be a representative of the Office.

(5) [~~(7)~~] Clients or recipients of services--Residents of long-term care facilities.

(6) [~~(8)~~] Contractor--The performing entity in a contract with the Department. The word contractor when used in this rule and related policies and procedures is synonymous with grantee or other entities as defined by the Board, by rule or order.

(7) [~~(9)~~] Conflict of interest--Status of an individual applying to be a certified volunteer ombudsman must be revealed to the Office of the State Long-Term Care Ombudsman and resolved prior to service. A conflict of interest exists if an individual applying to be a certified volunteer ombudsman or an immediate family member (first degree of consanguinity or affinity) of that individual has any one or more of the following:

(A) direct involvement in the licensing or certification of a long-term care facility or of a provider of a long-term care service;

(B) ownership or direct investment interest in a long-term care service;

(C) is employed by or participates in the management of a long-term care facility;

(D) receives or has the right to receive, directly or indirectly, remuneration under a compensation arrangement with an owner or operator of a long-term care facility; or

(E) has a family member residing in a long-term care facility in which the representative is assigned or provides advocacy.

(8) [(10)] Department--The Texas Department of [on] Aging and Disability Services (DADS), the single state agency for Older Americans Act (OAA) programs.

(9) Facility Coverage--In-person visit by a certified volunteer or staff ombudsman that involves contact with residents, families, facility staff or others to identify and resolve complaints and to help protect residents' health, safety, welfare and rights.

(10) [(11)] Friendly Visitor--A volunteer who has a relationship with the local ombudsman entity but who does not participate in complaint resolution. A Friendly Visitor receives orientation and training as prescribed by the Office but does not receive certification, is not a representative of the Office and shall not have access to resident records. This is an optional program operated at the discretion of the local ombudsman entity.

(11) [(12)] In-service--A planned educational effort conducted or coordinated by professional staff or certified volunteers.

(12) [(13)] Local ombudsman entity--An area agency on aging or other entity, as defined by the Board, by rule or order which is responsible for implementation of all aspects of the local ombudsman program as defined in these rules.

(13) [(14)] Long-term care facility--A facility that is licensed or regulated or that should [is required to] be licensed or regulated by the Texas Department of Aging and Disability [Human] Services.

(14) [(15)] Managing local ombudsman--The professional staff person at the regional level who directs the local ombudsman program. A managing local ombudsman is a certified staff ombudsman and shall be a representative of the Office.

(15) [(16)] Nursing home--An institution that provides organized and structured nursing care and service, and is subject to licensure under the Health and Safety Code, Chapter 242.

(16) [(17)] Office--The Office of the State Long-Term Care Ombudsman, an independent division of the Texas Department of [on] Aging and Disability Services.

(17) [(18)] Ombudsman intern--A volunteer who has been admitted to the local training program as a potential certified volunteer ombudsman.

[(19) Professional--Refers to an individual who has obtained a four-year bachelor degree in aging-related areas or human services, or has equivalent qualifying experience as a substitute for a degree. Such substitution shall be consistent with the employing entity's personnel policies.]

(18) [(20)] State Long-Term Care Ombudsman, also known as the State Ombudsman--The person designated by the [Executive Director of the] Department as Chief Administrator of the Office of the State Long-Term Care Ombudsman, in accordance with the requirements of the Older Americans Act [, regarding expertise and experience.] The State Ombudsman is accountable to the [Executive] Director, Center for Consumer and External Affairs of the Department for program and personnel matters.

(b) Purpose. The purpose of this rule is to ensure [assure] the development and operation of an ombudsman program, which advocates for the rights of residents and their families to receive the highest quality of care and quality of life in long-term care facilities and which provides services to assist in protecting the health, safety and welfare of residents.

(c) Philosophy and Program Outcomes. Persons who are unable to care for themselves are entitled to dependable and consistent care that includes:

(1) a safe and healthy environment;

(2) satisfaction of nutritional needs;

(3) medical services, including physical, mental and psychosocial rehabilitation;

(4) an environment that promotes and maintains the individual's dignity, self-determination, communication and protection of individual rights.

(d) Eligibility. Residents of long-term care facilities aged 60 and above are eligible for Ombudsman services. Residents who are under 60 years of age and require advocacy services may be served if the advocacy effort benefits 60-year-old and older residents.

(e) Access. The Office shall ensure [assure] that Office representatives (employees or volunteers who represent an entity designated by the Department [managing local ombudsmen and certified staff ombudsmen] shall be granted access to long-term care facility residents and their records if consent of the resident or the legal representative of the resident is obtained or as permitted by the Older Americans Act and state statute [as defined in Ombudsman procedures].

(f) Responsibilities of contractors to operate local ombudsman entities. Contractors shall be either an area agency on aging or an entity designated [defined] by the Department [Board]. The local ombudsman entity shall:

(1) be an organization with a responsive and visible presence in its region. It shall:

(A) perform the duties as outlined in the OAA consistent with these rules and guidance provided [the procedures required] by the Office:

(i) provide services to protect the health, safety, welfare and rights of residents;

(ii) ensure that residents have regular, timely access to representatives of the program and have timely responses to complaints and request for assistance;

(iii) identify, investigate and resolve complaints made by or on behalf of residents that relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of the residents;

(B) be an expert and reliable source of information for families seeking information on long-term care options [placement] or general requests for assistance;

(C) develop a facility coverage plan based on Ombudsman complaint/program experience and as a minimum consider nursing facilities ranked at 50 or less in the DADS Quality Reporting System (QRS) overall rating and consider fragile operating facilities that have trustee placement or are scheduled to close as reported by DADS Long-Term Care Regulatory. Coverage plans showing weekly, monthly and quarterly visitation schedules will be submitted to the

Office on a quarterly basis or more frequently if requested by the Office in a format developed in cooperation with the network. The minimum coverage schedule for stable operating facilities shall be quarterly [have a visible and active presence in long-term care facilities sufficient for clients and families to have access to ombudsman services that promote or improve quality of care and that result in the timely identification and resolution of complaints and concerns. In addition to regular visits by certified ombudsmen, each licensed nursing home shall be visited a minimum of one time, and more often as necessary, each year by the managing local ombudsman or a paid staff ombudsman of the local ombudsman entity. The local ombudsman entity may establish affiliations with other volunteer groups to exchange information and identify advocacy needs to support facility coverage].

(D) coordinate with state, regional and local agencies and be recognized as an active member in the continuum of care in the communities it serves;

(E) have a mutually positive referral relationship with the Department's Long-Term Care Regulatory [Texas Department of Human Services] and the Texas Department of Family and Protective [and Regulatory] Services; and

(F) be a catalyst for community involvement in long-term care facilities and be viewed as a credible source of information for the community, the regulatory system, and the nursing home industry;

(2) appoint the managing local ombudsman who shall oversee the local ombudsman program and provide leadership in a manner that achieves program goals and objectives. [meet the requirements of a professional. In addition, two years of direct services to the elderly or experience in ombudsman services, advocacy, dispute resolution, or volunteer management are preferred.]

[(3) have adequate staff to manage all aspects of the program and shall designate the managing local ombudsman.]

(3) [(4)] establish and maintain a complaint management system that at a minimum shall:

(A) obtain or provide training to interns and certified volunteer ombudsmen on handling complaints and dispute resolution;

(B) have an intake process for receiving complaints that begins within two business days of receipt and as soon as possible for emergency and safety situations;

(C) have a written process for certified volunteer ombudsmen to identify and investigate complaints and concerns with referral to the managing local ombudsman or his/her designee when assistance is needed;

(D) have a written process for [equitably] resolving total complaints that results in a minimum percentage, as defined by the Office, of complaints resolved in an objective and impartial manner;

(E) have a process for reporting complaint activity as required by the local ombudsman entity and the Office; and

(F) have a written process to assure that complaint and client-oriented material remain confidential and is protected from access by unauthorized persons.

(4) [(5)] establish mechanisms [a process] to identify and remove conflicts of interest [as prescribed in procedures established by the Office];

(5) [(6)] establish and maintain a volunteer management system, if the local program uses volunteers, in which the local Ombudsman entity shall:

(A) analyze the number of volunteers needed for administrative duties, other activities, and facility coverage;

(B) recruit individuals to become certified volunteer ombudsmen using all appropriate means and conduct appropriate follow-up with individuals who expressed interest [so that the total number of certified staff and volunteer ombudsmen are at least the number prescribed by the Legislative Budget Board of the Texas Legislature];

(C) process applicants that includes [through the completion of an application that contains all minimum information required by the Office to include] the completion of a criminal background check of all volunteer and paid staff ombudsmen prior to certification. Supervise the completion of certification training and internship; make recommendation for certification of individuals to the Office [State Long-Term Care Ombudsman] and assign certified ombudsmen to appropriate long-term care facilities;

(D) provide state-approved initial certification training and provide 12 hours of local continuing education each federal fiscal year, for certified ombudsmen [each representative of the Office];

(E) provide state-approved orientation and training for Friendly Visitors, if such a program is operated by the local ombudsman entity;

(F) support and supervise volunteers and staff involved in the local program during their service;

(G) promote retention through regular communication, recognition, motivational activities, and feedback of satisfaction with program services;

(H) establish and use a grievance and complaint system; and

(I) develop exit procedures to include input from the certified volunteers and staff who leave the ombudsman program and notification to the Office of their status with their written comments.

(6) [(7)] ensure [assure] that residents, families, and complainants have regular and timely access to ombudsman services [during the normal business week] at no cost through a toll-free number or acceptance of collect calls. [with acknowledgement of the receipt of the complaint within one business day. The telephone number of the local ombudsman entity and the managing local ombudsman shall be listed under the area agency on aging listing in accordance with current Department policy;]

(7) [(8)] support the development [formation] of family and resident councils [in each facility of the region, in an effort to provide advocacy resources to promote quality of care];

(8) [(9)] provide informational resources relating to quality of care and resident-centered care to residents, family, and facility staff [of each nursing home in the region]. Be available to provide in-service training in long-term care facilities in the region. [Certified volunteer or paid staff ombudsmen may conduct such in-service training];

(9) [(10)] coordinate with regional administrators or their designees of the Department's [Texas Department of Human Services] Long-Term Care Regulatory [Services] division serving the region at least quarterly, and the Texas Department of Family and Protective [and Regulatory] Services as needed, to develop efficient referral, communication, and problem-solving procedures;

(10) [(11)] participate in a minimum percentage, as defined by the Office, of survey activities with the [Texas] Department [of Human Services] in accordance with requirements established by

the Office [the cooperative agreement between the Department and the Texas Department of Human Services].

(11) [(12)] submit program performance and other reports in accordance with requirements established by the Office and the Department; and

[(13) develop and implement individual nursing home advocacy plans followed by development and implementation of a regional advocacy plan that is based on an analysis of individual nursing home advocacy plans and other sources of information that supports the achievement of the highest levels of quality of care and quality of life for residents;]

(12) [(14)] promote local awareness of the ombudsman entity through the frequent use of local and regional resources, including the media, in order to provide visibility to the program. [, to include listing the phrase, "Advocate for Nursing Home Residents," in all brochures, publications, and media activities; and]

[(15) encourage coordination with citizen, membership and advocacy organizations to support quality of care and increase community involvement with and awareness of long-term care services.]

(g) Responsibilities of Certified Volunteer Ombudsmen: A [certified] volunteer who has met the requirements of the Office [ombudsman] shall execute the purposes of the ombudsman program as outlined in this rule and under the supervision of the managing local ombudsman.

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 May 17, 2004.

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Gary Jessee

Director of the Office of AAA Support and Operations

Texas Department on Aging

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For further information, please call: (512) 424-6857

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 815. UNEMPLOYMENT INSURANCE

The Texas Workforce Commission (Commission) proposes amendments to Chapter 815, Unemployment Insurance, Subchapter B, Benefits, Claims and Appeals, §815.15, Parties with Appeal Rights; §815.28, Work Search Requirements; and to Subchapter C, Tax Provisions, §815.109, Payment of Contributions and Reimbursements.

Purpose

The purpose of the proposed amendments is twofold:

To clarify the applicability of the Unemployment Insurance (UI) administrative rules regarding Work Search requirements to certain classifications of UI claimants, by amending §815.15 and §815.28(a)(1), and

To define the due date for payment of additional taxes and interest resulting from a chargeback adjustment by amending §815.109(e).

The Commission proposes amending §815.15, Parties With Appeal Rights, to clarify that employers affected by the proposed §815.28(a)(1)(E)(v) shall be parties of interest in any appeals proceedings resulting from circumstances described in the new clauses.

The Commission proposes amending §815.28, Work Search Requirements, to add three additional classifications of exempted claimants to those listed in subsection (a)(1)(E), and to add a new subsection (a)(1)(F), clarifying the applicability of work search requirements to claimants receiving extended UI benefits and to individuals engaged in efforts to establish themselves in a self-employment venture.

The Commission proposes amending §815.109, Payment of Contributions and Reimbursements, to clarify that if an additional tax results from a chargeback adjustment, the due date for the quarters affected by the adjustment is the first day of the second month following the month in which the Agency mailed the statement or letter notifying the employer of the change in tax rate and additional tax due. The amendment shall also clarify that amounts due shall be paid on or before the last day of this second month.

Background

§815.15. Parties with Appeal Rights.

The Commission proposes to amend §815.15 by adding §815.15(c)(6) in coordination with proposed §815.28(a)(1)(E)(v). For claimants on a temporary layoff of longer than 12 weeks, a waiver from work search requirements may be requested by the separating employer and granted by the Agency Executive Director. The Executive Director's decision in such a case will be subject to review in any benefits appeal where a determination of ineligibility for benefits results from the decision. Proposed §815.15(c)(6) will make the requesting employer a party of interest in any such appeal. The Commission proposes to conform §815.15(c) to eliminate the specific references to paragraphs (1) - (5) and create a general reference to the paragraphs.

Proposed amendments to §815.28(a)(1)(E)

With few exceptions, UI claimants are required as a condition of eligibility to register for Wagner-Peyser job matching and reemployment services. This work registration requirement, often referred to as the "work test" for UI eligibility, is the only specific "work search" requirement for regular UI claimants set out in federal law. As a result, "work registration" and "work search" are closely connected in law and historical precedent. Consequently, the Commission finds that the terms should be applied and treated consistently.

Section 815.28(a)(1)(E) currently includes explicit exemptions to the rule's requirements for two classifications of UI claimants:

(1) Individuals participating in a Shared Work Plan under Texas Labor Code §215.041(c), and

(2) Individuals participating in Agency approved or Trade Act training under Texas Labor Code §207.022 and §207.023.

Section 815.28(a)(1)(E) also excludes individuals otherwise exempted by other law.

Based on other law and historical Commission precedent, three other classifications of UI claimants are exempt from the Wagner-Peyser job matching registration and reemployment services requirement. However, these claimants are not explicitly exempted from the Work Search requirements of §815.28. These three classifications of UI claimants are:

(1) Individuals on temporary layoff with a definite date to return to work, and who are exempt from work registration requirements under §815.20(8)(A);

(2) Individuals who are members in good standing of a union with a nondiscriminatory hiring hall and are exempt from work registration requirements under §815.20(8)(B); and

(3) Individuals performing jury service.

Section 815.28(a)(1)(E)(iii) - (v) Relates to Exemptions from Work Search Requirements for Individuals on Temporary Layoff with a Definite Date to Return to Work.

The Commission proposes to amend §815.28 in order to explicitly exempt from the rule's requirement individuals temporarily laid off but with a definite date to return to work. These individuals are already exempt from the work registration requirement under §815.20(8)(A). The Commission proposes to grant exemptions when:

(a) the individual is on temporary layoff with a definite return to work date, which is eight weeks or less from the layoff date;

(b) the individual is on temporary layoff with a definite return to work date which is no more than 12 weeks from the layoff date, provided that written confirmation of the return to work date is received from the separating employer; and

(c) the individual is on temporary layoff that is more than 12 weeks due to a disaster or other extraordinary circumstances, provided that a waiver from work search requirements is granted by the Agency Executive Director. The Executive Director's decision in such cases will be subject to review in any benefits appeal where ineligibility results from the decision. The requesting employer will be made a party of interest to any such appeal.

While the purpose of work search requirements is to move unemployed workers toward reemployment as quickly as possible, exemptions are warranted in the case where workers are merely temporarily laid off. This is because employers have a substantial investment in their trained employees. The Commission's work search rules should not operate to move the trained worker away from the previous employer or to separate the worker from his soon-to-be reinstated job opportunity. Employers should not be deprived of their investment because of a requirement for the employee to seek other work simply because economic conditions dictate a temporary workforce reduction. Additionally, the claimant worker should not be required, because of attendant work search requirements, to relocate or change occupations during the period between a temporary lay off and the return to work date. Loss of trained workers may also delay the economic recovery of a business, which may in turn delay the recovery of the Texas economy as a whole. An exemption in these cases from work search requirements is therefore in the best interests of the temporarily laid off workers, their employers, and all Texans.

Given the significant interest in exempting workers temporarily laid off and the interest in re-employing claimants as soon as possible, the Commission's longstanding practice is to limit work search exemptions to eight weeks unless the claimant's employer requests a longer exemption period of up to 12 weeks. Employer requests for exemptions of more than 12 weeks are granted only after administrative review. This procedure was developed as a balance between the two objectives:

(1) rapid reemployment of claimants, and

(2) assisting employers retain skilled workers in order to rapidly recover from economic dislocations.

§815.28(a)(1)(E)(vi), Exemption from Work Search Requirements for Individuals who are Members in Good Standing of a Union with a Nondiscriminatory Hiring Hall

The Commission further proposes to amend §815.28 to explicitly exempt from the general work search requirements any UI claimants who are members in good standing of a union with a nondiscriminatory hiring hall since they are exempt from work registration requirements under §815.20(8)(B).

A hiring hall is best defined by its function which is to match workers and jobs. Traditionally, it is a physical location where employers seek workers and workers come to seek employment. Since 1934, Merriam-Webster has defined hiring hall more specifically as "a union-operated placement office where registered applicants are referred in rotation to jobs." The key elements of the hiring hall are a list of job assignments maintained by the union business agent, and a "daybook" listing of available employees. Most unions with hiring halls maintain the daybook where active members must sign, in person, at least once a week. Many also require a daily call-in. Generally, laid off workers sign the daybook to indicate their availability and, with some allowances for seniority or experience, are referred to new job assignments on a first come, first served basis. In effect, the labor organization performs ongoing work search and job placement activities on behalf of its members.

In many cases, exclusive contracts between labor and employer organizations require that workers supplied by the union complete necessary training, attain certain experience levels, or achieve other qualifying standards. To meet these contractual obligations, the labor organizations have established hiring halls, and members are generally required by their union, as a condition of membership, both to accept hiring hall referrals and to refuse employment offers which are not made through the union hiring hall.

Employers frequently provide members' insurance and/or retirement benefits through the union. The bylaws or dispatching rules of union hiring halls spell out the hall's purpose and procedure with respect to such benefits. Depending on the union, some members must work at least 1,000 to 1,500 hours per year to maintain insurance benefits and to qualify for a year of service toward retirement. Seeking employment with nonunion employers, and failing to seek work through the hiring hall according to union rules or bylaws could therefore cause members to lose their union membership, insurance, vacation, and pension.

The Commission's longstanding policy of exempting from work registration and work search requirements individuals who are members in good standing of a union with a nondiscriminatory hiring hall is grounded in federal and state law. In the Landrum-Griffin Act, 29 U.S.C. §151(d), 29 U.S.C. §401 and elsewhere, the U.S. Congress guaranteed workers the right to organize, set out structural standards for labor organizations, and required that mutual activities such as hiring halls must be respected. The Texas Labor Code §207.008(b), mirroring language of the Federal Unemployment Tax Act (FUTA), 26 U.S.C.

§3304(5)(c), states that UI benefits may not be denied "to an otherwise eligible individual for refusal to accept new work if... as a condition of being employed, the individual is required to join a company union or to resign from or refrain from joining a bona fide labor organization."

In recognition of all of these factors, the Commission has historically exempted this classification of claimants from work search requirements. The Commission has previously determined that claimants who usually obtain work through a union meet the requirement of making an active, independent search for work if each of the following conditions is met:

(1) the claimant is a union member in good standing; and

(2) the union maintains a nondiscriminatory hiring hall, as that term is defined by the Landrum-Griffin Act. The Commission finds that these conditions warrant continued exemption from the work search requirements.

The Commission estimates that the number of claimants in this classification represent only 1.71 percent of all regular Texas UI claimants. Further, claimants who meet this exemption tend to collect benefits for fewer weeks than other claimants and are less likely to exhaust their benefits.

Although the Commission finds that an exemption is appropriate for these claimants, the Commission emphasizes that any UI claimant who is a member in good standing of a union with a nondiscriminatory hiring hall must maintain contact with and use the placement services of the hiring hall.

§815.28(a)(1)(E)(vii), Exemption from Work Search Requirements for Individuals Actively Engaged in Jury Service

The Commission proposes to amend §815.28 to explicitly exempt from the rule's requirements individuals performing jury service for a period of three days or longer, with such exemption to apply only to weeks in which the claimant is actively performing jury service.

The Commission has taken the position that to hold a claimant unavailable during a period of jury service would be to penalize the claimant for complying with the claimant's legal citizenship obligation. The Commission will not force a claimant to choose between receipt of unemployment benefits and violation of the claimant's statutory obligation to serve on a jury.

§815.28(a)(1)(F), Applicability of Work Search Requirements to Certain Classifications of Claimants

The Commission proposes to amend §815.28 to add a new subsection (a)(1)(F), clarifying that Work Search requirements shall apply to:

(a) recipients of state extended UI benefits, who are required to actively seek work under Texas Labor Code §209.043;

(b) recipients of federal extended unemployment benefits, except that if the federal legislation establishing such benefits or administrative directives for administering such benefits includes work search requirements, which are in conflict with those established by §815.28, the federal requirements or administrative directives shall apply; and

(c) individuals who are engaged in efforts to establish themselves in a self-employment venture.

Texas Labor Code §209.043, Requirement to Seek Work, provides work search requirements for claimants receiving Texas (state) extended unemployment benefits. In addition, some national legislation providing federal extended unemployment benefits has included work search requirements, which may conflict with the provisions of §815.28. Section 815.28 does not now specifically address the applicability of the rule to claimants receiving either state or federal extended benefits. The Commission amends the rule to clarify that the work search requirements apply to these claimants.

Similarly, the Commission has previously determined that the work search requirement under §815.28 does not exempt claimants who are establishing a self-employment venture for themselves. Again, the Commission amends the rule to explicitly provide that the requirements apply to these claimants.

The Commission's Appeals Policy and Precedent Manual currently includes a work search component at AA 160.05, "General Statement of Commission Policy on Work Search." The Commission intends that the amended rule once adopted shall supersede the General Statement of Commission Policy on Work Search contained in the Appeals Policy and Precedent Manual at AA 160.05. It also will supersede Appeal No. 2925-CA-77, which is digested in the Manual at AA 160.10 and at 415.05; Appeal Precedent Number 1994-CA-0581, digested in Appeals Policy and Precedent Manual at AA 370.10; and any other provisions in the Appeals Policy and Precedent Manual in conflict. The Commission intends to rescind the precedents in an open meeting.

§815.109. Payment of Contributions and Reimbursements.

The Commission proposes to amend §815.109(e), by re-lettering subsection (e) to (f) and subsection (f) to (g) and inserting a new subsection (e). This amendment clarifies when an additional tax resulting from a chargeback adjustment is due, and when interest will begin to accrue on any unpaid balance. The Commission intends that if, for example, an employer receives a notice of additional taxes due, which is dated March 15, the due date for payment will be May 1, the final date for payment without further penalty will be May 31, and interest will begin to accrue on June 1.

UI tax rates are calculated annually during the fourth quarter and are effective January 1 of the following year. Chargebacks are the primary component in an employer's experience rating, which in turn is the primary factor determining the employer's annual tax rate. Annual tax rates, including prior year tax rates, can be adjusted at any time during the year when chargebacks are adjusted as a result of an appeal of a UI benefit decision.

When a claimant is initially disqualified for benefits but appeals the decision and ultimately prevails, the employer's tax rate is recalculated based on benefits paid to that claimant. It is not unusual for the Commission to resolve such an appeal after the new year's tax rate notice has been mailed and the employer has already paid taxes under that new rate. Generally, each employer in the claimant's base period shares in the chargebacks proportionately according to the wages earned by the claimant from each employer. This is true unless a base period employer timely responds to the notice of chargeback and is not chargeable for the benefits based upon a Commission determination. However, when the employer is liable the chargebacks are posted to the employer's account for the quarter in which they occurred. The employer's annual tax rate is recalculated based upon the revised chargebacks.

Assessment of Interest. When the recalculated tax rate is higher than the original rate, the employer is notified of the increase and

of the additional tax and interest due for each quarter affected. The interest is calculated retroactively, based on the original due date of the quarterly report. Moreover, the length of the appeal process sometimes causes the total period of adjustment, including the interest assessment, to encompass several quarters in prior years and to extend to the most recently filed quarter. This current policy on interest assessments can produce a financial burden for affected employers.

Due dates for payment of tax are set by §815.109(a) which states, in part, "contributions shall accrue quarterly and shall become due on the first day of the month following the calendar quarter. They shall be paid to the Agency on or before the last day of the month."

Exceptions to timely payment of tax due. Under §815.109(e), the Commission has provided for extensions of up to 60 days beyond the required due dates for payment of regular quarterly taxes. However, the rule does not speak directly to due dates in the situation described above, where the amounts of tax due (and interest charges) result from appeals decisions that occur considerably later than 60 days after the original quarterly due date.

Interest is charged on taxes not paid by due dates. The Texas Labor Code §213.021(a) states, in part "An employer who does not pay a contribution on or before the date prescribed by the commission is liable to the state for interest of one and one-half percent of the contribution for each month or portion of a month that the contribution and interest payments are not paid in full."

There is no specific provision in statute or Commission rule addressing the Commission's ability to accept payment in chargeback adjustment cases without assessing interest. However, the Commission has often granted employers in such cases an additional 30 days from the notice to pay without assessing interest. The proposed amendment will clarify Texas Workforce Commission's business practice and preserve it in rule. The proposed amendment also will grant employers more flexibility by making the due date contingent upon the date the Agency mailed the statement or letter notifying the employer of the change in tax rate and additional tax due, rather than a fixed 30-day deadline.

Coordination with Stakeholders: Prior to proposing these rule amendments, the Commission circulated a policy concept paper outlining the changes to the Board chairs, members and executive directors, and the Texas Association of Workforce Boards Policy Committee requesting feedback on the draft policy changes. As §815.109 does not directly affect Boards, the Commission determined that the concept review phase could be expedited. In addition, the concept for amendments to §815.28 and §815.15 were discussed on March 19, 2004, in a conference call with Board Executive Directors and staff. While no written remarks were submitted, clarification of the Boards' roles in the work search process and in other areas was requested and provided.

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the amendments will be in effect, the following fiscal statements will apply:

There are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the amendments;

There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the amendments;

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the amendments;

There are no foreseeable implications relating to costs or revenue of the state or local government as a result of enforcing or administering the amendments; and

Mr. Townsend has also determined that there is no adverse economic effect on small businesses or individuals as a result of enforcing or administering the amendments.

LaSha Lenzy, Director of Unemployment Insurance and Regulation, has determined that for each year of the first five years the amendments are in effect, the public benefits anticipated as a result of clarifying the rules are to:

(a) provide improved service to employers, UI claimants, and the people of Texas;

(b) assist employers in retaining trained workers; and

(c) stabilize local economies by helping employers quickly recover from short-term dislocations.

Mark Hughes, Director of Labor Market Information, has determined that the proposed amendments would positively impact private employment by facilitating employers' efforts to obtain and retain qualified workers. While the proposed amendments are intended in part to stabilize local economies and facilitate economic recovery by local businesses, the impacts are relatively minor in broader economic context. Mr. Hughes does not expect any significant impact upon overall employment conditions in the state as a result of the proposed amendments.

Comments on the proposal may be submitted to John Moore, Office of the General Counsel, Texas Workforce Commission, 101 East 15th Street, Room 608, Austin, Texas 78778-0001, (512) 463-3041. Comments may also be submitted via fax (512) 463-2220 or e-mail at John.Moore@twc.state.tx.us. Comments must be received by the Commission within 30 days from the date this proposal is published in the *Texas Register*. A Public Hearing will be conducted if requested under Government Code §2001.029.

SUBCHAPTER B. BENEFITS, CLAIMS AND APPEALS

40 TAC §815.15, §815.28

The amendments are proposed under Texas Labor Code §301.0015 and §302.002, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of services and activities.

The amendments affect Texas Labor Code, Title 4.

§815.15. Parties with Appeal Rights.

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

(c) An employer may file an appeal from a determination that affects a claimant's entitlement to benefits if the employer is a party of interest to the determination. The paragraphs [~~Paragraphs~~ ~~(1)~~ - ~~(5)~~] of this subsection are situations in which the Agency shall treat an employer as a party of interest in a specific proceeding. Only one employer shall be a party of interest to a proceeding.

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

(6) If an employer has requested a waiver under §815.28(a)(1)(E)(v) of this subchapter and the Agency Executive

Director denies the waiver, the employer shall be a party of interest to any benefits appeal where ineligibility results from that denial.

§815.28. Work Search Requirements.

(a) Purpose. The purpose of this rule is to describe the work search requirements and process that must be met for claimants to continue to receive unemployment compensation benefits. A claimant is required to register for work, to actively seek work and be available for work, as well as accept suitable work. The rule also describes the process to be utilized by Local Workforce Development Boards (Boards) when formulating the numerical weekly work search contact requirements.

(1) A claimant shall be considered available for work during the time the claimant is making a reasonable search for suitable work as defined by this section.

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

(E) This section [rule] shall not apply to:

(i) (No change.)

(ii) individuals participating in Agency approved or Trade Act training, §207.022 and §207.023 of the Act; [or]

(iii) individuals on temporary layoff with a definite date to return to work that is within eight weeks or less from the date of layoff;

(iv) individuals on temporary layoff with a definite return to work date that is within eight to 12 weeks from the date of layoff, provided the exemption from work search requirements is explicitly requested in writing by the separating employer;

(v) individuals on temporary layoff with a definite return to work date that is more than 12 weeks from the date of layoff provided that a waiver from work search requirements is requested by the separating employer and granted by the Agency Executive Director. The Executive Director's decision is subject to review in any benefits appeal where ineligibility results from the decision. The requesting employer is a party of interest to any such appeal, as described in §815.15(c)(6) of this subchapter;

(vi) individuals who are members in good standing of a union that maintains a nondiscriminatory hiring hall, as that term is defined by the Landrum-Griffin Act, and who maintain contact with and use the placement services of the hiring hall;

(vii) individuals who perform jury service for a period of three days or longer, during the weeks in which the individual is actively performing jury service; or

(viii) [(iii)] individuals who are otherwise exempted by law.

(F) This section shall apply to all claimants unless specifically exempted, including:

(i) recipients of state extended unemployment benefits, who are required to actively seek work under Texas Labor Code §209.043;

(ii) recipients of federal extended unemployment benefits, except that if the legislation establishing such benefits or administrative directives for administering such benefits include work search requirements, which are in conflict with those established herein, the federal requirements or administrative directives shall apply; or

(iii) individuals who are engaged in efforts to establish themselves in a self-employment venture.

(2) (No change.)

(b) - (e) (No change.)

(f) Local Boards shall have the flexibility within the guidelines provided in this section to formulate the appropriate minimum number of weekly work search contacts for their respective workforce area, using appropriate guidelines to be developed in consultation with Agency [agency] staff, and shall maintain written documentation. Boards shall review the minimum number of weekly work search contacts for each workforce area at least once per year on a date to be determined by the Agency.

(g) (No change.)

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

Filed with the Office of the Secretary of State on May 12, 2004.

TRD-200403195
John Moore
General Counsel
Texas Workforce Commission
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 463-2573

SUBCHAPTER C. TAX PROVISIONS

40 TAC §815.109

The amendments are proposed under Texas Labor Code §301.0015 and §302.002, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of services and activities.

The amendments affect Texas Labor Code, Title 4.

§815.109. Payment of Contributions and Reimbursements.

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

(e) Additional tax resulting from a chargeback adjustment is due on the first day of the second month following the month in which the Agency mailed the statement or letter notifying the employer of the change in tax rate and additional tax due. Amounts due from such chargeback adjustments shall be paid and must be received by the Agency on or before the last day of this second month.

(f) [(e)] When good cause is shown, the Agency may extend the due date for the payment of contributions or reimbursements; [,] however, the extension may not exceed 60 days and shall not be effective unless the extension is authorized in writing by the Agency. In the event the Agency for good cause shown extends the due date for payment of contributions or reimbursements the payments shall be made to the Agency on or before the 30th day following the extended due date.

(g) [(f)] An agent or other entity making a payment on behalf of 20 or more employers shall furnish an allocation list on magnetic or electronic media using a format prescribed by this Agency, unless the Agency has approved another format and method in writing. This list shall be furnished with the remittance, and the remittance shall be allocated to the credit of the employers according to the order in which the employers appear on the list.

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 May 12, 2004.

TRD-200403196
John Moore
General Counsel
Texas Workforce Commission
Earliest possible date of adoption: June 27, 2004
For further information, please call: (512) 463-2573

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 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 100. CHARTERS

SUBCHAPTER A. OPEN-ENROLLMENT CHARTER SCHOOLS

19 TAC §100.1

The State Board of Education (SBOE) proposed an amendment to §100.1 as published in the March 26, 2004, issue of the *Texas Register* (29 TexReg 3028). Section 100.1 establishes the application and selection procedures and criteria for open-enrollment charter schools. The proposed amendment would have changed the process for reviewing charter school applications that do not contain all required information and documentation by eliminating the review by the SBOE committee responsible for charter schools from the process.

During its meeting on May 7, 2004, the SBOE took action to retain language in §100.1 that reads, "including a process for review by the SBOE committee responsible for charter schools," that had been proposed for removal. Therefore, the proposed amendment to §100.1 published in the *Texas Register* in March 2004 is withdrawn.

Filed with the Office of the Secretary of State on May 17, 2004.

TRD-200403333
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: May 17, 2004
For further information, please call: (512) 475-1497

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. MEDICAID REIMBURSEMENT RATES

SUBCHAPTER C. REIMBURSEMENT METHODOLOGY FOR NURSING FACILITIES

1 TAC §355.311

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §355.311 without changes to the proposed text published in the March 26, 2004, issue of the *Texas Register* (29 TexReg 2996).

HHSC is adopting the amendment to make the process of determining interim reimbursement rates for state veterans homes more efficient. Currently, the interim rate determination is made based on the lower of an estimated per diem cost that requires time-consuming calculations or on the semi-private basic daily rate in effect on the first day of the rate period. Since the semi-private daily rate is historically the lower of the two rates, HHSC determined to remove the option and require the use of the semi-private basic daily rate as the interim rate. In the course of preparing the amendment, HHSC deleted several definitions from the rule that were no longer necessary and corrected the section titles to several cross-references.

HHSC received no comments regarding adoption of the amendment.

The amendment is adopted under the Government Code, §531.033, which authorizes the commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under Human Resources Code, Chapter 32.

The amendment affects the Government Code, §531.033 and §531.021(b).

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 May 12, 2004.

TRD-200403227

Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: June 1, 2004
Proposal publication date: March 26, 2004
For further information, please call: (512) 438-3734

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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 §1.16

The Texas Department of Housing and Community Affairs (the Department) adopts, without changes, the proposed new §1.16, concerning ethics and disclosure requirements for outside financial advisors and service providers, as published in the March 26, 2004 issue of the *Texas Register* (29 TexReg 3015).

This section is adopted in order to implement new legislation enacted in the 78th Legislative Session.

No comments were received regarding the proposed new section.

The new section 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 May 17, 2004.

TRD-200403312
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Effective date: June 6, 2004
Proposal publication date: March 26, 2004
For further information, please call: (512) 475-4595

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TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 12. TEXAS HISTORIC COURTHOUSE PRESERVATION PROGRAM

13 TAC §12.7

The Texas Historical Commission (THC) adopts the amendment to §12.7 of Chapter 12 (Title 13, Part 2 of the Texas Administrative Code), concerning the Texas Historic Courthouse Preservation Program without changes to the proposed text as published in the March 26, 2004, issue of the *Texas Register* (29 TexReg 3017) and will not be republished.

The purpose of the adopted amendment is for greater efficiency and accountability within the Texas Historic Courthouse Preservation Program.

The amendment is adopted under §442.005(q), Title 4 of the Texas Government Code, which provides the Texas Historical Commission with the authority to promulgate rules and conditions to reasonably affect the purposes of this chapter.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 12, 2004.

TRD-200403229

F. Lawerence Oaks

Executive Director

Texas Historical Commission

Effective date: June 1, 2004

Proposal publication date: March 26, 2004

For further information, please call: (512) 463-8817

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER J. COSTS, RATES AND TARIFFS

DIVISION 2. RECOVERY OF STRANDED COSTS

16 TAC §25.263

The Public Utility Commission of Texas (commission) adopts an amendment to §25.263, relating to True-Up Proceeding, with no changes to the proposed text as published in the April 9, 2004 *Texas Register* (29 Tex Reg 3585). The amendment to §25.263 implements the provisions of Public Utility Regulatory Act (PURA) §39.262, which sets forth the requirements for the final true-up of stranded costs. The amendment deletes the conflict-of- interest provisions in subsection (f) of the rule, relating to the employment of a valuation panel to ascertain the existence and value of a control premium for any power generation company that uses the partial stock valuation method to determine the market value of its generation assets, in connection with determining the company's stranded costs. The commission will instead consider appropriate conflict-of-interest standards in selecting persons to serve on the valuation panel. This amendment is adopted under Project Number 29478.

A public hearing on the amendment was held at commission offices on Tuesday, April 13, 2004 at 9:30 a.m. Representatives from CenterPoint Energy Houston Electric, LLC (CenterPoint); Texas Industrial Energy Consumers (TIEC); and Clark, Thomas & Winters (CTW) attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

The commission received one set of written comments on the proposed amendment jointly filed by the City of Houston, Coalition of Cities, Office of Public Utility Counsel, Texas Industrial Energy Consumers, Gulf Coast Coalition of Cities, Houston Council for Health and Education, and State of Texas (collectively, "Ratepayer Advocates").

Summary of Comments at Public Hearing

CenterPoint commented at the public hearing that with regard to potential conflicts of interest, the banks that are eligible to serve on the valuation panel also perform work for some of the major intervenor groups. CenterPoint noted that, therefore, the concerns relating to conflicts of interest in the selection of a valuation panel are not completely one-sided.

Summary of Ratepayer Advocates' Written Comments

Ratepayer Advocates noted in their written comments that the stated purpose of the proposed amendment is to attract "a broader group of persons who would be eligible to serve on the valuation panel and a more accurate determination of the market value of stranded costs." Ratepayer Advocates additionally noted that the commission's initial Request for Proposal (RFP) in this project did not elicit any responses, and that they appreciate the commission's efforts to broaden the prospective panel for valuation of the control premium pursuant to PURA §39.262(h)(3). Ratepayer Advocates expressed concern, however, that the proposed amendment may not adequately address the intent of the legislature that the panelists be "independent," and may not be sufficient to elicit an adequate number of responses because of the strong disincentives for "sell-side" investment banks to participate. Ratepayer Advocates suggested that the foremost intent of the Legislature was that the participating investment bankers remain independent. To the extent that a potential panelist is not independent, this would clearly violate the intent of the Legislature in enacting PURA §39.262. Therefore, the Ratepayer Advocates urged the commission to expressly include appropriate conflict-of-interest standards in the rule.

Ratepayer Advocates noted that banks and similar sell-side intermediaries, which include mergers and acquisitions firms, make their money from commissions on the issuance of new securities, commissions on the sales and trading of existing securities, and from transaction fees involving mergers, acquisitions and divestitures. Even a relatively small offering (*e.g.*, $200 million) can generate three to five million dollars in fees for the intermediaries involved. Consequently, Ratepayers Advocates

noted, it cannot be assumed that any large investment bank would be willing to jeopardize this lucrative business in order to participate in a commission valuation panel that yields relatively little compensation and that has the potential to alienate future clients. Ratepayer Advocates averred that it may be that it was this disincentive, rather than the direct prohibition of conflicts of interest, which kept any of the top ten investment banks from bidding on the last RFP. If this is the case, Ratepayer Advocates submitted, then the recently approved amendment to the rule may not be sufficient inducement for these firms to bid on any future RFP.

Ratepayer Advocates also commented that, to the extent that any large investment bank does intend to issue securities for CenterPoint or related entities, it is hard to see how any such panelist could be considered independent. It cannot be assumed that an investment bank would ignore its own financial gain in issuing securities, and jeopardize further engagement with CenterPoint, to issue a valuation opinion unfavorable to CenterPoint in this case. Ratepayer Advocates therefore requested that the commission consider alternatives which Ratepayer Advocates believe are viable options under PURA. Specifically, the Ratepayer Advocates requested that the commission seek to fulfill the legislative intent underlying PURA §39.262 by issuing an RFP that would seek responses from alternate groups of independent financial experts, including "buy-side" analysts who do not make their money through transaction fees and trading commissions. Ratepayer Advocates noted that although PURA §39.262(h)(3) states that the valuation panel must consist of financial experts, chosen from the top ten nationally recognized investment banks, there is a very real possibility that the commission will not be able to convene an independent valuation panel in accordance with this language. Thus, Ratepayer Advocates suggested that it may be impossible for the commission to follow the exact letter of the statute should it choose to convene a valuation panel. Ratepayer Advocates averred that Texas law is clear that the commission has the authority to consider alternatives necessary to fulfill legislative intent if the plain language of the statute cannot be followed or following the plain language of the statute would lead to an absurdity.

Ratepayer Advocates noted that The Texas Supreme Court has long recognized that "the intention of the legislature in enacting a law is the law itself, and must be enforced when ascertained, *although it may not be consistent with the strict letter of the statute.* Courts will not follow the letter of the statute when it leads away from the true intent and purpose of the legislature and to conclusions inconsistent with the general purpose of the act." (Ratepayer Advocates' emphasis)

Ratepayer Advocates cited the directive in PURA §39.262(a) that an electric utility "may not be permitted to overrecover stranded costs through the procedures established by this section or through the application of the measures provided by the other sections of this chapter." They opined that the Legislature could not have intended that a control premium be avoided simply because the top ten independent investment banking firms with demonstrated experience in the electric utility industry failed to respond to a RFP. To the extent that an independent valuation panel cannot be convened, and a control premium exists for a particular stock, then a utility would overrecover stranded costs by the measures set forth in "this section"--PURA §39.262-- if the control premium is not adopted. Ratepayer Advocates therefore argued that not convening an independent panel, simply because of a failure to receive responses from the top ten independent investment banking firms, would lead to a result that directly contravenes PURA.

Ratepayer Advocates commented that the commission has ample experience to select a fair valuation panel consisting of financial experts chosen from among the most nationally recognized firms with demonstrated experience in the United States electric industry. Ratepayer Advocates opined that such a selection by the commission would comply with the intent of PURA, which is the supreme law, although it may not be possible to comply with the strict letter of the law. Accordingly, Ratepayer Advocates requested that the commission issue an alternative RFP that is consistent with the legislative intent behind PURA §39.262, while using the commission's expertise to ensure compliance with the Legislative intent in selecting qualified financial experts to serve on the panel. Ratepayer Advocates strongly urged the commission to consider alterative panels to analyze the need for a control premium, as the case law strongly supports such options when it is impossible to follow the exact letter of the statute, while still complying with legislative intent.

The commission understands Ratepayer Advocates' concern to be that the amended rule will not attract a sufficient number of independent, qualified respondents. Ratepayer Advocates' concern is premature. As reflected in the filings in this Project, the commission has received several responses from apparently qualified RFP respondents. As the Ratepayer Advocates note, one of the chief concerns with respect to independence is the prospect that serving on the valuation panel would impair a company's future business prospects with CenterPoint or a related company. The RFP contains clear restrictions on performing current or post-agreement work for either CenterPoint Energy Houston Electric, LLC, or Texas Genco, LP, and despite this prohibition, the commission received several responses to the RFP. The Ratepayer Advocates in their comments did not specifically suggest that the commission change the proposed rule, and the commission is not making any changes in response to these comments. The commission shares Ratepayer Advocates' concern that it be able to select independent, qualified persons to serve on a valuation panel, and it intends to make every reasonable effort to select such a panel.

With regard to CenterPoint's comments at the public hearing, the commission acknowledges that to the extent that the same investment banks eligible for the valuation panel also conduct business with certain of the intervenor groups, this would have the effect of mitigating concerns about conflicts with CenterPoint or Texas Genco. Similar, however, to its conclusions regarding Ratepayer Advocates' comments, the commission is not making any changes in response to these comments because CenterPoint did not specifically suggest that the commission change the proposed rule.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2004) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §39.262, which requires the commission to conduct a true-up proceeding for each investor-owned electric utility on a schedule and under procedures to be determined by the commission.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 39.252 and 39.262.

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 May 13, 2004.

TRD-200403257
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: June 2, 2004
Proposal publication date: April 9, 2004
For further information, please call: (512) 936-7223

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 60. TEXAS COMMISSION OF LICENSING AND REGULATION

The Texas Department of Licensing and Regulation ("Department") adopts the repeal of existing rules at 16 Texas Administrative Code ("TAC"), §60.10 and §§60.100-60.108, 60.120-60.124, 60.150-60.160, 60.170-60.174, and 60.190-60.192 and adopts new rules at 16 TAC §60.10, §60.66, and §§60.100-60.101, 60.150-60.159, and 60.170-60.173, concerning authority and responsibilities, organization, and practice and procedure before the Texas Commission of Licensing and Regulation and the Department as published in the February 6, 2004, issue of the *Texas Register* (29 TexReg 1127), without changes, and will not be republished. Section 60.160(c) is changed from the proposed text as published in the February 6, 2004, issue of the *Texas Register* (29 TexReg 1127) to correct a typographical error.

The repeal removes the sections concerning definitions and hearings procedures that must be rewritten to comply with Senate Bills 279 and 1147 passed during the 78th Legislative Session that amend Chapter 51, Texas Occupations Code, providing for the addition of new requirements that hearings before the Department be heard by the State Office of Administrative Hearings and that the Department develop and implement a negotiated rulemaking and an alternative dispute resolution procedure. The new rules are necessary to comply with new legislation, provide the public access to new avenues for settling cases, and increase regulatory efficiency.

The Department drafted and distributed the rule proposal to persons internal and external to the agency. No comments were received.

SUBCHAPTER A. AUTHORITY AND RESPONSIBILITIES

16 TAC §60.10

The repeal is adopted under Chapter 51, §§51.201 and 51.203, Texas Occupations Code, which authorize the Commission to adopt rules as necessary for its own procedures and to implement each law establishing a program regulated by the Department.

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

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 May 12, 2004.

TRD-200403201
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: June 1, 2004
Proposal publication date: February 6, 2004
For further information, please call: (512) 463-7348

16 TAC §60.10

The new rules are adopted under Chapter 51, §§51.201 and 51.203, Texas Occupations Code, which authorize the Commission to adopt rules as necessary for its own procedures and to implement each law establishing a program regulated by the Department.

The statutory provisions affected by the new rule adoption are those set forth in the Chapter 51, Texas Occupations Code. No other statutes, articles, or codes are affected by the new rules as adopted.

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 May 12, 2004.

TRD-200403202
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: June 1, 2004
Proposal publication date: February 6, 2004
For further information, please call: (512) 463-7348

SUBCHAPTER B. ORGANIZATION

16 TAC §60.66

The new rule is adopted under Chapter 51, §§51.201 and 51.203, Texas Occupations Code, which authorize the Commission to adopt rules as necessary for its own procedures and to implement each law establishing a program regulated by the Department.

The statutory provisions affected by the new rule adoption are those set forth in the Chapter 51, Texas Occupations Code. No other statutes, articles, or codes are affected by the new rules as adopted.

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 May 12, 2004.

TRD-200403203
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: June 1, 2004
Proposal publication date: February 6, 2004
For further information, please call: (512) 463-7348

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SUBCHAPTER D. PRACTICE AND PROCEDURE

16 TAC §§60.100 - 60.108, 60.120 - 60.124, 60.150 - 60.160, 60.170 - 60.174, 60.190 - 60.192

The repeal is adopted under Chapter 51, §§51.201 and 51.203, Texas Occupations Code, which authorize the Commission to adopt rules as necessary for its own procedures and to implement each law establishing a program regulated by the Department.

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

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 May 12, 2004.

TRD-200403204
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: June 1, 2004
Proposal publication date: February 6, 2004
For further information, please call: (512) 463-7348

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16 TAC §§60.100, 60.101, 60.150 - 60.160, 60.170 - 60.173

The new rules are adopted under Chapter 51, §§51.201 and 51.203, Texas Occupations Code, which authorize the Commission to adopt rules as necessary for its own procedures and to implement each law establishing a program regulated by the Department. The statutory provisions affected by the new rule adoption are those set forth in the Chapter 51, Texas Occupations Code. No other statutes, articles, or codes are affected by the new rules as adopted.

§60.160. Failure to Attend Hearing and Default.

(a) If, within twenty days after receiving a Notice of Alleged Violation, the Respondent fails to accept the Department's determination and recommended administrative penalty and/or sanction, or fails to make a written request for a hearing on the determination, the Department may propose entry of a default order against the Respondent unless otherwise provided by applicable law.

(b) Where a Respondent fails to answer to the Notice of Alleged Violation, the Department may present to the Commission and/or the Executive Director a motion for default order along with a proposed default order containing findings of fact and conclusions of law. Respondents will be notified as to the time and place the motion for default order will be considered. If a Respondent attends at the time and place prescribed in the notice, an administrative hearing may be set in accordance with §60.101(b).

(c) After receiving a notice proposing denial of an application or a notice proposing denial of an opportunity to take an examination, an Applicant may request a hearing in writing within twenty days of receipt of the notice or forfeit the right to a hearing unless otherwise provided by applicable law.

(d) 1 TAC §155.55 (SOAH rules) applies where a Respondent fails to appear on the day and time set for administrative hearing. In that case, the Department's staff may move either for dismissal of the case from SOAH's docket or for the issuance of a default proposal for decision by the judge.

(e) Any document served upon a party is prima facie evidence of receipt if it is directed to the party's last known complete, correct address as shown by the Department's records. This presumption is rebuttable. Failure to claim properly addressed certified or registered mail will not support a finding of nondelivery.

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 May 12, 2004.

TRD-200403205
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: June 1, 2004
Proposal publication date: February 6, 2004
For further information, please call: (512) 463-7348

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CHAPTER 60. TEXAS COMMISSION OF LICENSING AND REGULATION

The Texas Department of Licensing and Regulation ("Department") adopts the repeal of 16 Texas Administrative Code ("TAC"), Chapter 60, Subchapter E, Administration, §60.201; and adopts new rules at 16 Texas Administrative Code, Chapter 60, Subchapter E, Administration, Division 2, Training, §60.210; Division 3, Historically Underutilized Businesses, §60.220; Division 4, Bid Opening and Tabulation, §60.230; and Division 5, Vendor Protests, §60.240 and §60.241, regarding the Texas Commission of Licensing and Regulation administrative rules as published in the February 20, 2004, issue of the *Texas Register* (29 TexReg 1494), without changes, and will not be republished.

The repeal allows for a rule organizational structure that can accommodate several different but related rule matters in the area of agency internal administration, such as compliance with statutory training and purchasing requirements. The adoption of the new rules also complies with Texas Government Code §§2161.003, 2155.076 and 2156.005, which require, respectively, agency rules pertaining to historically underutilized businesses, vendor protest procedures, and bid opening and tabulation.

The Department drafted and distributed the proposal to persons internal and external to the agency. No comments were received.

SUBCHAPTER E. ADMINISTRATION

16 TAC §60.201

The repeal is adopted under Chapter 51, §51.201, Texas Occupations Code, which authorizes the Commission to adopt rules as necessary for its own procedures.

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

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 May 12, 2004.

TRD-200403206
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: June 1, 2004
Proposal publication date: February 20, 2004
For further information, please call: (512) 463-7348

SUBCHAPTER E. ADMINISTRATION

DIVISION 2. TRAINING

16 TAC §60.210

The new rule is adopted under Chapter 51, §51.201, Texas Occupations Code, which authorizes the Commission to adopt rules as necessary for its own procedures.

The statutory provisions affected by the adopted new rule are those set forth in Chapter 51, Texas Occupations Code, and Chapter 656, Texas Government Code. No other statutes, articles, or codes are affected by the new rule as adopted.

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 May 12, 2004.

TRD-200403207
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: June 1, 2004
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For further information, please call: (512) 463-7348

DIVISION 3. HISTORICALLY UNDERUTILIZED BUSINESSES

16 TAC §60.220

The new rule is adopted under Chapter 51, §51.201, Texas Occupations Code, which authorizes the Commission to adopt rules as necessary for its own procedures.

The statutory provisions affected by the adopted new rule are those set forth in Chapter 51, Texas Occupations Code and Chapter 2161, Texas Government Code. No other statutes, articles, or codes are affected by the new rule as adopted.

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) 463-7348

DIVISION 4. BID OPENING AND TABULATION

16 TAC §60.230

The new rule is adopted under Chapter 51, §51.201, Texas Occupations Code, which authorizes the Commission to adopt rules as necessary for its own procedures.

The statutory provisions affected by the adopted new rule are those set forth in Texas Occupations Code, Chapter 51 and Chapter 2156, Texas Government Code. No other statutes, articles, or codes are affected by the new rule as adopted.

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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DIVISION 5. VENDOR PROTESTS

16 TAC §60.240, §60.241

The new rules are adopted under Chapter 51, §51.201, Texas Occupations Code, which authorizes the Commission to adopt rules as necessary for its own procedures.

The statutory provisions affected by the adopted new rules are those set forth in Texas Occupations Code, Chapter 51 and Chapter 2156, Texas Government Code. No other statutes, articles, or codes are affected by the new rules as adopted.

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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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER C. GENERAL EDUCATIONAL DEVELOPMENT

19 TAC §89.47

The State Board of Education (SBOE) adopts an amendment to §89.47, concerning general educational development (GED), without changes to the proposed text as published in the March 26, 2004, issue of the *Texas Register* (29 TexReg 3027) and will not be republished. The section establishes provisions relating to the issuance of a GED certificate and a copy of test scores. The adopted amendment updates the rule to reflect an increase in the non-refundable fee assessed for issuance of a certificate and a copy of test scores.

The Texas Education Agency incurs expenditures related to the issuance of GED certificates. The administrative costs are supported solely by fees collected as required in statute. GED revenues (generated by fees) for fiscal year 2003 fell significantly short of the current projected budget. Projected revenues were not met due to rising administrative costs and a steady decrease of test takers in recent years. The adopted amendment increases the fee from $10.00 to $15.00.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Texas Education Code, §7.111, which authorizes the State Board of Education by rule to establish and require payment of a fee as a condition of the issuance of a high school equivalency certificate and a copy of the scores of the examinations. The statute further states that the fee must be reasonable and designed to cover the administrative costs of issuing the certificate and a copy of the scores.

The amendment implements the Texas Education Code, §7.111.

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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TRD-200403329
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Texas Education Agency
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For further information, please call: (512) 475-1497

CHAPTER 100. CHARTERS

SUBCHAPTER A. OPEN-ENROLLMENT CHARTER SCHOOLS

19 TAC §100.105

The State Board of Education (SBOE) adopts an amendment to §100.105, concerning open- enrollment charter schools, without changes to the proposed text as published in the March 26, 2004, issue of the *Texas Register* (29 TexReg 3028) and will not be republished.

Section 100.105 establishes the applicability of existing rule and statute to public senior college or university charters. The adopted amendment to §100.105 creates application and selection procedures that are unique to charters granted under Texas Education Code (TEC), Chapter 12, Subchapter E, by adding new language to provide more specificity regarding the applicability of provisions in 19 TAC Chapter 100, Subchapter A, to a public senior college or university charter school.

No comments were received regarding adoption of the amendments.

The amendment to §100.105 is adopted under the Texas Education Code (TEC), §12.152, which authorizes the SBOE to grant a charter on the application of a public senior college or university for an open-enrollment charter school.

The amendment implements the Texas Education Code, §12.152.

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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CHAPTER 101. ASSESSMENT

SUBCHAPTER B. DEVELOPMENT AND ADMINISTRATION OF TESTS

19 TAC §101.33

The State Board of Education (SBOE) adopts an amendment to §101.33, concerning student assessment, without changes to the proposed text as published in the March 26, 2004, issue of the *Texas Register* (29 TexReg 3030) and will not be republished. The section addresses the release of tests. The adopted amendment revises the schedule for release of tests.

Texas Education Code (TEC), §39.023(e), authorizes the SBOE to adopt rules relating to the release of statewide assessments and answer keys after the last time the instruments are administered for a school year. At the September 2003 meeting, the SBOE adopted a schedule for the release of tests to comply with the amendments made to TEC, §39.023(e), by House Bill 3459,

78th Texas Legislature, 2003, requiring the release of test items to be reduced to every other year. At the February 2004 meeting, in response to concerns expressed by a number of educators that some students may never see the actual tests that they have taken, the SBOE was presented with a revision to the schedule for release that seems to represent the best compromise given the requirements of statute. During its meeting on February 27, 2004, the SBOE directed the commissioner of education to make appropriate posting with the Secretary of State's Texas Register Division so that action to adopt the rule amendment could take place at the May 7, 2004, SBOE meeting.

During its May 2004 meeting, the SBOE took action to approve second reading and final adoption of the rule amendment that revises the schedule for release of tests.

The adopted amendment to §101.33 revises the schedule, calling for the release of all tests for the Texas Assessment of Knowledge and Skills (TAKS), the State-Developed Alternative Assessment (SDAA), and the Reading Proficiency Tests in English (RPTE) in school year 2003-2004 and every even-numbered year after that time. One advantage to this schedule is that it allows for another complete set of released TAKS tests to be viewed and used for appropriate educational purposes. It should be noted that this schedule does not include the release of TAKS tests for the 2004-2005 school year, which is the first year that fifth-grade students will be held to the advancement requirements of the Student Success Initiative in reading and mathematics. Representative released tests would still be available for students and parents to view.

Following is a summary of public comment received and corresponding agency response regarding the proposed amendment to 19 TAC §101.33.

Comment. An individual representing the Texas Statewide Network of Assessment Professionals (T-SNAP) urged the SBOE through a memo that was provided to the SBOE Committee on Instruction to "vote in favor of the amended rules for the released test schedule." The commenter also stressed the importance of the released tests as "the most valuable and most used materials provided by the State to support professionals in the field to assist students in understanding our mandated State curriculum."

Agency response. The agency agrees with the recommendation to release all tests in 2004.

The amendment is adopted under the Texas Education Code, Chapter 39, Subchapter B, which authorizes the State Board of Education to adopt rules to create and implement a statewide assessment program.

The amendment implements the Texas Education Code, Chapter 39, Subchapter B.

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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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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Proposal publication date: March 26, 2004
For further information, please call: (512) 463-9701

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CHAPTER 105. FOUNDATION SCHOOL PROGRAM
SUBCHAPTER A. DEFINITIONS
19 TAC §105.1

The State Board of Education (SBOE) adopts an amendment to §105.1, concerning the Foundation School Program, with changes to the proposed text as published in the March 26, 2004, issue of the *Texas Register* (29 TexReg 3031). Section 105.1 sets forth provisions related to the definition of tax levy and tax collection. The adopted amendment updates the rule to reflect statutory changes.

House Bill 98, 76th Texas Legislature, 1999, added Texas Education Code (TEC), §44.0011, authorizing school districts to choose July 1 or September 1 as the start date of their fiscal year. SBOE rule defined tax collections as total taxes collected between September 1 and August 31. The adopted amendment revises the definition of tax collections to conform to this statutory change and provides clarification for type of tax collections.

The adopted amendment to 19 TAC §105.1 adds a statutory reference in subsection (a), revises language in subsection (b)(2) to expand fiscal year options, and adds new subsection (b)(3) to include a definition for types of tax collections. In response to public comment, additional language is adopted with new subsection (b)(2)(C) to address the treatment of collections related to property value adjustments for major taxpayers pursuant to TEC, §42.2531.

School districts that choose to implement the alternate fiscal year will modify the reporting of tax collections accordingly. The Financial Accountability System Resource Guide has been revised to provide guidance to school districts that choose an alternate fiscal year regarding the reporting of their financial data.

Following is a summary of public comment received and corresponding agency response regarding the proposed amendment to 19 TAC §105.1.

Comment. An administrator of the Gregory-Portland Independent School District commented that school districts that have received adjustments to tax collections based on major taxpayer protests pursuant to TEC, §42.2531, should be allowed to attribute tax collections to the year in which the taxes were originally levied.

Agency response. The agency agrees with the comment. The SBOE adopted additional language to this amendment that provides that districts may petition the commissioner concerning the suggested treatment of tax collections.

The amendment is adopted under the Texas Education Code, §42.004, which authorizes the commissioner, in accordance with the rules of the State Board of Education, to take such action and require such reports consistent with TEC, Chapter 42, as may be necessary to implement and administer the Foundation School Program.

The amendment implements the Texas Education Code, §42.004.

§105.1. Rules for the Definition of Tax Levy and Tax Collection.

(a) General provisions. For the purpose of determining state aid under the Texas Education Code, Chapter 42 and Chapter 46, and in implementing the wealth-equalizing provisions of the Texas Education Code, Chapter 41, calculations that include tax collections as a data element shall reference subsection (b) of this section.

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

(1) Total levy. The sum of the maintenance and operation and debt service levies generated by applying a district's adopted tax rates to its locally assessed valuation of property for the current tax year.

(2) Tax collection.

(A) For districts with a fiscal year that begins on July 1, total taxes collected between July 1 and June 30 for the current and all prior years' levies.

(B) For districts with a fiscal year that begins on September 1, total taxes collected between September 1 and August 31 for the current and all prior years' levies.

(C) For a district that has been awarded a property value adjustment for a major taxpayer protest pursuant to Texas Education Code, §42.2531, the district may petition the commissioner to attribute taxes that had been withheld due to the protest of valuation to the year in which the taxes were originally levied.

(3) Types of tax collections.

(A) Maintenance and operations taxes are those taxes collected during the fiscal year that are associated with the levy of local maintenance and operations tax rates, including current and delinquent taxes and any delinquent taxes related to former county education districts, but not including penalties and interest that accrue on delinquent maintenance and operations tax levies.

(B) Interest and sinking fund taxes are those associated with the levy of local interest and sinking fund taxes, not including penalties and interest that accrue on delinquent interest and sinking funds tax levies.

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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Cristina De La Fuente-Valadez
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CHAPTER 150. COMMISSIONER'S RULES CONCERNING EDUCATOR APPRAISAL
SUBCHAPTER AA. TEACHER APPRAISAL

19 TAC §150.1003

The Texas Education Agency (TEA) adopts an amendment to §150.1003, concerning teacher appraisal, with changes to the proposed text as published in the January 16, 2004, issue of the *Texas Register* (29 TexReg 439). The section establishes the recommended appraisal process and criteria on which to appraise the performance of teachers. The adopted amendment implements provisions relating to employment policies adopted by a board of trustees that require a written evaluation of each teacher, in accordance with Texas Education Code (TEC), §21.203(a) and §21.352(c), as amended by House Bill (HB) 1440, 78th Texas Legislature, 2003.

TEC, Chapter 21, was amended by HB 1440, 78th Texas Legislature, 2003, to modify §21.203(a) and §21.352(c). The modification to the law provides school districts with the option that a teacher may be appraised less frequently if the teacher agrees in writing and the teacher's most recent evaluation rated the teacher as at least proficient, or the equivalent, and did not identify any area of deficiency.

The adopted amendment to 19 TAC §153.1003 establishes the option of less frequent appraisals for eligible teachers. Language is added in proposed new subsection (l) to establish the provision for a teacher to be appraised less frequently, to describe specific criteria that may be included in local district policy related to this appraisal option, and to address teacher performance that would result in placing the teacher back on the traditional annual appraisal cycle. Language is also added to permit districts to annually review the written agreements with teachers that are appraised under this option.

In response to public comment, the following change was made to 19 TAC §150.1003 since published as proposed. Language was changed in new subsection (l)(1) to clarify that a less frequent appraisal is to be based upon the most recent appraisal of the teacher rather than the most recent evaluation.

Following is a summary of public comment received and corresponding agency response regarding the proposed amendment to 19 TAC §150.1003.

Comment. An individual commented that new subsection (l)(1) is confusing since it refers to both "appraisal" and "evaluation."

Agency Response. The agency agrees and the rule text has been changed from "evaluation" to "appraisal" to clarify that a less frequent appraisal is to be based upon the most recent appraisal of the teacher rather than the most recent evaluation.

The amendment is adopted under the Texas Education Code, §21.351(a), which authorizes the commissioner of education to adopt a recommended appraisal process and criteria on which to appraise the performance of teachers.

The amendment implements the Texas Education Code, §§21.203, 21.351, and 21.352.

§150.1003. Appraisals, Data Sources, and Conferences.

(a) Each teacher must be appraised each school year, except as provided by subsection (l) of this section. Whenever possible, an appraisal shall be based on the teacher's performance in fields and teaching assignments for which he or she is certified.

(b) The annual teacher appraisal shall include:

(1) at least one classroom observation of a minimum of 45 minutes as identified in subsection (g) of this section, with additional walk-throughs and observations conducted at the discretion of the appraiser;

(2) a written summary of each observation, which shall be given to teachers within ten working days after the completion of an observation, with a pre- and post-observation conference conducted at the request of the teacher or appraiser;

(3) completion of Section I of the Teacher Self-Report Form that shall be presented to the principal:

(A) within the first three weeks from the day of completion of the Professional Development and Appraisal System (PDAS) orientation as described in §150.1007 of this title (relating to Teacher Orientation);

(B) within the first three weeks from the day of completion of the PDAS orientation as described in §150.1007 of this title for teachers new to the PDAS; or

(C) within the first three weeks of instruction in the school years when the PDAS orientation is not required pursuant to §150.1007 of this title.

(4) revision of Section I (if necessary) and completion of Sections II and III of the Teacher Self-Report Form that shall be presented to the principal at least two weeks prior to the summative annual conference;

(5) cumulative data of written documentation collected regarding job-related teacher performance, in addition to formal classroom observations;

(6) a written summative annual appraisal report; and

(7) a summative annual conference.

(c) A teacher may be given advance notice of the date or time of an appraisal, but advance notice is not required.

(d) Each school district shall establish a calendar for the appraisal of teachers. The appraisal period for each teacher must include all of the days of a teacher's contract. Observations during the appraisal period must be conducted during the required days of instruction for students during one school year. The appraisal calendar shall:

(1) exclude observations in the three weeks following the day of completion of the PDAS orientation in the school years when an orientation is required as described in §150.1007 of this title;

(2) exclude observations in the three weeks following the day of completion of the PDAS orientation for teachers new to the PDAS as described in §150.1007 of this title;

(3) exclude observations in the first three weeks of instruction in the school years when the PDAS orientation is not required pursuant to §150.1007 of this title;

(4) prohibit observations on the last day of instruction before any official school holiday or on any other day deemed inappropriate by the school district board of trustees; and

(5) indicate a period for summative annual conferences that ends no later than 15 working days before the last day of instruction for students.

(e) During the appraisal period, the appraiser shall evaluate and document teacher performance specifically related to the domain criteria as identified in §150.1002(b) of this title (relating to Assessment of Teacher Performance).

(f) The appraiser is responsible for documentation of the cumulative data identified in subsection (b)(5) of this section. Any third-party information from a source other than the teacher's supervisor that the appraiser wishes to include as cumulative data shall be verified and documented by the appraiser. Any documentation that will influence the teacher's summative annual appraisal report must be shared in writing with the teacher within ten working days of the appraiser's knowledge of the occurrence. The principal shall also be notified in writing when the appraiser is not the teacher's principal.

(g) By mutual consent of the teacher and the appraiser, the required minimum of 45 minutes of observation may be conducted in shorter time segments. The time segments must aggregate to at least 45 minutes.

(h) A written summative annual appraisal report shall be shared with the teacher no later than five working days before the summative conference and no later than 15 working days before the last day of instruction for students. The written summative annual appraisal report shall be placed in the teacher's personnel file by the end of the appraisal period.

(i) Unless waived in writing by the teacher, a summative conference shall be held within a time frame specified on the school district calendar and no later than 15 working days before the last day of instruction for students. The summative conference shall focus on the written summative report and related data sources.

(j) In cases where the appraiser is not an administrator on the teacher's campus, either the principal, assistant principal, or another supervisory staff member designated as an administrator on the campus will participate in the summative annual conference.

(k) Any documentation collected after the summative conference but before the end of the contract term during one school year may be considered as part of the appraisal of a teacher. If the documentation affects the teacher's evaluation in any domain, another summative report shall be developed and another summative conference shall be held to inform the teacher of the change(s).

(l) Except as otherwise provided by this subsection, appraisal must be done at least once during each school year. A teacher may be appraised less frequently if the teacher agrees in writing and the teacher's most recent appraisal rated the teacher as at least proficient, or the equivalent, and did not identify any area of deficiency. A teacher who is appraised less frequently than annually must be appraised at least once during each period of five school years.

(1) District policy may stipulate:

(A) whether the appraisal option is to be made available to teachers;

(B) whether the appraisal option is to be adopted districtwide or is to be campus specific;

(C) if the appraisal accompanying a teacher new to a district or campus meets the option as specified in this subsection, whether the appraisal is to be accepted or whether that teacher is to be appraised by the new campus administrator; and

(D) whether an appraiser may place a teacher on the traditional appraisal cycle as a result of performance deficiencies documented in accordance with subsections (b)(5) and (f) of this section.

(2) A school district may choose annually to review the written agreement with the teacher. However, at the conclusion of the school year, the district may modify appraisal options through board policy and may make changes to expectations for appraisals that apply to all teachers regardless of a teacher's participation in the appraisal option in the previous year(s).

(3) For purposes of this subsection, in the teacher-appraisal system recommended by the commissioner, an area of deficiency is a domain. A teacher must be rated as at least proficient for each domain

(i.e., for all domains) to be eligible for less frequent appraisals under 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.

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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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TITLE 22. EXAMINING BOARDS

PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 281. ADMINISTRATIVE PRACTICE AND PROCEDURES

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §281.8

The Texas State Board of Pharmacy adopts amendments to §281.8, concerning Grounds for Discipline for a Pharmacy License. Section 281.8 is adopted with changes to the proposed text as published in the March 26, 2004, issue of the *Texas Register* (29 TexReg 3042). The changes are based on staff recommendations to clarify that the rule applies to pharmacists, pharmacist-interns, and pharmacy technicians.

The adopted amendment clarifies the activities which could result in disciplinary action being taken against the holder of a pharmacy license.

No comments were received regarding the amendments.

The amendments are adopted under §§551.002, 554.051, and 565.002 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051 as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §565.002 as authorizing the agency to clarify the activities which could result in disciplinary action being taken against the holder of a pharmacy license.

The statutes affected by the amendment: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§281.8. Grounds for Discipline for a Pharmacy License.

(a) For the purposes of §565.002(9) of the Act, a pharmacy fails to establish and maintain effective controls against diversion of prescription drugs when:

(1) there is inadequate security or procedures to prevent unauthorized access to prescription drugs; or

(2) there is inadequate security or procedures to prevent the diversion of prescription drugs.

(b) For the purposes of §565.002(3) of the Act, it is grounds for discipline for a pharmacy license when:

(1) during the time an individual's license to practice pharmacy, either as a pharmacist or a pharmacist-intern, or a pharmacy technician's registration has been disciplined by the Board, resulting in the license or registration being revoked, canceled, retired, surrendered, denied or suspended, the pharmacy employs or allows such individual access to prescription drugs;

(2) the pharmacy possesses or engages in the sale, purchase, or trade or the offer to sell, purchase, or trade prescription drug samples; provided however, this paragraph does not apply to:

(A) prescription drugs provided by a manufacturer as starter prescriptions or as replacement for such manufacturer's outdated drugs;

(B) prescription drugs provided by a manufacturer in replacement for such manufacturer's drugs that were dispensed pursuant to written starter prescriptions; or

(C) prescription drug samples possessed by a pharmacy of a health care entity which provides health care primarily to indigent or low income patients at no or reduced cost and if:

(i) the samples are possessed in compliance with the Prescription Drug Marketing Act of 1987;

(ii) the pharmacy is owned by a charitable organization described in the Internal Revenue Code of 1986, or by a city, state or county government; and

(iii) the samples are for dispensing or provision at no charge to patients of such health care entity;

(3) the pharmacy possesses or engages in the sale, purchase, or trade or the offer to sell, purchase, or trade of prescription drugs:

(A) sold for export use only;

(B) purchased by a public or private hospital or other health care entity; or

(C) donated or supplied at a reduced price to a charitable organization described in the Internal Revenue Code of 1986, §501(c)(3), and possessed by a pharmacy other than one owned by the charitable organization;

(D) provided that subparagraphs (A) - (C) of this paragraph do not apply to:

(i) the purchase or other acquisition by a hospital or other health care entity which is a member of a group purchasing organization or from other hospitals or health care entities which are members of such organization;

(ii) the sale, purchase, or trade of a drug or an offer to sell, purchase, or trade a drug by an organization described in paragraph (2)(C)(ii) of this subsection to a nonprofit affiliate of the organization to the extent otherwise permitted by law;

(iii) the sale, purchase or trade of a drug or an offer to sell, purchase, or trade a drug among hospitals or other health care entities which are under common control;

(iv) the sale, purchase, or trade of a drug or an offer to sell, purchase, or trade a drug for emergency medical reasons including the transfer of a drug between pharmacies to alleviate temporary shortages of the drug arising from delays in or interruptions of regular distribution schedules;

(v) the dispensing of a prescription drug pursuant to a valid prescription drug order to the extent otherwise permitted by law; or

(4) the pharmacy engages in the sale, purchase, or trade or the offer to sell, purchase, or trade of:

(A) misbranded prescription drugs; or

(B) prescription drugs beyond the manufacturer's expiration date.

(c) For the purposes of §565.002(10) of the Act, the terms "fraud," "deceit," or "misrepresentation" in operating a pharmacy or in seeking a license to operate shall be defined as follows:

(1) "Fraud" means an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him, or to surrender a legal right, or to issue a license; a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives or is intended to deceive another;

(2) "Deceit" means the assertion, as a fact, of that which is not true by any means whatsoever to deceive or defraud another, and

(3) "Misrepresentation" means a manifestation by words or other conduct which is a false representation of a matter of fact.

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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TRD-200403297
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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Proposal publication date: March 26, 2004
For further information, please call: (512) 305-8028

CHAPTER 291. PHARMACIES
SUBCHAPTER A. ALL CLASSES OF PHARMACIES

22 TAC §291.6

The Texas State Board of Pharmacy adopts amendments to §291.6, concerning Pharmacy License Fees. The amendments are adopted without changes to the proposed text as published in the March 26, 2004, issue of the *Texas Register* (29 TexReg 3042).

The adopted amendments make adjustments to the initial pharmacy licensing fee by decreasing the amount charged by the Board to process an application from $351 to $341 and will add a $10 fee to fund TexasOnline. The total initial licensing fee of $368 for a two-year registration is not changed.

No comments were received regarding the amendments.

The amendments are adopted under §554.006 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §554.006 as authorizing the agency to establish reasonable and necessary fees to produce sufficient revenue to cover the cost of administering the Texas Pharmacy Act.

The statutes affected by the amendments: Chapters 551 - 566 and 568 - 569, Texas Occupations 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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Gay Dodson, R.Ph.
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Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

22 TAC §291.25

The Texas State Board of Pharmacy (TSBP) adopts new §291.25, concerning Pharmacies Compounding Non-Sterile Pharmaceuticals. Section 291.25 is adopted with changes to the proposed text as published in the March 26, 2004, issue of the *Texas Register* (29 TexReg 3043). The changes are based on comments received. The Board is deleting references to compounding for "office use" by physicians and for other pharmacies.

The new section outlines operating standards for pharmacies that compound non-sterile pharmaceuticals, implements the recommendations of the TSBP appointed Task Force on Compounding, and incorporates many of the provisions included in the United States Pharmacopeia (USP) new General Chapter 795 (Pharmaceutical Compounding Non-sterile Preparations).

The agency received oral comments on the proposed rules at a public hearing on May 4, 2004, and also received numerous written comments. The majority of the comments opposed the restriction of "office use" compounding. The Board agreed with the comments and deleted the reference to compounding for "office use" by physicians and for other pharmacies as noted above. One individual provided written comments in support of requiring a specific prescription for compounded medications. The Board agrees with this comment but also recognizes the need for "office use" compounding.

The Texas Pharmacy Association testified in support of the recommended changes made by Board staff.

The new section is adopted under §§551.002, 551.003, 554.001, and 554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §551.003(9) as authorizing the agency to adopt rules concerning the compounding of prescriptions. The Board interprets §551.003(33) as authorizing the agency to adopt rules concerning the practice of pharmacy. The Board interprets §554.001(a) as authorizing the agency to adopt rules to administer and enforce the Act and rules adopted under the Act as well as enforce other laws relating to the practice of pharmacy. The Board interprets §554.051(a) as authorizing the

agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §554.051(b) as authorizing the agency to adopt rules concerning the operation of a licensed pharmacy located in this state applicable to a pharmacy licensed by the board that is located in another state, if the board determines the rule is necessary to protect the health and welfare of the citizens of this state.

The statutes affected by the new section: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.25. Pharmacies Compounding Non-Sterile Pharmaceuticals.

(a) Purpose. The purpose of this section is to provide standards for the compounding of non-sterile pharmaceuticals in Class A (Community), Class B (Nuclear), Class C (Institutional) and Class E (Non-resident) pharmacies. Pharmacies compounding non-sterile pharmaceuticals shall comply with the requirements of this section in addition to all provisions for their specific license classification.

(b) Definitions. In addition to the definitions for specific license classifications, the following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Beyond-use date--The date after which a compounded preparation should not be used and is determined from the date the preparation was compounded.

(2) Component--Any ingredient intended for use in the compounding of a drug product, including those that may not appear in such product.

(3) Compounding--The preparation, mixing, assembling, packaging, or labeling of a drug or device:

(A) as the result of a practitioner's prescription drug or medication order, or an initiative based on the practitioner-patient-pharmacist relationship in the course of professional practice;

(B) in anticipation of prescription drug or medication orders based on routine, regularly observed prescribing patterns; or

(C) for the purpose of or as an incident to research, teaching, or chemical analysis and not for sale or dispensing.

(4) Manufacturing--The production, preparation, propagation, conversion, or processing of a drug or device, either directly or indirectly, by extraction from substances of natural origin or independently by means of chemical or biological synthesis and includes any packaging or repackaging of the substances or labeling or relabeling of the container and the promotion and marketing of such drugs or devices. Manufacturing also includes the preparation and promotion of commercially available products from bulk compounds for resale by pharmacies, practitioners, or other persons but does not include compounding.

(5) SOPs--Standard operating procedures.

(6) USP/NF--the current edition of the United States Pharmacopeia/National Formulary

(c) Personnel.

(1) Pharmacist-in-charge. In addition to the responsibilities for the specific class of pharmacy, the pharmacist-in-charge shall have the responsibility for, at a minimum, the following concerning non-sterile compounding:

(A) determining that all personnel involved in non-sterile compounding possess the education, training, and proficiency necessary to properly and safely perform compounding duties undertaken or supervised;

(B) determining that all personnel involved in non-sterile compounding obtain continuing education appropriate for the type of compounding done by the personnel;

(C) assuring that the equipment used in compounding is properly maintained;

(D) maintaining an appropriate environment in areas where non-sterile compounding occurs; and

(E) assuring that effective quality control procedures are developed and followed.

(2) Pharmacists. Special requirements for non-sterile compounding.

(A) All pharmacists engaged in compounding shall:

(i) possess the education, training, and proficiency necessary to properly and safely perform compounding duties undertaken or supervised; and

(ii) obtain continuing education appropriate for the type of compounding done by the pharmacist.

(B) A pharmacist shall inspect and approve all components, drug product containers, closures, labeling, and any other materials involved in the compounding process.

(C) A pharmacist shall review all compounding records for accuracy and conduct in-process and final checks to assure that errors have not occurred in the compounding process.

(D) A pharmacist is responsible for the proper maintenance, cleanliness, and use of all equipment used in the compounding process.

(3) Pharmacy technicians. All technicians engaged in compounding shall:

(A) possess the education, training, and proficiency necessary to properly and safely perform compounding duties undertaken;

(B) obtain continuing education appropriate for the type of compounding done by the pharmacy technician: and

(C) perform compounding duties under the direct supervision of and responsible to a pharmacist.

(4) Training.

(A) All training activities shall be documented and covered by appropriate SOPs as outlined in subsection (d)(7)(A) of this section.

(B) All personnel involved in non-sterile compounding shall be well trained and must participate in continuing relevant training programs.

(d) Operational Standards.

(1) General requirements.

(A) Non-sterile drug products may be compounded in licensed pharmacies:

(i) upon presentation of a practitioner's prescription drug or medication order based on a valid pharmacist/patient/prescriber relationship; or

(ii) in anticipation of future prescription drug or medication orders based on routine, regularly observed prescribing patterns.

(B) Non-sterile compounding in anticipation of future prescription drug or medication orders must be based upon a history of receiving valid prescriptions issued within an established pharmacist/patient/prescriber relationship, provided that in the pharmacist's professional judgment the quantity prepared is stable for the anticipated shelf time.

(i) The pharmacist's professional judgment shall be based on the criteria used to determine a beyond-use date outlined in paragraph (4)(C) of this subsection.

(ii) Documentation of the criteria used to determine the stability for the anticipated shelf time must be maintained and be available for inspection.

(iii) Any product compounded in anticipation of future prescription drug or medication orders shall be labeled. Such label shall contain:

(I) name and strength of the compounded medication or list of the active ingredients and strengths;

(II) facility's lot number;

(III) beyond-use date as determined by the pharmacist using appropriate documented criteria as outlined in clause (i) of this subparagraph; and

(IV) quantity or amount in the container.

(C) Commercially available products may be compounded for dispensing to individual patients provided the following conditions are met:

(i) the commercial product is not reasonably available from normal distribution channels in a timely manner to meet patient's needs; and

(ii) the prescribing practitioner has requested that the drug be compounded.

(D) A pharmacy may enter into an agreement to compound and dispense prescription/medication orders for another pharmacy provided the pharmacy complies with the provisions of §291.37 of this title (relating to Centralized Prescription Dispensing).

(E) Compounding pharmacies/pharmacists may advertise and promote the fact that they provide non-sterile prescription compounding services, which may include specific drug products and classes of drugs.

(2) Environment.

(A) Pharmacies regularly engaging in compounding shall have a designated and adequate area for the safe and orderly compounding of drug products, including the placement of equipment and materials. Pharmacies involved in occasional compounding shall prepare an area prior to each compounding activity which is adequate for safe and orderly compounding.

(B) Only personnel authorized by the responsible pharmacist shall be in the immediate vicinity of a drug compounding operation.

(C) A sink with hot and cold running water, exclusive of rest room facilities, shall be accessible to the compounding areas and be maintained in a sanitary condition. Supplies necessary for adequate washing shall be accessible in the immediate area of the sink and include:

(i) soap or detergent; and

(ii) air-driers or single-use towels.

(D) If drug products which require special precautions to prevent contamination, such as penicillin, are involved in a compounding operation, appropriate measures, including dedication of equipment for such operations or the meticulous cleaning of contaminated equipment prior to its use for the preparation of other drug products, must be used in order to prevent cross-contamination.

(3) Equipment and Supplies. The pharmacy shall:

(A) have a Class A prescription balance, or analytical balance and weights which shall be properly maintained and subject to inspection at least every three years by the Texas State Board of Pharmacy; and

(B) have equipment and utensils necessary for the proper compounding of prescription drug or medication orders. Such equipment and utensils used in the compounding process shall be:

(i) of appropriate design and capacity, and be operated within designed operational limits;

(ii) of suitable composition so that surfaces that contact components, in-process material, or drug products shall not be reactive, additive, or absorptive so as to alter the safety, identity, strength, quality, or purity of the drug product beyond the desired result;

(iii) cleaned and sanitized immediately prior to each use; and

(iv) routinely inspected, calibrated (if necessary), or checked to ensure proper performance.

(4) Labeling. In addition to the labeling requirements of the pharmacy's specific license classification, the label dispensed or distributed pursuant to a prescription drug or medication order shall contain the following.

(A) The generic name(s) or the official name(s) of the principal active ingredient(s) of the compounded preparation.

(B) A statement that the preparation has been compounded by the pharmacy. (An auxiliary label may be used on the container to meet this requirement).

(C) A beyond-use date after which the compounded preparation should not be used. The beyond-use date shall be determined as outlined in Chapter 795 of the USP/NF concerning Pharmacy Compounding Non-Sterile Preparations including the following.

(i) The pharmacist shall consider:

(I) physical and chemical properties of active ingredients;

(II) use of preservatives and/or stabilizing agents;

(III) dosage form;

(IV) storage containers and conditions; and

(V) scientific, laboratory, or reference data.

(ii) In the absence of stability information applicable for a specific drug or preparation, the following maximum beyond-use dates are to be used when the compounded preparation is packaged in tight, light-resistant containers and stored at controlled room temperatures.

(I) Nonaqueous liquids and solid formulations (Where the manufactured drug product is the source of active ingredient): 25% of the time remaining until the product's expiration date or 6 months, whichever is earlier.

(II) Water-containing formulations (Prepared from ingredients in solid form): Not later than 14 days when refrigerated between 2 - 8 degrees Celsius (36 - 46 degrees Fahrenheit)

(III) All other formulations: Intended duration of therapy or 30 days, whichever is earlier.

(iii) Beyond-use date limits may be exceeded when supported by valid scientific stability information for the specific compounded preparation.

(5) Written drug information. Written information about the compounded drug or its major active ingredient(s) shall be given to the patient at the time of dispensing. A statement which indicates that the product was compounded by the pharmacy must be included in this written information. If there is no written information available, the patient should be advised in writing that the drug has been compounded and how to contact a pharmacist, and if appropriate the prescriber, concerning the drug.

(6) Drugs, components, and materials used in non-sterile compounding.

(A) Drugs used in non-sterile compounding shall preferably be a USP/NF grade substances manufactured in an FDA-registered facility.

(B) If USP/NF grade substances are not available, or when food, cosmetics, or other substances are, or must be used, the substance shall be of a chemical grade in one of the following categories:

(i) Chemically Pure (CP);

(ii) Analytical Reagent (AR); or

(iii) American Chemical Society (ACS); or

(iv) Food Chemical Codex; or

(C) If a drug, component or material is not purchased from a FDA-registered facility, the pharmacist shall establish purity and stability by obtaining a Certificate of Analysis from the supplier.

(D) A manufactured drug product may be a source of active ingredient. Only manufactured drugs from containers labeled with a batch control number and a future expiration date are acceptable as a potential source of active ingredients. When compounding with manufactured drug products the pharmacist must consider all ingredients present in the drug product relative to the intended use of the compounded preparation.

(E) All components shall be stored in properly labeled containers in a clean, dry area, under proper temperatures.

(F) Drug product containers and closures shall not be reactive, additive, or absorptive so as to alter the safety, identity, strength, quality, or purity of the compounded drug product beyond the desired result.

(G) Components, drug product containers, and closures shall be rotated so that the oldest stock is used first.

(H) Container closure systems shall provide adequate protection against foreseeable external factors in storage and use that can cause deterioration or contamination of the compounded drug product.

(I) A pharmacy may not compound a drug product which appears on a federal Food and Drug Administration list of drug products withdrawn or removed from the market for safety reasons.

(7) Compounding process.

(A) All significant procedures performed in the compounding area shall be covered by written SOPs designed to ensure accountability, accuracy, quality, safety, an uniformity in the compounding process. At a minimum, SOPs shall be developed for:

(i) the facility;

(ii) equipment;

(iii) personnel;

(iv) actual compounding;

(v) product evaluation;

(vi) packaging; and

(vii) storage of compounded preparations.

(B) Any compounded preparation with an official monograph in the USP/NF shall be compounded, labeled, and packaged in conformity with the USP/NF monograph for the drug.

(C) Any person with an apparent illness or open lesion that may adversely affect the safety or quality of a drug product being compounded shall be excluded from direct contact with components, drug product containers, closures, any materials involved in the compounding process, and drug products until the condition is corrected.

(D) Personnel engaged in the compounding of drug products shall wear clean clothing appropriate to the operation being performed. Protective apparel, such as coats/jackets, aprons, hair nets, gowns, hand or arm coverings, or masks shall be worn as necessary to protect personnel from chemical exposure and drug products from contamination.

(E) At each step of the compounding process, the pharmacist shall assure that components used in compounding are accurately weighed, measured, or subdivided as appropriate to conform to the formula being prepared.

(8) Quality Control.

(A) The pharmacy shall follow established quality control procedures to monitor the output of compounded drug products for uniformity and consistency such as capsule weight variations, adequacy of mixing, clarity, or pH of solutions. When developing these procedures, pharmacy personnel shall consider the provisions of Chapter 795, concerning Pharmacy Compounding Non-Sterile Preparations, Chapter 1075, concerning Good Compounding Practices, and Chapter 1160, concerning Pharmaceutical Calculations in Prescription Compounding contained in the current USP/NF. Such procedures shall be documented and be available for inspection.

(B) Compounding procedures that are routinely performed, including batch compounding, shall be completed and verified according to written procedures. The act of verification of a compounding procedure involves checking to ensure that calculations, weighing and measuring, order of mixing, and compounding techniques were appropriate and accurately performed.

(C) Unless otherwise indicated or appropriate, compounded preparations are to be prepared to ensure that each preparation shall contain not less than 90.0 percent and not more than 110.0 percent of the theoretically calculated and labeled quantity of active ingredient per unit weight or volume and not less than 90.0 percent and not more than 110.0 percent of the theoretically calculated weight or volume per unit of the preparation.

(e) Records.

(1) Maintenance of records. Every record required by this section shall be kept by the pharmacy for at least two years.

(2) Compounding records.

(A) Compounding records for all compounded preparations shall be maintained by the pharmacy electronically or manually as part of the prescription drug or medication order, formula record, formula book, or compounding log and shall include:

(i) the date of preparation;

(ii) a complete formula, including methodology and necessary equipment which includes the brand name(s) of the raw materials, or if no brand name, the generic name(s) and name(s) of the manufacturer(s) of the raw materials and the quantities of each;

(iii) signature or initials of the pharmacist or pharmacy technician performing the compounding;

(iv) signature or initials of the pharmacist responsible for supervising pharmacy technicians and other supportive personnel and conducting in-process and final checks of compounded preparations if pharmacy technicians perform the compounding function;

(v) the quantity in units of finished products or amount of raw materials;

(vi) the container used and the number of units prepared;

(vii) a reference to the location of the following documentation which may be maintained with other records, such as quality control records:

(I) the criteria used to determine the beyond-use date; and

(II) documentation of performance of quality control procedures. Documentation of the performance of quality control procedures is not required if the compounding process is done pursuant to a patient specific order and involves the mixing of two or more commercially available oral liquids or commercially available preparations when the final product is intended for external use.

(B) Compounding records when batch compounding or compounding in anticipation of future prescription drug or medication orders.

(i) Master work sheet. A master work sheet shall be developed and approved by a pharmacist for formulations prepared in batch. Once approved, a duplicate of the master work sheet shall be used as the preparation work sheet from which each batch is prepared and on which all documentation for that batch occurs. The master work sheet shall contain at a minimum:

(I) the formula;

(II) the components;

(III) the compounding directions;

(IV) a sample label;

(V) evaluation and testing requirements;

(VI) specific equipment used during preparation; and

(VII) storage requirements.

(ii) Preparation work sheet. The preparation work sheet for each batch of preparations shall document the following:

(I) identity of all solutions and ingredients and their corresponding amounts, concentrations, or volumes;

(II) lot number or each component;

(III) component manufacturer/distributor or suitable identifying number;

(IV) container specifications (e.g., syringe, pump cassette);

(V) unique lot or control number assigned to batch;

(VI) beyond use date of batch-prepared products;

(VII) date of preparation;

(VIII) name, initials, or electronic signature of the person(s) involved in the preparation;

(IX) name, initials, or electronic signature of the responsible pharmacist;

(X) end-product evaluation and testing specifications, if applicable; and

(XI) comparison of actual yield to anticipated yield, when appropriate.

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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Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

22 TAC §291.26

The Texas State Board of Pharmacy (TSBP) adopts new §291.26, concerning Pharmacies Compounding Sterile Pharmaceuticals with changes to the proposed text as published in the March 26, 2004, issue of the *Texas Register* (29 TexReg 3048). Section 291.26 is adopted with changes based on comments received. The Board is deleting references to compounding for "office use" by physicians and for other pharmacies.

The new section outlines operating standards for pharmacies that compound sterile pharmaceuticals, implements the recommendations of the TSBP appointed Task Force on Compounding, and incorporates many of the provisions included in the United States Pharmacopeia (USP) new General Chapter 797 (Pharmaceutical Compounding Sterile Preparations).

The agency received oral comments on the proposed new section at a public hearing on May 4, 2004, and also received numerous written comments. The majority of the comments opposed the restriction of "office use" compounding. The Board agreed with the comments and deleted the reference to compounding for "office use" by physicians and for other pharmacies as noted above. One individual provided written comments in support of requiring a specific prescription for compounded medications. The Board agrees with this comment but also recognizes the need for "office use" compounding. One individual provided written comments indicating that the rules did not fully implement USP Chapter 797. The Board disagrees with this

comment and adopted the rules as indicated because the rules adequately protect the public. One written comment suggested clarifying storage requirements for low risk sterile compounded products. The Board agrees with the comment and amended the rule to reflect the clarification.

The Texas Pharmacy Association testified in support of the recommended changes made by Board staff.

The new section is adopted under §§551.002, 551.003, 554.001, and 554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §551.003(9) as authorizing the agency to adopt rules concerning the compounding of prescriptions. The Board interprets §551.003(33) as authorizing the agency to adopt rules concerning the practice of pharmacy. The Board interprets §554.001(a) as authorizing the agency to adopt rules to administer and enforce the Act and rules adopted under the Act as well as enforce other laws relating to the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §554.051(b) as authorizing the agency to adopt rules concerning the operation of a licensed pharmacy located in this state applicable to a pharmacy licensed by the board that is located in another state, if the board determines the rule is necessary to protect the health and welfare of the citizens of this state.

The statutes affected by this rule: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.26. Pharmacies Compounding Sterile Pharmaceuticals.

(a) Purpose. The purpose of this section is to provide standards for the compounding of sterile pharmaceuticals by all in Class A (Community), Class B (Nuclear), Class C (Institutional) and Class E (Non-resident) pharmacies. Pharmacies compounding sterile pharmaceuticals shall comply with all requirements for their specific license classification and this section.

(b) Definitions. In addition to the definitions for specific license classifications, the following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) ACPE--Accreditation Council for Pharmacy Education.

(2) Airborne particulate cleanliness class--The level of cleanliness specified by the maximum allowable number of particles per cubic meter of air as specified in the International Organization of Standardization (ISO) Classification Air Cleanliness (ISO 14644-1). For example:

(A) ISO Class 5 (formerly Class 100) is an atmospheric environment which contains less than 3,520 particles 0.5 microns in diameter per cubic meter of air (formerly stated as 100 particles 0.5 microns in diameter per cubic foot of air);

(B) ISO Class 7 (formerly Class 10,000) is an atmospheric environment which contains less than 352,000 particles 0.5 microns in diameter per cubic meter of air (formerly stated as 10,000 particles 0.5 microns in diameter per cubic foot of air); and

(C) ISO Class 8 (formerly Class 100,000) is an atmospheric environment which contains less than 3,520,000 particles 0.5 microns in diameter per cubic meter of air (formerly stated as 100,000 particles 0.5 microns in diameter per cubic foot of air).

(3) Ancillary supplies--Supplies necessary for the administration of compounded sterile pharmaceuticals.

(4) Aseptic preparation--The technique involving procedures designed to preclude contamination of drugs, packaging, equipment, or supplies by microorganisms during processing.

(5) Automated compounding or counting device--An automated device that compounds, measures, counts, and or packages a specified quantity of dosage units for a designated drug product.

(6) Batch preparation compounding--Compounding of multiple sterile-product units, in a single discrete process, by the same individual(s), carried out during one limited time period. Batch preparation/compounding does not include the preparation of multiple sterile-product units pursuant to patient specific medication orders.

(7) Beyond-use date--The date after which a compounded preparation should not be used and is determined from the date the preparation was compounded.

(8) Biological Safety Cabinet--Containment unit suitable for the preparation of low to moderate risk agents where there is a need for protection of the product, personnel, and environment, according to the International Organization of Standardization (ISO), Specifications for testing and monitoring to prove continued compliance with ISO 14644-1 and/or ISO 14644-2.

(9) Clean room--A room in which the concentration of airborne particles is controlled and there are one or more clean zones according to the International Organization of Standardization (ISO), Specifications for testing and monitoring to prove continued compliance with ISO 14644-1 and/or ISO 14644-2.

(10) Clean zone--A defined space in which the concentration of airborne particles is controlled to meet a specified airborne particulate cleanliness class.

(11) Component--Any ingredient intended for use in the compounding of a drug product, including those that may not appear in such product.

(12) Compounding--The preparation, mixing, assembling, packaging, or labeling of a drug or device:

(A) as the result of a practitioner's prescription drug or medication order or initiative based on the practitioner-patient pharmacist relationship in the course of professional practice;

(B) in anticipation of prescription drug or medication orders based on routine, regularly observed prescribing patterns; or

(C) for the purpose of or as an incident to research, teaching, or chemical analysis and not for sale or dispensing.

(13) Controlled area--A controlled area is the area designated for preparing sterile pharmaceuticals.

(14) Critical site--Any opening providing a direct pathway between a sterile product and the environment or any surface coming in direct contact with the product and the environment.

(15) Cytotoxic--A pharmaceutical that has the capability of killing living cells.

(16) Device--An instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component part or accessory, that is required under federal or state law to be ordered or prescribed by a practitioner.

(17) Process validation--Documented evidence providing a high degree of assurance that a specific process will consistently produce a product meeting its predetermined specifications and quality attributes.

(18) SOPs--Standard operating procedures.

(19) Quality assurance--The set of activities used to assure that the process used in the preparation of sterile drug products lead to products that meet predetermined standards of quality.

(20) Quality control--The set of testing activities used to determine that the ingredients, components (e.g., containers), and final sterile pharmaceuticals prepared meet predetermined requirements with respect to identity, purity, non-pyrogenicity, and sterility.

(21) Sterile pharmaceutical--A dosage form free from living micro-organisms.

(22) USP/NF--The current edition of the United States Pharmacopeia/National Formulary.

(c) Personnel.

(1) Pharmacist-in-charge.

(A) General. The pharmacy shall have a pharmacist-in-charge in compliance with the specific license classification of the pharmacy.

(B) Responsibilities. In addition to the responsibilities for the specific class of pharmacy, the pharmacist-in-charge shall have the responsibility for, at a minimum, the following concerning sterile compounding:

(i) developing a system to assure that all pharmacy personnel responsible for compounding and/or supervising the compounding of sterile pharmaceuticals within the pharmacy receive appropriate education and training and competency evaluation;

(ii) determining that all pharmacists involved in compounding sterile pharmaceuticals obtain continuing education appropriate for the type of compounding done by the pharmacist;

(iii) supervising a system to assure appropriate procurement of drugs and devices and storage of all pharmaceutical materials including pharmaceuticals, components used in the compounding of pharmaceuticals, and drug delivery devices;

(iv) assuring that the equipment used in compounding is properly maintained;

(v) developing a system for the disposal and distribution of drugs from the pharmacy;

(vi) developing a system for bulk compounding or batch preparation of drugs;

(vii) developing a system for the compounding, sterility assurance, quality assurance and quality control of sterile pharmaceuticals; and

(viii) if applicable, assuring that the pharmacy has a system to dispose of cytotoxic and/or biohazardous waste in a manner so as not to endanger the public health.

(2) Pharmacists. Special requirements for sterile compounding.

(A) All pharmacists engaged in compounding shall:

(i) possess the education, training, and proficiency necessary to properly and safely perform compounding duties undertaken or supervised; and

(ii) obtain continuing education appropriate for the type of compounding done by the pharmacist.

(B) A pharmacist shall inspect and approve all components, drug product containers, closures, labeling, and any other materials involved in the compounding process.

(C) A pharmacist shall review all compounding records for accuracy and conduct in-process and final checks to assure that errors have not occurred in the compounding process.

(D) A pharmacist is responsible for the proper maintenance, cleanliness, and use of all equipment used in the compounding process.

(E) A pharmacist shall be accessible at all times to respond to patients' and other health professionals' questions and needs. Such access may be through a telephone which is answered 24 hours a day.

(3) Pharmacy technicians. Pharmacy technicians may compound sterile pharmaceuticals provided the pharmacy technicians:

(A) have completed the education and training specified in paragraph (4) of this subsection; and

(B) are supervised by a pharmacist who has completed the training specified in paragraph (4) of this subsection, conducts in-process and final checks, and affixes his or her initials to the appropriate quality control records.

(4) Special education, training, and evaluation requirements for pharmacy personnel compounding or responsible for the direct supervision of pharmacy personnel compounding sterile pharmaceuticals.

(A) General.

(i) All pharmacy personnel preparing sterile pharmaceuticals shall receive didactic and experiential training and competency evaluation through demonstration, testing (written or practical) as outlined by the pharmacist-in-charge and described in the policy and procedure or training manual. Such training shall include instruction and experience in the following areas:

(I) aseptic technique;

(II) critical area contamination factors;

(III) environmental monitoring;

(IV) facilities;

(V) equipment and supplies;

(VI) sterile pharmaceutical calculations and terminology;

(VII) sterile pharmaceutical compounding documentation;

(VIII) quality assurance procedures;

(IX) aseptic preparation procedures including proper gowning and gloving technique;

(X) handling of cytotoxic and hazardous drugs, if applicable; and

(XI) general conduct in the controlled area.

(ii) The aseptic technique of each person compounding or responsible for the direct supervision of personnel compounding sterile pharmaceuticals shall be observed and evaluated as satisfactory

through written or practical tests and process validation and such evaluation documented.

(iii) Although process validation may be incorporated into the experiential portion of a training program, process validation must be conducted at each pharmacy where an individual compounds sterile pharmaceuticals. No product intended for patient use shall be compounded by an individual until the on-site process validation test indicates that the individual can competently perform aseptic procedures, except that a pharmacist may temporarily compound sterile pharmaceuticals and supervise pharmacy technicians compounding sterile pharmaceuticals without process validation provided the pharmacist:

(I) has completed a recognized course in an accredited college of pharmacy or a course sponsored by an ACPE approved provider which provides 20 hours of instruction and experience in the areas listed in this subparagraph; and

(II) completes the on-site process validation within seven days of commencing work at the pharmacy.

(iv) Process validation procedures for assessing the preparation of specific types of sterile pharmaceuticals shall be representative of all types of manipulations, products, risk levels, and batch sizes that personnel preparing that type of pharmaceutical are likely to encounter.

(v) The pharmacist-in-charge shall assure continuing competency of pharmacy personnel through in-service education, training, and process validation to supplement initial training. Personnel competency shall be evaluated:

(I) during orientation and training prior to the regular performance of those tasks;

(II) whenever the quality assurance program yields an unacceptable result;

(III) whenever unacceptable techniques are observed; and

(IV) at least on an annual basis.

(B) Pharmacists.

(i) All pharmacists who compound sterile pharmaceuticals or supervise pharmacy technicians compounding sterile pharmaceuticals shall:

(I) complete through a single course, a minimum of 20 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph. Such training shall be completed at least every seven years and may be obtained through:

(-a-) completion of a structured on-the-job didactic and experiential training program at this pharmacy which provides 20 hours of instruction and experience in the areas listed in paragraph (1) of this subsection. Such training may not be transferred to another pharmacy unless the pharmacies are under common ownership and control and use a common training program; or

(-b-) completion of a recognized course in an accredited college of pharmacy or a course sponsored by an ACPE approved provider which provides 20 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph; and

(II) every two years complete six hours of continuing education related to sterile product compounding offered by a provider approved by ACPE. (These hours may be applied towards the hours required for renewal of a license to practice pharmacy.)

(III) possess knowledge about:

(-a-) aseptic processing;

(-b-) quality control and quality assurance as related to environmental, component, and end-product testing;

(-c-) chemical, pharmaceutical, and clinical properties of drugs;

(-d-) container, equipment, and closure system selection; and

(-e-) sterilization techniques.

(ii) The required experiential portion of the training programs specified in this subparagraph must be supervised by an individual who has already completed training as specified in subparagraph (B) or (C) of this paragraph.

(C) Pharmacy technicians. In addition to qualifications for specific license classifications all pharmacy technicians who compound sterile pharmaceuticals shall:

(i) have a high school or equivalent education;

(ii) have initial training obtained either through completion of:

(I) a single course, a minimum of 40 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph. Such training may be obtained through:

(-a-) completion of a structured on-the-job didactic and experiential training program at this pharmacy which provides 40 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph. Such training may not be transferred to another pharmacy unless the pharmacies are under common ownership and control and use a common training program; or

(-b-) completion of a course sponsored by an ACPE approved provider which provides 40 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph; or

(II) a training program which is accredited by the American Society of Health-System Pharmacists (formerly the American Society of Hospital Pharmacists). Individuals enrolled in training programs accredited by the American Society of Health-System Pharmacists may compound sterile pharmaceuticals in a licensed pharmacy provided:

(-a-) the compounding occurs only during times the individual is assigned to a pharmacy as a part of the experiential component of the American Society of Health-System Pharmacists training program;

(-b-) the individual is under the direct supervision of and responsible to a pharmacist who has completed training as specified in subparagraph (B) of this paragraph; and

(-c-) the supervising pharmacist conducts in-process and final checks;

(iii) acquire the required experiential portion of the training programs specified in this subparagraph under the supervision of an individual who has already completed training as specified in subparagraph (B) or (C) of this paragraph; and

(iv) every two years complete six hours of continuing education related to sterile product compounding. (These hours may be applied towards the hours required for renewal of a pharmacy technician's registration.)

(D) Documentation of Training. A written record of initial and in-service training and the results of written or practical testing and process validation of pharmacy personnel shall be maintained and contain the following information:

(i) name of the person receiving the training or completing the testing or process validation;

(ii) date(s) of the training, testing, or process validation;

(iii) general description of the topics covered in the training or testing or of the process validated;

(iv) name of the person supervising the training, testing, or process validation; and

(v) signature (first initial and last name or full signature) of the person receiving the training or completing the testing or process validation and the pharmacist-in-charge or other pharmacist employed by the pharmacy and designated by the pharmacist-in-charge as responsible for training, testing, or process validation of personnel.

(d) Operational Standards.

(1) General Requirements.

(A) Sterile drug products may be compounded in licensed pharmacies:

(i) upon presentation of a practitioner's prescription drug or medication order based on a valid pharmacist/patient/prescriber relationship; or

(ii) in anticipation of future prescription drug or medication orders based on routine, regularly observed prescribing patterns.

(B) Sterile compounding in anticipation of future prescription drug or medication orders must be based upon a history of receiving valid prescriptions issued within an established pharmacist/patient/prescriber relationship, provided that in the pharmacist's professional judgment the quantity prepared is stable for the anticipated shelf time.

(i) The pharmacist's professional judgment shall be based on the criteria used to determine a beyond-use date outlined in paragraph (5)(C) of this subsection.

(ii) Documentation of the criteria used to determine the stability for the anticipated shelf time must be maintained and be available for inspection.

(iii) Any product compounded in anticipation of future prescription drug or medication orders shall be labeled. Such label shall contain:

(I) name and strength of the compounded medication or list of the active ingredients and strengths;

(II) facility's lot number;

(III) beyond-use date as determined by the pharmacist using appropriate documented criteria as outlined in clause (i) of this subparagraph;

(IV) quantity or amount in the container;

(V) appropriate ancillary instructions, such as storage instructions or cautionary statements, including cytotoxic warning labels where appropriate; and

(VI) device-specific instructions, where appropriate.

(C) Commercially available products may be compounded for dispensing to individual patients provided the following conditions are met:

(i) the commercial product is not reasonably available from normal distribution channels in a timely manner to meet patient's needs; and

(ii) the prescribing practitioner has requested that the drug be compounded.

(D) A pharmacy may enter into an agreement to compound and dispense prescription/medication orders for another pharmacy provided the pharmacy complies with the provisions of §291.37 of this title (relating to Centralized Prescription Dispensing).

(E) Compounding pharmacies/pharmacists may advertise and promote the fact that they provide sterile prescription compounding services, which may include specific drug products and classes of drugs.

(2) Risk levels for compounded sterile pharmaceuticals. Risk Levels for sterile compounded preparations shall be as outlined in USP/NF Chapter 797 Pharmacy Compounding Sterile Preparations and as listed below.

(A) Low-risk level compounded sterile pharmaceuticals.

(i) Low-risk level compounded sterile pharmaceuticals are those compounded under all of the following conditions.

(I) The compounded sterile preparations are compounded with aseptic manipulations entirely within ISO Class 5 or better air quality using only sterile ingredients, products, components, and devices.

(II) The compounding involves only transfer, measuring, and mixing manipulations with closed or sealed packaging systems that are performed promptly and attentively.

(III) Manipulations are limited to aseptically opening ampuls, penetrating sterile stoppers on vials with sterile needles and syringes, and transferring sterile liquids in sterile syringes to sterile administration devices and packages of other sterile products.

(IV) For a low-risk preparation, in the absence of passing a sterility test, the storage periods cannot exceed the following periods: before administration, 48 hours at controlled room temperature, for not more than 14 days if stored in cold temperatures, and for 45 days if stored in a frozen state at minus 20 degrees Celsius or colder). For delayed activation device systems, the storage period begins when the device is activated.

(ii) Examples of low-risk compounding include the following.

(I) Single transfers of sterile dosage forms from ampuls, bottles, bags, and vials using sterile syringes with sterile needles, other administration devices, and other sterile containers. The contents of ampuls require sterile filtration to remove glass particles.

(II) Manually measuring and mixing no more than three manufactured products to compound drug admixtures and nutritional solutions.

(B) Medium-risk level compounded sterile pharmaceuticals.

(i) Medium-risk level compounded sterile pharmaceuticals are those compounded aseptically under low-risk conditions and one or more of the of the following conditions exists.

(I) Multiple individual or small doses of sterile products are combined or pooled to prepare a compounded sterile pharmaceutical that will be administered either to multiple patients or to one patient on multiple occasions.

(II) The compounding process includes complex aseptic manipulations other than the single-volume transfer.

(III) The compounding process requires unusually long duration, such as that required to complete the dissolution or homogenous mixing.

(IV) The sterile compounded pharmaceutical's do not contain broad-spectrum bacteriostatic substances, and they are administered over several days.

(V) For a medium-risk preparation, in the absence of passing sterility test, the storage periods cannot exceed the following time periods: before administration, the compounded sterile preparations are properly stored and are exposed for not more than 30 hours at controlled room temperature for not more than 7 days at a cold temperature, and for 45 days in solid frozen state at minus 20 degrees or colder.

(ii) Examples of medium-risk compounding include the following.

(I) Compounding of total parenteral nutrition fluids using a manual or automated device during which there are multiple injections, detachments, and attachments of nutrient source products to the device or machine to deliver all nutritional components to a final sterile container.

(II) Filling of reservoirs of injection and infusion devices with multiple sterile drug products and evacuations of air from those reservoirs before the filled device is dispensed.

(III) Filling of reservoirs of injection and infusion devices with volumes of sterile drug solutions that will be administered over several days at ambient temperatures between 25 and 40 degrees Celsius (77 and 104 degrees Fahrenheit).

(IV) Transfer of volumes from multiple ampuls or vials into a single, final sterile container or product.

(C) High-risk level compounded sterile pharmaceuticals.

(i) High-risk level compounded sterile pharmaceuticals are those compounded under any of the following conditions.

(I) Non-sterile ingredients, including manufactured products are incorporated, or a non-sterile device is employed before terminal sterilization.

(II) Sterile ingredients, components, devices, and mixtures are exposed to air quality inferior to ISO Class 5. This includes storage in environments inferior to ISO Class 5 of opened or partially used packages of manufactured sterile products that lack antimicrobial preservatives.

(III) Non-sterile preparations are exposed no more than 6 hours before being sterilized.

(IV) It is assumed, and not verified by examination of labeling and documentation from suppliers or by direct determination, that the chemical purity and content strength of ingredients meet their original or compendial specifications in unopened or in opened packages of bulk ingredients.

(V) For a high-risk preparation, in the absence of passing sterility test, the storage periods cannot exceed the following time periods: before administration, the compounded sterile preparations are properly stored and are exposed for not more than 24 hours at controlled room temperature for not more than 3 days at a cold temperature, and for 45 days in solid frozen state at minus 20 degrees or colder.

(ii) Examples of high-risk compounding include the following.

(I) Dissolving non-sterile bulk drug and nutrient powders to make solutions, which will be terminally sterilized.

(II) Sterile ingredients, components, devices, and mixtures are exposed to air quality inferior to ISO Class 5. This includes storage in environments inferior to ISO Class 5 of opened or partially used packages of manufactured sterile products that lack antimicrobial preservatives.

(III) Measuring and mixing sterile ingredients in non-sterile devices before sterilization is performed.

(IV) Assuming, without appropriate evidence or direct determination, that packages of bulk ingredients contain at least 95% by weight of their active chemical moiety and have not been contaminated or adulterated between uses.

(3) Environment.

(A) Special requirements for the compounding of sterile pharmaceuticals. When the pharmacy compounds sterile pharmaceuticals, the following is applicable.

(i) Controlled area.

(I) Low and Medium Risk Preparations. The pharmacy shall have a designated controlled area for the compounding of sterile pharmaceuticals that is functionally separate from areas for the preparation of non-sterile pharmaceuticals and is constructed to minimize the opportunities for particulate and microbial contamination. This controlled area for the preparation of sterile pharmaceuticals shall:

(-a-) have a controlled environment that is aseptic or contains an aseptic environmental control device(s). If the aseptic environmental control device is located within the controlled area, the controlled area must extend a minimum of six feet from the device and clearly marked to identify the separation between the controlled and non-controlled area;

(-b-) be clean, well lighted, and of sufficient size to support sterile compounding activities;

(-c-) be used only for the compounding of sterile pharmaceuticals;

(-d-) be designed to avoid outside traffic and air flow;

(-e-) be designed such that hand sanitizing and gowning occurs outside the controlled area but is accessible without use of the hands of the compounding personnel;

(-f-) have non-porous and washable floors or floor covering to enable regular disinfection;

(-g-) be ventilated in a manner not interfering with aseptic environmental control conditions;

(-h-) have walls, ceilings, and fixtures, shelving, counters, and cabinets that are smooth, impervious, free from cracks and crevices, and nonshedding. (acoustical ceiling tiles that are coated with an acrylic paint are acceptable);

(-i-) have drugs and supplies stored on shelving areas above the floor to permit adequate floor cleaning; and

(-j-) contain only the appropriate compounding supplies and not be used for bulk storage for supplies and materials. Objects that shed particles may not be brought into the controlled area.

(II) High-risk Preparations. In addition to the requirements in subclause (I) of this clause, when high-risk preparations are compounded, the aseptic environment control device(s) shall be located in a controlled area that maintains at least an ISO Class 8 (formerly Class 100,000) environment.

(ii) Aseptic environment control device(s). The pharmacy shall prepare sterile pharmaceuticals in an appropriate

aseptic environmental control device(s) or area, such as a laminar air flow hood, biological safety cabinet, clean room which is capable of maintaining at least ISO Class 5 (formerly Class 100) conditions during normal activity, or other aseptic environmental control devices that produce ISO Class 5 (formerly Class 100) environmental conditions or better. The aseptic environmental control device(s) shall:

(I) be certified by an independent contractor according to the International Organization of Standardization (ISO) Classification of Particulate Matter in Room Air (ISO 14644-1) for operational efficiency at least every six months or when it is relocated; and

(II) have pre-filters inspected periodically and replaced as needed, in accordance with written policies and procedures, and the inspection and/or replacement date documented.

(iii) Automated compounding or counting device. If automated compounding or counting devices are used, the pharmacy shall have a method to calibrate and verify the accuracy of automated compounding or counting devices used in aseptic processing and document the calibration and verification on a routine basis.

(iv) Cytotoxic drugs. In addition to the requirements specified in clause (ii) of this subparagraph, if the product is also cytotoxic, the following is applicable.

(I) General.

(-a-) All personnel involved in the compounding of cytotoxic products shall wear appropriate protective apparel, such as masks, gloves, and gowns or coveralls with tight cuffs.

(-b-) Appropriate safety and containment techniques for compounding cytotoxic drugs shall be used in conjunction with aseptic techniques required for preparing sterile pharmaceuticals.

(-c-) Disposal of cytotoxic waste shall comply with all applicable local, state, and federal requirements.

(-d-) Prepared doses of cytotoxic drugs must be dispensed, labeled with proper precautions inside and outside, and distributed in a manner to minimize patient contact with cytotoxic agents.

(II) Aseptic environment control device(s).

(-a-) Cytotoxic drugs must be prepared in a vertical flow biological safety cabinet, or other aseptic environmental control devices that produce ISO Class 5 (formerly Class 100) environmental conditions or better and provide protection from cytotoxic products to personnel.

(-b-) If the aseptic environment control device is also used to prepare non-cytotoxic sterile pharmaceuticals, the device must be thoroughly cleaned prior to its use to prepare non-cytotoxic sterile pharmaceuticals.

(B) Security requirements. The pharmacy may authorize personnel to gain access to that area of the pharmacy containing dispensed sterile pharmaceuticals, in the absence of the pharmacist, for the purpose of retrieving dispensed prescriptions to deliver to patients. If the pharmacy allows such after-hours access, the area containing the dispensed sterile pharmaceuticals shall be an enclosed and lockable area separate from the area containing undispensed prescription drugs. A list of the authorized personnel having such access shall be in the pharmacy's policy and procedure manual.

(C) Storage requirements. All drugs shall be stored at the proper temperature and conditions, as defined in the USP/NF. The most commonly used definitions are as follows:

(i) freezer A place in which the temperature maintained thermostatically between minus 25 degrees and minus 10 degrees Celsius (minus 13 degrees and 14 degrees Fahrenheit).

(ii) cold Any temperature not exceeding 8 degrees Celsius (46 degrees Fahrenheit. A refrigerator is a cold place in which the temperature maintained thermostatically between 2 degrees and 8 degrees Celsius (36 degrees and 46 degrees Fahrenheit);

(iii) cool--temperature between 8 degrees and 15 degrees Celsius (46 degrees and 59 degrees Fahrenheit) which may, alternatively, be stored in a refrigerator unless otherwise specified on the labeling; and

(iv) controlled room temperature--temperature maintained thermostatically between 15 degrees and 30 degrees Celsius (59 degrees and 86 degrees Fahrenheit).

(4) Equipment and supplies. Pharmacies compounding sterile pharmaceuticals shall have the following equipment and supplies:

(A) a system or device (i.e., thermometer) to monitor the temperature and humidity to ensure that proper storage requirements are met, if sterile pharmaceuticals are stored in the refrigerator;

(B) a system or device to monitor the temperature and humidity where bulk chemicals are stored;

(C) if applicable, a Class A prescription balance, or analytical balance and weights. Such balance shall be properly maintained and subject to inspection at least every three years by the Texas State Board of Pharmacy;

(D) have equipment and utensils necessary for the proper compounding of prescription drug or medication orders. Such equipment and utensils used in the compounding process shall be:

(i) of appropriate design, appropriate capacity, and be operated within designed operational limits;

(ii) of suitable composition so that surfaces that contact components, in-process material, or drug products shall not be reactive, additive, or absorptive so as to alter the safety, identity, strength, quality, or purity of the drug product beyond the desired result;

(iii) cleaned and sanitized immediately prior to each use; and

(iv) routinely inspected, calibrated (if necessary), or checked to ensure proper performance;

(E) appropriate disposal containers for used needles, syringes, etc., and if applicable, cytotoxic waste from the preparation of chemotherapeutic agents, and/or biohazardous waste;

(F) appropriate packaging or delivery containers to maintain proper storage conditions for products;

(G) infusion devices, if applicable; and

(H) all necessary supplies, including:

(i) disposable needles, syringes, and other supplies for aseptic mixing;

(ii) disinfectant cleaning solutions;

(iii) hand washing agents with bactericidal action;

(iv) disposable, lint free towels or wipes;

(v) appropriate filters and filtration equipment;

(vi) cytotoxic spill kits, if applicable; and

(vii) masks, caps, coveralls or gowns with tight cuffs, shoe covers, and gloves, as applicable.

(5) Labeling. In addition to the labeling requirements for the pharmacy's specific license classification, the label dispensed or distributed pursuant to a prescription drug or medication order shall contain the following.

(A) The generic name(s) or the official name(s) of the principal active ingredient(s) of the compounded pharmaceutical.

(B) A statement that the preparation has been compounded by the pharmacy. (An auxiliary label may be used on the container to meet this requirement).

(C) A beyond-use date after which the compounded pharmaceutical should not be used. The beyond-use date shall be determined as outlined in Chapter 797 of the USP/NF concerning Pharmacy Compounding Sterile Preparations.

(D) If the sterile pharmaceutical is compounded in a batch, the following should also be included on the batch label.

(i) unique lot number assigned to the batch;

(ii) quantity;

(iii) appropriate ancillary instructions, such as storage instructions or cautionary statements, including cytotoxic warning labels where appropriate; and

(iv) device-specific instructions, where appropriate.

(6) Written drug information. Written information about the compounded drug or its major active ingredient(s) shall be given to the patient at the time of dispensing. A statement which indicates that the product was compounded by the pharmacy must be included in this written information. If there is no written information available, the patient should be advised in writing that the drug has been compounded and how to contact a pharmacist, and if appropriate the prescriber, concerning the drug.

(7) Pharmaceutical Care Services. In addition to the pharmaceutical care requirements for the pharmacy's specific license classification, the following requirements must be met.

(A) Sterile pharmaceuticals compounded pursuant to prescription drug orders (outpatients and long-term care facility patients).

(i) Primary provider. There shall be a designated physician primarily responsible for the patient's medical care. There shall be a clear understanding between the physician, the patient, and the pharmacy of the responsibilities of each in the areas of the delivery of care, and the monitoring of the patient. This shall be documented in the patient medication record (PMR).

(ii) Patient training. The pharmacist-in-charge shall develop policies that assure that the patient and/or patient's caregiver receives information regarding drugs and their safe and appropriate use, including instruction when applicable, regarding:

(I) appropriate disposition of hazardous solutions and ancillary supplies;

(II) proper disposition of controlled substances in the home;

(III) self-administration of drugs, where appropriate;

(IV) emergency procedures, including how to contact an appropriate individual in the event of problems or emergencies related to drug therapy; and

(V) if the patient or patient's caregiver prepares sterile preparations in the home, the following additional information shall be provided:

(-a-) safeguards against microbial contamination, including aseptic techniques for compounding intravenous admixtures and aseptic techniques for injecting additives to premixed intravenous solutions;

(-b-) appropriate storage methods, including storage durations for sterile pharmaceuticals and expirations of self-mixed solutions;

(-c-) handling and disposition of premixed and self- mixed intravenous admixtures; and

(-d-) proper disposition of intravenous admixture compounding supplies such as syringes, vials, ampules, and intravenous solution containers.

(iii) Pharmacist-patient relationship. It is imperative that a pharmacist-patient relationship be established and maintained throughout the patient's course of therapy. This shall be documented in the patient's medication record (PMR).

(iv) Patient monitoring. The pharmacist-in-charge shall develop policies to ensure that:

(I) the patient's response to drug therapy is monitored and conveyed to the appropriate health care provider; and

(II) the first dose of any new drug therapy is administered in the presence of an individual qualified to monitor for and respond to adverse drug reactions.

(B) Sterile pharmaceutical compounded pursuant to medication orders (inpatients).

(i) Education. The pharmacist-in-charge in cooperation with appropriate multi-disciplinary staff of the facility shall develop policies that assure that:

(I) the patient and/or patient's caregiver receives information regarding drugs and their safe and appropriate use; and

(II) health care providers are provided with patient specific drug information.

(ii) Patient monitoring. The pharmacist-in-charge in cooperation with appropriate multi-disciplinary staff of the facility shall develop policies to ensure that the patient's response to drug therapy is monitored and conveyed to the appropriate health care provider.

(8) Drugs, components, and materials used in sterile compounding.

(A) Drugs used in sterile compounding shall preferably be a USP/NF grade substances manufactured in an FDA-registered facility.

(B) If USP/NF grade substances are not available shall be of a chemical grade in one of the following categories:

(i) Chemically Pure (CP);

(ii) Analytical Reagent (AR); or

(iii) American Chemical Society (ACS); or

(iv) Food Chemical Codex; or

(C) If a drug, component or material is not purchased from a FDA- registered facility, the pharmacist shall establish purity and stability by obtaining a Certificate of Analysis from the supplier.

(D) All components shall:

(i) preferably be manufactured in an FDA-registered facility; or

(ii) in the professional judgment of the pharmacist, be of high quality and obtained from acceptable and reliable alternative sources; and

(iii) stored in properly labeled containers in a clean, dry area, under proper temperatures.

(E) Drug product containers and closures shall not be reactive, additive, or absorptive so as to alter the safety, identity, strength, quality, or purity of the compounded drug product beyond the desired result.

(F) Components, drug product containers, and closures shall be rotated so that the oldest stock is used first.

(G) Container closure systems shall provide adequate protection against foreseeable external factors in storage and use that can cause deterioration or contamination of the compounded drug product.

(H) A pharmacy may not compound a drug product which appears on a federal Food and Drug Administration list of drug products withdrawn or removed from the market for safety reasons.

(9) Compounding process.

(A) All significant procedures performed in the compounding area shall be covered by written SOPs designed to ensure accountability, accuracy, quality, safety, and uniformity in the compounding process. At a minimum, SOPs shall be developed for:

(i) the facility;

(ii) equipment;

(iii) personnel;

(iv) actual compounding;

(v) product evaluation;

(vi) packaging; and

(vii) storage of compounded pharmaceuticals.

(B) Any compounded formulation with an official monograph in the USP/NF shall be compounded, labeled, and packaged in conformity with the USP/NF monograph for the drug.

(C) Any person with an apparent illness or open lesion that may adversely affect the safety or quality of a drug product being compounded shall be excluded from direct contact with components, drug product containers, closures, any materials involved in the compounding process, and drug products until the condition is corrected.

(D) Personnel engaged in the compounding of drug products shall wear clean clothing appropriate to the operation being performed. Protective apparel, such as coats/jackets, aprons, hair nets, gowns, hand or arm coverings, or masks shall be worn as necessary to protect personnel from chemical exposure and drug products from contamination.

(E) At each step of the compounding process, the pharmacist shall assure that components used in compounding are accurately weighed, measured, or subdivided as appropriate to conform to the formula being prepared.

(10) Quality control.

(A) Quality control procedures. The pharmacy shall follow established quality control procedures to monitor the quality of compounded drug products for conformity with the quality indicators established for the product. When developing these procedures, pharmacy personnel shall consider the provisions of Chapter 797, concerning Pharmaceutical Compounding Sterile Preparations, Chapter 1075, concerning Good Compounding Practices, and Chapter 1160, concerning Pharmaceutical Calculations in Prescription Compounding contained in the current USP/NF. Such procedures shall be documented and be available for inspection.

(B) End product evaluations.

(i) The pharmacy shall conduct and document end product evaluations appropriate for the preparation in accordance with written SOPs. End product evaluations for non-batch compounded pharmaceuticals may be performed on random samples. All batch compounded pharmaceuticals shall have end product evaluations.

(ii) High-risk level compounded sterile pharmaceutical for administration by injection into the vascular and central nervous systems that are prepared in groups of more than 25 identical individual single-dose packages (such as ampuls, bags, syringes, and vials), or in multiple dose vials for administration to multiple patients, or are exposed longer than 12 hours at 2 - 8 degrees Celsius (36 - 46 degrees Fahrenheit) and longer than six hours at warmer than 8 degrees Celsius (46 degrees Fahrenheit) before they are sterilized shall be tested to ensure they are sterile and do not contain excessive bacterial endotoxins as specified in Chapter 797 of the USP/NF. If the preparation is a suspension, it should be tested to assure it is not contaminated by fungus.

(e) Records.

(1) Maintenance of records. Every record required by this section shall be kept by the pharmacy for at least two years.

(2) Compounding records.

(A) Compounding pursuant to patient specific prescription drug or medication orders. Compounding records for all compounded pharmaceuticals shall be maintained by the pharmacy electronically or manually as part of the prescription drug or medication order, formula record, formula book, or compounding log and shall include:

(i) the date of preparation;

(ii) a complete formula, including methodology and necessary equipment which includes the brand name(s) of the raw materials, or if no brand name, the generic name(s) or official name and name(s) of the manufacturer(s) or distributor of the raw materials and the quantities of each;

(iii) signature or initials of the pharmacist or pharmacy technician performing the compounding;

(iv) signature or initials of the pharmacist responsible for supervising pharmacy technicians and other supportive personnel and conducting in-process and finals checks of compounded pharmaceuticals if pharmacy technicians perform the compounding function;

(v) the quantity in units of finished products or amount of raw materials;

(vi) the container used and the number of units prepared; and

(vii) a reference to the location of the following documentation which may be maintained with other records, such as quality control records:

(I) the criteria used to determine the beyond-use date; and

(II) documentation of performance of quality control procedures.

(B) Batch compounding or compounding in anticipation of future prescription drug or medication orders.

(i) Master work sheet. A master work sheet shall be developed and approved by a pharmacist for pharmaceuticals prepared in batch. Once approved, a duplicate of the master work sheet shall be used as the preparation work sheet from which each batch is prepared and on which all documentation for that batch occurs. The master work sheet shall contain at a minimum:

(I) the formula;

(II) the components;

(III) the compounding directions;

(IV) a sample label;

(V) evaluation and testing requirements;

(VI) specific equipment used during preparation; and

(VII) storage requirements.

(ii) Preparation work sheet. The preparation work sheet for each batch of pharmaceuticals shall document the following:

(I) identity of all solutions and ingredients and their corresponding amounts, concentrations, or volumes;

(II) lot number for each component;

(III) component manufacturer/distributer or suitable identifying number;

(IV) container specifications (e.g., syringe, pump cassette);

(V) unique lot or control number assigned to batch;

(VI) expiration date of batch-prepared products;

(VII) date of preparation;

(VIII) name, initials, or electronic signature of the person(s) involved in the preparation;

(IX) name, initials, or electronic signature of the responsible pharmacist;

(X) end-product evaluation and testing specifications, if applicable; and

(XI) comparison of actual yield to anticipated yield, when appropriate.

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 May 17, 2004.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

22 TAC §§291.31 - 291.34

The Texas State Board of Pharmacy adopts amendments to §291.31, concerning Definitions; §291.32, concerning Personnel; §291.33, concerning Operational Standards; and §291.34, concerning Records in a Class A (Community) Pharmacy. The amendments are adopted without changes to the proposed text as published in the March 26, 2004, issue of the *Texas Register* (29 TexReg 3058).

The amendments to §§291.31 - 291.33 remove the current provisions relating to compounding of non-sterile and sterile pharmaceuticals and reference new §291.25 and §291.26 which outline new provisions for the compounding of non-sterile and sterile pharmaceuticals. The amendments to §291.34 specify that only a pharmacist may verify the receipt of controlled substances by a pharmacy; require written prescriptions which are electronically signed to be on security paper to prevent alteration or copying; and clarify electronically transmitted confidential patient information must be in compliance with other state and federal laws.

One individual provided written comments in support of §291.34 regarding written prescriptions which are electronically signed to be on security paper.

The amendments are adopted under §§551.002, 551.003, 554.001, and 554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §551.003(9) as authorizing the agency to adopt rules concerning the compounding of prescriptions. The Board interprets §551.003(33) as authorizing the agency to adopt rules concerning the practice of pharmacy. The Board interprets §554.001(a) as authorizing the agency to adopt rules to administer and enforce the Act and rules adopted under the Act as well as enforce other laws relating to the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the amendments: Chapters 551 - 566 and 568 - 569, Texas Occupations 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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22 TAC §291.36

The Texas State Board of Pharmacy (TSBP) adopts repeal of §291.36, concerning Class A Pharmacies Compounding Sterile Pharmaceuticals without changes to the proposal as published in the March 26, 2004, issue of the *Texas Register* (29 TexReg 3067).

The repeal eliminates a section that is no longer necessary since the provisions of this section are incorporated into new §291.26. New §291.26 outlines operating standards for pharmacies that compound sterile pharmaceuticals, implements the recommendations of the TSBP appointed Task Force on Compounding (Task Force), and incorporates many of the provisions included in the United States Pharmacopeia (USP) new General Chapter 797 (Pharmaceutical Compounding Sterile Preparations).

No comments were received regarding the repeal.

The repeal is adopted under §§551.002, 551.003, 554.001, and 554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §551.003(9) as authorizing the agency to adopt rules concerning the compounding of prescriptions. The Board interprets §551.003(33) as authorizing the agency to adopt rules concerning the practice of pharmacy. The Board interprets §554.001(a) as authorizing the agency to adopt rules to administer and enforce the Act and rules adopted under the Act as well as enforce other laws relating to the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the repeal: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 17, 2004.

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Executive Director/Secretary
Texas State Board of Pharmacy
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Proposal publication date: March 26, 2004
For further information, please call: (512) 305-8028

SUBCHAPTER C. NUCLEAR PHARMACY (CLASS B)

22 TAC §§291.52 - 291.55

The Texas State Board of Pharmacy (TSBP) adopts amendments to §291.52, concerning Definitions; §291.53, concerning Personnel; §291.54, concerning Operational Standards; and §291.55, concerning Records in a Class B (Nuclear) Pharmacy with changes to the proposed text as published in the March 26, 2004, issue of the *Texas Register* (29 TexReg 3069). The amendments are adopted with changes based on comments received.

The amendments to §§291.52 - 291.54 amend the current provisions relating to compounding of sterile pharmaceuticals to match new §291.26 which outlines new provisions for the compounding of sterile pharmaceuticals. New §291.26 outlines operating standards for pharmacies that compound sterile pharmaceuticals, implements the recommendations of the TSBP appointed Task Force on Compounding (Task Force), and incorporates many of the provisions included in the United States Pharmacopeia (USP) new General Chapter 797 (Pharmaceutical Compounding Sterile Preparations). The amendments to §291.55 specify that only a pharmacist may verify the receipt of controlled substances by a pharmacy and clarify electronically transmitted confidential patient information must be in compliance with other state and federal laws.

One comment suggested clarifying storage requirements for low risk sterile compounded products. The Board agrees with the comment and amended the rule to reflect the clarification.

The amendments are adopted under §§551.002, 551.003, 554.001, and 554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §551.003(9) as authorizing the agency to adopt rules concerning the compounding of prescriptions. The Board interprets §551.003(33) as authorizing the agency to adopt rules concerning the practice of pharmacy. The Board interprets §554.001(a) as authorizing the agency to adopt rules to administer and enforce the Act and rules adopted under the Act as well as enforce other laws relating to the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the amendments: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.52. Definitions

The following words and terms, when used in these sections, shall have the following meanings, unless the context clearly indicates otherwise. Any term not defined in this section shall have the definition set forth in the Act, §551.003.

(1) Act--The Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Occupations Code, as amended.

(2) Accurately as prescribed--Dispensing, delivering, and/or distributing a prescription drug order or radioactive prescription drug order:

(A) to the correct patient (or agent of the patient) for whom the drug or device was prescribed;

(B) with the correct drug in the correct strength, quantity, and dosage form ordered by the practitioner; and

(C) with correct labeling (including directions for use) as ordered by the practitioner. Provided, however, that nothing herein shall prohibit pharmacist substitution if substitution is conducted in

strict accordance with applicable laws and rules, including Subchapter A, Chapter 562 of the Texas Pharmacy Act.

(3) ACPE--Accreditation Council for Pharmacy Education.

(4) Administer--The direct application of a prescription drug and/or radiopharmaceutical, by injection, inhalation, ingestion, or any other means to the body of a patient by:

(A) a practitioner, an authorized agent under his supervision, or other person authorized by law; or

(B) the patient at the direction of a practitioner.

(5) Airborne particulate cleanliness class--The level of cleanliness specified by the maximum allowable number of particles per cubic foot of air as specified in Federal Standard 209E, et seq. For example:

(A) Class 100 (ISO Class 5) is an atmospheric environment which contains less than 100 particles no greater than 0.5 microns in diameter per cubic foot of air;

(B) Class 10,000 (ISO Class 7) is an atmospheric environment which contains less than 10,000 particles no greater than 0.5 microns in diameter per cubic foot of air; and

(C) Class 100,000 (ISO Class 8) is an atmospheric environment which contains less than 100,000 particles no greater than 0.5 microns in diameter per cubic foot of air.

(6) Ancillary supplies--Supplies necessary for the administration of compounded sterile pharmaceuticals.

(7) Aseptic preparation--The technique involving procedures designed to preclude contamination of drugs, packaging, equipment, or supplies by microorganisms during processing.

(8) Authentication of product history--Identifying the purchasing source, the intermediate handling, and the ultimate disposition of any component of a radioactive drug.

(9) Authorized nuclear pharmacist--A pharmacist who has completed the specialized training requirements specified by these rules for the preparation and distribution of radiopharmaceuticals.

(10) Authorized user--Any individual named on a Texas radioactive material license, issued by the Texas Department of Health, Bureau of Radiation Control.

(11) Automated compounding or drug dispensing device--An automated device that compounds, measures, counts, packages, and/or labels a specified quantity of dosage units for a designated drug product.

(12) Biological Safety Cabinet--Containment unit suitable for the preparation of low to moderate risk agents where there is a need for protection of the product, personnel, and environment, according to National Sanitation Foundation (NSF) Standard 49.

(13) Board--The Texas State Board of Pharmacy.

(14) Class B pharmacy license or nuclear pharmacy license--A license issued to a pharmacy dispensing or providing radioactive drugs or devices for administration to an ultimate user.

(15) Clean room--A room in which the concentration of airborne particles is controlled and there are one or more clean zones according to the International Organization of Standardization (ISO), Specifications for testing and monitoring to prove continued compliance with ISO 14644-1 and/or ISO 14644-2.

(16) Clean zone--A defined space in which the concentration of airborne particles is controlled to meet a specified airborne particulate cleanliness class.

(17) Component--Any ingredient intended for use in the compounding of a drug product, including those that may not appear in such product.

(18) Compounding--The preparation, mixing, assembling, packaging, or labeling of a drug or device:

(A) as the result of a practitioner's prescription drug or medication order or initiative based on the practitioner-patient pharmacist relationship in the course of professional practice;

(B) in anticipation of prescription drug or medication orders based on routine, regularly observed prescribing patterns; or

(C) for the purpose of or as an incident to research, teaching, or chemical analysis and not for sale or dispensing.

(19) Controlled area--A controlled area is the area designated for preparing sterile radiopharmaceuticals.

(20) Controlled substance--A drug, immediate precursor, or other substance listed in Schedules I - V or Penalty Groups 1-4 of the Texas Controlled Substances Act, as amended, or a drug, immediate precursor, or other substance included in Schedule I, II, III, IV, or V of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended (Public Law 91-513).

(21) Critical site--Any opening providing a direct pathway between a sterile product and the environment or any surface coming in direct contact with the product and the environment.

(22) Dangerous drug--A drug or device that:

(A) is not included in Penalty Group 1, 2, 3, or 4, Chapter 481, Health and Safety Code, and is unsafe for self-medication; or

(B) bears or is required to bear the legend:

(i) "Caution: federal law prohibits dispensing without prescription" or "Rx only" or another legend that complies with federal law; or

(ii) "Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian."

(23) Data communication device--An electronic device that receives electronic information from one source and transmits or routes it to another (e.g., bridge, router, switch, or gateway).

(24) Deliver or delivery--The actual, constructive, or attempted transfer of a prescription drug or device, radiopharmaceutical, or controlled substance from one person to another, whether or not for a consideration.

(25) Designated agent--

(A) a licensed nurse, physician assistant, pharmacist, or other individual designated by a practitioner, and for whom the practitioner assumes legal responsibility, who communicates radioactive prescription drug orders to a pharmacist; or

(B) a licensed nurse, physician assistant, or pharmacist employed in a health care facility to whom the practitioner communicates a radioactive prescription drug order.

(26) Device--An instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related articles, including any component parts or accessory that is required under federal or state law to be ordered or prescribed by a practitioner.

(27) Diagnostic prescription drug order--A radioactive prescription drug order issued for a diagnostic purpose.

(28) Dispense--Preparing, packaging, compounding, or labeling for delivery a prescription drug or device, or a radiopharmaceutical in the course of professional practice to an ultimate user or his agent by or pursuant to the lawful order of a practitioner.

(29) Dispensing pharmacist--The authorized nuclear pharmacist responsible for the final check of the dispensed prescription before delivery to the patient.

(30) Distribute--The delivering of a prescription drug or device, or a radiopharmaceutical other than by administering or dispensing.

(31) Electronic radioactive prescription drug order--A radioactive prescription drug order which is transmitted by an electronic device to the receiver (pharmacy).

(32) Internal test assessment--Validation of tests for quality control necessary to insure the integrity of the test.

(33) Nuclear pharmacy technique--The mechanical ability required to perform the nonjudgmental, technical aspects of preparing and dispensing radiopharmaceuticals.

(34) Original prescription--The:

(A) original written radioactive prescription drug orders; or

(B) original verbal or electronic radioactive prescription drug orders reduced to writing either manually or electronically by the pharmacist.

(35) Pharmacist-in-charge--The pharmacist designated on a pharmacy license as the pharmacist who has the authority or responsibility for a pharmacy's compliance with laws and rules pertaining to the practice of pharmacy.

(36) Pharmacy technician--An individual whose responsibility in a pharmacy is to provide technical services that do not require professional judgment regarding preparing and distributing drugs and who works under the direct supervision of and is responsible to a pharmacist. Pharmacy technician includes registered pharmacy technicians and pharmacy technician trainees.

(37) Pharmacy technician trainee--A person who is not registered as a pharmacy technician by the board and is either:

(A) participating in a pharmacy's technician training program; or

(B) currently enrolled in a:

(i) pharmacy technician training program accredited by the American Society of Health-System Pharmacists; or

(ii) health science technology education program in a Texas high school that is accredited by the Texas Education Agency.

(38) Process validation--Documented evidence providing a high degree of assurance that a specific process will consistently produce a product meeting its predetermined specifications and quality attributes.

(39) Quality assurance--The set of activities used to assure that the process used in the preparation of sterile drug products lead to products that meet predetermined standards of quality.

(40) Radiopharmaceutical--A prescription drug or device that exhibits spontaneous disintegration of unstable nuclei with the emission of a nuclear particle(s) or photon(s), including any nonradioactive reagent kit or nuclide generator that is intended to be used in preparation of any such substance.

(41) Radioactive drug quality control--The set of testing activities used to determine that the ingredients, components (e.g., containers), and final radiopharmaceutical prepared meets predetermined requirements with respect to identity, purity, non-pyrogenicity, and sterility and the interpretation of the resulting data in order to determine the feasibility for use in humans and animals including internal test assessment, authentication of product history, and the keeping of mandatory records.

(42) Radioactive drug service--The act of distributing radiopharmaceuticals; the participation in radiopharmaceutical selection and the performance of radiopharmaceutical drug reviews.

(43) Radioactive prescription drug order--An order from a practitioner or a practitioner's designated agent for a radiopharmaceutical to be dispensed.

(44) Sterile radiopharmaceutical--A dosage form of a radiopharmaceutical free from living micro-organisms.

(45) Therapeutic prescription drug order--A radioactive prescription drug order issued for a specific patient for a therapeutic purpose.

(46) Ultimate user--A person who has obtained and possesses a prescription drug or radiopharmaceutical for his or her own use or for the use of a member of his or her household.

§291.53. Personnel.

(a) Pharmacists-in-Charge.

(1) General.

(A) Every nuclear pharmacy shall have an authorized nuclear pharmacist designated on the nuclear pharmacy license as the pharmacist-in-charge who shall be responsible for a nuclear pharmacy's compliance with laws and regulations, both state and federal, pertaining to the practice of nuclear pharmacy.

(B) The nuclear pharmacy pharmacist-in-charge shall see that directives from the board are communicated to the owner(s), management, other pharmacists, and interns of the nuclear pharmacy.

(C) An authorized nuclear pharmacist may be pharmacist-in-charge for no more than one nuclear pharmacy at any one given time.

(2) Responsibilities. The pharmacist-in-charge shall have the responsibility for, at a minimum, the following:

(A) ensuring that radiopharmaceuticals are dispensed and delivered safely and accurately as prescribed;

(B) developing a system to assure that all pharmacy personnel responsible for compounding and/or supervising the compounding of radiopharmaceuticals within the pharmacy receive appropriate education and training and competency evaluation;

(C) determining that all pharmacists involved in compounding sterile radiopharmaceuticals obtain continuing education appropriate for the type of compounding done by the pharmacist;

(D) supervising a system to assure appropriate procurement of drugs and devices and storage of all pharmaceutical materials including radiopharmaceuticals, components used in the compounding of radiopharmaceuticals, and drug delivery devices;

(E) assuring that the equipment used in compounding is properly maintained;

(F) developing a system for the disposal and distribution of drugs from the Class B pharmacy;

(G) developing a system for bulk compounding or batch preparation of radiopharmaceuticals;

(H) developing a system for the compounding, sterility assurance, and quality control of sterile radiopharmaceuticals;

(I) maintaining records of all transactions of the Class B pharmacy necessary to maintain accurate control over and accountability for all pharmaceutical materials including radiopharmaceuticals, required by applicable state and federal laws and rules;

(J) developing a system to assure the maintenance of effective controls against the theft or diversion of prescription drugs, and records for such drugs;

(K) assuring that the pharmacy has a system to dispose of radioactive and cytotoxic waste in a manner so as not to endanger the public health; and

(L) legal operation of the pharmacy, including meeting all inspection and other requirements of all state and federal laws or rules governing the practice of pharmacy.

(b) Authorized nuclear pharmacists.

(1) General.

(A) The pharmacist-in-charge shall be assisted by a sufficient number of additional authorized nuclear pharmacists as may be required to operate the pharmacy competently, safely, and adequately to meet the needs of the patients of the pharmacy.

(B) All personnel performing tasks in the preparation and distribution of radiopharmaceuticals shall be under the direct supervision of an authorized nuclear pharmacist. General qualifications for an authorized nuclear pharmacist are the following. A pharmacist shall:

(i) meet minimal standards of training and experience in the handling of radioactive materials in accordance with the requirements of the Texas Regulations for Control of Radiation of the Bureau of Radiation Control, Texas Department of Health;

(ii) be a pharmacist licensed by the board to practice pharmacy in Texas; and

(iii) submit to the board either:

(I) written certification that he or she has current board certification as a nuclear pharmacist by the Board of Pharmaceutical Specialties; or

(II) written certification signed by preceptor authorized nuclear pharmacist that he or she has achieved a level of competency sufficient to independently operate as an authorized nuclear pharmacist and has satisfactorily completed 700 hours in a structured educational program consisting of both:

(-a-) 200 hours of didactic training in a program accepted by the Bureau of Radiation Control, Texas Department of Health in the following areas:

(-1-) radiation physics and instrumentation;

(-2-) radiation protection;

(-3-) mathematics pertaining to the use and measurement of radioactivity;

(-4-) radiation biology; and

(-5-) chemistry of radioactive material for medical use; and

(-b-) 500 hours of supervised experience in a nuclear pharmacy involving the following:

(-1-) shipping, receiving, and performing related radiation surveys;

(-2-) using and performing checks for proper operation of dose calibrators, survey meters, and, if appropriate, instruments used to measure alpha- or beta-emitting radionuclides;

(-3-) calculating, assaying, and safely preparing dosages for patients or human research subjects;

(-4-) using administrative controls to avoid mistakes in the administration of radioactive material; and

(-5-) using procedures to prevent or minimize contamination and using proper decontamination procedures.

(C) The board may issue a letter of notification that the evidence submitted by the pharmacist meets the requirements of subparagraph (B)(i) - (iii) of this paragraph and has been accepted by the board and that, based thereon, the pharmacist is recognized as an authorized nuclear pharmacist.

(D) Authorized nuclear pharmacists are solely responsible for the direct supervision of pharmacy technicians and for delegating nuclear pharmacy techniques and additional duties, other than those listed in paragraph (2) of this subsection, to pharmacy technicians. Each authorized nuclear pharmacist:

(i) shall verify the accuracy of all acts, tasks, or functions performed by pharmacy technicians; and

(ii) shall be responsible for any delegated act performed by pharmacy technicians under his or her supervision.

(E) All authorized nuclear pharmacists while on duty, shall be responsible for complying with all state and federal laws or rules governing the practice of pharmacy.

(F) The dispensing pharmacist shall ensure that the drug is dispensed and delivered safely and accurately as prescribed.

(2) Special requirements for sterile compounding.

(A) All pharmacists engaged in compounding shall:

(i) possess the education, training, and proficiency necessary to properly and safely perform compounding duties undertaken or supervised; and

(ii) obtain continuing education appropriate for the type of compounding done by the pharmacist.

(B) A pharmacist shall inspect and approve all components, drug product containers, closures, labeling, and any other materials involved in the compounding process.

(C) A pharmacist shall review all compounding records for accuracy and conduct in-process and final checks to assure that errors have not occurred in the compounding process.

(D) A pharmacist is responsible for the proper maintenance, cleanliness, and use of all equipment used in the compounding process.

(3) Duties. Duties which may only be performed by an authorized nuclear pharmacist are as follows:

(A) receiving verbal therapeutic prescription drug orders and reducing these orders to writing, either manually or electronically;

(B) receiving verbal, diagnostic prescription drug orders in instances where patient specificity is required for patient safety (e.g., radiolabeled blood products, radiolabeled antibiodies) and reducing these orders to writing, either manually or electronically;

(C) interpreting and evaluating radioactive prescription drug orders;

(D) selection of drug products; and

(E) performing the final check of the dispensed prescription before delivery to the patient to ensure that the radioactive prescription drug order has been dispensed accurately as prescribed.

(c) Pharmacy Technicians.

(1) General.

(A) On June 1, 2004, all persons employed as pharmacy technicians must be either registered pharmacy technicians or pharmacy technician trainees as follows.

(i) All persons who have passed the required pharmacy technician certification examination must be registered with the board under the provisions this section.

(ii) All persons who have not taken and passed the required pharmacy certification examination shall be designated pharmacy technician trainees under the provisions of §297.5 of this title (relating to Pharmacy Technician Trainees).

(B) Between January 1, 2004, and May 31, 2004, all persons employed as pharmacy technicians who are qualified for registration by the board shall register according to the schedule designated by the board. Between January 1, 2004 and May 31, 2004, persons who are awaiting their scheduled time for registration and persons who have applied for registration, but the registration has not been completed shall comply with the rules in effect prior to January 1, 2004, relating to requirements and duties for certified pharmacy technicians.

(C) All pharmacy technicians shall meet the training requirements specified in §297.6 of this title (relating to Pharmacy Technician Training).

(2) Special requirements for sterile compounding. Pharmacy technicians may compound sterile pharmaceuticals provided the pharmacy technicians:

(A) have completed the education and training specified in subsection (d) of this subsection; and

(B) are supervised by a pharmacist who has completed the training specified in subsection (d) of this subsection, conducts in-process and final checks, and affixes his or her initials to the appropriate quality control records.

(3) Duties.

(A) General. Pharmacy technicians may perform any nuclear pharmacy technique delegated by an authorized nuclear pharmacist which is associated with the preparation and distribution of radiopharmaceuticals other than those duties listed in subsection (b)(3) of this section provided:

(i) an authorized nuclear pharmacist conducts in-process and final checks; and

(ii) pharmacy technicians are under the direct supervision of and responsible to an authorized nuclear pharmacist.

(B) Labeling. Only registered pharmacy technicians may affix a label to a prescription container.

(4) Ratio of authorized nuclear pharmacist to pharmacy technicians.

(A) The ratio of authorized nuclear pharmacists to pharmacy technicians may not exceed 1:2, provided that only one pharmacy technician may be engaged in the compounding of a sterile radiopharmaceutical.

(B) The ratio of authorized nuclear pharmacists to pharmacy technicians may be 1:3 provided that at least one of the three technicians is a registered pharmacy technician and only one may be engaged in the compounding of a sterile radiopharmaceutical.

(d) Special education, training, and evaluation requirements for pharmacy personnel compounding or responsible for the direct supervision of pharmacy personnel compounding sterile radiopharmaceuticals.

(1) General.

(A) All pharmacy personnel preparing sterile radiopharmaceuticals shall receive didactic and experiential training and competency evaluation through demonstration, testing (written or practical) as outlined by the pharmacist-in-charge and described in the policy and procedure or training manual. Such training shall include instruction and experience in the following areas:

(i) aseptic technique;

(ii) critical area contamination factors;

(iii) environmental monitoring;

(iv) facilities;

(v) equipment and supplies;

(vi) sterile pharmaceutical and radiopharmaceutical calculations and terminology;

(vii) sterile radiopharmaceutical compounding documentation;

(viii) quality assurance procedures;

(ix) aseptic preparation procedures including proper gowning and gloving technique;

(x) handling of hazardous drugs, if applicable; and

(xi) general conduct in the controlled area.

(B) The aseptic technique of each person compounding or responsible for the direct supervision of personnel compounding sterile radiopharmaceuticals shall be observed, evaluated, and documented as satisfactory through written or practical tests and process validation.

(C) Although process validation may be incorporated into the experiential portion of a training program, process validation must be conducted at each pharmacy where an individual compounds sterile radiopharmaceuticals. No product intended for patient use shall be compounded by an individual until the on-site process validation test indicates that the individual can competently perform aseptic procedures, except that an authorized nuclear pharmacist may temporarily compound sterile radiopharmaceuticals and supervise pharmacy technicians compounding sterile radiopharmaceuticals without process validation provided the authorized nuclear pharmacist:

(i) has completed a recognized course in an accredited college of pharmacy or a course sponsored by an ACPE approved

provider which provides 20 hours of instruction and experience in the areas listed in this paragraph; and

(ii) completes the on-site process validation within seven days of commencing work at the pharmacy.

(D) Process validation procedures for assessing the preparation of specific types of sterile radiopharmaceuticals shall be representative of all types of manipulations, products, risk levels and batch sizes that personnel preparing that type of radioradiopharmaceutical are likely to encounter.

(E) The pharmacist-in-charge shall assure continuing competency of pharmacy personnel through in-service education, training, and process validation to supplement initial training. Personnel competency shall be evaluated:

(i) during orientation and training prior to the regular performance of those tasks;

(ii) whenever the quality assurance program yields an unacceptable result;

(iii) whenever unacceptable techniques are observed; and

(iv) at least on an annual basis.

(2) Pharmacists.

(A) All pharmacists who compound sterile radiopharmaceuticals or supervise pharmacy technicians compounding sterile radiopharmaceuticals shall:

(i) complete through a single course, a minimum of 20 hours of instruction and experience in the areas listed in paragraph (1) of this subsection. Such training may be obtained through:

(I) completion of a structured on-the-job didactic and experiential training program at this pharmacy which provides 20 hours of instruction and experience in the areas listed in paragraph (1) of this subsection. Such training may not be transferred to another pharmacy unless the pharmacies are under common ownership and control and use a common training program; or

(II) completion of a recognized course in an accredited college of pharmacy or a course sponsored by an ACPE approved provider which provides 20 hours of instruction and experience in the areas listed in paragraph (1) of this subsection; and

(ii) possess knowledge about:

(I) aseptic processing;

(II) quality control and quality assurance as related to environmental, component, and end-product testing;

(III) chemical, pharmaceutical, and clinical properties of drugs;

(IV) container, equipment, and closure system selection; and

(V) sterilization techniques; and

(iii) every two years complete six hours of continuing education related to sterile or nuclear product compounding offered by a provider approved by ACPE. (These hours may be applied towards the hours required for renewal of a license to practice pharmacy.)

(B) The required experiential portion of the training programs specified in this paragraph must be supervised by an individual who has already completed training in the compounding of sterile pharmaceuticals as specified in paragraph (2) or (3) of this subsection.

(3) Pharmacy technicians. In addition to the qualifications and training outlined in subsection (c) of this section, all pharmacy technicians who compound sterile radiopharmaceuticals shall:

(A) have a high school or equivalent education;

(B) have initial training obtained either through completion of:

(i) a single course, a minimum of 40 hours of instruction and experience in the areas listed in paragraph (1) of this subsection. Such training may be obtained through:

(I) completion of a structured on-the-job didactic and experiential training program at this pharmacy which provides 40 hours of instruction and experience in the areas listed in paragraph (1) of this subsection. Such training may not be transferred to another pharmacy unless the pharmacies are under common ownership and control and use a common training program; or

(II) completion of a course sponsored by an ACPE approved provider which provides 40 hours of instruction and experience in the areas listed in paragraph (1) of this subsection; or

(ii) a training program which is accredited by the American Society of Health-System Pharmacists (formerly the American Society of Hospital Pharmacists). Individuals enrolled in training programs accredited by the American Society of Health-System Pharmacists may compound sterile pharmaceuticals in a licensed pharmacy provided:

(I) the compounding occurs only during times the individual is assigned to a pharmacy as a part of the experiential component of the American Society of Health-System Pharmacists training program;

(II) the individual is under the direct supervision of and responsible to a pharmacist who has completed training as specified in paragraph (1) of this subsection; and

(III) the supervising pharmacist conducts in-process and final checks; and

(C) repeat the training specified in subparagraph (B) of this paragraph at least every seven years; and

(D) acquire the required experiential portion of the training programs specified in this subparagraph under the supervision of an individual who has already completed training as specified in paragraph (2) or (3) of this subsection.

(E) every two years complete six hours of continuing education related to sterile product compounding. (These hours may be applied towards the hours required for renewal of a pharmacy technician's registration.)

(4) Documentation of Training. A written record of initial and in-service training and the results of written or practical testing and process validation of pharmacy personnel shall be maintained and contain the following information:

(A) name of the person receiving the training or completing the testing or process validation;

(B) date(s) of the training, testing, or process validation;

(C) general description of the topics covered in the training or testing or of the process validated;

(D) name of the person supervising the training, testing, or process validation; and

(E) signature (first initial and last name or full signature) of the person receiving the training or completing the testing or process validation and the pharmacist-in-charge or other pharmacist employed by the pharmacy and designated by the pharmacist-in-charge as responsible for training, testing, or process validation of personnel.

§291.54. Operational Standards.

(a) Licensing requirements.

(1) It is unlawful for a person to provide radioactive drug services unless such provision is performed by a person licensed to act as an authorized nuclear pharmacist, as defined by the board, or is a person acting under the direct supervision of an authorized nuclear pharmacist acting in accordance with the Act and its rules, and the regulations of the Texas Department of Health, Bureau of Radiation Control. Subsection (a) of this section does not apply to:

(A) a licensed practitioner or his or her designated agent for administration to his or her patient, provided no person may receive, possess, use, transfer, own, acquire, or dispose of radiopharmaceuticals except as authorized in a specific or a general license as provided in Texas Regulations for Control of Radiation, Part 41, Texas Department of Health, or the Act;

(B) institutions and/or facilities with nuclear medicine services operated by practitioners and who are licensed by the Texas Department of Health, Bureau of Radiation Control, to prescribe, administer, and dispense radioactive materials (drugs and/or devices).

(2) An applicant for a Class B pharmacy shall provide evidence to the board of the possession of a Texas Department of Health Radiation Control Number.

(3) A Class B pharmacy shall register annually with the board on a pharmacy license application provided by the board, following the procedures specified in §291.1 of this title (relating to Pharmacy License Application).

(4) A Class B pharmacy which changes ownership shall notify the board within ten days of the change of ownership and apply for a new and separate license as specified in §291.4 of this title (relating to Change of Ownership).

(5) A Class B pharmacy which changes location and/or name shall notify the board within ten days of the change and file for an amended license as specified in §291.2 of this title (relating to Change of Location and/or Name).

(6) A Class B pharmacy owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within ten days of the change, following the procedures in §291.3 of this title (relating to Change of Managing Officers).

(7) A Class B pharmacy shall notify the board in writing within ten days of closing, following the procedures in §291.5 of this title (relating to Closed Pharmacies).

(8) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(9) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for the issuance and renewal of a license and the issuance of an amended license.

(10) A Class B pharmacy, licensed under the provisions of the Act, §560.051(a)(2), which also operates another type of pharmacy which would otherwise be required to be licensed under the Act, §560.051(a)(1), concerning community pharmacy (Class A), is not required to secure a license for such other type of pharmacy; provided, however, such licensee is required to comply with the provisions of §291.31 of this title (relating to Definitions); §291.32 of this title (relating to Personnel); §291.33 of this title (relating to Operational Standards); §291.34 of this title (relating to Records); and §291.35 of this title (relating to Official Prescription Requirements), to the extent such rules are applicable to the operation of the pharmacy.

(11) A Class B pharmacy engaged in nonsterile compounding of drug products shall comply with the provisions of §291.25 of this title (relating to Pharmacies Compounding Non-Sterile Pharmaceuticals)

(12) A Class B pharmacy engaged in sterile compounding of pharmaceutical drug products other than radiopharmaceuticals shall comply with the provisions of §291.26 of this title (relating to Pharmacies Compounding Sterile Pharmaceuticals).

(b) Risk levels for compounded sterile pharmaceuticals. Risk Levels for sterile compounded preparations shall be as outlined in USP/NF Chapter 797 Pharmacy Compounding Sterile Preparations and as listed below.

(1) Low-risk level compounded sterile pharmaceuticals.

(A) Low-risk level compounded sterile pharmaceuticals are those compounded under all of the following conditions.

(i) The compounded sterile preparations are compounded with aseptic manipulations entirely within ISO Class 5 or better air quality using only sterile ingredients, products, components, and devices.

(ii) The compounding involves only transfer, measuring, and mixing manipulations with closed or sealed packaging systems that are performed promptly and attentively.

(iii) Manipulations are limited to aseptically opening ampuls, penetrating sterile stoppers on vials with sterile needles and syringes, and transferring sterile liquids in sterile syringes to sterile administration devices and packages of other sterile products.

(iv) For a low-risk preparation, in the absence of passing a sterility test, the storage periods cannot exceed the following periods: before administration, 48 hours at controlled room temperature, for not more than 14 days if stored in cold temperatures, and for 45 days if stored in a frozen state at minus 20 degrees Celsius or colder). For delayed activation device systems, the storage period begins when the device is activated.

(B) Examples of low-risk compounding include the following.

(i) Single transfers of sterile dosage forms from ampuls, bottles, bags, and vials using sterile syringes with sterile needles, other administration devices, and other sterile containers. The contents of ampuls require sterile filtration to remove glass particles.

(ii) Manually measuring and mixing no more than three manufactured products to compound drug admixtures and nutritional solutions.

(2) Medium-risk level compounded sterile pharmaceuticals.

(A) Medium-risk level compounded sterile pharmaceuticals are those compounded aseptically under low-risk conditions and one or more of the of the following conditions exists.

(i) Multiple individual or small doses of sterile products are combined or pooled to prepare a compounded sterile pharmaceutical that will be administered either to multiple patients or to one patient on multiple occasions.

(ii) The compounding process includes complex aseptic manipulations other than the single-volume transfer.

(iii) The compounding process requires unusually long duration, such as that required to complete the dissolution or homogenous mixing.

(iv) The sterile compounded pharmaceutical's do not contain broad-spectrum bacteriostatic substances, and they are administered over several days.

(v) For a medium-risk preparation, in the absence of passing sterility test, the storage periods cannot exceed the following time periods: before administration, the compounded sterile preparations are properly stored and are exposed for not more than 30 hours at controlled room temperature for not more than 7 days at a cold temperature, and for 45 days in solid frozen state at minus 20 degrees or colder.

(B) Examples of medium-risk compounding include the following.

(i) Compounding of total parenteral nutrition fluids using a manual or automated device during which there are multiple injections, detachments, and attachments of nutrient source products to the device or machine to deliver all nutritional components to a final sterile container.

(ii) Filling of reservoirs of injection and infusion devices with multiple sterile drug products and evacuations of air from those reservoirs before the filled device is dispensed.

(iii) Filling of reservoirs of injection and infusion devices with volumes of sterile drug solutions that will be administered over several days at ambient temperatures between 25 and 40 degrees Celsius (77 and 104 degrees Fahrenheit).

(iv) Transfer of volumes from multiple ampuls or vials into a single, final sterile container or product.

(3) High-risk level compounded sterile pharmaceuticals.

(A) High-risk level compounded sterile pharmaceuticals are those compounded under any of the following conditions.

(i) Non-sterile ingredients, including manufactured products are incorporated, or a non-sterile device is employed before terminal sterilization.

(ii) Sterile ingredients, components, devices, and mixtures are exposed to air quality inferior to ISO Class 5. This includes storage in environments inferior to ISO Class 5 of opened or partially used packages of manufactured sterile products that lack antimicrobial preservatives.

(iii) Non-sterile preparations are exposed no more than 6 hours before being sterilized.

(iv) It is assumed, and not verified by examination of labeling and documentation from suppliers or by direct determination, that the chemical purity and content strength of ingredients meet their original or compendial specifications in unopened or in opened packages of bulk ingredients.

(v) For a high-risk preparation, in the absence of passing sterility test, the storage periods cannot exceed the following time periods: before administration, the compounded sterile preparations are properly stored and are exposed for not more than 24 hours at controlled room temperature for not more than 3 days at a cold temperature, and for 45 days in solid frozen state at minus 20 degrees or colder.

(B) Examples of high-risk compounding include the following.

(i) Dissolving non-sterile bulk drug and nutrient powders to make solutions, which will be terminally sterilized.

(ii) Sterile ingredients, components, devices, and mixtures are exposed to air quality inferior to ISO Class 5. This includes storage in environments inferior to ISO Class 5 of opened or partially used packages of manufactured sterile products that lack antimicrobial preservatives.

(iii) Measuring and mixing sterile ingredients in non-sterile devices before sterilization is performed.

(iv) Assuming, without appropriate evidence or direct determination, that packages of bulk ingredients contain at least 95% by weight of their active chemical moiety and have not been contaminated or adulterated between uses.

(c) Environment.

(1) Generic Substitution. A pharmacist may substitute on a prescription drug order issued for a brand name product provided the substitution is authorized and performed in compliance with Chapter 309 of this title (relating to Generic Substitution).

(2) Special requirements for the compounding of sterile radiopharmaceuticals. When the pharmacy compounds sterile radiopharmaceuticals, the following is applicable.

(A) A drug dispensed pursuant to a radioactive prescription drug order shall be dispensed in an appropriate immediate inner container as follows.

(i) If a drug is susceptible to light, the drug shall be dispensed in a light-resistant container.

(ii) If a drug is susceptible to moisture, the drug shall be dispensed in a tight container.

(iii) The container should not interact physically or chemically with the drug product placed in it so as to alter the strength, quality, or purity of the drug beyond the official requirements.

(B) Controlled area.

(i) Low and Medium Risk Preparations. The pharmacy shall have a designated controlled area for the compounding of sterile radiopharmaceuticals that is functionally separate from areas for the preparation of non-sterile pharmaceuticals and is constructed to minimize the opportunities for particulate and microbial contamination. This controlled area for the preparation of sterile pharmaceuticals shall:

(I) have a controlled environment that is aseptic or contains an aseptic environmental control device(s). If the aseptic environmental control device is located within the controlled area, the controlled area must extend a minimum of six feet from the device and clearly marked to identify the separation between the controlled and non-controlled area;

(II) be clean, well lighted, and of sufficient size to support sterile compounding activities;

(III) be used only for the compounding of sterile pharmaceuticals;

(IV) be designed to avoid outside traffic and air flow;

(V) be designed such that hand sanitizing and gowning occurs outside the controlled area but accessible without use of the hands of the compounding personnel;

(VI) have non-porous and washable floors or floor covering to enable regular disinfection;

(VII) be ventilated in a manner not interfering with aseptic environmental control conditions;

(VIII) have walls, ceilings, and fixtures, shelving, counters, and cabinets that are smooth, impervious, free from cracks and crevices, and nonshedding. (acoustical ceiling tiles that are coated with an acrylic paint are acceptable);

(IX) have drugs and supplies stored on shelving areas above the floor to permit adequate floor cleaning; and

(X) contain only the appropriate compounding supplies and not be used for bulk storage for supplies and materials. Objects that shed particles may not be brought into the controlled area.

(ii) High-risk Preparations. In addition to the requirements in subclause (I), when high-risk preparations are compounded, the aseptic environment control device(s) shall be located in a controlled area that maintains at least an ISO Class 8 (formerly Class 100,000) environment.

(C) Automated compounding device(s). If automated compounding device(s) are used, the pharmacy shall have a method to calibrate and verify the accuracy of automated compounding devices used in aseptic processing and document the calibration and verification on a routine basis.

(3) Security requirements.

(A) All areas occupied by a pharmacy shall be capable of being locked by key or combination, so as to prevent access by unauthorized personnel when a pharmacist is not on-site.

(B) The pharmacy may authorize personnel to gain access to that area of the pharmacy containing dispensed sterile radiopharmaceuticals, in the absence of the pharmacist, for the purpose of retrieving dispensed prescriptions to deliver to patients. If the pharmacy allows such after-hours access, the area containing the dispensed sterile radiopharmaceuticals shall be an enclosed and lockable area separate from the area containing undispensed prescription drugs. A list of the authorized personnel having such access shall be in the pharmacy's policy and procedure manual.

(C) Each pharmacist while on duty shall be responsible for the security of the prescription department, including provisions for effective control against theft or diversion of prescription drugs, and records for such drugs

(d) Prescription dispensing and delivery.

(1) Generic Substitution. A pharmacist may substitute on a prescription drug order issued for a brand name product provided the substitution is authorized and performed in compliance with Chapter 309 of this title (relating to Generic Substitution).

(2) Prescription containers (immediate inner containers).

(A) A drug dispensed pursuant to a radioactive prescription drug order shall be dispensed in an appropriate immediate inner container as follows.

(i) If a drug is susceptible to light, the drug shall be dispensed in a light-resistant container.

(ii) If a drug is susceptible to moisture, the drug shall be dispensed in a tight container.

(iii) The container should not interact physically or chemically with the drug product placed in it so as to alter the strength, quality, or purity of the drug beyond the official requirements.

(B) Immediate inner prescription containers or closures shall not be re-used.

(3) Delivery containers (outer containers).

(A) Prescription containers may be placed in suitable containers for delivery which will transport the radiopharmaceutical safely in compliance with all applicable laws and regulations.

(B) Delivery containers may be re-used provided they are maintained in a manner to prevent cross contamination.

(4) Labeling.

(A) The immediate inner container of a radiopharmaceutical shall be labeled with:

(i) standard radiation symbol;

(ii) the words "caution-radioactive material";

(iii) the name of the radiopharmaceutical; and

(iv) the unique identification number of the prescription.

(B) The outer container of a radiopharmaceutical shall be labeled with:

(i) the name, address, and phone number of the pharmacy;

(ii) the date dispensed;

(iii) the directions for use, if applicable;

(iv) the unique identification number of the prescription;

(v) the name of the patient if known, or the statement, "for physician use" if the patient is unknown;

(vi) the standard radiation symbol;

(vii) the words "caution-radioactive material";

(viii) the name of the radiopharmaceutical;

(ix) the amount of radioactive material contained in millicuries (mCi), microcuries (uCi), or bequerels (Bq) and the corresponding time that applies to this activity, if different from the requested calibration date and time;

(x) the name or initials of the person preparing the product and the authorized nuclear pharmacist who checked and released the final product unless documents are maintained in the pharmacy identifying these individuals for each prescription dispensed;

(xi) if a liquid, the volume in milliliters;

(xii) the requested calibration date and time; and

(xiii) the expiration date and/or time.

(C) The amount of radioactivity shall be determined by radiometric methods for each individual preparation immediately at the time of dispensing and calculations shall be made to determine the amount of activity that will be present at the requested calibration date and time, due to radioactive decay in the intervening period, and this activity and time shall be placed on the label per requirements set out in paragraph (4) of this subsection.

(e) Pharmaceutical Care Services.

(1) The following minimum level of pharmaceutical care services shall be provided whenever a therapeutic prescription drug order is dispensed and, when in the professional judgement of the pharmacist dispensing a diagnostic prescription drug order, the services are necessary to protect the patient's health while striving to produce positive patient outcomes. When it is determined that the following services are necessary, the dispensing pharmacist shall assure that efforts are made to gather the information necessary to properly perform the services.

(A) Drug utilization review. A systematic ongoing process of drug utilization review shall be designed, followed, and documented to increase the probability of desired patient outcomes and decrease the probability of undesired outcomes from drug therapy with radiopharmaceuticals.

(B) Drug regimen review.

(i) For the purpose of promoting therapeutic appropriateness, an authorized nuclear pharmacist shall, prior to or at the time of dispensing, evaluate therapeutic prescription drug orders and patient medication history for:

(I) known allergies;

(II) rational therapy contraindications;

(III) reasonable dose and route of administration;

(IV) reasonable directions for use;

(V) duplication of therapy;

(VI) drug-drug interactions;

(VII) drug-food interactions;

(VIII) drug-disease interactions;

(IX) adverse drug reactions;

(X) proper utilization, including overutilization or underutilization; and

(XI) clinical laboratory or clinical monitoring methods to monitor and evaluate drug effectiveness, side effects, toxicity, or adverse effects, and appropriateness to continued use of the drug in its current regimen.

(ii) Upon identifying any clinically significant conditions, situations, or items listed in clause (i) of this subparagraph, the authorized nuclear pharmacist shall take appropriate steps to avoid or resolve the problem including consultation with the prescribing practitioner.

(iii) The drug regimen review may be conducted by remotely accessing the pharmacy's electronic data base from outside the pharmacy by an individual Texas licensed pharmacist employee of the pharmacy, provided the pharmacy establishes controls to protect the privacy of the patient and the security of confidential records.

(2) Other pharmaceutical care services which may be provided by authorized nuclear pharmacists include, but are not limited to, the following:

(A) managing drug therapy as delegated by a practitioner as allowed under the provisions of the Medical Practice Act;

(B) managing patient compliance programs;

(C) providing preventative health care services; and

(D) providing case management of patients who are being treated with high-risk or high-cost drugs, or who are considered "high risk" due to their age, medical condition, family history, or related concern.

(f) Equipment. The following minimum equipment is required in a nuclear pharmacy:

(1) vertical laminar flow hood;

(2) dose calibrator;

(3) refrigerator and a system or device (i.e., thermometer) to monitor the temperature and humidity to ensure that proper storage requirements are met, if sterile pharmaceuticals are stored in the refrigerator;

(4) Class A prescription balance, and accurate weights or balance of greater sensitivity if compounding occurs in the pharmacy which requires weighing;

(5) scintillation analyzer;

(6) microscope and hemocytometer;

(7) equipment and utensils necessary for the proper compounding of prescription drug or medication orders. Such equipment and utensils used in the compounding process shall be:

(A) of appropriate design, appropriate capacity, and be operated within designed operational limits;

(B) of suitable composition so that surfaces that contact components, in-process material, or drug products shall not be reactive, additive, or absorptive so as to alter the safety, identity, strength, quality, or purity of the drug product beyond acceptable standards;

(C) cleaned and sanitized immediately prior to each use; and

(D) routinely inspected, calibrated (if necessary), or checked to ensure proper performance;

(8) appropriate disposal containers for used needles, syringes, etc., and if applicable, cytotoxic waste from the preparation of chemotherapeutic agents, and/or biohazardous waste;

(9) all necessary supplies, including:

(A) disposable needles, syringes, and other aseptic mixing;

(B) disinfectant cleaning solutions;

(C) hand washing agents with bactericidal action;

(D) disposable, lint free towels or wipes;

(E) appropriate filters and filtration equipment;

(F) cytotoxic spill kits, if applicable; and

(G) masks, caps, coveralls or gowns with tight cuffs, shoe covers, and gloves, as applicable.

(10) adequate glassware, utensils, gloves, syringe shields and remote handling devices, and adequate equipment for product quality control;

(11) adequate shielding material;

(12) typewriter or comparable equipment;

(13) radiation dosimeters for visitors and personnel and log entry book;

(14) exhaust/fume hood with monitor, for storage and handling of all volatile radioactive drugs if applicable, to be determined by the Texas Radiation Control Bureau;

(15) calculator; and

(16) adequate radiation monitor(s).

(g) Library. A nuclear pharmacy shall maintain a reference library which shall include the following in hard copy or electronic format:

(1) United States Pharmacopoeia/National Formulary with supplements;

(2) federal and state laws and regulations relating to Texas pharmacy;

(3) Texas Regulations for Control of Radiation;

(4) reference on the safe handling of radioactive materials;

(5) a minimum of three texts dealing with nuclear medicine science;

(6) reference on sterile product preparation; and

(7) Code of Federal Regulations, Title 49, Parts 106-199, with recent amendments.

(h) Radiopharmaceuticals and/or radioactive materials.

(1) General requirements.

(A) Radiopharmaceuticals may only be dispensed pursuant to a radioactive prescription drug order.

(B) An authorized nuclear pharmacist may distribute radiopharmaceuticals to authorized users for patient use. A nuclear pharmacy may also furnish radiopharmaceuticals for departmental or physicians' use if such authorized users maintain a Texas radioactive materials license, and the radiopharmaceutical is labeled "for physician use," provided such distribution is documented in the control system.

(C) An authorized nuclear pharmacist may transfer to authorized users radioactive materials not intended for drug use in accordance with Part 41 of the Texas Regulations for Control of Radiation, Texas Department of Health.

(D) The transportation of radioactive materials from the nuclear pharmacy must be in accordance with current state and federal transportation regulations.

(2) Procurement and storage.

(A) The pharmacist-in-charge shall have the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff relative to such responsibility.

(B) Prescription drugs and devices shall be stored within the prescription department or a locked storage area.

(C) All drugs shall be stored at the proper temperature, as defined by the following terms.

(i) Cold--Any temperature not exceeding 8 degrees Centigrade (46 degrees Fahrenheit). A refrigerator is a cold place in which the temperature is maintained thermostatically between 2 and 8 degrees Centigrade (36 and 46 degrees Fahrenheit). A freezer is a cold place in which the temperature is maintained thermostatically between -20 and -10 degrees Centigrade (-4 and -14 degrees Fahrenheit).

(ii) Cool--Any temperature between 8 and 15 degrees Centigrade (46 and 59 degrees Fahrenheit). An article for which storage in a cool place is directed may, alternatively, be stored in a refrigerator unless otherwise specified in the labeling.

(iii) Room temperature--The temperature prevailing in a working area. Controlled room temperature is a temperature thermostatically between 15 and 30 degrees Centigrade (59 and 86 degrees Fahrenheit).

(iv) Warm--Any temperature between 30 and 40 degrees Centigrade (86 and 104 degrees Fahrenheit).

(v) Excessive heat--Temperature above 40 degrees Centigrade (104 degrees Fahrenheit).

(vi) Protection from freezing where, in addition to the risk of breakage of the container, freezing subjects a product to loss of strength or potency, or to destructive alteration of the dosage form, the container label bears an appropriate instruction to protect the product from freezing.

(3) Out-of-date and other unusable drugs or devices.

(A) Any drug or device bearing an expiration date shall not be dispensed beyond the expiration date of the drug or device.

(B) Outdated and other unusable drugs or devices shall be removed from dispensing stock and shall be quarantined together until such drugs or devices are disposed of properly.

(i) Loading bulk drugs into automated compounding devices.

(1) Automated compounding device may be loaded with bulk drugs only by an authorized nuclear pharmacist or by supportive personnel under the direction and direct supervision of an authorized pharmacist.

(2) The label of an automated compounding device container shall indicate the brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor.

(3) Records of loading bulk drugs into an automated compounding device shall be maintained to show:

(A) name of the drug, strength, and dosage form;

(B) manufacturer or distributor;

(C) manufacturer's lot number;

(D) expiration date;

(E) quantity added to the automated compounding device;

(F) date of loading;

(G) name, initials, or electronic signature of the person loading the automated compounding device; and

(H) name, initials, or electronic signature of the responsible authorized nuclear pharmacist.

(4) The automated compounding device shall not be used until an authorized nuclear pharmacist verifies that the system is properly loaded and affixes his or her signature or electronic signature to the record specified in paragraph (3) of this subsection.

(j) Sterile radiopharmaceuticals.

(1) Expiration date.

(A) The expiration date assigned shall be based on:

(i) established manufacturer's guidelines;

(ii) published literature; or

(iii) in-house or contracted stability studies.

(B) The method for establishing expiration dates shall be documented.

(2) Radioactive Drug Quality control. There shall be a documented, ongoing quality control program that monitors and evaluates personnel performance, equipment and facilities. Procedures shall be in place to assure that the pharmacy is capable of consistently preparing radiopharmaceuticals which are sterile and stable. Quality control procedures shall include, but are not limited to, the following:

(A) recall procedures;

(B) storage and dating;

(C) documentation of appropriate functioning of refrigerator, freezer, and other equipment;

(D) documentation of aseptic environmental control device(s) certification at least every year and the regular replacement of pre-filters as necessary;

(E) a process to evaluate and confirm the quality of the prepared radiopharmaceutical; and

(F) documentation of facility maintenance such as cleaning and environmental testing.

§291.55. Records.

(a) Maintenance of records.

(1) Every inventory or other record required to be kept under this section shall be kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative, and other authorized local, state, or federal law enforcement agencies.

(2) Records of controlled substances listed in Schedules I and II shall be maintained separately from all other records of the pharmacy.

(3) Records of controlled substances, other than original prescription drug orders, listed in Schedules III-V shall be maintained separately or readily retrievable from all other records of the pharmacy. For purposes of this subsection, "readily retrievable" means that the controlled substances shall be asterisked, red-lined, or in some other manner readily identifiable apart from all other items appearing on the record.

(4) Records, except when specifically required to be maintained in original or hard-copy form, may be maintained in an alternative data retention system, such as a data processing system or direct imaging system provided:

(A) the records maintained in the alternative system contain all of the information required on the manual record; and

(B) the data processing system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(b) Prescriptions.

(1) Professional responsibility. Pharmacists shall exercise sound professional judgment with respect to the accuracy and authenticity of any radioactive prescription drug order they dispense. If the pharmacist questions the accuracy or authenticity of a radioactive prescription drug order, he/she shall verify the order with the practitioner prior to dispensing.

(2) Verbal radioactive prescription drug orders.

(A) Only an authorized nuclear pharmacist or a pharmacist-intern under the direct supervision of an authorized nuclear pharmacist may receive from a practitioner or a practitioner's designated agent:

(i) a verbal therapeutic prescription drug order; or

(ii) a verbal diagnostic prescription drug order in instances where patient specificity is required for patient safety (e.g., radiolabeled blood products, radiolabeled antibodies).

(B) A practitioner shall designate in writing the name of each agent authorized by the practitioner to communicate prescriptions verbally for the practitioner. The practitioner shall maintain at the practitioner's usual place of business a list of the designated agents. The practitioner shall provide a pharmacist with a copy of the practitioner's written authorization for a specific agent on the pharmacist's request.

(C) A pharmacist may not dispense a verbal radioactive prescription drug order for a Schedule III, IV, or V controlled substance issued by a practitioner licensed in another state unless the practitioner is also registered under the Texas Controlled Substances Act.

(D) A pharmacist may not dispense a verbal radioactive prescription drug order for a dangerous drug or a controlled substance issued by a practitioner licensed in the Dominion of Canada or the United Mexican States unless the practitioner is also licensed in Texas.

(3) Written radioactive prescription drug orders.

(A) Practitioner's signature. Written radioactive prescription drug orders shall be manually signed by the practitioner (electronically produced or rubber stamped signatures may not be used).

(i) A practitioner may sign a radioactive prescription drug order in the same manner as he would sign a check or legal document, e.g., J.H. Smith or John H. Smith.

(ii) The radioactive prescription drug order may not be signed by a practitioner's agent but may be prepared by an agent for the signature of a practitioner. However, the prescribing practitioner is responsible in case the radioactive prescription drug order does not conform in all essential respects to the law and regulations.

(B) Radioactive prescription drug orders written by practitioners in another state.

(i) Dangerous drug prescription orders. A pharmacist may dispense a radioactive prescription drug order for dangerous drugs issued by practitioners in a state other than Texas in the same manner as radioactive prescription drug orders for dangerous drugs issued by practitioners in Texas are dispensed.

(ii) Controlled substance prescription drug orders. A pharmacist may dispense radioactive prescription drug orders for controlled substances in Schedule III, IV, or V issued by a practitioner in another state provided:

(I) the radioactive prescription drug order is an original written prescription issued by a person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, who has a current federal Drug Enforcement Administration registration number, and who may legally prescribe Schedule III, IV, or V controlled substances in such other state;

(II) the radioactive prescription drug order is not dispensed or refilled more than six months from the initial date of issuance and may not be refilled more than five times; and

(III) if there are no refill instructions on the original written radioactive prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original written radioactive prescription drug order have been dispensed, a new written radioactive prescription drug order is obtained from the prescribing practitioner prior to dispensing any additional quantities of controlled substances.

(C) Radioactive prescription drug orders written by practitioners in the United Mexican States or the Dominion of Canada.

(i) Controlled substance prescription drug orders. A pharmacist may not dispense a radioactive prescription drug order for a Schedule II, III, IV, or V controlled substance issued by a practitioner licensed in the Dominion of Canada or the United Mexican States.

(ii) Dangerous drug prescription drug orders. A pharmacist may dispense a radioactive prescription drug order for a dangerous drug issued by a person licensed in the Dominion of Canada or the United Mexican States as a physician, dentist, veterinarian, or podiatrist provided:

(I) the radioactive prescription drug order is an original written prescription; and

(II) if there are no refill instructions on the original written radioactive prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original written radioactive prescription drug order have been dispensed, a new written radioactive prescription drug order shall be obtained from the prescribing practitioner prior to dispensing any additional quantities of dangerous drugs.

(iii) Prescription drug orders for Schedule II controlled substances. No Schedule II controlled substance may be dispensed without a written prescription drug order of a practitioner on a official prescription form as required by the Texas Controlled Substances Act, §481.075.

(4) Electronic radioactive prescription drug orders. For the purpose of this paragraph, electronic radioactive prescription drug orders shall be considered the same as verbal radioactive prescription drug orders.

(A) An electronic radioactive prescription drug order may be transmitted by a practitioner or a practitioner's designated agent:

(i) directly to a pharmacy; or

(ii) through the use of a data communication device provided:

(I) the confidential prescription information is not altered during transmission; and

(II) confidential patient information is not accessed or maintained by the operator of the data communication device other than for legal purposes under federal and state law.

(B) A practitioner shall designate in writing the name of each agent authorized by the practitioner to electronically transmit prescriptions for the practitioner. The practitioner shall maintain at the practitioner's usual place of business a list of the designated agents. The practitioner shall provide a pharmacist with a copy of the practitioner's written authorization for a specific agent on the pharmacist's request.

(C) A pharmacist may not dispense an electronic radioactive prescription drug order for a:

(i) Schedule II controlled substance except as authorized for faxed prescriptions in §481.074, Health and Safety Code;

(ii) Schedule III, IV, or V controlled substance issued by a practitioner licensed in another state unless the practitioner is also registered under the Texas Controlled Substances Act; or

(iii) dangerous drug or controlled substance issued by a practitioner licensed in the Dominion of Canada or the United Mexican States unless the practitioner is also licensed in Texas.

(5) Original prescription drug order records.

(A) Original prescriptions shall be maintained by the pharmacy in numerical order and remain legible for a period of two years from the date of filling or the date of the last refill dispensed.

(B) If an original prescription drug order is changed, such prescription order shall be invalid and of no further force and effect; if additional drugs are to be dispensed, a new prescription drug order with a new and separate number is required.

(C) Original prescriptions shall be maintained in one of the following formats:

(i) in three separate files as follows:

(I) prescriptions for controlled substances listed in Schedule II;

(II) prescriptions for controlled substances listed in Schedule III-V; and

(III) prescriptions for dangerous drugs and nonprescription drugs; or

(ii) within a patient medication record system provided that original prescriptions for controlled substances are maintained separate from original prescriptions for noncontrolled substances and triplicate prescriptions for Schedule II controlled substances are maintained separate from all other original prescriptions.

(D) Original prescription records other than triplicate prescriptions may be stored on microfilm, microfiche, or other system which is capable of producing a direct image of the original prescription record, e.g., digitalized imaging system. If original prescription records are stored in a direct imaging system, the following is applicable.

(i) The record of refills recorded on the original prescription must also be stored in this system.

(ii) The original prescription records must be maintained in numerical order and as specified in subparagraph (C) of this paragraph.

(iii) The pharmacy must provide immediate access to equipment necessary to render the records easily readable.

(6) Prescription drug order information.

(A) All original radioactive prescription drug orders shall bear:

(i) name of the patient, if applicable at the time of the order;

(ii) name of the institution;

(iii) name, and if for a controlled substance, the address and DEA registration number of the practitioner

(iv) name of the radiopharmaceutical;

(v) amount of radioactive material contained in millicuries (mCi), microcuries (uCi), or bequerels (Bq) and the corresponding time that applies to this activity, if different than the requested calibration date and time;

(vi) date and time of calibration;

(vii) if a liquid, the volume in milliliters;

(viii) date of issuance; and

(ix) if telephoned to the pharmacy by a designated agent, the full name of the designated agent.

(B) All original electronic radioactive prescription drug orders shall bear:

(i) name of the patient, if applicable at the time of the order;

(ii) name of the institution;

(iii) name, and if for a controlled substance, the address and DEA registration number of the practitioner;

(iv) name of the radiopharmaceutical;

(v) amount of radioactive material contained in millicuries (mCi), microcuries (uCi), or bequerels (Bq) and the corresponding time that applies to this activity, if different than the requested calibration date and time;

(vi) date and time of calibration;

(vii) if a liquid, the volume in milliliters;

(viii) a statement which indicates that the prescription has been electronically transmitted (e.g., Faxed to or electronically transmitted to:);

(ix) name, address, and electronic access number of the pharmacy to which the prescription was transmitted;

(x) telephone number of the prescribing practitioner;

(xi) date the prescription drug order was electronically transmitted to the pharmacy, if different from the date of issuance of the prescription;

(xii) date of issuance; and

(xiii) if telephoned to the pharmacy by a designated agent, the full name of the designated agent.

(C) At the time of dispensing, a pharmacist is responsible for the addition of the following information to the original prescription:

(i) unique identification number of the prescription drug order;

(ii) initials or identification code of the person who compounded the sterile radiopharmaceutical and the pharmacist who checked and released the product;

(iii) name, quantity, lot number, and expiration date of each product used in compounding the sterile radiopharmaceutical; and

(iv) date of dispensing, if different from the date of issuance.

(7) Refills. A radioactive prescription drug order must be filled from an original prescription which may not be refilled.

(c) Policy and procedure manual.

(1) All nuclear pharmacies shall maintain a policy and procedure manual. The nuclear pharmacy policy and procedure manual is a compilation of written policy and procedure statements.

(2) A technical operations manual governing all nuclear pharmacy functions shall be prepared. It shall be continually revised to reflect changes in techniques, organizations, etc. All pharmacy personnel shall be familiar with the contents of the manual.

(3) The nuclear pharmacy policies and procedures manual shall be prepared by the pharmacist-in-charge with input from the affected personnel and from other involved staff and committees to govern procurement, preparation, distribution, storage, disposal, and control of all drugs used and the need for policies and procedures relative to procurement of multisource items, inventory, investigational drugs, and new drug applications.

(d) Other records. Other records to be maintained by a pharmacy:

(1) a permanent log of the initials or identification codes which will identify each dispensing pharmacist by name (the initials or identification code shall be unique to ensure that each pharmacist can be identified, i.e., identical initials or identification codes shall not be used);

(2) copy 3 of DEA order form (DEA 222) which has been properly dated, initialed, and filed, and all copies of each unaccepted or defective order form and any attached statements or other documents;

(3) a hard copy of the power of attorney to sign DEA 222 order forms (if applicable);

(4) suppliers' invoices of dangerous drugs and controlled substances; a pharmacist shall verify that the controlled drugs listed on the invoices were actually received by clearly recording his/her initials and the actual date of receipt of the controlled substances;

(5) suppliers' credit memos for controlled substances and dangerous drugs;

(6) a hard copy of inventories required by §291.17 of this title (relating to Inventory Requirements);

(7) hard-copy reports of surrender or destruction of controlled substances and/or dangerous drugs to an appropriate state or federal agency;

(8) records of distribution of controlled substances and/or dangerous drugs to other pharmacies, practitioners, or registrants; and

(9) a hard copy of any notification required by the Texas Pharmacy Act or these sections, including, but not limited to, the following:

(A) reports of theft or significant loss of controlled substances to DEA, DPS, and the board;

(B) notifications of a change in pharmacist-in-charge of a pharmacy; and

(C) reports of a fire or other disaster which may affect the strength, purity, or labeling of drugs, medications, devices, or other materials used in the diagnosis or treatment of injury, illness, and disease.

(e) Permission to maintain central records. Any pharmacy that uses a centralized recordkeeping system for invoices and financial data shall comply with the following procedures.

(1) Controlled substance records. Invoices and financial data for controlled substances may be maintained at a central location provided the following conditions are met.

(A) Prior to the initiation of central recordkeeping, the pharmacy submits written notification by registered or certified mail to the divisional director of the Drug Enforcement Administration as required by the Code of Federal Regulations, Title 21, §1304.04(a), and submits a copy of this written notification to the Texas State Board of Pharmacy. Unless the registrant is informed by the divisional director of the Drug Enforcement Administration that permission to keep central records is denied, the pharmacy may maintain central records commencing 14 days after receipt of notification by the divisional director.

(B) The pharmacy maintains a copy of the notification required in subparagraph (A) of this paragraph.

(C) The records to be maintained at the central record location shall not include executed DEA order forms, prescription drug orders, or controlled substance inventories, which shall be maintained at the pharmacy.

(2) Dangerous drug records. Invoices and financial data for dangerous drugs may be maintained at a central location.

(3) Access to records. If the records are kept on microfilm, computer media, or in any form requiring special equipment to render the records easily readable, the pharmacy shall provide access to such equipment with the records.

(4) Delivery of records. The pharmacy agrees to deliver all or any part of such records to the pharmacy location within two business days of written request of a board agent or any other authorized official.

(5) Ownership of pharmacy records. For purposes of these sections, a pharmacy licensed under the Act is the only entity which may legally own and maintain prescription drug records.

(f) Confidentiality.

(1) A pharmacist shall provide adequate security of radioactive prescription drug order and patient medication records to prevent indiscriminate or unauthorized access to confidential health information. If radioactive prescription drug orders, requests for refill authorization, or other confidential health information are not transmitted directly between a pharmacy and a physician but are transmitted through a data communication device, confidential health information may not be accessed or maintained by the operator of the data communication device unless specifically authorized to obtain the confidential information by this subsection.

(2) Confidential records are privileged and may be released only to:

(A) the patient or the patient's agent;

(B) practitioners and other pharmacists when, in the pharmacist's professional judgment, such release is necessary to protect the patient's health and well-being;

(C) other persons, the board, or other state or federal agencies authorized by law to receive such information;

(D) a law enforcement agency engaged in investigation of suspected violations of the Controlled Substances Act or the Dangerous Drug Act;

(E) a person employed by any state agency which licenses a practitioner as defined in the Act if such person is engaged in the performance of the person's official duties; or

(F) an insurance carrier or other third party payor authorized by a patient to receive such information.

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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Executive Director/Secretary
Texas State Board of Pharmacy
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SUBCHAPTER D. INSTITUTIONAL PHARMACY (CLASS C)

22 TAC §§291.72 - 291.76

The Texas State Board of Pharmacy (TSBP) adopts amendments to §291.72, concerning Definitions and §291.73 concerning Personnel, without changes to the proposed text published in the March 26, 2004, issue of the *Texas Register* (29 TexReg 3080). The Board adopts §291.74, concerning Operational Standards; §291.75, concerning Records in a Class C (Institutional) Pharmacy; and §291.76, concerning Class C Pharmacies Located in a Freestanding Ambulatory Surgical Center with changes to the proposed text based on staff recommendations to correct citations.

The adopted amendments to §§291.72 - 291.74 and §291.76 amend the current provisions relating to compounding of sterile pharmaceuticals to match new section §291.26 which outlines new provisions for the compounding of sterile pharmaceuticals. New §291.26 outlines operating standards for pharmacies that compound sterile pharmaceuticals, implements the recommendations of the TSBP appointed Task Force on Compounding (Task Force), and incorporates many of the provisions included in the United States Pharmacopeia (USP) new General Chapter 797 (Pharmaceutical Compounding Sterile Preparations). The amendments to §291.75 and §291.76(e), specify that only a pharmacist may verify the receipt of controlled substances by a pharmacy.

No comments were received regarding amendments.

The amendments are adopted under §§551.002, 551.003, 554.001, and 554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §551.003(9) as authorizing the agency to adopt rules concerning the compounding of prescriptions. The Board interprets §551.003(33) as authorizing the agency to adopt rules concerning the practice of pharmacy. The Board interprets §554.001(a) as authorizing the agency to adopt rules to administer and enforce the Act and rules adopted under the Act as well as enforce other laws relating to the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the amendments: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.74. Operational Standards.

(a) Licensing requirements.

(1) A Class C pharmacy shall register annually or biennially with the board on a pharmacy license application provided by the board, following the procedures specified in §291.1 of this title (relating to Pharmacy License Application).

(2) If the institutional pharmacy is owned or operated by a hospital management or consulting firm, the following conditions apply.

(A) The pharmacy license application shall list the hospital management or consulting firm as the owner or operator.

(B) The hospital management or consulting firm shall obtain DEA and DPS controlled substance registrations that are issued in their name, unless the following occurs:

(i) the hospital management or consulting firm and the facility cosign a contractual pharmacy service agreement which assigns overall responsibility for controlled substances to the facility; and

(ii) such hospital pharmacy management or consulting firm maintains dual responsibility for the controlled substances.

(3) A Class C pharmacy which changes ownership shall notify the board within 10 days of the change of ownership and apply for a new and separate license as specified in §291.4 of this title (relating to Change of Ownership).

(4) A Class C pharmacy which changes location and/or name shall notify the board within 10 days of the change and file for an amended license as specified in §291.2 if this title (relating to Change of Location and/or Name).

(5) A Class C pharmacy owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within 10 days of the change following the procedures in §291.3 of this title (relating to Change of Managing Officers).

(6) A Class C pharmacy shall notify the board in writing within 10 days of closing, following the procedures in §291.5 of this title (relating to Closed Pharmacies).

(7) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for the issuance and renewal of a license and the issuance of an amended license.

(8) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(9) A Class C pharmacy, licensed under the Act, §560.051(a)(3), which also operates another type of pharmacy which would otherwise be required to be licensed under the Act, §560.051(a)(1) (Community Pharmacy (Class A)) or the Act, §560.051(a)(2) (Nuclear Pharmacy (Class B)), is not required to secure a license for the such other type of pharmacy; provided, however, such licensee is required to comply with the provisions of §291.31 of this title (relating to Definitions), §291.32 of this title (relating to Personnel), §291.33 of this title (relating to Operational Standards), §291.34 of this title (relating to Records), and §291.35 of this title (relating to Official Prescription Records), contained in Community Pharmacy (Class A), or §291.51 of this title (relating to Purpose), §291.52 of this title (relating to Definitions), §291.53 of this title (relating to Personnel), §291.54 of this title (relating to Operational Standards), and §291.55 of this title (relating to Records), contained in Nuclear Pharmacy (Class B), to the extent such sections are applicable to the operation of the pharmacy.

(10) A Class C (Institutional) pharmacy engaged in non-sterile compounding of drug products for inpatients of the hospital shall comply with the provisions of §291.25 of this title (relating to Pharmacies Compounding Non-Sterile Pharmaceuticals);

(11) A Class C (Institutional) pharmacy engaged in the compounding of sterile pharmaceuticals shall comply with the provisions of §291.26 of this title (relating to Pharmacies Compounding Sterile Pharmaceuticals).

(12) A Class C (Institutional) pharmacy engaged in the provision of remote pharmacy services, including storage and dispensing of prescription drugs, shall comply with the provisions of §291.20 of this title (relating to Remote Pharmacy Services).

(13) A Class C (Institutional) pharmacy engaged in centralized prescription dispensing and/or prescription drug or medication order processing shall comply with the provisions of §291.37 of this title (relating to Centralized Prescription Dispensing) and/or §291.38 of this title (relating to Centralized Prescription Drug or Medication Order Processing).

(b) Environment.

(1) General requirements.

(A) The institutional pharmacy shall be enclosed and lockable.

(B) The institutional pharmacy shall have adequate space necessary for the storage, compounding, labeling, dispensing, and sterile preparation of drugs prepared in the pharmacy, and additional space, depending on the size and scope of pharmaceutical services.

(C) The institutional pharmacy shall be arranged in an orderly fashion and shall be kept clean. All required equipment shall be clean and in good operating condition.

(D) A sink with hot and cold running water exclusive of restroom facilities shall be available to all pharmacy personnel and shall be maintained in a sanitary condition at all times.

(E) The institutional pharmacy shall be properly lighted and ventilated.

(F) The temperature of the institutional pharmacy shall be maintained within a range compatible with the proper storage of drugs. The temperature of the refrigerator shall be maintained within a range compatible with the proper storage of drugs requiring refrigeration.

(G) If the institutional pharmacy has flammable materials, the pharmacy shall have a designated area for the storage of flammable materials. Such area shall meet the requirements set by local and state fire laws.

(H) The institutional pharmacy shall store antiseptics, other drugs for external use, and disinfectants separately from internal and injectable medications.

(2) Security requirements.

(A) All areas occupied by an institutional pharmacy shall be capable of being locked by key or combination, so as to prevent access by unauthorized personnel by force.

(B) Each pharmacist on duty shall be responsible for the security of the institutional pharmacy, including provisions for adequate safeguards against theft or diversion of dangerous drugs, controlled substances, and records for such drugs.

(C) The institutional pharmacy shall have locked storage for Schedule II controlled substances and other drugs requiring additional security.

(c) Equipment and supplies. Institutional pharmacies distributing medication orders shall have the following equipment:

(1) typewriter or comparable equipment; and

(2) refrigerator and a system or device (e.g., thermometer) to monitor the temperature and humidity to ensure that proper storage requirements are met.

(d) Library. A reference library shall be maintained which includes the following in hard- copy or electronic format:

(1) current copies of the following:

(A) Texas Pharmacy Act and rules;

(B) Texas Dangerous Drug Act and rules;

(C) Texas Controlled Substances Act and regulations; and

(D) Federal Controlled Substances Act and regulations (or official publication describing the requirements of the Federal Controlled Substances Act and regulations);

(2) at least one current or updated reference from each of the following categories:

(A) drug interactions. A reference text on drug interactions, such as Drug Interaction Facts. A separate reference is not required if other references maintained by the pharmacy contain drug interaction information including information needed to determine severity or significance of the interaction and appropriate recommendations or actions to be taken;

(B) a general information reference text, such as:

(i) Facts and Comparisons with current supplements;

(ii) United States Pharmacopeia Dispensing Information Volume I (Drug Information for the Healthcare Provider);

(iii) AHFS Drug Information with current supplements;

(iv) Remington's Pharmaceutical Sciences; or

(v) Clinical Pharmacology;

(3) a current or updated reference on injectable drug products, such as Handbook of Injectable Drugs;

(4) basic antidote information and the telephone number of the nearest regional poison control center;

(5) metric-apothecary weight and measure conversion charts.

(e) Absence of a pharmacist.

(1) Medication orders.

(A) In facilities with a full-time pharmacist, if a practitioner orders a drug for administration to a bona fide patient of the facility when the pharmacy is closed, the following is applicable.

(i) Prescription drugs and devices only in sufficient quantities for immediate therapeutic needs may be removed from the institutional pharmacy.

(ii) Only a designated licensed nurse or practitioner may remove such drugs and devices.

(iii) A record shall be made at the time of withdrawal by the authorized person removing the drugs and devices. The record shall contain the following information:

(I) name of patient;

(II) name of device or drug, strength, and dosage form;

(III) dose prescribed;

(IV) quantity taken;

(V) time and date; and

(VI) signature (first initial and last name or full signature) or electronic signature of person making withdrawal.

(iv) The original or direct copy of the medication order may substitute for such record, providing the medication order meets all the requirements of clause (iii) of this subparagraph.

(v) The pharmacist shall verify the withdrawal and perform a drug regimen review as specified in subsection (g)(1)(B) of this section as soon as practical, but in no event more than 72 hours from the time of such withdrawal.

(B) In facilities with a part-time or consultant pharmacist, if a practitioner orders a drug for administration to a bona fide patient of the facility when the pharmacist is not on duty, or when the pharmacy is closed, the following is applicable.

(i) Prescription drugs and devices only in sufficient quantities for therapeutic needs may be removed from the institutional pharmacy.

(ii) Only a designated licensed nurse or practitioner may remove such drugs and devices.

(iii) A record shall be made at the time of withdrawal by the authorized person removing the drugs and devices; the record shall meet the same requirements as specified in subparagraph (A)(iii) and (iv) of this paragraph.

(iv) The pharmacist shall verify the withdrawal and perform a drug regimen review as specified in subsection (g)(1)(B) of this section after a reasonable interval, but in no event may such interval exceed seven days.

(2) Floor stock. In facilities using a floor stock method of drug distribution, the following is applicable.

(A) Prescription drugs and devices may be removed from the pharmacy only in the original manufacturer's container or prepackaged container.

(B) Only a designated licensed nurse or practitioner may remove such drugs and devices.

(C) A record shall be made at the time of withdrawal by the authorized person removing the drug or device; the record shall contain the following information:

(i) name of the drug, strength, and dosage form;

(ii) quantity removed;

(iii) location of floor stock;

(iv) date and time; and

(v) signature (first initial and last name or full signature) or electronic signature of person making the withdrawal.

(D) The pharmacist shall verify the withdrawal after a reasonable interval, but in no event may such interval exceed seven days.

(f) Drugs.

(1) Procurement, preparation and storage.

(A) The pharmacist-in-charge shall have the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff of the facility, relative to such responsibility.

(B) The pharmacist-in-charge shall have the responsibility for determining specifications of all drugs procured by the facility.

(C) Institutional pharmacies may not sell, purchase, trade or possess prescription drug samples, unless the pharmacy meets all of the following conditions:

(i) the pharmacy is owned by a charitable organization described in the Internal Revenue Code of 1986, or by a city, state or county government;

(ii) the pharmacy is a part of a health care entity which provides health care primarily to indigent or low income patients at no or reduced cost;

(iii) the samples are for dispensing or provision at no charge to patients of such health care entity; and

(iv) the samples are possessed in compliance with the federal Prescription Drug Marketing Act of 1986.

(D) All drugs shall be stored at the proper temperatures, as defined by the following.

(i) Cold--Any temperature not exceeding 8 degrees Centigrade (46 degrees Fahrenheit). A refrigerator is a cold place in which the temperature is maintained thermostatically between 2 and 8 degrees Centigrade (36 and 46 degrees Fahrenheit). A freezer is a cold place in which the temperature is maintained thermostatically between -20 and -10 degrees Centigrade (-4 and -14 degrees Fahrenheit).

(ii) Cool--Any temperature between 8 and 15 degrees Centigrade (46 and 59 degrees Fahrenheit). An article for which storage in a cool place is directed may, alternatively, be stored in a refrigerator unless otherwise specified in the labeling.

(iii) Room temperature--The temperature prevailing in a working area. Controlled room temperature is a temperature thermostatically between 15 and 30 degrees Centigrade (59 and 86 degrees Fahrenheit).

(iv) Warm--Any temperature between 30 and 40 degrees Centigrade (86 and 104 degrees Fahrenheit).

(v) Excessive heat--Any temperature above 40 degrees Centigrade (104 degrees Fahrenheit).

(vi) Protection from freezing where, in addition to the risk of breakage of the container, freezing subjects a product to loss of strength or potency, or to destructive alteration of the dosage form, the container label bears an appropriate instruction to protect the product from freezing.

(E) Any drug bearing an expiration date may not be distributed beyond the expiration date of the drug.

(F) Outdated and other unusable drugs shall be removed from stock and shall be quarantined together until such drugs are disposed of properly.

(2) Formulary.

(A) A formulary shall be developed by the facility committee performing the pharmacy and therapeutics function for the facility.

(B) The pharmacist-in-charge or pharmacist designated by the pharmacist-in-charge shall be a full voting member of the committee performing the pharmacy and therapeutics function for the facility, when such committee is performing the pharmacy and therapeutics function.

(3) Pre-packaging of drugs.

(A) Drugs may be pre-packaged in quantities suitable for internal distribution only by a pharmacist or by supportive personnel under the direction and direct supervision of a pharmacist.

(B) The label of a pre-packaged unit shall indicate:

(i) brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(ii) facility's unique lot number;

(iii) expiration date based on currently available literature; and

(iv) quantity of the drug, if the quantity is greater than one.

(C) Records of pre-packaging shall be maintained to show:

(i) name of the drug, strength, and dosage form;

(ii) facility's unique lot number;

(iii) manufacturer or distributor;

(iv) manufacturer's lot number;

(v) expiration date;

(vi) quantity per prepackaged unit;

(vii) number of prepackaged units;

(viii) date packaged;

(ix) name, initials, or electronic signature of the prepacker; and

(x) name, initials, or electronic signature of the responsible pharmacist.

(D) Stock packages, repackaged units, and control records shall be quarantined together until checked/released by the pharmacist.

(4) Sterile pharmaceuticals prepared in a location other than the pharmacy. A distinctive supplementary label shall be affixed to the container of any admixture. The label shall bear at a minimum:

(A) patient's name and location;

(B) name and amount of drug(s) added;

(C) name of the basic solution;

(D) name or identifying code of person who prepared admixture; and

(E) expiration date of solution.

(5) Distribution.

(A) Medication orders.

(i) Drugs may be given to patients in facilities only on the order of a practitioner. No change in the order for drugs may be made without the approval of a practitioner.

(ii) Drugs may be distributed only from the original or a direct copy of the practitioner's medication order.

(iii) Supportive personnel may not receive verbal medication orders.

(iv) Institutional pharmacies shall be exempt from the labeling provisions and patient notification requirements of §562.006 and §562.009 of the Act, as respects drugs distributed pursuant to medication orders.

(B) Procedures.

(i) Written policies and procedures for a drug distribution system (best suited for the particular institutional pharmacy) shall be developed and implemented by the pharmacist-in-charge, with the advice of the committee performing the pharmacy and therapeutics function for the facility.

(ii) The written policies and procedures for the drug distribution system shall include, but not be limited to, procedures regarding the following:

(I) pharmaceutical care services;

(II) handling, storage and disposal of cytotoxic drugs and waste;

(III) disposal of unusable drugs and supplies;

(IV) security;

(V) equipment;

(VI) sanitation;

(VII) reference materials;

(VIII) drug selection and procurement;

(IX) drug storage;

(X) controlled substances;

(XI) investigational drugs, including the obtaining of protocols from the principal investigator;

(XII) prepackaging and manufacturing;

(XIII) stop orders;

(XIV) reporting of medication errors, adverse drug reactions/events, and drug product defects;

(XV) physician orders;

(XVI) floor stocks;

(XVII) drugs brought into the facility;

(XVIII) furlough medications;

(XIX) self-administration;

(XX) emergency drug supply;

(XXI) formulary;

(XXII) monthly inspections of nursing stations and other areas where drugs are stored, distributed, administered or dispensed;

(XXIII) control of drug samples;

(XXIV) outdated and other unusable drugs;

(XXV) routine distribution of inpatient medication;

(XXVI) preparation and distribution of sterile pharmaceuticals;

(XXVII) handling of medication orders when a pharmacist is not on duty;

(XXVIII) use of automated compounding or counting devices;

(XXIX) use of data processing and direct imaging systems;

(XXX) drug administration to include infusion devices, drug delivery systems, and first dose monitoring;

(XXXI) drug labeling;

(XXXII) recordkeeping;

(XXXIII) quality assurance/quality control;

(XXXIV) duties and education and training of professional and nonprofessional staff; and

(XXXV) emergency preparedness plan, to include continuity of patient therapy and public safety.

(g) Pharmaceutical care services.

(1) The pharmacist-in-charge shall assure that at least the following pharmaceutical care services are provided to patients of the facility.

(A) Drug utilization review. A systematic ongoing process of drug utilization review shall be developed in conjunction with the medical staff to increase the probability of desired patient outcomes and decrease the probability of undesired outcomes from drug therapy.

(B) Drug regimen review.

(i) For the purpose of promoting therapeutic appropriateness, a pharmacist shall evaluate medication orders and patient medication records for:

(I) known allergies;

(II) rational therapy--contraindications;

(III) reasonable dose and route of administration;

(IV) reasonable directions for use;

(V) duplication of therapy;

(VI) drug-drug interactions;

(VII) drug-food interactions;

(VIII) drug-disease interactions;

(IX) adverse drug reactions;

(X) proper utilization, including overutilization or underutilization; and

(XI) clinical laboratory or clinical monitoring methods to monitor and evaluate drug effectiveness, side effects, toxicity, or adverse effects, and appropriateness to continued use of the drug in its current regimen.

(ii) The drug regimen review shall be conducted on a prospective basis when a pharmacist is on duty, except for an emergency order, and on a retrospective basis as specified in subsection (e)(1) of this section when a pharmacist is not on duty.

(iii) Any questions regarding the order must be resolved with the prescriber and a written notation of these discussions made and maintained.

(iv) The drug regimen review may be conducted by remotely accessing the pharmacy's electronic data base from outside the pharmacy by an individual Texas licensed pharmacist employee of the pharmacy, provided the pharmacy establishes controls to protect the privacy of the patient and the security of confidential records.

(C) Education. The pharmacist-in-charge in cooperation with appropriate multi-disciplinary staff of the facility shall develop policies that assure that:

(i) the patient and/or patient's caregiver receives information regarding drugs and their safe and appropriate use; and

(ii) health care providers are provided with patient specific drug information.

(D) Patient monitoring. The pharmacist-in-charge in cooperation with appropriate multi- disciplinary staff of the facility shall develop policies to ensure that the patient's response to drug therapy is monitored and conveyed to the appropriate health care provider.

(2) Other pharmaceutical care services which may be provided by pharmacists in the facility include, but are not limited to, the following:

(A) managing drug therapy as delegated by a practitioner as allowed under the provisions of the Medical Practice Act;

(B) administering immunizations and vaccinations under written protocol of a physician;

(C) managing patient compliance programs;

(D) providing preventative health care services; and

(E) providing case management of patients who are being treated with high-risk or high- cost drugs, or who are considered "high risk" due to their age, medical condition, family history, or related concern.

(h) Emergency rooms.

(1) During the times a pharmacist is on duty in the facility any prescription drugs supplied to an outpatient, including emergency department patients, may only be dispensed by a pharmacist.

(2) When a pharmacist is not on duty in the facility, the following is applicable for supplying prescription drugs from the emergency room.

(A) If the patient has been admitted to the emergency room and assessed by a practitioner at the hospital, the following procedures shall be observed in supplying prescription drugs from the emergency room.

(i) Dangerous drugs and/or controlled substances may only be supplied in accordance with the system of control and accountability for dangerous drugs and/or controlled substances administered or supplied from the emergency room; such system shall be developed and supervised by the pharmacist-in-charge or staff pharmacist designated by the pharmacist- in-charge.

(ii) Only dangerous drugs and/or controlled substances listed on the emergency room drug list may be supplied; such list shall be developed by the pharmacist-in-charge and the facility's emergency department committee (or like group or person responsible for policy in that department) and shall consist of dangerous drugs and/or controlled substances of the nature and type to meet the immediate needs of emergency room patients.

(iii) Dangerous drugs and/or controlled substances may only be supplied in prepackaged quantities not to exceed a 72-hour supply in suitable containers and appropriately prelabeled (including necessary auxiliary labels) by the institutional pharmacy.

(iv) At the time of delivery of the dangerous drugs and/or controlled substances, the practitioner or licensed nurse under the supervision of a practitioner shall appropriately complete the label with at least the following information:

(I) name, address, and phone number of the facility;

(II) date supplied;

(III) name of practitioner;

(IV) name of patient;

(V) directions for use;

(VI) brand name and strength of the dangerous drug or controlled substance; or if no brand name, then the generic name, strength, and the name of the manufacturer or distributor of the dangerous drug or controlled substance;

(VII) quantity supplied; and

(VIII) unique identification number.

(v) The practitioner, or a licensed nurse under the supervision of the practitioner, shall give the appropriately labeled, prepackaged drug to the patient and explain the correct use of the drug.

(vi) A perpetual record of dangerous drugs and/or controlled substances supplied from the emergency room shall be maintained in the emergency room. Such record shall include the following:

(I) date supplied;

(II) practitioner's name;

(III) patient's name;

(IV) brand name and strength of the dangerous drug or controlled substance; or if no brand name, then the generic name, strength, and the name of the manufacturer or distributor of the dangerous drug or controlled substance;

(V) quantity supplied; and

(VI) unique identification number.

(vii) The pharmacist-in-charge, or staff pharmacist designated by the pharmacist-in-charge, shall verify the correctness of this record at least once every seven days.

(B) If the patient has been admitted to the emergency room of a hospital and a practitioner telephones an order for a dangerous drug to be supplied, the following is applicable.

(i) Dangerous drugs may only be supplied to patients of hospitals after the normal business hours of local pharmacies and when pharmacy services are not reasonably available to the patient.

(ii) The practitioner shall cosign any order for a dangerous drug which is telephoned to the hospital emergency room within 72 hours.

(iii) The practitioner shall have a previous patient/physician relationship with the patient admitted to the emergency room.

(iv) The dangerous drugs may only be supplied in accordance with the system of control and accountability for drugs administered or supplied from the emergency room; such system shall be developed and supervised by the pharmacist-in-charge or staff pharmacist designated by the pharmacist-in-charge.

(v) Only dangerous drugs listed on the emergency room drug list may be supplied; such list shall be developed by the pharmacist-in-charge and the facility's emergency department committee (or like group or person responsible for policy in that department) and shall consist of dangerous drugs of the nature and type to meet the immediate needs of emergency room patients.

(vi) The dangerous drugs may only be supplied in prepackaged quantities not to exceed a 72-hour supply in suitable containers and appropriately prelabeled (including necessary auxiliary labels) by the institutional pharmacy.

(vii) At any time of delivery of the dangerous drugs, a licensed nurse shall complete the label with at least the following information:

(I) name, address, and phone number of the facility;

(II) date supplied;

(III) name of the practitioner;

(IV) name of the patient;

(V) directions for use;

(VI) brand name and strength of the dangerous drug; or if no brand name, then the generic name, strength, and the name of the manufacturer or distributor of the dangerous drug;

(VII) quantity supplied; and

(VIII) unique identification number.

(viii) A licensed nurse shall give the appropriately labeled, prepackaged dangerous drug to the patient and explain the correct use of the drug.

(ix) A perpetual record of dangerous drugs supplied from the emergency room shall be maintained in the emergency room. Such record shall include the following:

(I) date supplied;

(II) practitioner's name;

(III) patient's name;

(IV) brand name and strength of the dangerous drug; or if no brand name, then the generic name, strength, and the name of the manufacturer or distributor of the dangerous drug;

(V) quantity supplied; and

(VI) unique identification number.

(x) The pharmacist-in-charge or staff pharmacist designated by the pharmacist-in-charge shall verify the correctness of this record at least once every seven days.

(C) Prior to implementing the procedures for supplying dangerous drugs to emergency room patients of a hospital on the telephone order of a practitioner, as specified in subparagraph (B) of this paragraph, the hospital shall notify the board of its intent to implement this policy. Such notification shall be signed by the hospital administrator, medical director, and pharmacist-in-charge and contain the following information:

(i) the hours the hospital pharmacy is open for pharmacy services; and

(ii) documentation of the lack of pharmacy services after normal business hours of the hospital pharmacy.

(i) Radiology departments.

(1) During the times a pharmacist is on duty, any prescription drugs dispensed to an outpatient, including radiology department patients, may only be dispensed by a pharmacist.

(2) When a pharmacist is not on duty, the following procedures shall be observed in supplying prescription drugs from the radiology department.

(A) Prescription drugs may only be supplied to patients who have been scheduled for an x- ray examination at the facility.

(B) Prescription drugs may only be supplied in accordance with the system of control and accountability for prescription drugs administered or supplied from the radiology department and supervised by the pharmacist-in-charge or staff pharmacist designated by the pharmacist-in-charge.

(C) Only prescription drugs listed on the radiology drug list may be supplied; such list shall be developed by the pharmacist-in-charge and the facility's radiology committee (or like group or persons responsible for policy in that department) and shall consist of drugs for the preparation of a patient for a radiological procedure.

(D) Prescription drugs may only be supplied in prepackaged quantities in suitable containers and prelabeled by the institutional pharmacy with the following information:

(i) name and address of the facility;

(ii) directions for use;

(iii) name and strength of the prescription drug--if generic name, the name of the manufacturer or distributor of the prescription drug;

(iv) quantity;

(v) facility's lot number and expiration date; and

(vi) appropriate ancillary label(s).

(E) At the time of delivery of the prescription drug, the practitioner or practitioner's agent shall complete the label with the following information:

(i) date supplied;

(ii) name of physician;

(iii) name of patient; and

(iv) unique identification number.

(F) The practitioner or practitioner's agent shall give the appropriately labeled, prepackaged prescription drug to the patient.

(G) A perpetual record of prescription drugs supplied from the radiology department shall be maintained in the radiology department. Such records shall include the following:

(i) date supplied;

(ii) practitioner's name;

(iii) patient's name;

(iv) brand name and strength of the prescription drug; or if no brand name, then the generic name, strength, dosage

form, and the name of the manufacturer or distributor of the prescription drug;

(v) quantity supplied; and

(vi) unique identification number.

(H) The pharmacist-in-charge, or a pharmacist designated by the pharmacist-in-charge, shall verify the correctness of this record at least once every seven days.

(j) Automated devices and systems.

(1) Automated compounding or counting devices. If a pharmacy uses automated compounding or counting devices:

(A) the pharmacy shall have a method to calibrate and verify the accuracy of the automated compounding or counting device and document the calibration and verification on a routine basis;

(B) the devices may be loaded with bulk or unlabeled drugs only by a pharmacist or by pharmacy technicians under the direction and direct supervision of a pharmacist;

(C) the label of an automated compounding or counting device container shall indicate the brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(D) records of loading bulk or unlabeled drugs into an automated compounding or counting device shall be maintained to show:

(i) name of the drug, strength, and dosage form;

(ii) manufacturer or distributor;

(iii) manufacturer's lot number;

(iv) expiration date;

(v) date of loading;

(vi) name, initials, or electronic signature of the person loading the automated compounding or counting device; and

(vii) signature or electronic signature of the responsible pharmacist; and

(E) the automated compounding or counting device shall not be used until a pharmacist verifies that the system is properly loaded and affixes his or her signature to the record specified in subparagraph (D) of this paragraph.

(2) Automated medication supply systems.

(A) Authority to use automated medication supply systems. A pharmacy may use an automated medication supply system to fill medication orders provided that:

(i) the pharmacist-in-charge is responsible for the supervision of the operation of the system;

(ii) the automated medication supply system has been tested by the pharmacy and found to dispense accurately. The pharmacy shall make the results of such testing available to the Board upon request; and

(iii) the pharmacy will make the automated medication supply system available for inspection by the board for the purpose of validating the accuracy of the system.

(B) Quality assurance program. A pharmacy which uses an automated medication supply system to fill medication orders shall operate according to a written program for quality assurance of the automated medication supply system which:

(i) requires continuous monitoring of the automated medication supply system; and

(ii) establishes mechanisms and procedures to test the accuracy of the automated medication supply system at least every six months and whenever any upgrade or change is made to the system and documents each such activity.

(C) Policies and procedures of operation.

(i) When an automated medication supply system is used to store or distribute medications for administration pursuant to medication orders, it shall be operated according to written policies and procedures of operation. The policies and procedures of operation shall establish requirements for operation of the automated medication supply system and shall describe policies and procedures that:

(I) include a description of the policies and procedures of operation;

(II) provide for a pharmacist's review and approval of each original or new medication order filled through the use of the automated medication supply system:

(-a-) before the order is filled when a pharmacist is on duty except for an emergency order;

(-b-) retrospectively within 72 hours in a facility with a full-time pharmacist when a pharmacist is not on duty at the time the order is made; or

(-c-) retrospectively within 7 days in a facility with a part-time or consultant pharmacist when a pharmacist is not on duty at the time the order is made;

(III) provide for access to the automated medication supply system for stocking and retrieval of medications which is limited to licensed healthcare professionals or pharmacy technicians acting under the supervision of a pharmacist;

(IV) provide that a pharmacist is responsible for the accuracy of the restocking of the system. The actual restocking may be performed by a pharmacy technician;

(V) provide for an accountability record to be maintained which documents all transactions relative to stocking and removing medications from the automated medication supply system;

(VI) require a prospective or retrospective drug regimen review is conducted as specified in subsection (g) of this section; and

(VII) establish and make provisions for documentation of a preventative maintenance program for the automated medication supply system.

(ii) A pharmacy which uses an automated medication supply system to fill medication orders shall, at least annually, review its written policies and procedures, revise them if necessary, and document the review.

(D) Recovery Plan. A pharmacy which uses an automated medication supply system to store or distribute medications for administration pursuant to medication orders shall maintain a written plan for recovery from a disaster or any other situation which interrupts the ability of the automated medication supply system to provide services necessary for the operation of the pharmacy. The written plan for recovery shall include:

(i) planning and preparation for maintaining pharmacy services when an automated medication supply system is experiencing downtime;

(ii) procedures for response when an automated medication supply system is experiencing downtime;

(iii) procedures for the maintenance and testing of the written plan for recovery; and

(iv) procedures for notification of the Board and other appropriate agencies whenever an automated medication supply system experiences downtime for more than two days of operation or a period of time which significantly limits the pharmacy's ability to provide pharmacy services.

(3) Verification of medication orders prepared by the pharmacy department through the use of an automated medication supply system. A pharmacist must check drugs prepared pursuant to medication orders to ensure that the drug is prepared for distribution accurately as prescribed. This paragraph does not apply to automated medication supply systems used for storage and recordkeeping of medications located outside of the pharmacy department.

(A) This check shall be considered accomplished if:

(i) a check of the final product is conducted by a pharmacist after the automated system has completed preparation of the medication order and prior to delivery to the patient; or

(ii) the following checks are conducted by a pharmacist:

(I) if the automated medication supply system contains bulk stock drugs, a pharmacist verifies that those drugs have been accurately stocked; and

(II) a pharmacist checks the accuracy of the data entry of each original or new medication order entered into the automated medication supply system before the order is filled.

(B) If the final check is accomplished as specified in subparagraph (A)(ii) of this paragraph, the following additional requirements must be met.

(i) The medication order preparation process must be fully automated from the time the pharmacist releases the medication order to the automated system until a completed medication order, ready for delivery to the patient, is produced.

(ii) The pharmacy has conducted initial testing and has a continuous quality assurance program which documents that the automated medication supply system dispenses accurately as specified in paragraph (2)(A) and (B) of this subsection.

(iii) The automated medication supply system documents and maintains:

(I) the name(s), initials, or identification code(s) of each pharmacist responsible for the checks outlined in subparagraph (A)(ii) of this paragraph; and

(II) the name(s), initials, or identification code(s) and specific activity(ies) of each pharmacist or pharmacy technician who performs any other portion of the medication order preparation process.

(iv) The pharmacy establishes mechanisms and procedures to test the accuracy of the automated medication supply system at least every month rather than every six months as specified in paragraph (2)(B) of this subsection.

(4) Automated checking device.

(A) For the purpose of this subsection, an automated checking device is a fully automated device which confirms, after a drug is prepared for distribution but prior to delivery to the patient, that the correct drug and strength has been labeled with the correct label for the correct patient.

(B) The final check of a drug prepared pursuant to a medication order shall be considered accomplished using an automated checking device provided:

(i) a check of the final product is conducted by a pharmacist prior to delivery to the patient or the following checks are performed by a pharmacist:

(I) the prepackaged drug used to fill the order is checked by a pharmacist who verifies that the drug is labeled and packaged accurately; and

(II) a pharmacist checks the accuracy of each original or new medication order.

(ii) the medication order is prepared, labeled, and made ready for delivery to the patient in compliance with Class C (Institutional) Pharmacy rules; and

(iii) prior to delivery to the patient:

(I) the automated checking device confirms that the correct drug and strength has been labeled with the correct label for the correct patient; and

(II) a pharmacist performs all other duties required to ensure that the medication order has been prepared safely and accurately as prescribed.

(C) If the final check is accomplished as specified in subparagraph (B) of this paragraph, the following additional requirements must be met.

(i) The pharmacy has conducted initial testing of the automated checking device and has a continuous quality assurance program which documents that the automated checking device accurately confirms that the correct drug and strength has been labeled with the correct label for the correct patient.

(ii) The pharmacy documents and maintains:

(I) the name(s), initials, or identification code(s) of each pharmacist responsible for the checks outlined in subparagraph (B)(I) of this paragraph; and

(II) the name(s), initials, or identification code(s) and specific activity(ies) of each pharmacist or pharmacy technician who performs any other portion of the medication order preparation process.

(iii) The pharmacy establishes mechanisms and procedures to test the accuracy of the automated checking device at least monthly.

§291.75. Records.

(a) Maintenance of records.

(1) Every inventory or other record required to be kept under the provisions of §291.71 of this title (relating to Purpose), §291.72 of this title (relating to Definitions), §291.73 of this title (relating to Personnel), §291.74 of this title (relating to Operational Standards), and this section contained in Institutional Pharmacy (Class C) shall be kept by the institutional pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies.

(2) Records of controlled substances listed in Schedule I and II shall be maintained separately from all other records of the pharmacy.

(3) Records of controlled substances listed in Schedules III-V shall be maintained separately or readily retrievable from all other records of the pharmacy. For purposes of this subsection, readily retrievable means that the controlled substances shall be asterisked, redlined, or in some other manner readily identifiable apart from all other items appearing on the record.

(4) Records, except when specifically required to be maintained in original or hard-copy form, may be maintained in an alternative data retention system, such as a data processing or direct imaging system, e.g., microfilm or microfiche, provided:

(A) the records in the alternative data retention system contain all of the information required on the manual record; and

(B) the alternative data retention system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(b) Outpatient records.

(1) Outpatient records shall be maintained as provided in §291.34 of this title (relating to Records), and §291.35 of this title (relating to Official Prescription Records), contained in Community Pharmacy (Class A).

(2) Outpatient prescriptions, including, but not limited to, furlough and discharge prescriptions, that are written by the practitioner must be written on a form which meets the requirements of the Act, §562.006. Medication order forms or copies thereof do not meet the requirements for outpatient forms.

(3) Controlled substances listed in Schedule II must be written on an official prescription form in accordance with the Texas Controlled Substances Act, §481.075, and rules promulgated pursuant to the Texas Controlled Substances Act, unless exempted by the Texas controlled substances regulations, §13.74 (Texas Administrative Code, Title 37, Chapter 13), entitled "Exceptions to Use of Forms." Outpatient prescriptions for Schedule II controlled substances that are exempted from the official prescription requirement must be manually signed by the practitioner.

(c) Inpatient records.

(1) Original medication orders.

(A) Each original medication order shall bear the following information:

(i) patient name and room number or identification number;

(ii) drug name, strength, and dosage form;

(iii) directions for use;

(iv) date; and

(v) signature or electronic signature of the practitioner or that of his or her authorized agent.

(B) Original medication order shall be maintained with the medication administration records of the patients.

(2) Patient medication records (PMR). A patient medication record shall be maintained for each inpatient of the facility. The PMR shall contain at a minimum the following information.

(A) Patient information:

(i) patient name and room number or identification number;

(ii) gender, and date of birth or age;

(iii) weight and height;

(iv) known drug sensitivities and allergies to drugs and/or food;

(v) primary diagnoses and chronic conditions;

(vi) primary physician; and

(vii) other drugs the patient is receiving.

(B) Medication order information:

(i) date of distribution;

(ii) drug name, strength, and dosage form; and

(iii) directions for use.

(3) Controlled substances records. Controlled substances records shall be maintained as follows.

(A) All records for controlled substances shall be maintained in a readily retrievable manner.

(B) Controlled substances records shall be maintained in a manner to establish receipt and distribution of all controlled substances.

(4) Schedule II controlled substances records. Records of controlled substances listed in Schedule II shall be maintained as follows.

(A) Records of controlled substances listed in Schedule II shall be maintained separately from records of controlled substances in Schedules III, IV, and V, and all other records.

(B) An institutional pharmacy shall maintain a perpetual inventory of any controlled substance listed in Schedule II.

(C) Distribution records for controlled substances listed in Schedule II shall bear the following information:

(i) patient's name;

(ii) prescribing or attending practitioner;

(iii) name of drug, dosage form, and strength;

(iv) time and date of administration to patient and quantity administered;

(v) signature (first initial and last name or full signature) or electronic signature of the individual administering the controlled substance;

(vi) returns to the pharmacy; and

(vii) waste (waste is required to be witnessed and cosigned, electronically or manually, by another individual).

(5) Floor stock records.

(A) Distribution records for Schedule II-V controlled substances floor stock shall include the following information:

(i) patient's name;

(ii) prescribing or attending practitioner;

(iii) name of controlled substance, dosage form, and strength;

(iv) time and date of administration to patient;

(v) quantity administered;

(vi) signature (first initial and last name or full signature) or electronic signature of the individual administering drug;

(vii) returns to the pharmacy; and

(viii) waste (waste is required to be witnessed and cosigned, manually or electronically, by another individual).

(B) The record required by subparagraph (A) of this paragraph shall be maintained separately from patient records.

(C) A pharmacist shall review distribution records with medication orders on a periodic basis to verify proper usage of drugs, not to exceed 30 days between such reviews.

(6) General requirements for records maintained in a data processing system.

(A) Noncompliance with data processing requirements. If a hospital pharmacy's data processing system is not in compliance with the Board's requirements, the pharmacy must maintain a manual recordkeeping system.

(B) Requirements for back-up systems. The facility shall maintain a back-up copy of information stored in the data processing system using disk, tape, or other electronic back- up system and update this back-up copy on a regular basis, at least monthly, to assure that data is not lost due to system failure.

(C) Change or discontinuance of a data processing system.

(i) Records of distribution and return for all controlled substances, nalbuphine (e.g., Nubain), tripelennamine (e.g., PBZ) and carisoprodol (e.g., Soma). A pharmacy that changes or discontinues use of a data processing system must:

(I) transfer the records to the new data processing system; or

(II) purge the records to a printout which contains the same information as required on the audit trail printout as specified in paragraph (7)(B) of this subsection. The information on this printout shall be sorted and printed by drug name and list all distributions/returns chronologically.

(ii) Other records. A pharmacy that changes or discontinues use of a data processing system must:

(I) transfer the records to the new data processing system; or

(II) purge the records to a printout which contains all of the information required on the original document.

(iii) Maintenance of purged records. Information purged from a data processing system must be maintained by the pharmacy for two years from the date of initial entry into the data processing system.

(D) Loss of data. The pharmacist-in-charge shall report to the board in writing any significant loss of information from the data processing system within 10 days of discovery of the loss.

(7) Data processing system maintenance of records for the distribution and return of all controlled substances, nalbuphine (e.g., Nubain), tripelennamine (e.g., PBZ), and carisoprodol (e.g., Soma) to the pharmacy.

(A) Each time a controlled substance, nalbuphine (e.g., Nubain), tripelennamine (e.g., PBZ), or carisoprodol (e.g., Soma) is distributed from or returned to the pharmacy, a record of such distribution or return shall be entered into the data processing system.

(B) The data processing system shall have the capacity to produce a hard copy printout of an audit trail of drug distribution and return for any strength and dosage form of a drug (by either brand or generic name or both) during a specified time period. This printout shall contain the following information:

(i) patient's name and room number or patient's facility identification number;

(ii) prescribing or attending practitioner's name;

(iii) name, strength, and dosage form of the drug product actually distributed;

(iv) total quantity distributed from and returned to the pharmacy;

(v) if not immediately retrievable via CRT display, the following shall also be included on the printout:

(I) prescribing or attending practitioner's address; and

(II) practitioner's DEA registration number, if the medication order is for a controlled substance.

(C) An audit trail printout for each strength and dosage form of these drugs distributed during the preceding month shall be produced at least monthly and shall be maintained in a separate file at the facility. The information on this printout shall be sorted by drug name and list all distributions/returns for that drug chronologically.

(D) The pharmacy may elect not to produce the monthly audit trail printout if the data processing system has a workable (electronic) data retention system which can produce an audit trail of drug distribution and returns for the preceding two years. The audit trail required in this paragraph shall be supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy, or other authorized local, state, or federal law enforcement or regulatory agencies.

(8) Failure to maintain records. Failure to provide records set out in this subsection, either on site or within 72 hours for whatever reason, constitutes prima facie evidence of failure to keep and maintain records.

(9) Data processing system downtime. In the event that a hospital pharmacy which uses a data processing system experiences system downtime, the pharmacy must have an auxiliary procedure which will ensure that all data is retained for on-line data entry as soon as the system is available for use again.

(d) Distribution of controlled substances to another registrant. A pharmacy may distribute controlled substances to a practitioner, another pharmacy or other registrant, without being registered to distribute, under the following conditions.

(1) The registrant to whom the controlled substance is to be distributed is registered under the Controlled Substances Act to dispense that controlled substance.

(2) The total number of dosage units of controlled substances distributed by a pharmacy may not exceed 5.0% of all controlled substances dispensed or distributed by the pharmacy during the 12-month period in which the pharmacy is registered; if at any time it does exceed 5.0%, the pharmacy is required to obtain an additional registration to distribute controlled substances.

(3) If the distribution is for a Schedule III, IV, or V controlled substance, a record shall be maintained which indicates:

(A) the actual date of distribution;

(B) the name, strength, and quantity of controlled substances distributed;

(C) the name, address, and DEA registration number of the distributing pharmacy; and

(D) the name, address, and DEA registration number of the pharmacy, practitioner, or other registrant to whom the controlled substances are distributed.

(4) If the distribution is for a Schedule I or II controlled substance, the following is applicable.

(A) The pharmacy, practitioner or other registrant who is receiving the controlled substances shall issue copy 1 and copy 2 of a DEA order form (DEA 222) to the distributing pharmacy.

(B) The distributing pharmacy shall:

(i) complete the area on the DEA order form (DEA 222) titled TO BE FILLED IN BY SUPPLIER;

(ii) maintain copy 1 of the DEA order form (DEA 222) at the pharmacy for two years; and

(iii) forward copy 2 of the DEA order form (DEA 222) to the divisional office of the Drug Enforcement Administration.

(e) Other records. Other records to be maintained by a pharmacy:

(1) a permanent log of the initials or identification codes which will identify pharmacy personnel by name (the initials or identification code shall be unique to ensure that each person can be identified, i.e., identical initials or identification codes cannot be used);

(2) copy 3 of DEA order form (DEA 222) which has been properly dated, initialed, and filed, and all copies of each unaccepted or defective order form and any attached statements or other documents;

(3) a hard copy of the power of attorney to sign DEA 222 order forms (if applicable);

(4) suppliers' invoices of dangerous drugs and controlled substances; a pharmacist shall verify that the controlled drugs listed on the invoices were actually received by clearly recording his/her initials and the actual date of receipt of the controlled substances;

(5) suppliers' credit memos for controlled substances and dangerous drugs;

(6) a hard copy of inventories required by §291.17 of this title (relating to Inventory Requirements) except that a perpetual inventory of controlled substances listed in Schedule II may be kept in a data processing system if the data processing system is capable of producing a hard copy of the perpetual inventory on-site;

(7) hard copy reports of surrender or destruction of controlled substances and/or dangerous drugs to an appropriate state or federal agency;

(8) a hard copy Schedule V nonprescription register book;

(9) records of distribution of controlled substances and/or dangerous drugs to other pharmacies, practitioners, or registrants; and

(10) a hard copy of any notification required by the Texas Pharmacy Act or these sections including, but not limited to, the following:

(A) reports of theft or significant loss of controlled substances to DEA, DPS, and the board;

(B) notifications of a change in pharmacist-in-charge of a pharmacy; and

(C) reports of a fire or other disaster which may affect the strength, purity, or labeling of drugs, medication, devices, or other materials used in diagnosis or treatment of injury, illness, and disease.

(f) Permission to maintain central records. Any pharmacy that uses a centralized recordkeeping system for invoices and financial data shall comply with the following procedures.

(1) Controlled substance records. Invoices and financial data for controlled substances may be maintained at a central location provided the following conditions are met.

(A) Prior to the initiation of central recordkeeping, the pharmacy submits written notification by registered or certified mail to the divisional director of the Drug Enforcement Administration as required by Title 21, Code of Federal Regulations, §1304.04(a), and submits a copy of this written notification to the Texas State Board of Pharmacy. Unless the registrant is informed by the divisional director of the Drug Enforcement Administration that permission to keep central records is denied, the pharmacy may maintain central records commencing 14 days after receipt of notification by the divisional director.

(B) The pharmacy maintains a copy of the notification required in subparagraph (A) of this paragraph.

(C) The records to be maintained at the central record location shall not include executed DEA order forms, prescription drug orders, or controlled substance inventories, which shall be maintained at the pharmacy.

(2) Dangerous drug records. Invoices and financial data for dangerous drugs may be maintained at a central location.

(3) Access to records. If the records are kept on microfilm, computer media, or in any form requiring special equipment to render the records easily readable, the pharmacy shall provide access to such equipment with the records.

(4) Delivery of records. The pharmacy agrees to deliver all or any part of such records to the pharmacy location within two business days of written request of a board agent or any other authorized official.

(g) Confidentiality.

(1) A pharmacist shall provide adequate security of prescription drug orders, medication orders, and patient medication records to prevent indiscriminate or unauthorized access to confidential health information.

(2) Confidential records are privileged and may be released only to:

(A) the patient or the patient's agent;

(B) a practitioner or another pharmacist if, in the pharmacist's professional judgement, the release is necessary to protect the patient's health and well being;

(C) the board or to a person or another state or federal agency authorized by law to receive the confidential record;

(D) a law enforcement agency engaged in investigation of a suspected violation of Chapter 481 or 483, Health and Safety Code, or the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. Section 801 et seq.);

(E) a person employed by a state agency that licenses a practitioner, if the person is performing the person's official duties; or

(F) an insurance carrier or other third party payor authorized by a patient to receive such information.

§291.76. Class C Pharmacies Located in a Freestanding Ambulatory Surgical Center.

(a) Purpose. The purpose of this section is to provide standards in the conduct, practice activities, and operation of a pharmacy located in a freestanding ambulatory surgical center that is licensed by the Texas Department of Health. Class C pharmacies located in a freestanding ambulatory surgical center shall comply with this section, in lieu of §§291.71 - 291.75 of this title (relating to Purpose; Definitions; Personnel; Operational Standards; and Records).

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

(1) Act--The Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Occupations Code, as amended.

(2) Ambulatory surgical center (ASC)--A freestanding facility that is licensed by the Texas Department of Health to provide surgical services to patients who do not require overnight hospital care.

(3) Automated drug dispensing system--An automated device that measures, counts, and/or packages a specified quantity of dosage units for a designated drug product.

(4) Board--The Texas State Board of Pharmacy.

(5) Consultant pharmacist--A pharmacist retained by a facility on a routine basis to consult with the ASC in areas that pertain to the practice of pharmacy.

(6) Controlled substance--A drug, immediate precursor, or other substance listed in Schedules I-V or Penalty Groups 1-4 of the Texas Controlled Substances Act, as amended, or a drug immediate precursor, or other substance included in Schedule I-V of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended (Public Law 91-513).

(7) Direct copy--Electronic copy or carbonized copy of a medication order including a facsimile (FAX), tele-autograph, or a copy transmitted between computers.

(8) Dispense--Preparing, packaging, compounding, or labeling for delivery a prescription drug or device in the course of professional practice to an ultimate user or his agent by or pursuant to the lawful order of a practitioner.

(9) Distribute--The delivery of a prescription drug or device other than by administering or dispensing.

(10) Downtime--Period of time during which a data processing system is not operable.

(11) Electronic signature--A unique security code or other identifier which specifically identifies the person entering information into a data processing system. A facility which utilizes electronic signatures must:

(A) maintain a permanent list of the unique security codes assigned to persons authorized to use the data processing system; and

(B) have an ongoing security program which is capable of identifying misuse and/or unauthorized use of electronic signatures.

(12) Floor stock--Prescription drugs or devices not labeled for a specific patient and maintained at a nursing station or other ASC department (excluding the pharmacy) for the purpose of administration to a patient of the ASC.

(13) Formulary--List of drugs approved for use in the ASC by an appropriate committee of the ambulatory surgical center.

(14) Hard copy--A physical document that is readable without the use of a special device (i.e., cathode ray tube (CRT), microfiche reader, etc.).

(15) Investigational new drug--New drug intended for investigational use by experts qualified to evaluate the safety and effectiveness of the drug as authorized by the federal Food and Drug Administration.

(16) Medication order--A written order from a practitioner or a verbal order from a practitioner or his authorized agent for administration of a drug or device.

(17) Pharmacist-in-charge--Pharmacist designated on a pharmacy license as the pharmacist who has the authority or responsibility for a pharmacy's compliance with laws and rules pertaining to the practice of pharmacy.

(18) Pharmacy--Area or areas in a facility, separate from patient care areas, where drugs are stored, bulk compounded, delivered, compounded, dispensed, and/or distributed to other areas or departments of the ASC, or dispensed to an ultimate user or his or her agent.

(19) Prescription drug

(A) A substance for which federal or state law requires a prescription before it may be legally dispensed to the public;

(B) A drug or device that under federal law is required, prior to being dispensed or delivered, to be labeled with either of the following statements:

(i) Caution: federal law prohibits dispensing without prescription or "Rx only" or another legend that complies with federal law; or

(ii) Caution: federal law restricts this drug to use by or on order of a licensed veterinarian; or

(C) A drug or device that is required by any applicable federal or state law or regulation to be dispensed on prescription only or is restricted to use by a practitioner only.

(20) Prescription drug order--

(A) A written order from a practitioner or verbal order from a practitioner or his authorized agent to a pharmacist for a drug or device to be dispensed; or

(B) A written order or a verbal order pursuant to Subtitle B, Chapter 157, Occupations Code.

(21) Full-time pharmacist--A pharmacist who works in a pharmacy from 30 to 40 hours per week or if the pharmacy is open less than 60 hours per week, one-half of the time the pharmacy is open.

(22) Part-time pharmacist--A pharmacist who works less than full-time.

(23) Pharmacy technician--An individual whose responsibility in a pharmacy is to provide technical services that do not require professional judgment regarding preparing and distributing drugs and who works under the direct supervision of and is responsible to a pharmacist. Pharmacy technician includes registered pharmacy technicians and pharmacy technician trainees.

(24) Pharmacy technician trainee--A person who is:

(A) not registered as a pharmacy technician by the board, and either:

(B) participating in a pharmacy's technician training program; or

(C) currently enrolled in a:

(i) pharmacy technician training program accredited by the American Society of Health- System Pharmacists; or

(ii) health science technology education program in a Texas high school that is accredited by the Texas Education Agency.

(25) Texas Controlled Substances Act--The Texas Controlled Substances Act, the Health and Safety Code, Chapter 481, as amended.

(c) Personnel.

(1) Pharmacist-in-charge.

(A) General. Each ambulatory surgical center shall have one pharmacist-in- charge who is employed or under contract, at least on a consulting or part-time basis, but may be employed on a full-time basis.

(B) Responsibilities. The pharmacist-in-charge shall have the responsibility for, at a minimum, the following:

(i) establishment of specifications for procurement and storage of all materials, including drugs, chemicals, and biologicals;

(ii) participation in the development of a formulary for the ASC, subject to approval of the appropriate committee of the ASC;

(iii) distribution of drugs to be administered to inpatients pursuant to an original or direct copy of the practitioner's medication order;

(iv) filling and labeling all containers from which drugs are to be distributed or dispensed;

(v) maintaining and making available a sufficient inventory of antidotes and other emergency drugs, both in the pharmacy and inpatient care areas, as well as current antidote information, telephone numbers of regional poison control center and other emergency assistance organizations, and such other materials and information as may be deemed necessary by the appropriate committee of the ASC;

(vi) records of all transactions of the ASC pharmacy as may be required by applicable state and federal law, and as may be necessary to maintain accurate control over and accountability for all pharmaceutical materials;

(vii) participation in those aspects of the ASC's patient care evaluation program which relate to pharmaceutical material utilization and effectiveness;

(viii) participation in teaching and/or research programs in the ASC;

(ix) implementation of the policies and decisions of the appropriate committee(s) relating to pharmaceutical services of the ASC;

(x) effective and efficient messenger and delivery service to connect the ASC pharmacy with appropriate areas of the ASC on a regular basis throughout the normal workday of the ASC;

(xi) labeling, storage, and distribution of investigational new drugs, including maintenance of information in the pharmacy and nursing station where such drugs are being administered, concerning the dosage form, route of administration, strength, actions, uses, side effects, adverse effects, interactions, and symptoms of toxicity of investigational new drugs;

(xii) meeting all inspection and other requirements of the Texas Pharmacy Act and this subsection; and

(xiii) maintenance of records in a data processing system such that the data processing system is in compliance with the requirements for a Class C (institutional) pharmacy located in a free-standing ASC.

(2) Consultant pharmacist.

(A) The consultant pharmacist may be the pharmacist-in-charge.

(B) A written contract shall exist between the ASC and any consultant pharmacist, and a copy of the written contract shall be made available to the board upon request.

(3) Pharmacists.

(A) General.

(i) The pharmacist-in-charge shall be assisted by a sufficient number of additional licensed pharmacists as may be required to operate the ASC pharmacy competently, safely, and adequately to meet the needs of the patients of the facility.

(ii) All pharmacists shall assist the pharmacist-in-charge in meeting the responsibilities as outlined in paragraph (1)(B) of this subsection and in ordering, administering, and accounting for pharmaceutical materials.

(iii) All pharmacists shall be responsible for any delegated act performed by pharmacy technicians under his or her supervision.

(iv) All pharmacists while on duty shall be responsible for complying with all state and federal laws or rules governing the practice of pharmacy.

(B) Duties. Duties of the pharmacist-in-charge and all other pharmacists shall include, but need not be limited to, the following:

(i) receiving and interpreting prescription drug orders and oral medication orders and reducing these orders to writing either manually or electronically;

(ii) selection of prescription drugs and/or devices and/or suppliers; and

(iii) interpreting patient profiles.

(C) Special requirements for compounding.

(i) Non-Sterile Pharmaceuticals. All pharmacists engaged in compounding non-sterile pharmaceuticals shall meet the training requirements specified in §291.25 of this title (relating to Pharmacies Compounding Non-Sterile Pharmaceuticals).

(ii) Sterile Pharmaceuticals. All pharmacists engaged in compounding non-sterile pharmaceuticals shall meet the training requirements specified in §291.26 of this title (relating to Pharmacies Compounding Sterile Pharmaceuticals).

(4) Pharmacy technicians.

(A) General

(i) On June 1, 2004, all persons employed as pharmacy technicians must be either registered pharmacy technicians or pharmacy technician trainees as follows.

(I) All persons who have passed the required pharmacy technician certification examination must be registered with the board under the provisions this section.

(II) All persons who have not taken and passed the required pharmacy certification examination shall be designated pharmacy technician trainees under the provisions of §297.5 of this title (relating to Pharmacy Technician Trainees).

(ii) Between January 1, 2004, and May 31, 2004, all persons employed as pharmacy technicians who are qualified for registration by the board shall register according to the schedule designated by the board. Between January 1, 2004 and May 31, 2004, persons who are awaiting their scheduled time for registration and persons who have applied for registration, but the registration has not been completed shall comply with the rules in effect prior to January 1, 2004, relating to requirements and duties for certified or exempt pharmacy technicians.

(iii) All pharmacy technicians shall meet the training requirements specified in §297.6 of this title (relating to Pharmacy Technician Training).

(B) Duties. Duties may include, but need not be limited to, the following functions, under the direct supervision of a pharmacist:

(i) prepacking and labeling unit and multiple dose packages, provided a pharmacist supervises and conducts in-process and final checks and affixes his or her signature or electronic signature to the appropriate quality control records;

(ii) preparing, packaging, compounding, or labeling prescription drugs pursuant to medication orders, provided a pharmacist supervises and checks the preparation;

(iii) compounding sterile pharmaceuticals pursuant to medication orders provided the pharmacy technicians:

(I) have completed the training specified in §291.26 of this title (relating to Pharmacies Compounding Sterile Pharmaceuticals); and

(II) are supervised by a pharmacist who has completed the sterile products training specified in §291.26 of this title, conducts in-process and final checks, and affixes his or her initials to the label or if batch prepared, to the appropriate quality control records. (The initials are not required on the label if it is maintained in a permanent record of the pharmacy.)

(iv) bulk compounding, provided a pharmacist supervises and conducts in-process and final checks and affixes his or her initials to the appropriate quality control records;

(v) distributing routine orders for stock supplies to patient care areas;

(vi) entering medication order and drug distribution information into a data processing system, provided judgmental decisions are not required and a pharmacist checks the accuracy of the information entered into the system prior to releasing the order or in compliance with the absence of pharmacist requirements contained in subsection (d)(6)(E) and (F) of this section;

(vii) maintaining inventories of drug supplies;

(viii) maintaining pharmacy records; and

(ix) loading bulk unlabeled drugs into an automated drug dispensing system provided a pharmacist supervises, verifies that the system was properly loaded prior to use, and affixes his or her signature or electronic signature to the appropriate quality control records.

(C) Procedures.

(i) Pharmacy technicians shall handle medication orders in accordance with standard written procedures and guidelines.

(ii) Pharmacy technicians shall handle prescription drug orders in the same manner as pharmacy technicians working in a Class A pharmacy.

(D) Special requirements for compounding.

(i) Non-Sterile Pharmaceuticals . All pharmacy technicians engaged in compounding non-sterile pharmaceuticals shall meet the training requirements specified in §291.25 of this title.

(ii) Sterile Pharmaceuticals. Pharmacy technicians may compound sterile pharmaceuticals pursuant to medication orders provided the pharmacy technicians:

(I) have completed the training specified in §291.26 of this title; and

(II) are supervised by a pharmacist who has completed the training specified in §291.26 of this title and who conducts in-process and final checks, and affixes his or her initials to the label or if batch prepared, to the appropriate quality control records. (The initials are not required on the label if it is maintained in a permanent record of the pharmacy).

(5) Identification of pharmacy personnel. All pharmacy personnel shall wear an identification tag or badge which bears the person's name and identifies him or her by title or function as follows:

(A) Pharmacy technicians. All pharmacy technicians shall wear an identification tag or badge which bears the person's name and identifies him or her as a pharmacy technician trainee a registered pharmacy technician, or a certified pharmacy technician, if the technician maintains current certification with the Pharmacy Technician Certification Board or any other entity providing an examination approved by the Board.

(B) Pharmacist interns. All pharmacist interns shall wear an identification tag or badge which bears the person's name and identifies him or her as a pharmacist intern.

(C) Pharmacists. All pharmacists shall wear an identification tag or badge which bears the person's name and identifies him or her as a pharmacist.

(d) Operational standards.

(1) Licensing requirements.

(A) An ASC pharmacy shall register annually with the board on a pharmacy license application provided by the board, following the procedures specified in §291.1 of this title (relating to Pharmacy License Application).

(B) If the ASC pharmacy is owned or operated by a pharmacy management or consulting firm, the following conditions apply.

(i) The pharmacy license application shall list the pharmacy management or consulting firm as the owner or operator.

(ii) The pharmacy management or consulting firm shall obtain DEA and DPS controlled substances registrations that are issued in the name of the firm, unless the following occur:

(I) the pharmacy management or consulting firm and the facility cosign a contractual pharmacy service agreement which assigns overall responsibility for controlled substances to the facility; and

(II) such pharmacy management or consulting firm maintains dual responsibility for the controlled substances.

(C) An ASC pharmacy which changes ownership shall notify the board within 10 days of the change of ownership and apply for a new and separate license as specified in §291.4 of this title (relating to Change of Ownership).

(D) An ASC pharmacy which changes location and/or name shall notify the board of the change within 10 days and file for an amended license as specified in §291.2 of this title (relating to Change of Location and/or Name).

(E) An ASC pharmacy owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within 10 days of the change, following the procedures in §291.3 of this title (relating to Change of Managing Officers).

(F) An ASC pharmacy shall notify the board in writing within 10 days of closing, following the procedures in §291.5 of this title (relating to Closed Pharmacies).

(G) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for issuance and renewal of a license and the issuance of an amended license.

(H) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(I) An ASC pharmacy, licensed under the Act, §560.051(a)(3), concerning institutional pharmacy (Class C), which also operates another type of pharmacy which would otherwise be required to be licensed under the Act, §560.051(a)(1), concerning community pharmacy (Class A), or the Act, §560.051(a)(2), concerning nuclear pharmacy (Class B), is not required to secure a license for the other type of pharmacy; provided, however, such license is required to comply with the provisions of §291.31 of this title (relating to Definitions), §291.32 of this title (relating to Personnel), §291.33 of this title (relating to Operational Standards), §291.34 of this title (relating to Records), and §291.35 of this title (relating to Official Prescription Records), or §291.51 of this title (relating to Purpose), §291.52 of this title (relating to Definitions), §291.53 of this title (relating to Personnel), §291.54 of this title (relating to Operational Standards), and §291.55 of this title (relating to Records), contained in Nuclear Pharmacy (Class B), to the extent such sections are applicable to the operation of the pharmacy.

(J) An ASC pharmacy engaged in non-sterile compounding of drug products for inpatients of the hospital shall comply with the provisions of §291.25 of this title (relating to Pharmacies Compounding Non-Sterile Pharmaceuticals).

(K) An ASC pharmacy engaged in the compounding of sterile pharmaceuticals shall comply with the provisions of §291.26 of this title (relating to Pharmacies Compounding Sterile Pharmaceuticals).

(L) An ASC pharmacy engaged in the provision of remote pharmacy services, including storage and dispensing of prescription drugs, shall comply with the provisions of §291.20 of this title (relating to Remote Pharmacy Services).

(M) An ASC pharmacy engaged in centralized prescription dispensing and/or prescription drug or medication order processing shall comply with the provisions of §291.37 of this title (relating to Centralized Prescription Dispensing) and/or §291.38 of this title (relating to Centralized Prescription Drug or Medication Order Processing).

(2) Environment.

(A) General requirements.

(i) Each ambulatory surgical center shall have a designated work area separate from patient areas, and which shall have space adequate for the size and scope of pharmaceutical services and shall have adequate space and security for the storage of drugs.

(ii) The ASC pharmacy shall be arranged in an orderly fashion and shall be kept clean. All required equipment shall be clean and in good operating condition.

(B) Special requirements.

(i) The ASC pharmacy shall have locked storage for Schedule II controlled substances and other controlled drugs requiring additional security.

(ii) The ASC pharmacy shall have a designated area for the storage of poisons and externals separate from drug storage areas.

(C) Security.

(i) Only authorized personnel may have access to storage areas for prescription drugs and/or devices.

(ii) All storage areas for prescription drugs and/or devices shall be locked by key or combination, so as to prevent access by unauthorized personnel.

(iii) The pharmacist-in-charge shall consult with ASC personnel with respect to security of the drug storage areas, including provisions for adequate safeguards against theft or diversion of prescription drugs and/or devices.

(3) Equipment and supplies. Ambulatory surgical centers supplying drugs for postoperative use shall have the following equipment and supplies:

(A) typewriter or comparable equipment; and

(B) adequate supply of child-resistant, moisture-proof, and light-proof containers;

(C) adequate supply of prescription labels and other applicable identification labels;

(4) Library. A reference library shall be maintained which includes the following in hard-copy or electronic format:

(A) current copies of the following:

(i) Texas Pharmacy Act and rules;

(ii) Texas Dangerous Drug Act and rules;

(iii) Texas Controlled Substances Act and rules;

(iv) Federal Controlled Substances Act and rules or official publication describing the requirements of the Federal Controlled Substances Act and rules;

(B) at least one current or updated reference from each of the following categories:

(i) Drug interactions. A reference text on drug interactions, such as Drug Interaction Facts. A separate reference is not required if other references maintained by the pharmacy contain drug interaction information including information needed to determine severity or significance of the interaction and appropriate recommendations or actions to be taken;

(ii) General information. A general information reference text, such as:

(I) Facts and Comparisons with current supplements;

(II) United States Pharmacopeia Dispensing Information Volume I (Drug Information for the Healthcare Provider);

(III) AHFS Drug Information with current supplements;

(IV) Remington's Pharmaceutical Sciences; or

(V) Clinical Pharmacology;

(C) a current or updated reference on injectable drug products, such as Handbook of Injectable Drugs;

(D) basic antidote information and the telephone number of the nearest regional poison control center.

(E) if the pharmacy compounds sterile pharmaceuticals, specialty references appropriate for the scope of services provided by the pharmacy, e.g., if the pharmacy prepares cytotoxic drugs, a reference text on the preparation of cytotoxic drugs, such as Procedures for Handling Cytotoxic Drugs.

(F) metric-apothecary weight and measure conversion charts.

(5) Drugs.

(A) Procurement, preparation, and storage.

(i) The pharmacist-in-charge shall have the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff of the facility, relative to such responsibility.

(ii) The pharmacist-in-charge shall have the responsibility for determining specifications of all drugs procured by the facility.

(iii) All drugs shall be stored at the proper temperatures, as defined by the following terms.

(I) Room temperature--temperature maintained between 15 degrees Celsius (59 degrees Fahrenheit) and 30 degrees Celsius (86 degrees Fahrenheit).

(II) Cool--temperature between 8 degrees Celsius (46 degrees Fahrenheit) and 15 degrees Celsius (59 degrees Fahrenheit) which may, alternatively, be stored in a refrigerator unless otherwise specified on the labeling.

(III) Refrigerate--temperature that is thermostatically maintained between 2 degrees Celsius (36 degrees Fahrenheit) and 8 degrees Celsius (46 degrees Fahrenheit).

(IV) Freeze--temperature that is thermostatically maintained between -20 degrees Celsius (-4 degrees Fahrenheit) and -10 degrees Celsius (14 degrees Fahrenheit).

(iv) Any drug bearing an expiration date may not be dispensed or distributed beyond the expiration date of the drug.

(v) Outdated drugs shall be removed from dispensing stock and shall be quarantined together until such drugs are disposed of.

(B) Formulary.

(i) A formulary may be developed by an appropriate committee of the ambulatory surgical center.

(ii) The pharmacist-in-charge or consultant pharmacist shall be a full voting member of any committee which involves pharmaceutical services.

(C) Prepackaging of drugs and loading of bulk unlabeled drugs into automated drug dispensing system.

(i) Prepackaging of drugs.

(I) Drugs may be prepackaged in quantities suitable for internal distribution only by a pharmacist or by pharmacy technicians under the direction and direct supervision of a pharmacist.

(II) The label of a prepackaged unit shall indicate:

(-a-) brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(-b-) facility's lot number;

(-c-) expiration date; and

(-d-) quantity of the drug, if quantity is greater than one.

(III) Records of prepackaging shall be maintained to show:

(-a-) the name of the drug, strength, and dosage form;

(-b-) facility's lot number;

(-c-) manufacturer or distributor;

(-d-) manufacturer's lot number;

(-e-) expiration date;

(-f-) quantity per prepackaged unit;

(-g-) number of prepackaged units;

(-h-) date packaged;

(-i-) name, initials, or electronic signature of the prepacker; and

(-j-) signature or electronic signature of the responsible pharmacist.

(IV) Stock packages, repackaged units, and control records shall be quarantined together until checked/released by the pharmacist.

(ii) Loading bulk unlabeled drugs into automated drug dispensing systems.

(I) Automated drug dispensing systems may be loaded with bulk unlabeled drugs only by a pharmacist or by pharmacy technicians under the direction and direct supervision of a pharmacist.

(II) The label of an automated drug dispensing system container shall indicate the brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor.

(III) Records of loading bulk unlabeled drugs into an automated drug dispensing system shall be maintained to show:

(-a-) name of the drug, strength, and dosage form;

(-b-) manufacturer or distributor;

(-c-) manufacturer's lot number;

(-d-) expiration date;

(-e-) date of loading;

(-f-) name, initials, or electronic signature of the person loading the automated drug dispensing system; and

(-g-) signature or electronic signature of the responsible pharmacist.

(IV) The automated drug dispensing system shall not be used until a pharmacist verifies that the system is properly loaded

and affixes his or her signature or electronic signature to the record specified in subclause (III) of this clause.

(6) Medication orders.

(A) Drugs may be administered to patients in ASCs only on the order of a practitioner. No change in the order for drugs may be made without the approval of a practitioner.

(B) Drugs may be distributed only pursuant to the original or a direct copy of the practitioner's medication order.

(C) Pharmacy technicians may not receive oral medication orders.

(D) ASC pharmacies shall be exempt from the labeling provisions and patient notification requirements of §562.006 and §562.009 of the Act, as respects drugs distributed pursuant to medication orders.

(E) In ASCs with a full-time pharmacist, if a practitioner orders a drug for administration to a bona fide patient of the facility when the pharmacy is closed, the following is applicable.

(7) Floor stock. In facilities using a floor stock method of drug distribution, the following is applicable for removing drugs or devices in the absence of a pharmacist.

(A) Prescription drugs and devices may be removed from the pharmacy only in the original manufacturer's container or prepackaged container.

(B) Only a designated licensed nurse or practitioner may remove such drugs and devices.

(C) A record shall be made at the time of withdrawal by the authorized person removing the drug or device; the record shall contain the following information:

(i) name of the drug, strength, and dosage form;

(ii) quantity removed;

(iii) location of floor stock;

(iv) date and time; and

(v) signature or electronic signature of person making the withdrawal.

(D) A pharmacist shall verify the withdrawal according to the following schedule.

(i) In facilities with a full-time pharmacist, the withdrawal shall be verified as soon as practical, but in no event more than 72 hours from the time of such withdrawal.

(ii) In facilities with a part-time or consultant pharmacist, the withdrawal shall be verified after a reasonable interval, but in no event may such interval exceed seven days.

(8) Policies and procedures. Written policies and procedures for a drug distribution system, appropriate for the ambulatory surgical center, shall be developed and implemented by the pharmacist-in-charge with the advice of the appropriate committee. The written policies and procedures for the drug distribution system shall include, but not be limited to, procedures regarding the following:

(A) controlled substances;

(B) investigational drugs;

(C) prepackaging and manufacturing;

(D) medication errors;

(E) orders of physician or other practitioner;

(F) floor stocks;

(G) adverse drug reactions;

(H) drugs brought into the facility by the patient;

(I) self-administration;

(J) emergency drug tray;

(K) formulary, if applicable;

(L) drug storage areas;

(M) drug samples;

(N) drug product defect reports;

(O) drug recalls;

(P) outdated drugs;

(Q) preparation and distribution of IV admixtures;

(R) procedures for supplying drugs for postoperative use, if applicable;

(S) use of automated drug dispensing systems; and

(T) use of data processing systems.

(9) Drugs supplied for postoperative use. Drugs supplied to patients for postoperative use shall be supplied according to the following procedures.

(A) Drugs may only be supplied to patients who have been admitted to the ambulatory surgical center.

(B) Drugs may only be supplied in accordance with the system of control and accountability established for drugs supplied from the ambulatory surgical center; such system shall be developed and supervised by the pharmacist-in-charge or staff pharmacist designated by the pharmacist-in-charge.

(C) Only drugs listed on the approved postoperative drug list may be supplied; such list shall be developed by the pharmacist-in-charge and the medical staff and shall consist of drugs of the nature and type to meet the immediate postoperative needs of the ambulatory surgical center patient.

(D) Drugs may only be supplied in prepackaged quantities not to exceed a 72-hour supply in suitable containers and appropriately prelabeled (including necessary auxiliary labels) by the pharmacy, provided, however that topicals and ophthalmics in original manufacturer's containers may be supplied in a quantity exceeding a 72-hour supply.

(E) At the time of delivery of the drug, the practitioner shall complete the label, such that the prescription container bears a label with at least the following information:

(i) date supplied;

(ii) name of practitioner;

(iii) name of patient;

(iv) directions for use;

(v) brand name and strength of the drug; or if no brand name, then the generic name of the drug dispensed, strength, and the name of the manufacturer or distributor of the drug; and

(vi) unique identification number.

(F) After the drug has been labeled by the practitioner, the practitioner or a licensed nurse under the supervision of the practitioner shall give the appropriately labeled, prepackaged medication to the patient.

(G) A perpetual record of drugs which are supplied from the ASC shall be maintained which includes:

(i) name, address, and phone number of the facility;

(ii) date supplied;

(iii) name of practitioner;

(iv) name of patient;

(v) directions for use;

(vi) brand name and strength of the drug; or if no brand name, then the generic name of the drug dispensed, strength, and the name of the manufacturer or distributor of the drug; and

(vii) unique identification number.

(H) The pharmacist-in-charge, or a pharmacist designated by the pharmacist-in-charge, shall review the records at least once every seven days.

(e) Records.

(1) Maintenance of records.

(A) Every inventory or other record required to be kept under the provisions of §291.76 of this title (relating to Institutional Pharmacy (Class C)) shall be kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies.

(B) Records of controlled substances listed in Schedules I and II shall be maintained separately from all other records of the pharmacy.

(C) Records of controlled substances listed in Schedules III - V shall be maintained separately or readily retrievable from all other records of the pharmacy. For purposes of this subsection, readily retrievable means that the controlled substances shall be asterisked, red-lined, or in some other manner readily identifiable apart from all other items appearing on the record.

(D) Records, except when specifically required to be maintained in original or hard-copy form, may be maintained in an alternative data retention system, such as a data processing or direct imaging system, e.g., microfilm or microfiche, provided:

(i) the records in the alternative data retention system contain all of the information required on the manual record; and

(ii) the alternative data retention system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(2) Outpatient records.

(A) Only a registered pharmacist may receive, certify, and receive prescription drug orders.

(B) Outpatient records shall be maintained as provided in §291.34 of this title (relating to Records), and §291.35 of this title (relating to Official Prescription Records) contained in Community Pharmacy (Class A).

(C) Outpatient prescriptions, including, but not limited to, discharge prescriptions, that are written by the practitioner, must be written on a form which meets the requirements of the Act, §562.006. Medication order forms or copies thereof do not meet the requirements for outpatient forms.

(D) Controlled substances listed in Schedule II must be written on an electronic prescription form in accordance with the Texas Controlled Substances Act, §481.075, and rules promulgated pursuant to the Texas Controlled Substances Act, unless exempted by the Texas Controlled Substances Rules, 37 TAC §13.74, entitled to "Exceptions to Use of Forms." Outpatient prescriptions for Schedule II controlled substances that are exempted from the official prescription requirement must be manually signed by the practitioner.

(3) Inpatient records.

(A) Each original medication order or set of orders issued together shall bear the following information:

(i) patient name;

(ii) drug name, strength, and dosage form;

(iii) directions for use;

(iv) date; and

(v) signature or electronic signature of the practitioner or that of his or her authorized agent, defined as a licensed nurse employee or consultant/full or part-time pharmacist of the ASC.

(B) Original medication orders shall be maintained with the medication administration record in the medical records of the patient.

(C) Controlled substances records shall be maintained as follows.

(i) All records for controlled substances shall be maintained in a readily retrievable manner.

(ii) Controlled substances records shall be maintained in a manner to establish receipt and distribution of all controlled substances.

(D) Records of controlled substances listed in Schedule II shall be maintained as follows.

(i) Records of controlled substances listed in Schedule II shall be maintained separately from records of controlled substances in Schedules III, IV, and V, and all other records.

(ii) An ASC pharmacy shall maintain a perpetual inventory of any controlled substance listed in Schedule II.

(iii) Distribution records for Schedule II-V controlled substances floor stock shall include the following information:

(I) patient's name;

(II) practitioner who ordered drug;

(III) name of drug, dosage form, and strength;

(IV) time and date of administration to patient and quantity administered;

(V) signature or electronic signature of individual administering controlled substance;

(VI) returns to the pharmacy; and

(VII) waste (waste is required to be witnessed and cosigned, manually or electronically, by another individual).

(E) Floor stock records shall be maintained as follows.

(i) Distribution records for Schedules III - V controlled substances floor stock shall include the following information:

(I) patient's name;

(II) practitioner who ordered controlled substance;

(III) name of controlled substance, dosage form, and strength;

(IV) time and date of administration to patient;

(V) quantity administered;

(VI) signature or electronic signature of individual administering drug;

(VII) returns to the pharmacy; and

(VIII) waste (waste is required to be witnessed and cosigned, manually or electronically, by another individual).

(ii) The record required by clause (i) of this subparagraph shall be maintained separately from patient records.

(iii) A pharmacist shall review distribution records with medication orders on a periodic basis to verify proper usage of drugs, not to exceed 30 days between such reviews.

(F) General requirements for records maintained in a data processing system are as follows.

(i) If an ASC pharmacy's data processing system is not in compliance with the board's requirements, the pharmacy must maintain a manual recordkeeping system.

(ii) Requirements for backup systems. The facility shall maintain a backup copy of information stored in the data processing system using disk, tape, or other electronic backup system and update this backup copy on a regular basis to assure that data is not lost due to system failure.

(iii) Change or discontinuance of a data processing system.

(I) Records of distribution and return for all controlled substances, nalbuphine (Nubain), and tripelennamine (PBZ). A pharmacy that changes or discontinues use of a data processing system must:

(-a-) transfer the records to the new data processing system; or

(-b-) purge the records to a printout which contains the same information as required on the audit trail printout as specified in subparagraph (G)(ii) of this paragraph. The information on this printout shall be sorted and printed by drug name and list all distributions/returns chronologically.

(II) Other records. A pharmacy that changes or discontinues use of a data processing system must:

(-a-) transfer the records to the new data processing system; or

(-b-) purge the records to a printout which contains all of the information required on the original document.

(III) Maintenance of purged records. Information purged from a data processing system must be maintained by the pharmacy for two years from the date of initial entry into the data processing system.

(iv) Loss of data. The pharmacist-in-charge shall report to the board in writing any significant loss of information from the data processing system within 10 days of discovery of the loss.

(G) Data processing system maintenance of records for the distribution and return of all controlled substances, nalbuphine (Nubain), or tripelennamine (PBZ) to the pharmacy.

(i) Each time a controlled substance, nalbuphine (Nubain), or tripelennamine (PBZ) is distributed from or returned to the pharmacy, a record of such distribution or return shall be entered into the data processing system.

(ii) The data processing system shall have the capacity to produce a hard-copy printout of an audit trail of drug distribution and return for any strength and dosage form of a drug (by either brand or generic name or both) during a specified time period. This printout shall contain the following information:

(I) patient's name and room number or patient's facility identification number;

(II) prescribing or attending practitioner's name;

(III) name, strength, and dosage form of the drug product actually distributed;

(IV) total quantity distributed from and returned to the pharmacy;

(V) if not immediately retrievable via CRT display, the following shall also be included on the printout:

(-a-) prescribing or attending practitioner's address; and

(-b-) practitioner's DEA registration number, if the medication order is for a controlled substance.

(iii) An audit trail printout for each strength and dosage form of these drugs distributed during the preceding month shall be produced at least monthly and shall be maintained in a separate file at the facility. The information on this printout shall be sorted by drug name and list all distributions/returns for that drug chronologically.

(iv) The pharmacy may elect not to produce the monthly audit trail printout if the data processing system has a workable (electronic) data retention system which can produce an audit trail of drug distribution and returns for the preceding two years. The audit trail required in this clause shall be supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy, or other authorized local, state, or federal law enforcement or regulatory agencies.

(H) Failure to maintain records. Failure to provide records set out in this subsection, either on site or within 72 hours for whatever reason, constitutes prima facie evidence of failure to keep and maintain records.

(I) Data processing system downtime. In the event that an ASC pharmacy which uses a data processing system experiences system downtime, the pharmacy must have an auxiliary procedure which will ensure that all data is retained for on-line data entry as soon as the system is available for use again.

(4) Distribution of controlled substances to another registrant. A pharmacy may distribute controlled substances to a practitioner, another pharmacy, or other registrant, without being registered to distribute, under the following conditions.

(A) The registrant to whom the controlled substance is to be distributed is registered under the Controlled Substances Act to dispense that controlled substance.

(B) The total number of dosage units of controlled substances distributed by a pharmacy may not exceed 5.0% of all controlled substances dispensed by the pharmacy during the 12-month period in which the pharmacy is registered; if at any time it does exceed 5.0%, the pharmacy is required to obtain an additional registration to distribute controlled substances.

(C) If the distribution is for a Schedule III, IV, or V controlled substance, a record shall be maintained which indicates:

(i) the actual date of distribution;

(ii) the name, strength, and quantity of controlled substances distributed;

(iii) the name, address, and DEA registration number of the distributing pharmacy; and

(iv) the name, address, and DEA registration number of the pharmacy, practitioner, or other registrant to whom the controlled substances are distributed.

(D) If the distribution is for a Schedule I or II controlled substance, the following is applicable.

(i) The pharmacy, practitioner, or other registrant who is receiving the controlled substances shall issue Copy 1 and Copy 2 of a DEA order form (DEA 222C) to the distributing pharmacy.

(ii) The distributing pharmacy shall:

(I) complete the area on the DEA order form (DEA 222C) titled "To Be Filled in by Supplier";

(II) maintain Copy 1 of the DEA order form (DEA 222C) at the pharmacy for two years; and

(III) forward Copy 2 of the DEA order form (DEA 222C) to the divisional office of the Drug Enforcement Administration.

(5) Other records. Other records to be maintained by the pharmacy include:

(A) a permanent log of the initials or identification codes which will identify each pharmacist by name. The initials or identification code shall be unique to ensure that each pharmacist can be identified, i.e., identical initials or identification codes cannot be used;

(B) Copy 3 of DEA order form (DEA 222C), which has been properly dated, initialed, and filed, and all copies of each unaccepted or defective order form and any attached statements or other documents;

(C) a hard copy of the power of attorney to sign DEA 222C order forms (if applicable);

(D) suppliers' invoices of dangerous drugs and controlled substances; a pharmacist shall verify that the controlled drugs listed on the invoices were actually received by clearly recording his/her initials and the actual date of receipt of the controlled substances;

(E) supplier's credit memos for controlled substances and dangerous drugs;

(F) a hard copy of inventories required by §291.17 of this title (relating to Inventory Requirements) except that a perpetual inventory of controlled substances listed in Schedule II may be kept in a data processing system if the data processing system is capable of producing a hard copy of the perpetual inventory on-site;

(G) hard-copy reports of surrender or destruction of controlled substances and/or dangerous drugs to an appropriate state or federal agency;

(H) a hard-copy Schedule V nonprescription register book;

(I) records of distribution of controlled substances and/or dangerous drugs to other pharmacies, practitioners, or registrants; and

(J) a hard copy of any notification required by the Texas Pharmacy Act or these rules, including, but not limited to, the following:

(i) reports of theft or significant loss of controlled substances to DEA, DPS, and the board;

(ii) notification of a change in pharmacist-in-charge of a pharmacy; and

(iii) reports of a fire or other disaster which may affect the strength, purity, or labeling of drugs, medications, devices, or other materials used in the diagnosis or treatment of injury, illness, and disease.

(6) Permission to maintain central records. Any pharmacy that uses a centralized recordkeeping system for invoices and financial data shall comply with the following procedures.

(A) Controlled substance records. Invoices and financial data for controlled substances may be maintained at a central location provided the following conditions are met.

(i) Prior to the initiation of central recordkeeping, the pharmacy submits written notification by registered or certified mail to the divisional director of the Drug Enforcement Administration as required by the Code of Federal Regulations, Title 21, §1304(a), and submits a copy of this written notification to the Texas State Board of Pharmacy. Unless the registrant is informed by the divisional director of the Drug Enforcement Administration that permission to keep central records is denied, the pharmacy may maintain central records commencing 14 days after receipt of notification by the divisional director.

(ii) The pharmacy maintains a copy of the notification required in this subparagraph.

(iii) The records to be maintained at the central record location shall not include executed DEA order forms, prescription drug orders, or controlled substance inventories, which shall be maintained at the pharmacy.

(B) Dangerous drug records. Invoices and financial data for dangerous drugs may be maintained at a central location.

(C) Access to records. If the records are kept on microfilm, computer media, or in any form requiring special equipment to render the records easily readable, the pharmacy shall provide access to such equipment with the records.

(D) Delivery of records. The pharmacy agrees to deliver all or any part of such records to the pharmacy location within two business days of written request of a board agent or any other authorized official.

(7) Confidentiality.

(A) A pharmacist shall provide adequate security of prescription drug orders, medication orders, and patient medication records to prevent indiscriminate or unauthorized access to confidential health information.

(B) Confidential records are privileged and may be released only to:

(i) the patient or the patient's agent;

(ii) a practitioner or another pharmacist if, in the pharmacist's professional judgement, the release is necessary to protect the patient's health and well being;

(iii) the board or to a person or another state or federal agency authorized by law to receive the confidential record;

(iv) a law enforcement agency engaged in investigation of a suspected violation of Chapter 481 or 483, Health and Safety Code, or the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. Section 801 et seq.);

(v) a person employed by a state agency that licenses a practitioner, if the person is performing the person's official duties; or

(vi) an insurance carrier or other third party payor authorized by a patient to receive such information.

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 May 17, 2004.

TRD-200403304
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: June 6, 2004
Proposal publication date: March 26, 2004
For further information, please call: (512) 305-8028

SUBCHAPTER F. NON-RESIDENT PHARMACY (CLASS E)

22 TAC §291.104

The Texas State Board of Pharmacy (TSBP) adopts amendments to §291.104, concerning Operational Standards in a Class E (Non-Resident) Pharmacy. The amendments are adopted without changes to the proposed text as published in the March 26, 2004, issue of the *Texas Register* (29 TexReg 3094).

The adopted amendment specifies that Class E Pharmacies must comply with the provisions of new §291.25 and/or §291.26 if they compound non-sterile and/or sterile pharmaceuticals and dispense those products to patients in Texas. New §291.25 and §291.26 outline operating standards for pharmacies that compound non-sterile and sterile pharmaceuticals, implement the recommendations of the TSBP appointed Task Force on Compounding (Task Force), and incorporate many of the provisions included in the United States Pharmacopeia (USP) new General Chapter 795 (Pharmaceutical Compounding Non-sterile Preparations) and General Chapter 797 (Pharmaceutical Compounding Sterile Preparations).

No comments were received regarding the amendments.

The amendments are adopted under §§551.002, 551.003, 554.001, and 554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §551.003(9) as authorizing the agency to adopt rules concerning the compounding of prescriptions. The Board interprets §551.003(33) as authorizing the agency to adopt rules concerning the practice of pharmacy. The Board interprets §554.001(a) as authorizing the agency to adopt rules to administer and enforce the Act and rules adopted under the Act as well as enforce other laws relating to the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §554.051(b) as authorizing the agency to adopt rules concerning the operation of a licensed pharmacy located in this state applicable to a pharmacy licensed by the board that is located in another state, if the board determines the rule is necessary to protect the health and welfare of the citizens of this state.

The statutes affected by this amendments: Chapters 551 - 566 and 568 - 569, Texas Occupations 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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Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

22 TAC §291.105

The Texas State Board of Pharmacy adopts amendments to §291.105, concerning Records in a Non-resident Pharmacy (Class E). The amendments are adopted without changes to the proposed text as published in the March 26, 2004, issue of the *Texas Register* (29 TexReg 3096).

The adopted amendments clarify requirements for the electronic transmission of prescriptions.

No comments were received regarding the amendments.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §554.051(b) as authorizing the agency to make a rule concerning the operation of a licensed pharmacy located in this state applicable to a pharmacy licensed by the board that is located in another state, if the board determines the rule is necessary to protect the health and welfare of the citizens of this state.

The statutes affected by the amendments: Chapters 551 - 566, and 568 - 569, Texas Occupations 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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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER D. FIRE AND ALLIED LINES INSURANCE

DIVISION 8. UNDERSERVED AREAS FOR RESIDENTIAL PROPERTY INSURANCE

28 TAC §5.3702

The Commissioner of Insurance adopts new §5.3702, concerning the designation of geographic areas as underserved for residential property insurance for purposes of the Insurance Code, Article 5.13-2C. The new section is adopted with changes to the proposed text as published in the March 19, 2004, issue of the *Texas Register* (29 TexReg 2846).

The new section is necessary to designate the areas determined by the Commissioner of Insurance to be underserved areas for purposes of Article 5.13-2C which provides exemptions from certain rate filing and approval requirements for certain insurers. The section identifies the factors and the methodology used in determining the areas to be underserved. Article 5.35-3, which is referenced in Article 5.13-2C §2(a)(2), provides that in determining which areas will be designated as underserved, the Commissioner shall consider whether residential property insurance is not reasonably available to a substantial number of owners of insurable residential property in the underserved area and any other relevant factors as determined by the Commissioner. Upon the determination of such areas, an insurer authorized to write property or casualty insurance in this state and writing residential property insurance in this state, will be evaluated in accordance with the criteria established in Article 5.13-2C as to whether or not it qualifies for an exemption from the rate filing and approval requirements of Articles 5.142 and 5.13-2. Because there is no single comprehensive measure to determine whether residential property insurance is or is not reasonably available to a substantial number of owners of insurable property either on a statewide basis or in any particular area of the state, the department has identified characteristics of particular geographic areas which are likely to be associated with greater difficulty by consumers in obtaining residential property insurance. In determining whether to designate an area as underserved, great weight was placed on the potential for residential property insurance not being reasonably available to a substantial number of owners of insurable property in that area. The department considered geographic factors based on two types of weather-related loss exposure underwriting restrictions used by insurers writing residential property insurance in Texas that limit the availability of residential property insurance coverages to a greater extent in some geographic areas than in others. The first type of weather-related loss exposure concerns the potential for catastrophic hurricanes and other types of windstorms in the counties that border the Gulf of Mexico and the inability of residents to obtain windstorm and hail insurance through the voluntary market in these areas. The Texas Windstorm Insurance Association (TWIA) was formed by the legislative enactment of Article 21.49 because windstorm and hail insurance was not reasonably available to a substantial number of owners of insurable property in the coastal counties. The department believes that the areas where windstorm and hail insurance is not reasonably available include both First Tier Coastal Counties (Tier 1) and Second Tier Coastal Counties (Tier 2) as defined in Article 21.49 §3 (l) and (m). The owners of insurable property in the Tier 1 and Tier 2 counties have a significantly greater difficulty in obtaining windstorm and hail insurance in the voluntary market than those property owners who reside outside of these areas. For these reasons, the location of a ZIP Code in the geographic areas that comprise the Tier 1 and Tier 2 coastal counties are considered a factor in determining whether an area is underserved for purposes of Article 5.13-2C. A second geographic area that has historically been affected by weather-related loss exposure underwriting factors is Dallas and Tarrant counties. Due to the frequency and severity of hail storms and the ensuing large losses in these counties, insurers have restricted their writing of residential property insurance and have limited the availability of certain property insurance coverages in these counties. Based on this lack of availability of residential property insurance to a substantial number of owners of insurable property in Dallas and Tarrant counties, the location of a ZIP Code in these counties is considered a factor in determining whether an area is underserved for purposes of Article 5.13-2C. ZIP Codes which are located in Tier 1, Tier 2, Dallas, or Tarrant counties are assigned five points. Additionally, the department utilized census data compiled for the year 2000 to identify certain demographic factors that have historically been correlated with the limited availability of residential property insurance. The factors to be considered are: low median household income (geographic areas with median household incomes of $36,000 or less), low median home value (geographic areas with the median value of owner-occupied dwellings of $75,000 or less), median year the house was constructed (geographic areas that contain dwellings with a median year built of 1974 or earlier), and a high percentage of uninsured households for residential property insurance (geographic areas where the percent of insured households is less than 50%). If the demographic factor for a specific ZIP Code indicates actual or potential difficulty for consumers in obtaining residential property insurance, the ZIP Code is assigned one point. If a ZIP Code does not receive at least one point it will receive zero points for the specific factor. Additionally, the department has identified a factor that correlates the market share of a set of insurer groups with the availability of residential property insurance. The department examined data reported by insurers pursuant to the Texas Statistical Plan for Residential Risks and determined the insurer groups that cumulatively write at least 90% of the residential property insurance policies that are in force in Texas. The department then analyzed data for each of the individual geographic ZIP Codes (excluding

single point ZIP Codes) and calculated the percent of policies in force that are being written by the same insurer groups that write 90% of the policies in force on a state wide basis. If an individual ZIP Code's cumulative market share calculation shows that the insurer groups that write 90% of the policies in force state wide are writing less than 90% of the policies in force in a particular ZIP Code, then this Zip Code receives one point. Further, if an individual ZIP Code's cumulative market share calculation shows that the insurer groups that write 90% of the policies in force state wide are writing 90% or more of the policies in force in a particular ZIP Code, then this Zip Code receives zero points. Geographic factors based upon the established lack of availability of certain types of residential property insurance in Tier 1 and Tier 2 counties and in Dallas and Tarrant counties and demographic factors and a market share factor that are correlated with the limited availability of residential property insurance were analyzed by ZIP Code area or county, and points were assigned to each of the factors. Based on the factors that were found to be present in each ZIP Code the points assigned to each factor were totaled for each ZIP Code. Areas with five or more points were identified as underserved or potentially underserved and designated as underserved areas. Generally, to be underserved a ZIP Code can meet any one of the geographic based criteria or it must meet all four of the demographic based criteria and the market share criteria. The department made changes to the rule based on comments. Subsection (a) was amended to add new paragraph (3) that lists as a purpose of the rule to provide a procedure that requires insurers to certify eligibility for the exemption provided by Article 5.13-2C. The department amended subsection (c), which lists the Zip Codes that are designated as underserved areas, to add all of the additional Zip Codes in Harris county that had been inadvertently omitted. In the proposal, staff had only included the Zip Codes in Harris county that were in designated catastrophe areas. However, since Harris county is classified as a Tier 2 county all of the Zip Codes in Harris county have been included. The department added new subsection (e) that requires insurers to certify their compliance with the requirements of Article 5.13-2C and their eligibility for the exemption and provides a form that insurers may use for this certification. The revisions to the rule based on the comments do not introduce new subject matter or affect new persons.

Subsection (a) specifies the purpose of the section is to designate the areas determined by the Commissioner to be underserved areas for purposes of Article 5.13-2C, identify the factors and methodology used in determining the underserved areas, and provide a procedure that requires insurers to certify eligibility for the exemption provided by Article 5.13-2C. Subsection (b) defines terms used in the section. Subsection (c) lists the ZIP Codes that are designated as underserved areas for purposes of Article 5.13-2C. Subsection (d) outlines the factors and methodology that are used in determining which areas should be designated as underserved. These factors include geographic factors based on two types of weather-related loss exposure underwriting restrictions including being located in Tier 1 or Tier 2 coastal counties or being located in Dallas or Tarrant counties; demographic factors including low median household income (geographic areas with median household incomes of $36,000 or less), low median home value (geographic areas with the median value of owner-occupied dwellings of $75,000 or less), median year the house was constructed (geographic areas that contain dwellings with a median year built of 1974 or earlier), and high percentage of uninsured households for residential property insurance (geographic areas where the percent of insured households is less than 50%); and a factor that correlates the market share of a set of insurer groups with the availability of residential property insurance. New subsection (e) outlines a procedure and provides a form for an insurer to certify that it meets the standards and requirements set forth in Article 5.13-2C, and is thereby exempt from any rate filing and approvals that would be otherwise required by either Article 5.142 or Article 5.13-2 of the Insurance Code.

Comment: One commenter stated that the list of Zip Codes in subsection (c) did not contain all of the Zip Codes in Harris county which is a Tier 2 county and that some Zip Codes in Dallas and Tarrant counties were not included.

Agency response: With respect to Harris county, the department has amended subsection (c), which lists the Zip Codes that are designated as underserved areas, to add all of the additional Zip Codes in Harris county that had been inadvertently omitted. In the proposal, staff had only included the Zip Codes in Harris county that were in designated catastrophe areas. However, since Harris county is designated in Article 21.49 §3(m) as a Tier 2 county all of the Zip Codes in Harris county have been included. With respect to Dallas and Tarrant counties, the Zip Codes that the commenter alleged to be omitted were found to be "mailing Zip Codes." The rule utilizes geographic Zip Codes since the Census Bureau only reports demographic data for geographic ZIP Codes. A geographic ZIP Code is a statistical geographic entity that approximates the delivery area for a U.S. Postal Service five-digit ZIP Code and is an aggregation of census blocks that have the same predominant ZIP Code associated with the residential mailing addresses in the Census Bureau's master address file for census data compiled for the year 2000. The data that is reported for a mailing Zip Code is included in the data for the geographic Zip Code in which the mailing Zip Code is located. Therefore, the mailing Zip Codes have not been included in the rule since the data for such Zip Codes has already been included in the geographic Zip Code data.

Comment: One commenter believes that the rule should provide a mechanism by which those insurers that qualify for the exemption may demonstrate to the department their qualification and entitlement to the exemption. The commenter proposed an amendment to the rule that would require an annual certification by an exempt insurer to the department demonstrating that it meets the standards and requirements set forth in Article 5.13-2C. The commenter further believes that the department should promulgate a certification form for insurers to file this information with the department on an annual basis if they desire to apply for an exemption from rate filing and approvals.

Agency response: The department agrees that a mechanism should be provided to insurers to demonstrate their entitlement to the exemption and has added new subsection (e)(A) which requires the insurer to certify to its eligibility for the exemption when a rate filing would otherwise be required. The Department will review insurers' certifications in accordance with the provisions of Article 5.13-2C. Additionally, in new subsection (e)(B) the department has provided a form for use by insurers to certify their compliance with the requirements of Article 5.13-2C and their entitlement to the exemption but insurers may submit their own forms provided the insurer's form contains all of the required information.

Comment: One commenter believes that each of the demographic factors should not have equal weight but believes that it would be more appropriate to give greater weight to the market share factor and percent of insured households factor since these measures appear to more directly reflect the underlying

availability of insurance in an area than the other demographic factors.

Agency response: At the present time no objective data has been presented to the department to indicate that the market share factor or the percent of insured households factor should be given more weight than the other demographic factors. The department is open to reevaluating the weight given to the various demographic factors in the future if new data is presented that indicates the weighting of the factors should be adjusted.

Comment: One commenter expresses concern that the rule as proposed could encourage small insurers to "over-write" in the high risk coastal areas in their attempt to attain the rate filing exemption. The commenter believes that if a large storm hits the coast, the over exposure in the coastal areas could lead to the insolvency of the smaller insurers and a dissipation of the guaranty fund. Additionally, the commenter believes that the anticipated overexposure of small insurers which the commenter contends might lead to insolvencies outweighs the intended benefit of the rate filing exemption which is to stimulate the writing of residential property insurance policies in the underserved areas. The commenter further recommends removing the geographic factors based on weather-related loss exposure underwriting restrictions; however, if the geographic factors are retained, then the commenter recommends that reinsurance and surplus requirements be included in the rule to address the risk of insolvency.

Agency response: Staff believes that the small insurers would not "over-write" in the coastal areas because they would not have any greater incentive to write in the coastal Zip Codes than in the Zip Codes which are designated as underserved due to demographic or market share factors; hence, there is no reason to eliminate the geographic factors. Furthermore, recent trends in the coastal areas show that insurers in general are reducing their book of business in the coastal areas and requiring Texas Windstorm Insurance Association (TWIA) to insure the risks that are being non-renewed. The statistical data reported by TWIA shows that during the last two and a half years the liability exposure of TWIA has increased an average of 17% per year which indicates that the trend for all insurers including Lloyd's insurers is to reduce their writing of business in the high risk coastal areas. Additionally, Lloyd's insurers have not had to make rate filings until the recent requirements for rate filings were imposed in 2003 under SB 14 and Lloyd's insurers had not exhibited any tendency during this long period of rate deregulation to "over-write" in the high risk coastal areas. The department does not believe that reinsurance and surplus requirements are needed in the rule because there are currently adequate mechanisms in place to monitor the financial condition of insurers including financial examinations and early warning indicators that the department will utilize to attempt to prevent insolvencies from occurring.

Comment: One commenter believes that designating the coastal and Dallas/Tarrant county areas as underserved will not create more capacity in these areas and will not address anything MAP, FAIR, and TWIA are not already addressing. Additionally, the commenter believes that the department's experience with the small number of applicants in the residential property MAP program indicates that the underlying reason for the existence of underserved areas is not the lack of availability of insurance in these areas. The commenter further believes that the department's experience with the FAIR Plan and the rapid increase in the number of policyholders in the FAIR Plan indicates that the underlying reason for the existence of underserved areas is the lack of affordability.

Agency response: The purpose of the rule is to designate areas as underserved to encourage more small insurers to write residential property policies for property valued at less than $100,000 in these underserved areas thereby reducing the growth in the residual insurance markets.

Comment: One commenter believes that the demographic factors are more appropriate than the geographic factors for determining the underserved areas and requests that data be provided so that the insurers and public can determine whether the measurements are fair.

Agency response: The data for median household income, median home values, and median year built are all available from the Census Bureau in the data compiled for the year 2000. The percent of households insured can be computed by combining the census data for the number of households in a ZIP Code with the data from the Texas Statistical Plan for Residential Risks.

Comment: One commenter expresses concern that there is no provision for reassessing the qualification by an insurer for the exemption or for reassessing whether a ZIP Code continues to qualify as an underserved area and believes that this could lead to abuse by an insurer manipulating its book of business to qualify for the exemption and then to stop writing in the underserved areas or the types of home specified in Article 5.13-2C.

Agency response: The department has added new subsection (e)(A) which requires insurers to certify their eligibility for the exemption whenever a rate filing would otherwise be required. The department will review insurers' certifications in accordance with the provisions of Article 5.13-2C. Although the exemption does relieve insurers from the requirement of making rate filings, it does not exempt insurers from complying with the rate standards set out in Article 1.02. Based on a periodic review, any changes in designations of ZIP Codes as underserved areas may be adopted at any time by amending the section pursuant to the Government Code §§2001.004-2001.038 (Administrative Procedure Act).

Comment: One commenter recommends adding a provision that limits the rate filing exemption to only those rates used for the underserved areas.

Agency response: The statutory exemption in Article 5.13-2C states "an insurer…is exempt from the rate filing and approval requirements of Article 5.142 and Article 5.13-2 of this code." The department does not believe that the statutory exemption makes a distinction that allows an exemption from rate filings pertaining only to the underserved areas. If an insurer qualifies for an exemption under Article 5.13-2C then it would be exempt from rate filings with respect to the entire state.

Comment: Commenter recommends that a provision be added to clarify that despite the exemption from rate filing other laws including rate standards, credit scoring restrictions, territorial restrictions, and discrimination provisions still apply.

Agency response: The department does not believe that such a provision would be necessary because Article 5.13-2C only provides an exemption from rate filing and approval requirements of Article 5.142 and Article 5.13-2 and it is clear that insurers could not claim an exemption from other statutory requirements.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTION.

For with changes: National Lloyds Insurance Company, Insurance Council of Texas, and Office of Public Insurance Counsel.

The new section is adopted pursuant to the Insurance Code, Articles 5.13-2C, 5.35-3 and §36.001. The Insurance Code Article 5.13-2C provides that an insurer may be exempt from the rate filing and approval requirements of Articles 5.142 and 5.13-2 if the total amount of premium collected for residential property insurance by an insurer is less than 2% of the total premium for the state and if more than 50% of the policies issued in the state are valued at less than $100,000 and are located in an underserved area for residential property insurance under Article 5.35-3. Article 5.35-3, §1(a) provides that by rule the Commissioner may determine and designate areas as underserved areas for residential property insurance. Section 36.001 of the Insurance Code 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.

§5.3702. Designation of Underserved Areas for Residential Property Insurance for Purposes of the Insurance Code Article 5.13-2C

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

(1) designate the areas determined by the Commissioner of Insurance to be underserved areas for purposes of residential property insurance pursuant to the Insurance Code Article 5.13-2C;

(2) identify the factors and methodology used in determining such underserved areas, and

(3) provide a procedure that requires insurers to certify their eligibility for the exemption provided by Article 5.13-2C.

(b) Definitions. The following words and terms when used in this section shall have the following meanings unless the context clearly indicates otherwise.

(1) Underserved area--An area determined and designated in this section as an underserved area by the Commissioner of Insurance for purposes of an exemption from rate filings and approval requirements for certain insurers pursuant to the Insurance Code Article 5.13-2C.

(2) Commissioner--Commissioner of Insurance.

(3) Department--Texas Department of Insurance.

(4) Market share--the number of residential property insurance policies that an individual insurer has in force expressed as a percentage of the total number of residential property insurance policies in force in a defined geographic area (i.e. state wide or in a specific ZIP Code).

(c) Underserved areas. The ZIP Codes in Figure 28 TAC §5.3702(c) are designated as underserved areas pursuant to the Insurance Code Article 5.13-2C, effective May 13, 2004:
Figure: 28 TAC §5.3702(c)

(d) Factors and methodology. In determining the areas designated as underserved, the Commissioner shall consider whether residential property insurance is not reasonably available to a substantial number of owners of insurable residential property in a specific geographic area and any other relevant factors as determined by the Commissioner. The determination of the areas to be designated as underserved is based on the factors and methodology outlined in this subsection.

(1) There is no single comprehensive measure of whether residential property insurance is or is not reasonably available or is or is not potentially reasonably available to a substantial number of owners of insurable property either on a statewide basis or in any particular area of the state. The Commissioner has identified characteristics of particular geographic areas which are likely to be associated with greater difficulty by consumers in obtaining residential property insurance.

(2) Geographic factors based on weather-related loss exposure and the resulting underwriting restrictions used by insurers writing residential property insurance in Texas that would limit the availability of residential property insurance coverages to a greater extent in some geographic areas than in others are as follows:

(A) Tier 1 and Tier 2 coastal counties. One type of weather-related loss exposure concerns the potential for catastrophic hurricanes and other types of windstorms in the First Tier Coastal Counties (Tier 1) and Second Tier Coastal Counties (Tier 2), as defined in Article 21.49 §3 (l) and (m), and the inability of residents to obtain windstorm and hail insurance through the voluntary market in these areas. The Commissioner has determined that the location of a ZIP Code in the geographic areas that comprise the Tier 1 and Tier 2 coastal counties is a factor to be used in determining whether an area is an underserved area for purposes of Article 5.13-2C. ZIP Codes located along the coast, Tiers 1 and 2, are assigned five points.

(B) Dallas and Tarrant Counties. A second geographic area that has historically been affected by weather-related loss exposure underwriting factors is Dallas and Tarrant counties. Due to the frequency and severity of hail storms and the ensuing claims in these counties, insurers have restricted their writing of residential property insurance and have limited the availability of certain property insurance coverages in these counties. Based on this lack of availability of residential property insurance to a substantial number of owners of insurable property in Dallas and Tarrant counties, the Commissioner has determined that the location of a ZIP Code in these counties be considered a factor in determining whether an area is underserved for purposes of Article 5.13-2C. ZIP Codes located in Dallas or Tarrant counties, are assigned five points.

(3) The specific demographic factors and the points assigned are as follows:

(A) ZIP Codes with median household incomes of $36,000 or less are assigned one point.

(B) ZIP Codes with median value of owner-occupied dwellings of $75,000 or less are assigned one point.

(C) ZIP Codes with a median year built of 1974 or earlier are assigned one point.

(D) ZIP Codes with percentages of insured households of less than 50% are assigned one point.

(4) Market share of a set of insurer groups is a factor that correlates with the availability of residential property insurance. The department examined data reported by insurers pursuant to the Texas Statistical Plan for Residential Risks and determined the insurer groups that account for at least 90% of the cumulative market share of residential property insurance policies written on a state wide basis. The department then analyzed data for each of the geographic ZIP Codes in Texas (excluding single point ZIP Codes) and calculated the cumulative market share written by the same insurer groups for each of the individual ZIP Codes. The cumulative market share for each individual ZIP Code was then compared to the state wide cumulative market share of 90%. If the cumulative market share for an individual ZIP Code is less than 90%, then this ZIP Code will receive one point.

(5) Based on the factors and points specified in paragraphs (2), (3), and (4) of this subsection, the number of points assigned were totaled by ZIP Code. Areas with five or more points were identified as underserved or potentially underserved and generally designated as underserved areas in subsection (c) of this section. To be underserved a ZIP Code can meet any one of the geographic based criteria or it must meet all four of the demographic based criteria and the market share criteria.

(e) Required certification of exemption to the Department.

(1) An insurer that may be entitled to the exemption from the insurance rate filing and approval requirements of Article 5.142 or Article 5.13-2 of the Insurance Code, pursuant to the provisions of Article 5.13-2C of the Insurance Code, shall file with the Department a Certification of Article 5.13-2C Exemption Compliance (EC-1) form at least ten days preceding the date an insurance rate filing would be otherwise required by the insurer under Article 5.142 or Article 5.13-2.

(2) The Certification of Article 5.13-2C Exemption Compliance (EC-1) form is provided by the Department for use by insurers seeking an exemption from rate filing and approval requirements pursuant to Article 5.13-2C. This form may be obtained from the Texas Department of Insurance website http:/www.tdi.state.tx.us or by requesting such form from the Property and Casualty Actuarial Division, Mail Code 105-5, P.O. Box 149104, Austin, TX 78714-9104. For purposes of this section, in lieu of submitting a form provided by the department, an insurer may submit to the department the insurer's own form if the form contains the same information that is required and contained in the form provided by the department. All Application for Article 5.13-2 Exemption forms must be submitted to the Texas Department of Insurance, Property and Casualty Intake Unit, Mail Code 104-3B, P.O. Box 149104, Austin, TX 78714-9104.

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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Gene C. Jarmon
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CHAPTER 34. STATE FIRE MARSHAL

The Commissioner of Insurance adopts amendments to §§34.506, 34.515 and 34.516 concerning the licensing and qualifying tests for Type A, Type B and Type PL licenses; §§34.606 and 34.613 - 34.615 concerning the licensing and qualifying tests for fire alarm technicians, fire alarm monitoring technicians, residential fire alarm superintendent single stations, fire alarm planning superintendent and residential fire alarm superintendents; §§34.706 and 34.713 - 34.715 concerning the licensing and qualifying tests for responsible managing employees; and §§34.808, 34.811, 34.813, and 34.814 concerning the licensing and qualifying tests for pyrotechnic operators, pyrotechnic special effects operators and flame effects operators. Sections 34.614 and 34.713 are adopted with one typographical change and a clarification that renewal fees must accompany renewal applications, respectively, to the proposed text as published in the April 2, 2004 issue of the *Texas Register* (29 TexReg 3407). Sections 34.506, 34.515, 34.516, 34.606, 34.613, 34.615, 34.706, 34.714, 34.715, 34.808, 34.811, 34.813 and 34.814 are adopted without changes and will not be republished.

The adoption is designed to implement legislation enacted by the 78th Legislature in House Bill (HB) 472. HB 472 amends Articles 5.43-1, 5.43-2 and 5.43-3, Insurance Code, by allowing the state fire marshal to increase the initial fee for certain licenses and to provide for the testing of certain license applicants by an external testing service, pursuant to a written agreement between the State Fire Marshal's Office (SFMO) and the testing service. HB 472 also amends Chapter 2154, Occupations Code, by requiring the state fire marshal to establish the scope and type of the qualifying tests for pyrotechnic operator and pyrotechnic special effects operator licenses and to permit the testing to be administered directly or by agreement with an external testing service. The amendments are necessary to establish the outsourcing of testing for certain licenses and clarify certain portions of the rules.

The adopted amendments replace "examination" with "test" throughout the sections to more clearly explain the licensing process and capitalizes "State Fire Marshal's Office" for consistency.

The adopted amendments add a definition for outsource testing service to §§34.506, 34.606, 34.706, and 34.808, a definition for department to §§34.706 and 34.808 and re-letter the remaining definitions of all the above cited sections as appropriate. The amendments to §§34.515, 34.614, 34.714, and 34.814 increase the fees for initial licenses and late fees, provide for the payment of fees to an outsource testing service, and replace all fee schedule graphics with text. The amendments to §§34.614 and 34.714 make these sections consistent with other provisions by providing that only overpayments resulting from mistakes of law or fact will be refunded. The amendments to §34.516 state that the SFMO shall designate the outsource testing service, clarify that one test may be given per license, the test consists of specific topics, and place a limit on the number of times a test may be scheduled during a twelve-month period.

The amendments to §34.613 change the wording of certain paragraphs indicating that the SFMO designates the qualifying tests and clarify that an applicant has 180 days from the department's receipt of the initial application to complete the application, which includes the submission of the appropriate fees and all required information. The amendments to §34.614 clarify the qualifying test fees if administered by the SFMO. The amendments to §34.615 provide that the qualifying test for the various fire alarm licenses can be given by an outsource testing service.

The amendments to §34.713 provide that the qualifying test for a responsible managing employee for dwelling and underground fire main licenses can be given by an outsource testing service and a copy of the confirmation letter from the testing service must accompany the application as evidence of technical qualifications for the license. Additionally, the amendments clarify that an applicant has 180 days from the department's receipt of the initial application to complete the application, which includes the submission of the appropriate fees and all required information. The amendments to §34.714 clarify the qualifying test fees if administered by the SFMO. The amendment to §34.715 sets out the number of times an applicant may schedule a test.

The amendments to §34.811 clarify the licensing process and set out the number of times a test may be scheduled. The amendments to §34.813 clarify that an applicant has 180 days from the department's receipt of the initial application to complete the application, which includes the submission of the appropriate fees and all required information. The amendments to §34.814 provide that the qualifying test for pyrotechnic operator, pyrotechnic special effects operator and flame effects operator licenses can be given by an outsource testing service. Additionally, the amendments to §34.814 set forth the payment amount for the various pyrotechnic and flame effects licenses as well as the qualifying test fees if administered by the SFMO.

No comments were received.

SUBCHAPTER E. FIRE EXTINGUISHER RULES

28 TAC §§34.506, 34.515, 34.516

The amended sections are adopted pursuant to the Insurance Code Articles 5.43-1, 5.43-2 and 5.43-3, Occupations Code §2154.052 and the Insurance Code §36.001. Insurance Code Articles 5.43-1, 5.43-2 and 5.43-3 mandate the adoption of rules necessary to implement the requirements of these articles. Occupations Code §2154.052 allows the commissioner to adopt and the fire marshal to administer rules that the commissioner considers necessary for the protection, safety, and preservation of life and property, including rules regulating the issuance of licenses and permits. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the 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 F. FIRE ALARM RULES

28 TAC §§34.606, 34.613 - 34.615

The amended sections are adopted pursuant to the Insurance Code Articles 5.43-1, 5.43-2 and 5.43-3, Occupations Code §2154.052 and the Insurance Code §36.001. Insurance Code Articles 5.43-1, 5.43-2 and 5.43-3 mandate the adoption of rules necessary to implement the requirements of these articles. Occupations Code §2154.052 allows the commissioner to adopt and the fire marshal to administer rules that the commissioner considers necessary for the protection, safety, and preservation of life and property, including rules regulating the issuance of licenses and permits. 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.

§34.614. Fees.

(a) Every fee payable to the department and required in accordance with the provisions of the Insurance Code, Article 5.43-2, and this subchapter must be paid by cash, money order, or check. Money orders and checks must be made payable to the Texas Department of Insurance. Except for overpayments resulting from mistakes of law or fact, all fees are non-refundable.

(b) Fees payable to the department must be paid at the Office of the State Fire Marshal in Austin, Texas, or mailed to an addressed specified by the state fire marshal.

(c) Fees for tests administered by an outsource testing service are payable to the testing service in the amount and manner required by the testing service.

(d) Fees are as follows:

(1) Certificates of registration:

(A) initial fee--$500;

(B) renewal fee (for two years)--$1,000;

(C) renewal late fee (expired 1 day to 90 days)--$125;

(D) renewal late fee (expired 91 days to two years)--$500;

(E) branch office initial fee--$150;

(F) branch office renewal fee (for two years)--$300;

(G) branch office late fee (expired 1 day to 90 days)--$37.50;

(H) branch office late fee (expired 91 days to two years)--$150;

(2) Certificates of registration--Single Station:

(A) initial fee--$250;

(B) renewal fee (for two years)--$500;

(C) renewal late fee (expired 1 day to 90 days)--$62.50;

(D) renewal late fee (expired 91 days to two years)--$250;

(E) branch office initial fee--None;

(F) branch office renewal fee (for two years)--None;

(3) Fire alarm licenses (Fire alarm technician license, Fire alarm monitoring technician license, Residential fire alarm superintendent (single station) license, Residential fire alarm superintendent license, Fire alarm planning superintendent license):

(A) initial fee--$120;

(B) renewal fee (for two years)--$200;

(C) renewal late fee (expired 1 day to 90 days)--$30;

(D) renewal late fee (expired 91 days to two years)--$120;

(4) Duplicate or revised certificate or license or other requested changes to certificates, or licenses--$20;

(5) Initial test fee (if administered by the State Fire Marshal's Office)--$20;

(6) Retest fee (if administered by the State Fire Marshal's Office)--$20.

(e) All fees are forfeited if the applicant does not appear for the scheduled test.

(f) Late fees are required of all certificate or license holders who fail to submit complete renewal applications before the expiration of the certificate or license except as provided in the Insurance Code, Article 5.43-2, §5C(c).

(g) Fees for certificates and licenses which have been expired for less than two years include both renewal and late fees.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER G. FIRE SPRINKLER RULES

28 TAC §§34.706, 34.713 - 34.715

The amended sections are adopted pursuant to the Insurance Code Articles 5.43-1, 5.43-2 and 5.43-3, Occupations Code §2154.052 and the Insurance Code §36.001. Insurance Code Articles 5.43-1, 5.43-2 and 5.43-3 mandate the adoption of rules necessary to implement the requirements of these articles. Occupations Code §2154.052 allows the commissioner to adopt and the fire marshal to administer rules that the commissioner considers necessary for the protection, safety, and preservation of life and property, including rules regulating the issuance of licenses and permits. 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.

§34.713. Applications.

(a) Certificates of registration.

(1) Applications for certificates must be submitted on forms provided by the state fire marshal and must be accompanied by all other information required by the Insurance Code, Article 5.43-3, and this subchapter. An application will not be deemed complete until all required forms and documents have been received in the state fire marshal's office.

(2) Applications shall be signed by the sole proprietor, or by each partner of a partnership, or by an officer of a corporation. For corporations, the application must be accompanied by the corporate charter of a Texas corporation, or, in the case of a foreign corporation, a copy of the Texas certificate of authority to do business. For applicants using an assumed name, the application must also be accompanied by evidence of compliance with the Assumed Business or Professional Name Act, Texas Business and Commerce Code Annotated, §36.01. The application shall also include written authorization by the applicant permitting the state fire marshal or his representative to enter, examine, and inspect any premises, building, room, or establishment used by the applicant while engaged in the business to determine compliance with the provisions of the Insurance Code, Article 5.43-3, and this subchapter.

(3) For corporations, the application must also include the corporate taxpayer identification number, the charter number, and a copy of the corporation's current franchise tax certificate of good standing issued by the state comptroller's office.

(4) An applicant shall not designate as its full-time RME a person who is the designated full-time RME of another registered firm.

(5) A registered firm must not conduct any business as a fire protection sprinkler contractor until a full-time RME is employed.

(6) A certificate of registration may not be renewed unless the firm has at least one licensed RME as a full-time employee before the expiration of the certificate of registration to be renewed. If an applicant for renewal does not have an RME as a full-time employee as a result of death or disassociation of an RME within 30 days preceding the expiration of the certificate of registration, the renewal applicant must inform the license section of the state fire marshal's office of the employment of a full-time RME before the certificate of registration will be renewed.

(7) Insurance required.

(A) The state fire marshal must not issue a certificate of registration under this subchapter unless the applicant files with the state fire marshal's office a proof of liability insurance. The insurance must include products and completed operations coverage.

(B) Each registered firm must maintain in force and on file in the state fire marshal's office the certificate of insurance as required. Failure to do so will be cause for action to suspend the firm's certificate of registration.

(C) Evidence of public liability insurance, as required by the Insurance Code, Article 5.43-3, §5, must be in the form of a certificate of insurance executed by an insurer authorized to do business in this state or, until September 1, 1989, a certificate of insurance for surplus lines coverage in compliance with the Insurance Code, Article 1.14-2, as contemplated under the Insurance Code, Article 5.43-3, §5(b).

(D) If a certificate of registration is to be issued in the name of a corporation, the corporate name must be used on the applicable insurance forms. If the corporation is obtaining a certificate of registration in an assumed name, the insurance must be issued to the corporation doing business as (dba) the assumed name. Example: XYZ Corporation dba XXX Fire Sprinkler Service.

(E) The insurance issued for a partnership must be issued to the name of the partnership or to the names of all the individual partners.

(F) The insurance for a proprietorship must be issued to the individual owner. If an assumed name is used, the insurance must be issued to the individual doing business as (dba) the assumed name. Example: William Jones dba XXX Fire Sprinkler Service.

(b) Responsible managing employee licenses.

(1) Original and renewal applications for a license from an employee of a firm engaged in the business must be submitted on forms provided by the state fire marshal and accompanied by all other information required by the Insurance Code, Article 5.43-3, and this chapter.

(2) The following documents must accompany the application as evidence of technical qualifications for a license:

(A) RME-General:

(i) proof of current registration in Texas as a professional engineer; or

(ii) a copy of NICET's notification letter confirming the applicant's successful completion of the test requirements for certification at Level III for fire protection automatic sprinkler systems layout.

(B) RME-Dwelling:

(i) proof of current registration in Texas as a professional engineer and evidence of the applicant's successful completion of a course, designated by the State Fire Marshal's Office, on the planning, inspection and installation of an NFPA 13D, dwelling fire protection sprinkler system; or

(ii) a copy of the notification letter confirming at least a 70% grade on the test covering dwelling fire protection sprinkler systems, administered by the State Fire Marshal's Office or an outsource testing service, and either:

(I) proof of license as a "RME-General" and evidence of the applicant's successful completion of a course, designated by the State Fire Marshal's Office, on the planning, inspection and installation of an NFPA 13D, dwelling fire protection sprinkler system; or

(II) evidence of the applicant's successful completion of a course, designated by the State Fire Marshal's Office, on the planning, inspection and installation of an NFPA 13D, dwelling fire protection sprinkler system and a copy of NICET's notification letter confirming the applicant's successful completion of the test requirements for certification at Level II for fire protection automatic sprinkler system layout and evidence of a current Texas master plumber license; or

(III) evidence of the applicant's successful completion of a course, designated by the State Fire Marshal's Office, on the planning, inspection and installation of an NFPA 13D, dwelling fire protection sprinkler system and a copy of NICET's notification letter confirming the applicant's successful completion of the test requirements for certification at Level II for fire protection automatic sprinkler system layout and evidence of current employment by a registered fire sprinkler contractor.

(C) RME-Underground Fire Main:

(i) proof of current registration in Texas as a professional engineer; or

(ii) a copy of the notification letter confirming at least a 70% grade on the test covering underground fire mains for fire protection sprinkler systems, administered by the State Fire Marshal's Office or an outsource testing service.

(c) Complete applications. The application form for a license or registration must be accompanied by the required fee and must, within 180 days of receipt by the department of the initial application, be complete and accompanied by all other information required by the Insurance Code Article 5.43-3 and this subchapter, or a new application must be submitted including all applicable fees.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gene C. Jarmon
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SUBCHAPTER H. STORAGE AND SALE OF FIREWORKS

28 TAC §§34.808, 34.811, 34.813, 34.814

The amended sections are adopted pursuant to the Insurance Code Articles 5.43-1, 5.43-2 and 5.43-3, Occupations Code §2154.052 and the Insurance Code §36.001. Insurance Code Articles 5.43-1, 5.43-2 and 5.43-3 mandate the adoption of rules necessary to implement the requirements of these articles. Occupations Code §2154.052 allows the commissioner to adopt and the fire marshal to administer rules that the commissioner considers necessary for the protection, safety, and preservation of life and property, including rules regulating the issuance of licenses and permits. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 294. GROUNDWATER MANAGEMENT AREAS

The Texas Commission on Environmental Quality (commission) adopts the repeal of §§294.1 - 294.4, 294.10 - 294.12, and 294.60 - 294.63. Sections 294.1 - 294.4, 294.10 - 294.12, and 294.60 - 294.63 are adopted *without changes* as published in the November 21, 2003 issue of the *Texas Register* (28 TexReg 10423).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED REPEALS

Senate Bill 2, §2.22, 77th Legislature, 2001, transferred the authority to designate groundwater management areas from the commission to the Texas Water Development Board (TWDB).

Texas Water Code (TWC), §35.004, provides that the TWDB shall designate all the management areas in the state by September 1, 2003. The TWDB has designated these areas. Three groundwater management areas were designated by the commission under TWC, Chapter 52 and one management area was designated under TWC, Chapter 35, which was renumbered from former Chapter 52. The commission adopts the repeal of these groundwater management areas because they are no longer valid and to avoid confusion with the TWDB groundwater management area designations.

SECTION BY SECTION DISCUSSION

Chapter 294 has been renamed to "Priority Groundwater Management Areas" to accurately reflect the content of the chapter.

Subchapters A, B, and F are repealed because the authority to designate groundwater management areas was transferred to the TWDB. Subchapter A, Carrizo-Wilcox Aquifer, contains §294.1, Definitions; §294.2, Designation of Management Area 3 of the Carrizo-Wilcox Aquifer; §294.3, Designation of Management Area 4 of the Carrizo-Wilcox Aquifer; and §294.4, Description of Boundaries. Subchapter B, Antlers Sand Aquifer, contains §294.10, Definitions; §294.11, Designation of Union Hill Underground Water Management Area of the Antlers Sand Aquifer; and §294.12, Description of Boundaries. Subchapter F, East Texas Groundwater Management Area, contains §294.60, Purpose and Scope; §294.61, Definitions; §294.62, Designation of East Texas Groundwater Management Area (ETGMA); and §294.63, Boundaries.

A quadrennial review concurrent to this rulemaking readopts Subchapter D, Priority Groundwater Management Areas and Subchapter E, Designation of Priority Groundwater Management Areas. (Rule Project Number 2003-059-294-WT).

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the criteria for a "major environmental rule" as set out in that statute. The adopted repeal would not meet the definition of major environmental rule because it would not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rulemaking would repeal management area designations made by the commission under repealed law. The TWDB currently designates management areas.

The adopted repeals also do not meet the criteria for a "major environmental rule" as set out in the Texas Government Code, because §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The repeals are adopted under a specific state law, TWC, §35.004, which provides that the TWDB currently designates management areas. The repeals do not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. The repeals do not go beyond specific state and federal law, but implement the law by repealing the TCEQ designated management areas. Therefore, the commission concludes that a regulatory analysis is not required in this instance because the adopted repeals do not meet the definition of major environmental rule and do not trigger any of the four criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission performed an assessment of the adopted rulemaking in accordance with Texas Government Code, §2007.043. The specific purpose of the adopted rulemaking is to repeal management area designations made by the commission based on repealed law. Current law requires the TWDB to create management areas, and the TWDB has done so. The adopted repeals will substantially advance this stated purpose by repealing the management area designations made by the commission. These repeals do not impact real property because groundwater management area designation has no regulatory effect. The commission's assessment indicates that Texas Government Code, Chapter 2007, does not apply to the repeals because this is an action that does not adversely affect real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the adopted rulemaking is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will it affect any action/authorization identified in §505.11. Therefore, the adopted rulemaking is not subject to the Texas Coastal Management Program.

RESPONSE TO COMMENTS

The comment period closed on December 22, 2003. No comments were received.

SUBCHAPTER A. CARRIZO-WILCOX AQUIFER

30 TAC §§294.1 - 294.4

STATUTORY AUTHORITY

The repeals are adopted under TWC, §5.102, which grants the commission the authority to carry out its powers under the TWC; §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; and §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state.

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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Stephanie Bergeron
Director, Environmental Law Division
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SUBCHAPTER B. ANTLERS SAND AQUIFER

30 TAC §§294.10 - 294.12

STATUTORY AUTHORITY

The repeals are adopted under TWC, §5.102, which grants the commission the authority to carry out its powers under the TWC; §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; and §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state.

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 F. EAST TEXAS GROUNDWATER MANAGEMENT AREA

30 TAC §§294.60 - 294.63

STATUTORY AUTHORITY

The repeals are adopted under TWC, §5.102, which grants the commission the authority to carry out its powers under the TWC; §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; and §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state.

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CHAPTER 335. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE

SUBCHAPTER K. HAZARDOUS SUBSTANCE FACILITIES ASSESSMENT AND REMEDIATION

30 TAC §335.347

The Texas Commission on Environmental Quality (commission) adopts the amendment to §335.347 *with change* to the proposed text as published in the December 5, 2003 issue of the *Texas Register* (28 TexReg 10877).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The commission adopts these revisions to Chapter 335 to implement legislation from the 78th Legislature, 2003.

House Bill (HB) 2252 amended Texas Health and Safety Code (THSC), Chapter 361 (also known as the Solid Waste Disposal Act), Subchapter F, Registry and Cleanup of Certain Hazardous Waste Facilities. The legislation required the commission to adopt rules to implement the changes to THSC, §§361.181, 361.194, 361.197, and 361.201. THSC, §361.181(c) was amended to add a definition of "homestead." THSC, §361.194(b) was amended to allow the executive director to consider a landowner's financial ability to satisfy a lien in determining whether to prepare a lien affidavit or whether a lien is satisfied, including whether the landowner received financial compensation for the disposal of the substance addressed by the remedial action and whether the real property that is the subject of the lien is a homestead with a fair market value of $250,000 or less. THSC, §361.197 was amended by the addition of new subsection (e), which prohibits the commission from filing a cost recovery action under that section against an individual whose only significant asset is a homestead that includes the facility that is subject to, or affected by, a remedial action, that is occupied by the individual as a home, and that has a fair market value of $250,000 or less. THSC, §361.201 was amended by the addition of new subsections (d) and (e), which require, in cases where an individual's homestead includes the facility that is subject to, or affected by, a remedial action, that the commission adopt criteria by rule to determine whether the individual is financially capable of conducting any necessary remediation studies or remedial action and that the rule must provide that the individual's homestead may not be included in the total amount of the individual's assets if the homestead is occupied by the individual as a home and has a fair market value of $250,000 or less.

The adopted rule addresses the procedures and information necessary for the executive director to make these determinations under HB 2252. Additionally, the rule sets forth the statutory deadline for filing certain cost recovery actions and requires the agency to provide notice to property owners after a lien is filed.

SECTION DISCUSSION

The proposed amendment to §335.347 placed existing rule language into a new subsection (a) and added new subsections (b) - (h) to address the requirements of HB 2252 at proposal. The commission makes several changes to the proposed rules,

including placing proposed subsections (g) and (h) into subsection (f). The name of the section is also changed from proposal to reflect the changes made at adoption.

In subsection (a), the commission added, at adoption, the catch phrase "Financial capability- general" to describe the contents of the subsection and changed "a" to "any" in two instances to clearly show that the new subsections do not alter the applicability of subsection (a) to all superfund sites. In subsection (a)(8) the commission changed, at proposal, the words "pursuant to" to "under" to comply with agency rule writing standards. The title of §335.347 is changed at adoption to better describe the information included in the section.

New §335.347(b) includes provisions from new THSC, §361.201(d) and (e). The new provisions in §335.347(b) require that the executive director make a determination of the potentially responsible party's (PRP) financial capacity if the party is an individual whose homestead includes the facility subject to, or affected by, a remedial action. New §335.347(b) prohibits the agency from including the value of an individual's homestead in the total amount of the individual's assets if the individual is occupying the homestead as a home and the fair market value of the homestead is $250,000 or less. At adoption, the catch phrase "Homesteads" is added to the subsection and the word "will" is changed to "shall" to conform with agency style requirements.

New §335.347(c) includes provisions from new THSC, §361.194(b)(2). These provisions cover new criteria that the executive director may consider in determining whether to prepare an affidavit to attach a lien to real property or whether a lien is satisfied. At adoption, the catch phrase "Liens under Texas Health and Safety Code, §361.194" is added to describe the content of the subsection. At adoption, a new paragraph (1) is added and the proposed language in the subsection is renumbered as paragraph (2). The catch phrase "Filing of lien" is added to paragraph (1) and the catch phrase "Financial ability to satisfy lien" is added to paragraph (2). In paragraph (1), a provision is added, at adoption, to require that the executive director send notice to property owners after placing a lien on their property. The notice is required so that property owners are aware of the encumbrance on the property and may take steps to resolve the matter. In paragraph (2), the phrase "under Texas Health and Safety Code, §361.194" is deleted, at adoption, because the statutory section is cited in the catch phrase of the subsection. Additionally at adoption, the two paragraphs that had been in the proposed language are relettered as subparagraphs.

New §335.347(d) includes provisions from new THSC, §361.197(e). These provisions prohibit the commission from filing a cost recovery action under specified circumstances. At adoption, the catch phrase "Cost recovery actions" is added to the subsection to describe its content. Also at adoption, the proposed language is placed in paragraph (1) with the catch phrase "Homesteads" is added and the proposed three paragraphs are relettered as subparagraphs. A new paragraph (2) is added to reflect the statutory deadline of one year for the agency to file cost recovery actions in certain circumstances and the catch phrase "Limitation on filing" is added to describe the content at adoption.

New §335.347(e) addresses how the fair market value of a homestead is determined, since fair market value is a key element in HB 2252. At adoption, the catch phrase "Fair market value" is added to describe the content.

New §335.347(f) addresses the information that must be provided by the PRP within 90 days of a written request so that the executive director may make the determinations under the new §335.347(b) - (d). This provision is important to allow a case to move forward in a timely manner and to allow the commission to proceed with a cost recovery action within any required statute of limitations if the PRP does not qualify for the cost recovery prohibition. The catch phrase "PRP information" is added, at adoption, to describe the content. At adoption, the proposed language is placed into paragraph (1), with the existing paragraphs relettered as subparagraphs, and a citation is updated.

Proposed §335.347(g), which is moved to §335.347(f)(2) at adoption, allows the PRP to request an extension of the time frame for providing documents in subsection (f)(1). This provision gives the executive director the flexibility to consider extenuating circumstances when PRPs are having difficulties meeting the 90-day deadline. At adoption, this proposed subsection is placed into §335.347(f)(2) so that all provisions relating to a PRP's submittal of information are in subsection (f).

Proposed §335.347(h), which is moved to §335.347(f)(3) at adoption, states that for the purposes of the section, the executive director may determine that the property is not a homestead that is occupied by the individual as a home if the PRP does not provide the requested information within the required time frame. This provision is important so that the issue may be resolved and the case moved forward in situations where the information needed to make a determination that the property is a homestead that is occupied by the individual as a home is not provided. In addition, provisions are included which state that the PRP will receive notice of such a determination and that the determination is appealable. At adoption, this proposed subsection is placed into §335.347(f)(3), a citation is corrected, and the word "will" is changed to "shall" to conform with agency style requirements.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. While the specific intent of a "major environmental rule" is to protect the environment or reduce the risks to human health from environmental exposure, the specific intent of the rule is to allow, and in some instances require, the executive director to consider certain financial information when pursuing cost recovery and liens or when compelling an individual to perform remediation studies or remedial actions. Additionally, the intent of the rule is to set forth the statutory deadline for filing certain cost recovery actions and to require the agency to provide notice to property owners after a lien is filed. Thus, the specific intent of the rule is not to protect the environment nor reduce the risks to human health from environmental exposure. Additionally, the rule does not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Additionally, Texas Government Code, §2001.0225 only applies to a major environmental rule if the result of the rule is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract

between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking is not subject to the regulatory analysis provisions of §2001.0225 because it does not meet any of the four applicability requirements. Specifically, the rule is adopted to comply with and is specifically required by state law and is not adopted solely under the general powers of the agency. The rule also does not exceed a requirement of state law, federal law, or a delegation agreement or contract between the state and an agency or representative of the federal government.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the rule and performed an assessment of whether the rule constitutes a takings under Texas Government Code, Chapter 2007. The specific purpose of the rule is to allow, and in some instances require, the executive director to consider certain financial information when pursuing cost recovery and liens or when compelling an individual to perform remediation studies or remedial actions. Additionally, the purpose of the rule is to set forth the statutory deadline for filing certain cost recovery actions and to require the agency to provide notice to property owners after a lien is filed.

The rule substantially advances this stated purpose by amending §335.347 to: 1) require the executive director to determine a PRP's financial capacity if the party is an individual whose homestead includes the facility subject to or affected by a remedial action; 2) prohibit the agency from including the value of an individual's homestead in the total amount of the individual's assets if the individual is occupying the homestead as a home and the fair market value of the homestead is $250,000 or less; 3) specify criteria that the executive director may consider in determining whether to prepare an affidavit to attach a lien to real property or whether a lien is satisfied; 4) prohibit the commission from filing a cost recovery action under specified circumstances; 5) state how the fair market value of a homestead is determined; 6) require the PRP to submit certain information within 90 days of a written request so that the executive director may make such determinations; 7) specify that, for the purposes of the rule, the property is not a homestead that is occupied by the individual as a home if the PRP does not provide the requested information within the required time frame; 8) limit the period in which the agency may file a cost recovery action against responsible parties that have not complied with the terms of an administrative order under THSC, §361.188 to no later than one year after all remedial action has been completed; and 9) require the executive director to provide notice to property owners after a lien is filed on property under THSC, §361.194.

The rule does not impose a burden on private real property and it does not require a use of private real property. Promulgation and enforcement of the rule are neither a statutory nor a constitutional taking of private real property. Specifically, the rule does not affect a landowner's rights in private real property because the rulemaking does not burden the property in a manner that requires compensation as provided in specific articles of the United States and Texas Constitutions; nor does it restrict or limit the owner's right to the property resulting in a reduction in value by 25% or more beyond that which would otherwise exist in the absence of regulations.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the amendment is consistent with CMP goals and policies because the rulemaking relates only to the procedural mechanisms for cost recovery for remediation actions taken by the commission. The rulemaking will not have direct or significant adverse effect on any coastal natural resource areas; the rulemaking will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendment will not violate (exceed) any standards identified in the applicable CMP goals and policies.

PUBLIC COMMENT

The public comment period ended at 5:00 p.m. on January 5, 2004. No comments were received during the comment period.

STATUTORY AUTHORITY

The adopted amendment is authorized under HB 2252, 78th Legislature, 2003, which requires rules to implement the changes in law made to THSC, §§361.181, 361.194, 361.197, and 361.201. The amendment is also authorized by THSC, §361.024, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under THSC, Chapter 361. Additionally, the amendment is authorized by Texas Water Code, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the Texas Water Code.

§335.347. Financial Capability, Liens, and Cost Recovery Actions.

(a) Financial capability general. The executive director may make a determination of whether any potentially responsible party (PRP) is financially capable of participating in any facility investigation or remediation. Such a determination may be based on some or all of the following financial information:

(1) a PRP's audited financial statements;

(2) a PRP's federal or state income tax returns;

(3) a PRP's gross and net income for each of the preceding three years;

(4) a PRP's net worth for each of the preceding three years;

(5) a PRP's current cash flow position;

(6) a PRP's long-term liabilities;

(7) the liquidity of a PRP's assets; and

(8) any other data requested under §335.345 of this title (relating to Requests for Information or Production of Documents), which in the opinion of the executive director is relevant to a determination of the ability of the PRP to participate in a facility investigation or remediation.

(b) Homesteads. The executive director shall determine whether a PRP is financially capable of conducting any necessary remediation studies or remedial action if the PRP is an individual whose homestead includes the facility subject to, or affected by, a remedial action. The value of an individual's homestead may not be included in the total amount of the individual's assets if:

(1) the individual is occupying the homestead as a home; and

(2) the fair market value of the homestead is $250,000 or less.

(c) Liens under Texas Health and Safety Code, §361.194.

(1) Filing of lien. If the executive director files a lien on property, the executive director shall send a copy of the filed lien to the last known address of the owner of the property.

(2) Financial ability to satisfy lien. In making a determination whether to prepare an affidavit for lien or whether a lien is satisfied, the executive director may take into account a landowner's financial ability to satisfy the lien, including consideration of whether the landowner received financial compensation for the disposal of any substance addressed by the remedial action and whether the real property that is the subject of the lien:

(A) is a homestead and is being occupied as a home by the landowner; and

(B) has a fair market value of $250,000 or less.

(d) Cost recovery actions.

(1) Homesteads. The executive director may not file a cost recovery action under Texas Health and Safety Code, §361.197, against an individual if the individual's only significant asset is a homestead that:

(A) includes the facility subject to, or affected by, a remedial action;

(B) is occupied by the individual as a home; and

(C) has a fair market value of $250,000 or less.

(2) Limitation on filing. A cost recovery action against the responsible parties that have not complied with the terms of an administrative order under Texas Health and Safety Code, §361.188, may be filed by the agency no later than one year after all remedial action has been completed.

(e) Fair market value. For the purposes of this section, the fair market value of a homestead is the market value ascribed to a property by the tax appraisal authority of the county or counties in which the property is located, exclusive of any downward adjustment related to contamination. If this information is unavailable, the executive director may determine the fair market value of the property, which excludes any downward adjustment related to contamination, from information available at the time.

(f) PRP information.

(1) The PRP shall provide the following information within 90 days after receipt of a written request by the executive director so that the executive director may conduct the determinations under subsections (b) - (d) of this section:

(A) information listed in subsection (a) of this section;

(B) evidence that the subject property is the individual's homestead; and

(C) evidence that the individual is occupying the property as a home.

(2) The PRP may request an extension of the required time frame for providing documents if the extension is requested by the PRP within the initial 90-day time frame.

(3) For the purposes of this section, the executive director may determine that the property is not a homestead that is occupied by the individual as a home if the PRP does not provide the information requested in paragraph (1) of this subsection within the required time frame, including any extensions granted by the executive director. The executive director shall provide any such determination in writing to the PRP. The executive director's determination that the property is not a homestead that is occupied by the individual as a home is final and appealable under Texas Health and Safety Code, §361.321.

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 May 14, 2004.

TRD-200403266
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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER F. MOTOR VEHICLE SALES TAX

34 TAC §3.96

The Comptroller of Public Accounts adopts an amendment to §3.96, concerning imposition and collection of a surcharge on certain diesel-powered motor vehicles, without changes to the proposed text as published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2603).

The section is being amended to implement Tax Code §152.0215 as amended by House Bill 1365 of the 78th Legislature, 2003, effective July 1, 2003. The surcharge now applies to the purchase or use of all diesel-powered motor vehicles with a gross registered weight of more than 14,000 pounds.

Subsection (a) is amended to include all model years and vehicles purchased out of state. Subsection (b) is amended to specify surcharge rates by model year. New subsection (f) addresses credit for tax paid to another state. Other amendments are for clarity.

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, §152.0215

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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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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SUBCHAPTER J. PETROLEUM PRODUCTS DELIVERY FEE

34 TAC §3.151

The Comptroller of Public Accounts adopts an amendment to §3.151, concerning imposition, collection, and bond or other security of the fee, without changes to the proposed text as published in the March 19, 2004, issue of the *Texas Register* (29 TexReg 2852).

The 77th Legislature, 2001, amended Water Code, Chapter 26, to reduce the petroleum products delivery fee, and set forth incremental reductions of the fees imposed on the withdrawal of petroleum products imported into Texas or withdrawn from bulk facilities and delivered into cargo tanks or barges by 20% for fiscal years 2004 and 2005, 50% 2006, and 60% for 2007.

Subsection (c) is being amended to implement the reduced fee rate schedule for the fiscal years 2004 and 2005, effective September 1, 2003; for fiscal year 2006, effective September 1, 2005; and for the fiscal year 2007, effective September 1, 2006.

No comments were received regarding adoption of the amendment.

This amendment 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.

The amendment implements Water Code, §26.3574.

§3.151. Imposition, Collection, and Bonds or Other Security of the Fee.

(a) The Texas Petroleum Products Delivery Fee is imposed, collected, and paid to the state by operators of bulk facilities. The fee is assessed when petroleum products are withdrawn from the bulk facility and delivered into a cargo tank or barge or imported into this state in a cargo tank or barge for delivery to another location for distribution or sale. The fee is not assessed when the fuel is destined for delivery to another bulk facility, an electrical generating plant, a common carrier railroad for its exclusive use, or is to be exported from the state.

(b) For the purposes of this section, withdrawals from a bulk facility into a cargo tank or barge are not subject to the fee when the entire withdrawal is delivered into the fuel supply tanks of vessels or boats.

(c) The fee is collected by the operator of a bulk facility from the person ordering the withdrawal. The fee is computed as follows:

(1) For each delivery into a cargo tank or barge having a capacity of less than 2,500 gallons:

(A) $10 for each delivery made after August 31, 2003, and before September 1, 2005;

(B) $5 for each delivery made after August 31, 2005, and before September 1, 2006;

(C) $2 for each delivery made after August 31, 2006, and before September 1, 2007;

(D) the fee is repealed effective September 1, 2007.

(2) For each delivery into a cargo tank or barge having a capacity of 2,500 gallons or more but less than 5,000 gallons:

(A) $20 for each delivery made after August 31, 2003, and before September 1, 2005;

(B) $10 for each delivery made after August 31, 2005, and before September 1, 2006;

(C) $4 for each delivery made after August 31, 2006, and before September 1, 2007;

(D) the fee is repealed effective September 1, 2007.

(3) For each delivery into a cargo tank or barge having a capacity of 5,000 gallons or more but less than 8,000 gallons:

(A) $30 for each delivery made after August 31, 2003, and before September 1, 2005;

(B) $15 for each delivery made after August 31, 2005, and before September 1, 2006;

(C) $6 for each delivery made after August 31, 2006, and before September 1, 2007;

(D) the fee is repealed effective September 1, 2007.

(4) For each delivery into a cargo tank or barge having a capacity of 8,000 gallons or more but less than 10,000 gallons:

(A) $40 for each delivery made after August 31, 2003, and before September 1, 2005;

(B) $20 for each delivery made after August 31, 2005, and before September 1, 2006;

(C) $8 for each delivery made after August 31, 2006, and before September 1, 2007;

(D) the fee is repealed effective September 1, 2007.

(5) For each increment of 5,000 gallons or any part thereof delivered into a cargo tank or barge having a capacity of 10,000 gallons or more:

(A) $20 for each delivery made after August 31, 2003, and before September 1, 2005;

(B) $10 for each delivery made after August 31, 2005, and before September 1, 2006;

(C) $4 for each delivery made after August 31, 2006, and before September 1, 2007;

(D) the fee is repealed effective September 1, 2007.

(d) In determining the amount of fee due for motor gasoline, other alcohol blended fuels, and aviation gasoline, each net temperature corrected withdrawal of 7,000 gallons or more but less than 10,000 gallons shall be presumed to have been a delivery into a cargo tank having a capacity of 8,000 gallons or more but less than 10,000 gallons and the fee shall be collected as provided by subsection (c)(4) of this section.

(e) In determining the amount of fee due on all withdrawals not covered by subsection (d) of this section, it shall be presumed that the capacity of the cargo tank or barge is equal to the total net temperature corrected quantity of product withdrawn.

(f) For the purposes of this section, a bulk facility is a refinery terminal or any other terminal or facility which receives petroleum products by pipeline, rail, or barge, and delivers the products into a cargo tank or barge.

(g) For the purposes of this section, the operator of a bulk facility is the person who first invoices petroleum products withdrawn from the facility. An exchange statement is not considered an invoice.

(h) For the purposes of this section, an electrical generating facility is a plant operated for the primary purpose of generating electricity for sale to consumers.

(i) Persons exempt from the petroleum products delivery fee, including persons operating barges who make withdrawals from a permitted bulk facility for delivery into the fuel supply tanks of vessels or boats, shall request in writing a letter of exemption from the comptroller. The letter of exemption issued by the comptroller, or a copy, must be furnished to the seller each time purchases exempt from the petroleum products delivery fee are made.

(j) If the person making the sale to the exempt purchaser does not hold a petroleum products delivery fee permit, the purchaser must also furnish to the seller a statement listing the date of purchase, number of gallons purchased per delivery, and destination of the product. For the seller to receive credit for exempt sales, this documentation must be presented to the permitted bulk facility from which the product was purchased.

(k) The amount of the petroleum products delivery fee must be listed as a separate item on the invoice or cargo manifest issued by the person holding a permit to collect the fee upon the withdrawal of product from a bulk facility.

(l) Only persons who hold a petroleum products delivery fee permit may charge and collect the fee on the basis of the bracket system established in this section. No other persons selling fuel may list the fee as a separate item on invoices or manifest except:

(1) when required to do so by another governmental agency; or

(2) when an amount is clearly identified as reimbursement. An amount collected as reimbursement may not exceed the amount of fee actually paid by the person issuing the manifest or invoice.

(m) The comptroller may require a bulk facility operator to post a bond or other security to protect the revenues of the state.

(n) When determining the security required of a bulk facility operator, the comptroller will take into consideration the amount of fee that has or is expected to become due from the person, any past history of the person as a distributor or supplier of fuel, and the necessity to protect the state against the failure to pay the fee as it becomes due.

(o) The comptroller may require a bond equal to two times the highest amount of fees that will accrue during a reporting period. The minimum bond is $30,000. The maximum bond is $600,000 unless the comptroller believes there is undue risk of loss of fee revenues, in which event he may require one or more bond or securities in a total amount exceeding $600,000.

(p) If the comptroller determines that a bulk facility operator has for four consecutive years continuously complied with the conditions of the bond or other security on file, the operator is entitled on request to have the comptroller return, refund, or release the bond or security. However, if the comptroller determines that the revenues of the state would be jeopardized by the return, refund, or release of the bond or security, the comptroller may elect not to return, refund, or release the bond or security. The comptroller may reimpose a requirement of a bond or other security if necessary to protect the revenues of the state.

(q) A bond must be a continuing instrument, must constitute a new and separate obligation in the penal sum named in the bond for each calendar year or portion of a year while the bond is in force, and must remain in effect until the surety on the bond is released and discharged.

(r) In lieu of filing a surety bond, an applicant for a permit may substitute the following security:

(1) cash in the form of United States currency in an amount equal to the required bond, to be deposited in the suspense account of the state treasury;

(2) an assignment to the comptroller of a certificate of deposit in any bank or savings and loan association in Texas that is a member of the FDIC in an amount equal to the bond amount required; or

(3) an irrevocable letter of credit to the comptroller from any bank or savings and loan association in Texas that is a member of the FDIC in an amount of credit at least equal to the bond amount required.

(s) If the amount of an existing bond becomes insufficient or a security becomes unsatisfactory or unacceptable, the comptroller may require the filing of a new or of an additional bond or security.

(t) No surety bond or other form of security may be released until it is determined by examination or audit that no fee, penalty, or interest liability exists. The cash or securities shall be released within 60 days after the comptroller determines that no liability exists.

(u) The comptroller may use the cash or certificate of deposit security to satisfy a final determination of delinquent liability or a judgment secured in any action by this state to recover fees, cost, penalties, and interest found to be due this state by a person in whose behalf the cash or certificate security was deposited.

(v) A surety on a bond furnished by a permittee shall be released and discharged from liability to the state accruing on the bond after the expiration of 30 days after the date on which the surety files with the comptroller a written request to be released and discharged. The request does not relieve, release, or discharge the surety from a liability already accrued, or that accrues before the expiration of the 30-day period. Promptly after receipt of the request, the comptroller shall notify the permittee who furnished the bond, and unless the permittee, before the expiration date of the existing security, files with the comptroller a satisfactory new bond or other security, the comptroller shall cancel the permit.

(w) The comptroller shall notify immediately the issuer of a letter of credit of a final determination of the bulk facility operator's delinquent liability or a judgment secured in any action by this state to recover fees, cost, penalties, and interest found to be due this state by a bulk facility operator in whose behalf the letter of credit was issued. A letter of credit accepted as security shall contain a statement that the issuer agrees to respond to the comptroller's notice of liability with amounts sufficient to satisfy the comptroller's delinquency claim against the bulk facility operator.

(x) An examination or audit may be requested to obtain release of the security when the permit holder relinquishes the permit or desires to substitute one form of security for an existing one.

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 K. HOTEL OCCUPANCY TAX

34 TAC §3.161

The Comptroller of Public Accounts adopts an amendment to §3.161, concerning definitions, exemptions, and exemption certificate, with changes to the proposed text as published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2604). The change to the proposed text is in subsection (a)(2), to replace the word "Section" with the correct symbol to be consistent with *Texas Register* requirements.

This amendment incorporates legislative changes in House Bill 2424, 78th Legislature, 2003, which amended Tax Code, Chapter 156, to add the requirement that public and private institutions of higher education be Texas public and private institutions of higher education to be exempt from state hotel occupancy tax; to provide good faith acceptance, with proper documentation, of hotel occupancy tax exemption certificates by persons required to collect the tax; and to require the comptroller to produce and maintain a list of organizations that have received a letter of exemption under §156.102, and make the list available on the comptroller's Internet Web site.

Subsection (a)(2) is amended to provide that public and private institutions of higher education from other states and countries do not meet the requirements for exemption. Subsection (c)(2) is added to prescribe the support documentation required to accept an exemption certificate in good faith, including a printed copy of the comptroller's Internet Web site listing the organization as exempt for hotel tax when appropriate. The remainder of the subsection is renumbered accordingly.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.102, 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, §156.102(b) and §156.104.

§3.161. Definitions, Exemptions, and Exemption Certificate.

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

(1) Charitable or eleemosynary organization--A nonprofit organization devoting all or substantially all of its activities to the alleviation of poverty, disease, pain, and suffering by providing food, clothing, drugs, treatment, shelter, or psychological counseling directly to indigent or similarly deserving members of society with its funds derived primarily from sources other than fees or charges for its services. If the organization engages in any substantial activity other than the activities described in this section, it will not be considered as having been organized for purely public charity, and therefore, will not qualify for exemption under this provision. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are fraternal organizations, lodges, fraternities, sororities, service clubs, veterans groups, mutual benefit or social groups, professional groups, trade or business groups, trade associations, medical associations, chamber of commerce, and similar organizations. Even though not organized for profit and performing services that are often charitable in nature, these types of organizations do not meet the requirements for exemption under this provision.

(2) Educational organization--A nonprofit organization or governmental entity whose activities are devoted solely to systematic instruction, particularly in the commonly accepted arts, sciences, and vocations, and has a regularly scheduled curriculum, using the commonly accepted methods of teaching, a faculty of qualified instructors, and an enrolled student body or students in attendance at a place where the educational activities are regularly conducted. An organization that has activities consisting solely of presenting discussion groups, forums, panels, lectures, or other similar programs, may qualify for exemption under this provision, if the presentations provide instruction in the commonly accepted arts, sciences, and vocations. The organization will not be considered for exemption under this provision if the systematic instruction or educational classes are incidental to some other facet of the organization's activities. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are professional associations, business leagues, information resource groups, research organizations, support groups, home schools, and organizations that merely disseminate information by distributing printed publications. Entities that are defined in the Education Code, §61.003, as Texas public or private "institutions of higher education" are recognized for exemption under this provision. Included in the definition of "institutions of higher education" is any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as identified in Education Code, §61.003. A Texas private "institution of higher education" is a private or independent university or college that is organized under the Texas Non-Profit Corporation Act; exempt from taxation under Article VIII, §2, of the Texas Constitution and §501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. §501); and accredited by the Southern Association of Colleges and Schools. Beginning October 1, 2003, public and private "institutions of higher education" from other states or countries do not meet the requirements for exemption under this provision.

(3) Hotel--Any building or buildings in which members of the public obtain sleeping accommodations for a consideration. The term includes, in addition to the buildings listed in Tax Code, §156.001, manufactured homes, skid mounted bunk houses, residency inns, condominiums, cabins, and cottages.

(4) Permanent Resident--A person who has the right to use or occupy a room or space in a hotel for at least 30 consecutive days without interruption. A person may be an individual, organization, or entity.

(5) Private Club--An organization that provides members entertainment, recreation, sport, dining, or social facilities and assesses dues, initiation fees, and other charges for special privileges or status not available to the general public.

(6) Religious organization--A nonprofit organization that is an organized group of people regularly meeting for the primary purpose of holding, conducting and sponsoring religious worship services, according to the rights of their sect. The organization must be able to provide evidence of an established congregation showing that there is an organized group of people regularly attending these services. An organization that supports and encourages religion as an incidental part of its overall purpose, or one whose general purpose is furthering religious work or instilling its membership with a religious understanding, will not qualify for exemption under this provision. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are conventions or associations of churches, evangelistic associations, churches with membership consisting of family members only, missionary organizations and groups who meet for the purpose of holding prayer meetings, bible study or revivals.

(b) Exemptions. This subsection deals with exemptions from the state hotel occupancy tax. For information on city and county hotel taxes, contact the affected city or county.

(1) Religious, charitable, and educational organizations and their employees, including college and university personnel, traveling on official business of the organization are exempt from payment of hotel occupancy tax.

(2) State officials, judicial officers, heads of state agencies, the Executive Director of the Legislative Council, the Secretary of the Senate, state legislators, legislative employees, members of state boards and commissions, and designated state employees of the State of Texas who present a Hotel Tax Exemption Photo Identification Card when traveling on official state business are exempt from the hotel occupancy tax. State agency, institution, board, or commission employees who have not been issued a Hotel Tax Exemption Photo Identification Card must pay the hotel occupancy tax. The hotel tax paid by the state or reimbursed to a state employee may be refunded as provided in §3.163 of this title (relating to Refund of Hotel Occupancy Tax). For the purpose of claiming an exemption, a Hotel Tax Exemption Photo Identification Card includes:

(A) any photo identification card issued by a state agency that states "EXEMPT FROM HOTEL OCCUPANCY TAX, under Tax Code, §156.103(d)", or similar wording; or

(B) a Hotel Tax Exemption Card that states "when presented with a photo identification card issued by a Texas agency, the holder of this card is exempt from state, municipal, and county hotel occupancy tax, Tax Code, §156.103(d)", or similar wording.

(3) The United States government and its employees traveling on official business representing the United States government are exempt from the hotel occupancy tax.

(4) Diplomatic personnel of a foreign government who present an appropriate Tax Exemption Card issued by the United States Department of State are exempt from the tax.

(5) If an exemption applies, then the organization or individual claiming exemption must present an exemption certificate to the hotel.

(6) Permanent residents are exempt from payment of hotel occupancy tax.

(A) A permanent resident is exempt beginning on:

(i) the first day for which the resident has entered into a written agreement with the hotel or has given a written notice to the hotel of the resident's intent to use or occupy a room or space in the hotel for the next 30 or more consecutive days and the resident actually stays for at least the next 30 consecutive days; or

(ii) the first day after the 30th consecutive day of the stay, if the resident neither gave written notice of intent to stay, nor entered into any written agreement with the hotel. For example, if a person does not notify the hotel that he intends to stay for at least 30 days, but stays 35 days, then the person is exempt from hotel tax from the 31st day through the 35th day, but tax is due on the first 30 consecutive days of the occupancy.

(B) The permanent resident exemption ends when an interruption in the right to use or occupy the room or space occurs.

(C) Permanent residents are not required to physically occupy a room or space.

(D) Permanent residents may have the right to use or occupy different rooms in the same hotel without loss of the permanent resident exemption.

(E) The permanent resident exemption applies to the lowest number of rooms in a written notice, agreement, or contract for a range of rooms plus the number of rooms that qualify for the permanent resident exemption under subparagraph (A)(ii) of this paragraph.
Figure: 34 TAC §3.161(b)(6)(E) (No change.)

(c) Exemption certificate.

(1) Any organization or individual claiming exemption from the payment of hotel occupancy tax must furnish the hotel with a signed exemption certificate.

(2) The rental of a room or space in a hotel is exempt from tax if the person required to collect the tax receives, in good faith from a guest, a properly completed exemption certificate stating that the guest qualifies for exemption under Tax Code §156.102 or §156.103 or other law. The exemption certificate must be supported by the following documentation:

(A) for persons traveling on official business of the federal government, a valid government identification card;

(B) for state officials exempted by Tax Code §156.103(d), a Hotel Tax Photo Identification Card, as described in subsection (b)(2)(A) or (B) of this section;

(C) for diplomatic personnel of a foreign government, the appropriate Tax Exemption Card issued by the United States Department of State;

(D) for persons traveling on official business of a charitable, educational, or religious organization, as defined in subsection (a)(1), (2) or (6) of this section:

(i) a letter of hotel tax exemption issued by the Comptroller of Public Accounts; or

(ii) verification that the organization is on the comptroller's list of entities that have been provided a letter of exemption; such as, a printed copy of the Comptroller's Internet Web site listing the organization as exempt for hotel tax.

(E) For persons traveling on official business of an organization exempt by law other than Tax Code Chapter 156:

(i) a letter of hotel tax exemption issued by the Comptroller of Public Accounts; or

(ii) verification that the organization is on the comptroller's list of entities that have been provided a letter of exemption.

(F) The manner of payment by an employee of an exempt organization does not affect the exemption. To claim an exemption a nonemployee traveling on behalf of an exempt organization must pay the hotel directly with the organization's funds, by organization check, organization credit card, or direct billing to the organization by the hotel.

(3) A hotel claiming exemption of its receipts from hotel occupancy tax must provide proof that the receipts were exempt, either through exemption certificates or other competent evidence.

(4) Certain entities that are exempt from hotel tax may be issued identification numbers for administrative purpose only. The Comptroller may issue a tax number to an entity that is not exempt from Hotel Tax, and a tax number does not guarantee that an organization is exempt from Hotel Tax. An organization is not required to provide an identification number on the Hotel Tax Exemption Certificate.

(5) The exemption certificate must be substantially in the form herein adopted by reference. Copies of the certificate are available for inspection at the office of the Texas Register or may be obtained from the Comptroller of Public Accounts, P.O. Box 13528, Austin, Texas 78711. Copies may also be requested by calling our toll-free number 1-800-252-1385. In Austin, call 463-4600. (From a Telecommunication Device for the Deaf (TDD) only, call 1-800-248-4099 toll free. In Austin the local TDD number is 463-4621.) Taxpayers may download copies at www.window.state.tx.us.

(d) Exclusions.

(1) Dormitories and other housing facilities owned or leased and operated by institutions of higher education as defined in subsection (a)(2) of this section and used to provide sleeping accommodations for persons engaged in educational programs or activities at the institutions are excluded from the definition of a hotel in Tax Code, §156.001, and their rentals are not subject to tax. Hotels owned or leased and operated by institutions of higher education, however, are not excluded and their rentals are subject to tax.

(2) Private clubs as defined in subsection (a)(5) of this section do not collect tax on rentals of rooms to members. Tax is due, however, on the rental of rooms to nonmembers.

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 May 12, 2004.

TRD-200403222
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: June 1, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 475-0387

SUBCHAPTER O. STATE SALES AND USE TAX

34 TAC §3.325

The Comptroller of Public Accounts adopts an amendment to §3.325, concerning refunds, interest, and payments under protest, without changes to the proposed text as published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2606).

The adopted amendment implements legislative changes and codification of existing policies made by House Bill 2425, 78th Legislature, 2003, that describe when and how persons may obtain a refund of tax paid in error. Provisions relating to limitations in subsection (a) are reorganized in new subsection (c) and the remaining subsections have been relettered accordingly.

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 §§111.064, 111.104, 111.107, 111.108, and 111.207.

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 May 14, 2004.

TRD-200403259
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: June 3, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 475-0387

34 TAC §3.331

The Comptroller of Public Accounts adopts an amendment to §3.331, concerning transfers of common interests in tangible personal property; intercorporate services, with changes to the proposed text as published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2608). The section is adopted with changes to correct a typographical error in subsection (c)(3)(E).

The adopted amendment consolidates subsections (a) and (b) and reletters other subsections accordingly. Subsection (b) restates the exemption for joint research and development venture as provided by Tax Code §151.348. Subsection (c) updates and clarifies the current policy of intercorporate exemption as provided by Tax Code §151.346. Other amendments are made for clarity.

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, §151.346.

§3.331. Transfers of Common Interests in Tangible Personal Property; Intercorporate Services.

(a) Transfer of common interests.

(1) Sales or use tax is not due when an interest in tangible personal property is sold to a purchaser who, either before or after the sale, owns a joint or undivided interest in the tangible personal property with the seller.

(2) In order for the sale to be exempt, the following requirements must be met.

(A) The seller must have paid sales or use tax on the tangible personal property when it was purchased.

(B) The sale must be made pursuant to the terms of a good faith contractual relationship between the seller and the purchaser. Good faith contractual relationship means a legal relationship established between two or more persons created for considerations other than the avoidance of the limited sales and use tax.

(C) It is necessary that the purchaser, either before or after the sale, own a joint or undivided interest in the property with the seller. The joint ownership transfer exemption does not apply to sales between related corporations or other entities if the only joint ownership is the ultimate ownership of the corporation stock.

(b) Research and development ventures. Sales and use tax is not due on tangible personal property sold by a joint research and development venture as defined by 15 United States Code §4301 to a participating entity if the tangible personal property is created, developed, or substantially modified by or for the joint research and development venture.

(c) Intercorporate services.

(1) Sales or use tax is not due on charges for taxable services if the seller and purchaser are affiliated entities that are members of an affiliated group under 26 U.S.C. §1504, and if both entities report their income to the Internal Revenue Service on a single consolidated income tax return with at least one corporation that is a member of the affiliated group for the tax year in which the taxable service is provided. If either the seller or the purchaser elects to file a separate federal income tax return even though it is eligible to file a consolidated federal income tax return with other members of the affiliated group, the exemption provided by this subsection does not apply.

(2) Sales or use tax is not due on charges for taxable services if both the seller and purchaser are entities classified as members of an affiliated group under 26 U.S.C. §1504, but either the seller or purchaser or both cannot file a consolidated federal income tax return because of the exclusions provided by 26 U.S.C. §1504(b).

(3) The exemption provided by this subsection does not apply to sales of tangible personal property between affiliated corporations or sales of services that were taxable before September 2, 1987. The following services were taxable before September 2, 1987:

(A) amusement services;

(B) cable television services;

(C) personal services;

(D) motor vehicle parking and storage;

(E) the repair, remodeling, maintenance, or restoration of tangible personal property except maintenance of computer software and those services excluded from tax by Tax Code, §151.0101(a)(5); and

(F) telecommunications services.

(4) A seller of a taxable service must pay sales or use tax on its purchase of tangible personal property that the seller transfers as an integral part of the taxable service if the sale of the taxable service is exempt from sales tax under this subsection. The seller may not claim a sale for resale exemption.

(5) A seller of a taxable service must pay sales or use tax on its purchase of a taxable service that the seller transfers as an integral part of the taxable service sold if the sale of the taxable service is exempt from sales tax under this subsection. The seller may not claim a sale for resale exemption.

(6) When a contract contains charges for taxable items and charges for services that qualify for exemption under this subsection, the total charge will be taxable unless the charge for taxable items is separately stated to the customer.

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 May 12, 2004.

TRD-200403223
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: June 1, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 475-0387

CHAPTER 16. ELECTRONIC TRANSFER OF PAYMENTS TO THE TEXAS STATE TREASURY DEPARTMENT

34 TAC §16.3

The Comptroller of Public Accounts adopts the repeal of §16.3, concerning cigarette tax stamp payments, without changes to the proposed text as published in the February 13, 2004, issue of the *Texas Register* (29 TexReg 1302). The rule is being repealed because the information contained in the rule exists in another rule (General Rules 3.9).

No comments were received regarding adoption of the repeal.

The 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 Tax Code, Title 2.

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 May 14, 2004.

TRD-200403260
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: June 3, 2004
Proposal publication date: February 13, 2004
For further information, please call: (512) 475-0387

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

The Texas Department of Human Services (DHS) adopts amendments to §§19.101, 19.2302, and 19.2320; and adopts new §19.1113 and §19.1115 without changes to the proposed text published in the March 19, 2004, issue of the *Texas Register* (29 TexReg 2859).

Justification for the amendments and the new sections is to comply with federal guidelines and to implement changes mandated by the 78th Texas Legislature. The amendment to §19.101 and new §19.1113 and §19.1115 are being adopted to allow facilities to use paid feeding assistants, as provided in 42 Code of Federal Regulations (CFR), §§483.35, 483.75, 483.160, and 488.301. Justification for the amendment to §19.2302 is to add the requirement for facilities that furnish services under the Medicaid program to comply with solicitation guidelines in Occupations Code, Chapter 102, as required by Government Code, §531.116. The amendment to §19.2320 is being adopted to implement Human Resources Code §32.024, which holds the facility responsible for payment of nonemergency ambulance services when the facility fails to obtain prior authorization.

DHS received no comments regarding adoption of the amendments and new sections.

SUBCHAPTER B. DEFINITIONS

40 TAC §19.101

The amendment is adopted under the Human Resources Code, Chapters 22 and 32, and the Health and Safety Code, Chapter 242, which authorize DHS to administer public and medical assistance programs and to license and regulate nursing facilities; and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment affects the Human Resources Code, §§22.0001 - 22.040 and §§32.001 - 32.067, and the Health and Safety Code, §§242.001 - 242.852.

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 May 11, 2004.

TRD-200403189
Carey Smith
Deputy Commissioner, Legal Services
Texas Department of Human Services
Effective date: June 1, 2004
Proposal publication date: March 19, 2004
For further information, please call: (512) 438-3734

SUBCHAPTER L. DIETARY SERVICES

40 TAC §19.1113, §19.1115

The new sections are adopted under the Human Resources Code, Chapters 22 and 32, and the Health and Safety Code, Chapter 242, which authorize DHS to administer public and medical assistance programs and to license and regulate nursing facilities; and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections affect the Human Resources Code, §§22.0001 - 22.040 and §§32.001 - 32.067, and the Health and Safety Code, §§242.001 - 242.852.

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 May 11, 2004.

TRD-200403190
Carey Smith
Deputy Commissioner, Legal Services
Texas Department of Human Services
Effective date: June 1, 2004
Proposal publication date: March 19, 2004
For further information, please call: (512) 438-3734

SUBCHAPTER X. REQUIREMENTS FOR MEDICAID-CERTIFIED FACILITIES

40 TAC §19.2302, §19.2320

The amendments are adopted under the Human Resources Code, Chapters 22 and 32, and the Health and Safety Code, Chapter 242, which authorize DHS to administer public and medical assistance programs and to license and regulate nursing facilities; and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendments affect the Human Resources Code, §§22.0001 - 22.040 and §§32.001 - 32.067, and the Health and Safety Code, §§242.001 - 242.852.

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 May 11, 2004.

TRD-200403191
Carey Smith
Deputy Commissioner, Legal Services
Texas Department of Human Services
Effective date: June 1, 2004
Proposal publication date: March 19, 2004
For further information, please call: (512) 438-3734

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--Revised

Texas Education Agency

Title 19, Part 2

TRD-200403337
Filed: May 17, 2004

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Proposed Rule Reviews

Texas Education Agency

Title 19, Part 2

The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 66, State Adoption and Distribution of Instructional Materials, pursuant to the Texas Government Code, §2001.039.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reasons for adopting 19 TAC Chapter 66 continue to exist. The comment period begins with the publication of this notice and must last a minimum of 30 days.

Comments or questions regarding this rule review may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494, (512) 475-1497. Comments may also be submitted electronically to rules@tea.state.tx.us or faxed to (512) 463-0028.

TRD-200403336
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: May 17, 2004

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Railroad Commission of Texas

Title 16, Part 1

The Railroad Commission of Texas files this notice of intention to review and readopt 16 Texas Administrative Code Chapters 11 and 12, relating to Surface Mining and Reclamation Division and Coal Mining Regulations, respectively. This review and consideration is being conducted in accordance with Texas Government Code, §2001.039.

The agency's reasons for adopting these rules continue to exist; however, in a separate but concurrent rulemaking, the Commission has proposed some amendments to §12.108, regarding Permit Fees. The proposed amendments will be filed with the *Texas Register* concurrently with this proposed review. In addition, the Commission currently has pending a proposal to amend §§12.3, 12.142, 12.145, 12.384, and 12.385, regarding the use of coal combustion products and by-products. This proposal was published in the November 28, 2003, issue of the *Texas Register* (28 TexReg 10591).

The Commission also notes that in the April 9, 2004, issue of the *Texas Register* (29 TexReg 3584), the Texas Department of Transportation (TxDOT) proposed the repeal of Subchapter E in Chapter 11, in particular §§11.1001 - 11.1005, 11.1021, 11.1031 - 11.1045, 11.1061 - 11.1065, and 11.1081, concerning Quarry and Pit Safety. The rules are proposed for repeal because House Bill 2847, 78th Legislature, Regular Session, 2003, transferred all powers, duties, functions, and activities performed by the Commission under the Texas Aggregate Quarry and Pit Safety Act, Chapter 133, Natural Resources Code, to TxDOT. TxDOT proposed its new rules in new Subchapter M, §§21.701 - 21.723, Title 43, concerning quarry pit safety in the April 9, 2004, issue of the *Texas Register* (29 TexReg 3602).

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 interested 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 Melvin Hodgkiss, Director, Surface Mining and Reclamation Division, at (512) 463-6901. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.html.

Issued in Austin, Texas, on May 11, 2004.

TRD-200403231
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Filed: May 13, 2004

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Adopted Rule Reviews

Texas Education Agency

Title 19, Part 2

The Texas Education Agency (TEA) adopts the review of 19 TAC Chapter 100, Charters, Subchapter A, Open-Enrollment Charter Schools; and Subchapter B, Home-Rule School District Charters, pursuant to the Texas Government Code, §2001.039. The TEA

proposed the review of 19 TAC Chapter 100 in the March 26, 2004, issue of the *Texas Register* (29 TexReg 3239).

The TEA finds that the reason for adopting 19 TAC Chapter 100 continues to exist. The TEA received no comments related to the rule review requirement. Simultaneous to the rule review, the TEA proposed amendments to §100.1 and §100.105, which may be found in the Proposed Rules section of the March 26, 2004, issue (29 TexReg 3028). Subsequently, in response to action taken by the State Board of Education during its May 7, 2004, meeting, the TEA has filed a withdrawal of the amendment to §100.1 and the adoption of the amendment to §100.105. The adoption creates application and selection procedures that are unique to charters granted under Texas Education Code, Chapter 12, Subchapter E, and can be found in the Adopted Rules section of this issue. This concludes the review of 19 TAC Chapter 100.

TRD-200403334
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: May 17, 2004

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The Texas Education Agency (TEA) adopts the review of 19 TAC Chapter 102, Educational Programs, pursuant to the Texas Government Code, §2001.039. The TEA proposed the review of 19 TAC Chapter 102 in the December 5, 2003, issue of the *Texas Register* (28 TexReg 10977).

The TEA finds that the reasons for adopting 19 TAC Chapter 102, Subchapters AA and BB, continue to exist. The TEA received no comments related to the rule review requirement. Changes to Subchapter AA will be proposed in a future issue of the *Texas Register* in order to update the rule to address provisions resulting from Rider 49 of Article III, 78th Texas Legislature, 2003, relating to the Head Start-Ready to Read Program. Changes to Subchapter BB were necessary to update provisions to be consistent with current application instructions for the Master Reading Teacher Grant Program and to add provisions for the Master Mathematics Teacher Grant Program. The TEA adopted revisions to 19 TAC Chapter 102, Subchapter BB, in the May 7, 2004, issue of the *Texas Register* (29 TexReg 4472).

This concludes the review of 19 TAC Chapter 102.

TRD-200403368
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: May 18, 2004

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The Texas Education Agency (TEA) adopts the review of 19 TAC Chapter 129, Student Attendance, Subchapter A, Student Attendance Allowed; Subchapter B, Student Attendance Accounting; and Subchapter AA, Commissioner's Rules, pursuant to the Texas Government Code, §2001.039. The TEA proposed the review of 19 TAC Chapter 129 in the March 26, 2004, issue of the *Texas Register* (29 TexReg 3239).

The TEA finds that the reason for adopting 19 TAC Chapter 129 continues to exist. The TEA received no comments related to the rule review requirement. No changes are necessary as a result of the review. This concludes the review of 19 TAC Chapter 129.

TRD-200403335
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: May 17, 2004

♦ ♦ ♦

Texas Commission on Environmental Quality

Title 30, Part 1

The Texas Commission on Environmental Quality (commission) adopts the rules review and readopts Chapter 118, Control of Air Pollution Episodes, without changes, in accordance with Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist. The review did not identify any updates, consistency issues, or other changes that need to be addressed. The notice of intention to review was published in the December 12, 2003, issue of the *Texas Register* (28 TexReg 11117).

CHAPTER SUMMARY

Chapter 118 specifies actions to be taken by the commission and regulated entities in preparation for, or in response to, an air pollution episode. An episode is the existence of a widespread condition of air pollution that creates an emergency requiring immediate action to protect human health or safety. One of these episodes would cover a geographical area, involve a combination of stagnating weather conditions and specified ambient levels of specified pollutants, and remain for at least 12 hours. Under such conditions, the commission, with the governor's concurrence, would order any contributing source to reduce or discontinue the emission of air contaminants immediately.

Chapter 118 was first adopted on January 26, 1972, under provisions of the 1971 Texas Clean Air Act, the 1970 Federal Clean Air Act, and the content requirements for state implementation plans in the Code of Federal Regulations. Several improvements were made to the chapter in 1975, 1987, 1989, and 2000. In 1989, the chapter was revised to make its provisions consistent with new requirements published by the United States Environmental Protection Agency. In 2000, the chapter was revised to improve readability and to update references and citations as part of the commission's regulatory reform goals.

ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a review and determined that the reasons for the rules in Chapter 118 continue to exist. The rules are necessary under current provisions of Texas Health and Safety Code, Texas Clean Air Act, §382.026, concerning Orders Issued Under Emergencies; and Texas Water Code, §5.514, concerning Order Issued Under Air Emergency. In addition, Chapter 118 is the state's means of complying with the federal requirements of 40 Code of Federal Regulations Part 51, Subpart H, relating to Prevention of Air Pollution Emergency Episodes; and is a part of the state implementation plan to attain the federal national ambient air quality standards for ozone under 40 Code of Federal Regulations §52.2270 which implements the Federal Clean Air Act, §110, concerning Implementation Plans.

PUBLIC COMMENT

The public comment period closed on January 12, 2004. No comments were received.

TRD-200403265

Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: May 14, 2004

The Texas Commission on Environmental Quality (commission) adopts the rules review and readopts Chapter 294, Groundwater Management Areas, without changes, in accordance with Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist. The notice of intention to review was published in the January 16, 2004, issue of the *Texas Register* (29 TexReg 507).

CHAPTER SUMMARY

Chapter 294 provides for the designation of certain groundwater management areas and the procedures for the designation of priority groundwater management areas (PGMAs), including recommendations for the creation of groundwater conservation districts. The chapter provides the designations and delineations of priority groundwater management areas designated by commission rule prior to September 1, 2001, after which designations were made by commission order.

Subchapter A, Carrizo-Wilcox Aquifer, contains §294.1, Definitions; §294.2, Designation of Management Area 3 of the Carrizo-Wilcox Aquifer; §294.3, Designation of Management Area 4 of the Carrizo-Wilcox Aquifer; and §294.4, Description of Boundaries.

Subchapter B, Antlers Sand Aquifer, contains §294.10, Definitions; §294.11, Designation of Union Hill Underground Water Management Area of the Antlers Sand Aquifer; and §294.12, Description of Boundaries.

Subchapter D, Priority Groundwater Management Areas, provides for the designations and boundaries of three priority groundwater management areas and contains §294.30, Purpose and Applicability; §294.31, Designation of Briscoe, Hale and Swisher County Priority Groundwater Management Area; §294.32, Designation of Dallam County Priority Groundwater Management Area; and §294.35, Designation of Reagan, Upton, and Midland County Priority Groundwater Management Area.

Subchapter E, Designation of Priority Groundwater Management Areas, provides for the identification, stakeholder notice, coordination with participating agencies, and executive director report for priority groundwater management area studies. The subchapter provides procedures including notice and hearing for commission actions to consider designation of priority groundwater management areas. The subchapter contains §294.39, Purpose; §294.40, Definitions; §294.41, Priority Groundwater Management Area Identification, Study, and Executive Director's Report Concerning Designation; §294.42, Commission Action Concerning PGMA Designation; §294.43, Actions Required After PGMA Designation; and §294.44, Adding a PGMA to an Existing Groundwater Conservation District.

Subchapter F, East Texas Groundwater Management Area, contains §294.60, Purpose and Scope; §294.61, Definitions; §294.62, Designation of East Texas Groundwater Management Area (ETGMA); and §294.63, Boundaries.

ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a review and determined that the reasons for Subchapters D and E in Chapter 294 continue to exist. The rules are needed to implement the requirements of Texas Water Code, Chapter 35, in order to identify, study, and designate priority groundwater management areas in areas experiencing or likely to experience critical groundwater problems in the next 25 years. The name of the chapter should be changed to Priority Groundwater Management Areas to better describe the purpose of the rules.

The reasons for Subchapters A, B, and F no longer exist, and these subchapters are being repealed. Senate Bill 2, §2.22, 77th Legislature, 2001, transferred the authority to designate groundwater management areas from the commission to the Texas Water Development Board. These groundwater management areas are no longer valid and should be repealed to avoid confusion with the Texas Water Development Board groundwater management area designations.

PUBLIC COMMENT

The public comment period closed on February 17, 2004. No comments were received.

TRD-200403264
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: May 14, 2004

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 TAC §355.103(b)(7)(A)

building historical cost (excluding land)	$110,000
less 10% salvage value	-11,000
depreciable basis	$99,000

divided by 30 years = $3,300 depreciation expense per year

Figure: 28 TAC §5.3702(c)

ZIP	ZIP	ZIP	ZIP	ZIP	ZIP
75001	76017	76933	77461	78071	79003
75006	76018	76936	77463	78072	79005
75019	76020	76943	77464	78075	79009
75038	76021	76951	77465	78102	79013
75039	76022	77002	77467	78107	79014
75040	76028	77003	77468	78125	79021
75041	76034	77004	77469	78140	79027
75042	76036	77005	77471	78142	79029
75043	76039	77006	77476	78145	79031
75044	76040	77007	77477	78146	79034
75048	76051	77008	77478	78147	79035
75050	76052	77009	77479	78151	79039
75051	76053	77010	77480	78159	79040
75052	76054	77011	77481	78161	79041
75060	76060	77012	77482	78164	79042
75061	76063	77013	77483	78201	79043
75062	76067	77014	77485	78202	79045
75063	76092	77015	77486	78203	79046
75080	76102	77016	77488	78204	79052
75081	76103	77017	77489	78207	79054
75082	76104	77018	77493	78208	79056
75088	76105	77019	77494	78210	79057
75089	76106	77020	77502	78211	79061
75098	76107	77021	77503	78212	79064
75104	76108	77022	77504	78214	79065
75110	76109	77023	77505	78215	79072
75115	76110	77024	77506	78221	79079
75116	76111	77025	77507	78223	79080
75125	76112	77026	77510	78226	79082
75134	76114	77027	77511	78236	79083
75137	76115	77028	77514	78237	79086
75140	76116	77029	77515	78252	79087
75141	76117	77030	77517	78330	79092
75144	76118	77031	77518	78332	79095
75146	76119	77032	77519	78336	79096
75149	76120	77033	77520	78338	79101
75150	76123	77034	77521	78339	79102
75159	76126	77035	77530	78340	79106
75172	76127	77036	77531	78343	79107
75180	76131	77037	77532	78347	79201

ZIP	ZIP	ZIP	ZIP	ZIP	ZIP
75181	76132	77038	77533	78351	79220
75182	76133	77039	77534	78352	79225
75201	76134	77040	77535	78353	79226
75202	76135	77041	77536	78355	79227
75203	76137	77042	77538	78358	79229
75204	76140	77043	77539	78359	79230
75205	76148	77044	77541	78362	79233
75206	76155	77045	77545	78363	79234
75207	76177	77046	77546	78364	79235
75208	76179	77047	77547	78368	79237
75209	76180	77048	77550	78370	79239
75210	76248	77049	77551	78371	79240
75211	76255	77050	77553	78372	79241
75212	76261	77051	77554	78373	79243
75214	76262	77053	77560	78374	79244
75215	76265	77054	77561	78375	79245
75216	76301	77055	77562	78377	79247
75217	76311	77056	77563	78379	79248
75218	76363	77057	77564	78380	79250
75219	76364	77058	77565	78382	79252
75220	76366	77059	77566	78383	79255
75223	76371	77060	77568	78385	79256
75224	76372	77061	77571	78387	79257
75225	76374	77062	77573	78389	79261
75226	76380	77063	77575	78390	79311
75227	76384	77064	77577	78391	79312
75228	76388	77065	77578	78393	79313
75229	76424	77066	77581	78401	79316
75230	76435	77067	77582	78402	79322
75231	76436	77068	77583	78404	79323
75232	76437	77069	77584	78405	79324
75233	76442	77070	77585	78406	79325
75234	76443	77071	77586	78407	79326
75235	76445	77072	77587	78408	79329
75236	76448	77073	77590	78409	79331
75237	76454	77074	77591	78410	79336
75238	76455	77075	77597	78411	79339
75240	76457	77076	77598	78412	79342
75241	76458	77077	77611	78413	79343
75243	76460	77078	77613	78414	79345
75244	76464	77079	77615	78415	79346
75246	76466	77080	77617	78416	79347

ZIP	ZIP	ZIP	ZIP	ZIP	ZIP
75247	76470	77081	77619	78417	79350
75248	76471	77082	77622	78418	79351
75249	76475	77083	77623	78501	79355
75251	76481	77084	77625	78503	79356
75253	76483	77085	77627	78504	79357
75270	76491	77086	77629	78516	79359
75401	76504	77087	77630	78520	79364
75417	76511	77088	77632	78521	79369
75418	76518	77089	77640	78526	79370
75426	76520	77090	77642	78537	79371
75428	76525	77091	77650	78538	79373
75431	76528	77092	77651	78539	79376
75435	76530	77093	77655	78543	79379
75441	76531	77094	77656	78549	79381
75446	76550	77095	77657	78550	79401
75448	76569	77096	77659	78552	79403
75449	76577	77098	77662	78557	79404
75469	76628	77099	77663	78558	79405
75470	76629	77301	77665	78559	79406
75475	76632	77327	77701	78560	79411
75477	76634	77336	77702	78562	79412
75481	76635	77338	77703	78563	79501
75487	76639	77339	77705	78565	79502
75496	76645	77345	77706	78566	79505
75550	76648	77346	77707	78569	79506
75554	76649	77368	77708	78570	79512
75556	76660	77369	77713	78572	79517
75559	76661	77373	77803	78575	79518
75562	76664	77374	77837	78576	79526
75563	76666	77375	77853	78577	79527
75564	76667	77376	77857	78578	79528
75568	76670	77379	77859	78579	79532
75602	76678	77388	77901	78580	79534
75633	76680	77389	77904	78583	79539
75654	76685	77396	77905	78586	79543
75656	76690	77401	77950	78589	79544
75667	76693	77414	77951	78592	79546
75669	76701	77415	77954	78593	79547
75681	76704	77417	77957	78594	79548
75684	76705	77419	77960	78595	79549
75702	76706	77420	77961	78596	79556
75759	76707	77422	77962	78597	79560

ZIP	ZIP	ZIP	ZIP	ZIP	ZIP
75766	76708	77428	77963	78598	79566
75785	76711	77429	77964	78622	79567
75838	76798	77430	77968	78629	79601
75848	76801	77432	77969	78648	79607
75856	76821	77433	77970	78661	79718
75925	76823	77434	77971	78672	79719
75934	76832	77435	77973	78702	79730
75935	76834	77437	77975	78721	79731
75956	76837	77440	77977	78742	79735
75968	76842	77441	77978	78830	79741
75972	76844	77443	77979	78834	79745
75975	76848	77444	77982	78839	79752
75976	76849	77446	77983	78851	79772
76001	76853	77447	77988	78860	79781
76002	76854	77448	77990	78872	79782
76006	76856	77449	77991	78880	79785
76008	76859	77450	77994	78881	79830
76010	76861	77451	77995	78938	79837
76011	76864	77454	78008	78941	79842
76012	76878	77455	78012	78943	79843
76013	76901	77456	78014	78956	79848
76014	76903	77457	78019	78959	79854
76015	76930	77458	78022	78962	79855
76016	76932	77459	78040	79001	79901

Figure: 34 TAC §3.175(e)(1)

Registered Gross Weight	Less Than 5,000 Miles	5,000 to 9,999 Miles	10,000 to 14,999 Miles	15,000 Miles and Over
Class A: Less than 4,000 pounds	$30	$60	$90	$120
Class B: 4,000 to 10,000 pounds	$42	$84	$126	$168
Class C: 10,001 to 15,000 pounds	$48	$96	$144	$192
Class D: 15,001 to 27,500 pounds	$84	$168	$252	$336
Class E: 27,501 to 43,500 pounds	$126	$252	$378	$504
Class F: 43,501 and over	$186	$372	$558	$744

Figure: 34 TAC §3.180(c)(2)(B)

Example:

Deliveries to:

Date	Buyer A	Buyer B
July 5	5,000 gal.	5,000 gal.
July 10	2,500 gal.	2,500 gal.
July 15	2,500 gal.	2,501 gal.
July 20	3,000 gal.	500 gal.

The sale on July 20 to Buyer B is taxable because the 10,000 gallon limit was exceeded on July 15. The sale to Buyer A on July 20 is not taxable because it is the sale that caused the 10,000 gallon limit to be exceeded and the delivery does not exceed 7,400 gallons.

Figure: 34 TAC §3.184(f)

Registered Gross Weight	Less Than 5,000 Miles	5,000 to 9,999 Miles	10,000 to 14,999 Miles	15,000 Miles and Over
Class A: Less than 4,000 pounds	$30	$60	$90	$120
Class B: 4,000 to 10,000 pounds	$42	$84	$126	$168
Class C: 10,001 to 15,000 pounds	$48	$96	$144	$192
Class D: 15,001 to 27,500 pounds	$84	$168	$252	$336
Class E: 27,501 to 43,500 pounds	$126	$252	$378	$504
Class F: 43,501 and over	$186	$372	$558	$744

Figure: 34 TAC §3.185(f)

VEHICLE CLASS	REGISTERED GROSS WEIGHT	PERMIT COST
A	Less than 2,500 lbs.	$46.50
B	2,500 to 3,500 lbs.	$82.50
C	3,501 to 4,500 lbs.	$103.50
D	4,501 to 7,000 lbs.	$124.50
E	7,001 to 10,000 lbs.	$145.50

Figure: 34 TAC §3.189(f)

Statement for Purchasing Gasoline or Diesel Fuel for Resale

____
Date

____
Seller

____
Address

____
City, State Zip Code

Type of Fuel: Gasoline______Diesel Fuel______(Check one: Separate statements must be signed for gasoline and diesel fuel.)

Purchaser's Declaration:

I declare that the purchases from the above named seller are for resale.

Signature	Business Name
Name (Print)	Address
	City, State Zip Code
	Permit Number (If applicable)

Figure: 34 TAC §3.744(h)(1)

Registered Gross Weight	Less Than 5,000 Miles	5,000 to 9,999 Miles	10,000 to 14,999 Miles	15,000 Miles and Over
Class A: Less than 4,000 pounds	$30	$60	$90	$120
Class B: 4,000 to 10,000 pounds	$42	$84	$126	$168
Class C: 10,001 to 15,000 pounds	$48	$96	$144	$192
Class D: 15,001 to 27,500 pounds	$84	$168	$252	$336
Class E: 27,501 to 43,500 pounds	$126	$252	$378	$504
Class F: 43,501 and over	$186	$372	$558	$744

Figure: 34 TAC §3.748(c)(4)(B)

Example:

Deliveries to:

Date	Buyer A	Buyer B
July 5	5,000 gal.	5,000 gal.
July 10	2,500 gal.	2,500 gal.
July 15	2,500 gal.	2,501 gal.
July 20	3,000 gal.	500 gal.

The sale on July 20 to Buyer B is taxable because the 10,000 gallon limit was exceeded on July 15. The sale to Buyer A on July 20 is not taxable because it is the sale that caused the 10,000 gallon limit to be exceeded and the delivery does not exceed 7,400 gallons.

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.

Brazos Valley Workforce Development Board

Public Notice

The Brazos Valley Workforce Development Board (BVWDB) is soliciting quotes to upgrade its MIP Pro Fund Accounting Software to MIP Advantage Fund Accounting Software through competitive Request for Quote (RFQ) process. The Request for Quotes (RFQ) can be downloaded at: www.bvjobs.org or by request to John Jackson, 979-595-2800, ext 2208, by email at jjackson@bvcog.org, or by fax at 979-595-2817, or in writing to P.O. Box 4128, Bryan, TX 77805, Attention: Request for MIP upgrade RFQ.

The purpose of the RFQ is to solicit proposals to upgrade our existing 10 User MIP Pro Fund Accounting Software to 10 User MIP Advantage Fund Accounting Software. Modules included are General Ledger, Accounts Payable, Allocations Mgmt., Bank Reconciliation, Budget Management, Direct Deposit, Encumbrances, Import/Export, Payroll, Purchase Order and 5 Executive View Seats, including maintenance, 1 support incident, and implementation.

This software is used to provide the accounting records for various funds and organizations within the Brazos Valley Council of Governments. The primary consideration in selecting a provider for this Software will be overall cost, implementation and Workforce experience, availability and service.

The upgraded MIP Advantage Software will be used to establish a separate organization for Workforce Solutions of the Brazos Valley thus expanding data collection and reporting capabilities. The selected provider of this Software will be asked to install the Software, convert already existing data from MIP Pro Software to MIP Advantage Software in such a manner that there is no data integrity failure, assist in the set up of a new Workforce organization within that software in accordance with the needs of the Workforce Board Staff, and train accounting staff in the use and capabilities of MIP Advantage.

The deadline for proposals is 4:00 P.M. CST on Wednesday, May 19, 2004. Please direct questions via e-mail to:

jjackson@bvcog.org

Deadline for questions is Tuesday, May 18, 2004, 4:00 P.M. CST.

TRD-200403280
Tom Wilkinson, Jr.
Office Manager
Brazos Valley Workforce Development Board
Filed: May 14, 2004

♦ ♦ ♦

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 May 6, 2004, through May 13, 2004. The public comment period for these projects will close at 5:00 p.m. on June 18, 2004.

FEDERAL AGENCY ACTIONS:

Applicant: ESCO Marine, Inc.; Location: The project is located on the Brownsville Ship Channel (+/- USED Sta. 78+500 R from 0+00 at Brazos Santiago Pass/Jetties) at 16200 Joe Garza Sr. Road. The project can be located on the U.S.G.S. quadrangle map entitled: Palmito Hill, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 663100; Northing: 2872500. Project Description: The applicant proposes to excavate an 800-foot-long by 190-foot-wide ship dismantling slip and a 160-foot-long by 50-foot-wide barge loading slip from uplands contiguous with the Brownsville Ship Channel. Maximum project depths for the two areas would be -27 feet mean sea level. Excavation would be done in the dry until the final cutting open of the slip entrances. Excavated materials would be placed into a contained placement area (PA) located on adjoining uplands. The PA would be leveed with berms having a 24-inch-high clearance above the interior fill level. CCC Project No.: 04-0168-F1; Type of Application: U.S.A.C.E. permit application #23399 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

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-200403380
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: May 19, 2004

♦ ♦ ♦

Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in 303.003, 303.009, and 304.003, Tex. Fin. Code.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 05/24/04 - 05/30/04 is 18% for Consumer [1]/Agricultural/Commercial [2]/credit thru $250,000.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 05/24/04 - 05/30/04 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 06/01/04 - 06/30/04 is 5% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 06/01/04 - 06/30/04 is 5% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200403378
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: May 19, 2004

♦ ♦ ♦

Credit Union Department

Application 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 S&S Credit Union, Houston, Texas. The credit union is proposing to change its name to Space City Credit Union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200403382
Harold E. Feeney
Commissioner
Credit Union Department
Filed: May 19, 2004

♦ ♦ ♦

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 Baptist Credit Union, San Antonio, Texas to expand its field of membership. The proposal would permit students enrolled at the San Antonio Campus of Wayland Baptist University, to be eligible for membership in the credit union.

An application was received from Community Resource Credit Union, Baytown, Texas (#1) to expand its field of membership. The proposal would permit persons who live, work, attend school or worship in and businesses located within the boundaries of the Huffman Independent School District, to be eligible for membership in the credit union.

An application was received from Community Resource Credit Union, Baytown, Texas (#2) to expand its field of membership. The proposal would permit persons who live, work, attend school or worship in and businesses located within the boundaries of the Humble Independent School District, to be eligible for membership in the credit union.

An application was received from Community Resource Credit Union, Baytown, Texas (#3) to expand its field of membership. The proposal would permit persons who live, work, attend school or worship in and businesses located within the boundaries of the New Caney Independent School District, to be eligible for membership in the credit union.

An application was received from First Financial Community Credit Union, Brownsville, Texas to expand its field of membership. The proposal would permit persons who live, work, worship, attend school, and all businesses in Hidalgo, Willacy, Starr, and Kenedy Counties, Texas, to be eligible for membership in the credit union.

An application was received from Government Employees Credit Union of El Paso, Texas to expand its field of membership. The proposal would permit persons who work or reside in Dona Ana County New Mexico within a 25 mile radius of the GECU office located at 1500 N. Resler Drive in El Paso, Texas, to be eligible for membership in the credit union.

An application was received from Members Choice Credit Union, Houston, Texas (#1) to expand its field of membership. The proposal would permit persons who live, work, or attend school in and businesses Harris County, Texas, to be eligible for membership in the credit union.

An application was received from Members Choice Credit Union, Houston, Texas (#2) to expand its field of membership. The proposal would permit persons who live, work, or attend school in and businesses in Fort Bend County, Texas, to be eligible for membership in the credit union.

An application was received from Members Choice Credit Union, Houston, Texas (#3) to expand its field of membership. The proposal would permit persons who live, work, or attend school in and businesses in Waller County, Texas, to be eligible for membership in the credit union.

An application was received from Members Choice Credit Union, Houston, Texas (#4) to expand its field of membership. The proposal would permit persons who live, work, or attend school in and businesses in Montgomery County, Texas, to be eligible for membership in the credit union.

An application was received from Members Choice Credit Union, Houston, Texas (#5) to expand its field of membership. The proposal would permit persons who live, work, or attend school in and businesses in Brazoria County, Texas, to be eligible for membership in the credit union.

An application was received from Members Choice Credit Union, Houston, Texas (#6) to expand its field of membership. The proposal would permit persons who live, work, or attend school in and businesses in Austin County, Texas, to be eligible for membership in the credit union.

An application was received from Winkler County Credit Union, Kermit, Texas to expand its field of membership. The proposal would permit persons who live in, worship in, attend school in, or work in Reeves County, Texas, to be eligible for membership in the credit union.

An application was received from Texas One Community Credit Union, Houston, Texas to expand its field of membership. The proposal would permit persons who live, work or attend school in and businesses in Harris, Montgomery, Waller, and Fort Bend Counties, 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-200403383
Harold E. Feeney
Commissioner
Credit Union Department
Filed: May 19, 2004

Notice of Final Action Taken

In accordance with the provisions of 7 TAC §91.103, the Credit Union Department provides notice of the final action taken on the following applications:

Applications to Amend Articles of Incorporation--Approved

PIA of Texas Credit Union, Dallas, Texas--See *Texas Register* issue dated March 26, 2004.

Houston Energy Credit Union, Houston, Texas--See *Texas Register* issue dated March 26, 2004.

Vought Heritage Community Credit Union, Grand Prairie, Texas--See *Texas Register* issue dated March 26, 2004.

First Educators Credit Union, Houston, Texas--See *Texas Register* issue dated March 26, 2004.

TRD-200403384
Harold E. Feeney
Commissioner
Credit Union Department
Filed: May 19, 2004

Education Service Center, Region X

Request for Applications: Support for Homeless Education Program, School Year 2004-2005

Filing Authority. The availability of grant funds under Request for Applications RFA #ESCR-10/H2006.1 is authorized by the McKinney-Vento Homeless Education Assistance Improvements Act of 2001, Public Law 107-110.

Eligible Applicants. The Region 10 Education Service Center is requesting applications from school districts, regional education service centers, and open enrollment and home rule charter schools to facilitate the enrollment, attendance, and school success of homeless children and youth.

Description. Applicants should describe plans to provide tutoring, counseling, social work services, transportation, and other assistance that might improve the access of homeless children and youth to a free and appropriate public education. Project evaluations will include data on the impact of the project on the enrollment, school attendance, and the academic success of homeless students.

Dates of Project. The Support for Homeless Education Program grants will be implemented during the 2004-2005 school year. Applicants that successfully complete the first year of the program will be allowed to continue the projects for one additional year, contingent upon availability of funding from the US Department of Education. Applicants should plan for a starting date no earlier than September 1, 2004.

Project Amount. Approximately $200,000 will be provided for an unspecified number of projects; the number of projects will depend on the number of applicants. Projects funded will receive a maximum of $20,000 for the 2004-2005 school year and a maximum of $20,000 for the 2005-2006 school year. Project funding for the second year of funding for grantees is contingent upon 1) a grantee's successful completion of the first year of the project, and 2) funding levels appropriated for the program by the US Department of Education. This project is funded 100% from McKinney-Vento Homeless Education Assistance Act federal funds.

Selection Criteria. Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. The Region 10 ESC reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

Region 10 ESC is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit Region 10 ESC to pay any costs before an application is approved. The issuance of this RFA does not obligate Region 10 to award a grant or pay any costs incurred in preparing a response.

Requesting The Application. A complete copy of the Request For Application ESCR-10/H2006.1 may be obtained by writing The University of Texas at Austin, Charles A. Dana Center, Texas Homeless Education Office, 2901 North IH-35, Suite 2.246, Austin, TX 78722-2348, or by calling 1-800-446-3142 or (512) 475-9702 (in Austin). Please refer to the RFA # in your request. The application may be downloaded from the Texas Homeless Education Office website at http://www.utdanacenter.org/theo.

Further Information. For clarifying information about the RFA, contact the Texas Homeless Education Office at 1-800-446-3142 or (512) 475-9702.

Deadline for Receipt of Application. Applications must be received in the Region 10 ESC business office by 4:30 p.m. (Central Standard Time), Wednesday, June 16, 2004, to be considered.

TRD-200403307
Dr. Joe T. Farmer
Executive Director
Education Service Center, Region X
Filed: May 17, 2004

Texas Commission on Environmental Quality

Enforcement Orders

An agreed order was entered regarding Longview Brass & Aluminum Company, Docket No. 2001-0768-IHW-E on April 30, 2004 assessing $34,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Becky Petty, Staff Attorney at 512/239-3693, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding Abril Medina dba A & L Performance and Homero Medina, Docket No. 2001-0180-PST-E on April 30, 2004 assessing $12,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gitanjali Yadav, Staff Attorney at 512/239-2029, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Navarro Pecan Company, Inc., Docket No. 2001-0578- IHW-E on April 30, 2004 assessing $4,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alfred Okpohworho, Staff Attorney at 713/422-8918, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Madanco Corporation dba Shopper's Mart #106 and dba Chevron Food Mart, Docket No. 2002-0255-PST-E on April 30, 2004 assessing $6,875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alfred Okpohworho, Staff Attorney at 713/422-8918, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Pedro Castrellon dba Paca's Body Shop, Docket No. 2002- 1410-AIR-E on April 30, 2004 assessing $2,100 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Benjamin de Leon, Staff Attorney at 512/239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding City of La Villa, Docket No. 2001-1374-PWS-E on April 30, 2004 assessing $18,025 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alfred Okpohworho, Staff Attorney at 713/422-8918, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Ernest Pettit, Docket No. 2002-1216-OSS-E, on April 30, 2004 assessing $525 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Benjamin de Leon, Staff Attorney at 512/239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding A.C.S.S. Dallas Industrial, Incorporated, Docket No. 2003-0835-PST-E on April 30, 2004 assessing $1,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at 817/588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Kenneth and Mittie Thomson, Docket No. 2003-0838- PST-E on April 30, 2004 assessing $3,150 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laura Clark, Enforcement Coordinator at 409/899-8760, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ransom Industries, L.P. dba Tyler Pipe Company, Docket No. 2002-0079-AIR-E on April 30, 2004 assessing $112,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at 713/422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Western Gas Resources, Inc., Docket No. 2003-1223- AIR-E on April 30, 2004 assessing $4,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sandy VanCleave, Enforcement Coordinator at 512/239-0667, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tri-Union Development Corporation, Docket No. 2003- 1391-AIR-E on April 30, 2004 assessing $750 in administrative penalties with $150 deferred.

Information concerning any aspect of this order may be obtained by contacting Craig Carson, Enforcement Coordinator at 512/239-5612, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Matagorda County dba Midfield Community Wastewater Treatment Facility, Docket No. 2002-1266-MWD-E on April 30, 2004 assessing $15,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Catherine Albrecht, Enforcement Coordinator at 713/767-3672, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Forrest Glenn Cook dba Glenn Cook Texaco, Docket No. 2003-0885-PST-E on April 30, 2004 assessing $3,150 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Ronnie Kramer, Enforcement Coordinator at 806/468-0512, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding EBCO Land Development, Ltd., Docket No. 2003-0350- WR-E on April 30, 2004 assessing $13,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Catherine Albrecht, Enforcement Coordinator at 713/767-3672, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding C & R Distributing, Inc. dba C & R Fuel Control #42, Docket No. 2003-0627-AIR-E on April 30, 2004 assessing $750 in administrative penalties with $150 deferred.

Information concerning any aspect of this order may be obtained by contacting John Barry, Enforcement Coordinator at 409/899-8781, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Frontier Tank Lines, Inc., Docket No. 2003-1286-PST-E on April 30, 2004 assessing $900 in administrative penalties with $180 deferred.

Information concerning any aspect of this order may be obtained by contacting Mauricio Olaya, Enforcement Coordinator at 915/834-4967, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Alvarado, Docket No. 2003-1293-MWD-E on April 30, 2004 assessing $6,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting James Fleming, Enforcement Coordinator at 512/239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Varco, L.P. dba Tuboscope, Docket No. 2003-0028-AIR- E on April 30, 2004 assessing $71,000 in administrative penalties with $14,200 deferred.

Information concerning any aspect of this order may be obtained by contacting Ronnie Kramer, Enforcement Coordinator at 806/468-0512, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Mart, Docket No. 2003-0074-MWD-E on April 30, 2004 assessing $7,280 in administrative penalties with $1,456 deferred.

Information concerning any aspect of this order may be obtained by contacting Sunday Udoetok, Enforcement Coordinator at 512/239-0739, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Conner Steel Products, Inc., Docket No. 2003-1149- MLM-E on April 30, 2004 assessing $6,820 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at 512/239-5025, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Luke's Little Super, Inc. dba Luke's Little Supermarket & Deli, Inc., Docket No. 2003-0978-PST-E on April 30, 2004 assessing $2,540 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sherry Smith, Enforcement Coordinator at 512/239-0572, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ATOFINA Petrochemicals, Inc., Docket No. 2002-0888- AIR-E on April 30, 2004 assessing $146,875 in administrative penalties with $29,375 deferred.

Information concerning any aspect of this order may be obtained by contacting Laura Clark, Enforcement Coordinator at 409/899-8760, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ronnie Lee Legett dba Leggett Plumbing, Docket No. 2003-1198-SLG-E on April 30, 2004 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Laurie Eaves, Enforcement Coordinator at 512/239-4495, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Juan Pareida, Docket No. 2003-0486-MSW-E on April 30, 2004 assessing $1,800 in administrative penalties with $360 deferred.

Information concerning any aspect of this order may be obtained by contacting Steven Lopez, Enforcement Coordinator at 512/239-1896, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ATOFINA Petrochemicals, Inc., Docket No. 2002-1051- AIR-E on April 30, 2004 assessing $106,407 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laura Clark, Enforcement Coordinator at 409/899-8760, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200403361
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 18, 2004

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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 **June 28, 2004**. 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 June 28, 2004**. 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: Essra Corporation dba Que Paso Food Store; DOCKET NUMBER: 2003-0884- PST-E; TCEQ ID NUMBERS: 0049944 and RN101564805; LOCATION: 1705 Northwest 28th Street, Fort Worth, Tarrant 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 acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks (USTs); and 30 TAC §334.21, by failing to pay outstanding UST fees; PENALTY: $3,960; STAFF ATTORNEY: Lindsay Andrus, Litigation Division, MC 175, (512) 239-4761; REGIONAL OFFICE:

Dallas-Fort Worth Regional Office, 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Uppal Bros., Inc., dba Save Way Food Mart; DOCKET NUMBER: 2003-0997- PST-E; TCEQ ID NUMBERS: 44704 and RN102035367; LOCATION: 6620 Brentwood Stair Road, Fort Worth, Tarrant 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 acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; PENALTY: $5,350; STAFF ATTORNEY: Diana Grawitch, Litigation Division, MC 175, (512) 239- 0939; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Victor Flores fdba Victor's Convenience-Pharr; DOCKET NUMBER: 2003-0844- PST-E; TCEQ ID NUMBER: 48887; LOCATION: 1901 North I Road, Pharr, Hidalgo County, Texas; TYPE OF FACILITY: petroleum storage tank; RULES VIOLATED: 30 TAC §§334.10(a)(4), 334.8(c)(3)(D)(iii), 37.815, and 37.870(a)(4), by failing to demonstrate financial assurance; PENALTY: $2,140; STAFF ATTORNEY: Ashley Kever, Litigation Division, MC 175, (512) 239-2987; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

TRD-200403362
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: May 18, 2004

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 **June 28, 2004**. 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 June 28, 2004**. 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: Gilbert Interests, Inc.; DOCKET NUMBER: 2003-0508-PST-E; TCEQ ID NUMBER: RN103065272; LOCATIONS: (Picky's Pantry) 1950 William Cannon Drive; (Tarrytown Chevron) 3118 Windsor Road; (Metro Mart #5) 13436 Pond Springs Road; (Lucky Food Mart) 5800 South Congress Avenue; (Metro Star Grocery) 10304 North Lamar Boulevard; (Texan Mart #2) 12195 Metric Boulevard; (Metro Mart #4) 2113 Wells Branch; and (Capital Food Mart #2) 11005 Burnet Road, Austin, Travis County, Texas; TYPE OF FACILITY: fuel distribution center that delivers regulated substances to underground storage tanks (USTs); RULES VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to view a valid, posted TCEQ-issued delivery certificate prior to delivery of fuel to the facilities; PENALTY: $10,350; STAFF ATTORNEY: Sarah Utley, Litigation Division, MC R-13, (210) 403- 4017; REGIONAL OFFICE: Austin Regional Office, 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(2) COMPANY: Hooks Mobile Home Park, LTD.; DOCKET NUMBER: 2002-0912-MWD-E; TCEQ ID NUMBERS: 12083-001 and RN102177698; LOCATION: 12019 Aldine Westfield Road, Houston, Harris County, Texas; TYPE OF FACILITY: waste water treatment; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121, and Texas Pollutant Discharge Elimination System (TPDES) Permit Number 12083-001, Interim Effluent and Monitoring Requirements Number 1, by failing to comply with permitted effluent limits; and 30 TAC §305.125(1), TWC, §26.121, and TPDES Permit Number 12083-001, Interim Effluent and Monitoring Requirements Number 1, by failing to comply with permitted effluent limits at Outfall 002; PENALTY: $4,275; STAFF ATTORNEY: Sarah Utley, Litigation Division, MC R-13, (210) 403-4017; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Richard Hutt fdba Westlake Village Mobile Home Park; DOCKET NUMBER: 2002-0985-PWS-E; TCEQ ID NUMBER: 1260098; LOCATION: 4826 West Country Road, Cleburne, Johnson County, Texas; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.109(c)(2)(A)(iii) and Texas Health and Safety Code (THSC), §341.031(a) and §341.033(d), by failing to take bacteriological samples at the required frequency; 30 TAC §290.109(c)(3)(A)(ii) and THSC, §341.031(a), by failing to take the required number of repeat bacteriological samples following a sample containing coliform organisms; 30 TAC §290.109(c)(2)(F) and THSC, §341.031(a), by failing to take additional routine bacteriological samples following a sample containing coliform organisms; 30 TAC §290.109(b)(2) and (f)(3) and THSC, §341.031(a), by exceeding the maximum contaminant level for coliform; and 30 TAC §290.109(g) and §290.122(b) and (c), by failing to properly notify the public of coliform positive samples or failing to sample for coliform; PENALTY: $600; STAFF ATTORNEY: Ashley Kever, Litigation Division, MC 175, (512) 239-2987; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: Universal Transport, Inc.; DOCKET NUMBER: 2003-1337-PST-E; TCEQ ID NUMBER: RN103142667; LOCATION: (refueling station) 415 North Wayside, Houston, Harris County; (facility 1) 700 Breakaway Road, Cedar Park, Williamson County; (facility 2) 500 Terminal Road, Georgetown, Williamson County; and (facility 3) 6101 Rosedale Street, Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: aircraft refueling and convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.5(b)(1)(A),

by failing to observe that the owners or operators of the facilities had valid, current delivery certificates issued by the TCEQ, covering the UST systems, prior to depositing a regulated substance into the UST systems; PENALTY: $38,400; STAFF ATTORNEY: Alfred Okpohworho, Litigation Division, MC R-12, (713) 422-8918; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767- 3500; Austin Regional Office, 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339- 2929; and Dallas-Fort Worth Regional Office, 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200403363
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: May 18, 2004

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 111, Control of Air Pollution from Visible Emissions and Particulate Matter, and Chapter 330, Municipal Solid Waste

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive comments concerning revisions to 30 TAC §111.209, Exception for Disposal Fires; §330.4, Permit Required; and corresponding revisions to the Texas state implementation plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations, §51.102 of the United States Environmental Protection Agency regulations concerning SIPs. The amendment to §111.209 is proposed as a revision to the SIP.

The proposed rulemaking would conform agency rules with Senate Bill 216, 78th Legislature, 2003, which allows veterinarians to burn or bury animals and associated medical waste provided certain conditions are met.

A public hearing on this proposal will be held in Austin on June 24, 2004 at 10:00 a.m. in Building C, Room 131E, at the commission's central office, located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

Comments may be submitted to Patricia Durón, Texas Commission on Environmental Quality, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or by fax to (512) 239-4808. All comments should reference Rule Project Number 2004-003-330-WS. Comments must be received by 5:00 p.m., June 28, 2004. For further information, please contact Emily Barrett, Policy and Regulations Division, at (512) 239-3546.

TRD-200403270
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: May 14, 2004

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Notice of Water Quality Applications

The following notices were issued during the period of May 3, 2004 through May 12, 2004.

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.

AQUA WATER SUPPLY CORPORATION has applied for a renewal of TPDES Permit No. WQ0014226001, which authorizes the discharge of filter backwash and settling pit decant wastewater from an iron removal potable water plant at a daily average flow not to exceed 5, 000 gallons per day. The facility is located approximately 2.1 miles west-northwest of the intersection of Farm-to-Market Road 1624 and County Road 322, and approximately 2.4 miles southeast of the intersection of Farm-to-Market Road 696 and County Road 309 in Lee County, Texas.

BAYVIEW MUNICIPAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. 10770-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The facility is located at 3206 State Highway 146, approximately 1200 feet west of State Highway 146 and 5,500 feet north of the intersection of Farm- to-Market Road 646 and State Highway 146 in Galveston County, Texas.

BELL COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 1 has applied for a renewal of TPDES Permit No. 10351-001, which authorizes the discharge of treated water treatment plant filter backwash water at a daily average flow not to exceed 900,000 gallons per day. The facility is located three miles west-northwest of Lake Belton Dam, north of Farm-to-Market Road 439 and approximately one mile north of Westcliff Park in Bell County, Texas.

BELL COUNTY WATER CONTROL & IMPROVEMENT DISTRICT NO. 2 has applied for a renewal of TPDES Permit No. 11090-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 94,000 gallons per day. The facility is located immediately west of State Highway 95 approximately 700 feet south of the intersection of State Highway 95 and Farm-to-Market Road 436 in Bell County, Texas.

TOWN OF DARROUZETT has applied for a major amendment to Permit No. 10446-001 to authorize a change in irrigation site from a 36-acre Park and Golf Course to a 21.36-acre non-public access pastureland. The current permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day via surface irrigation of 36 acres of a Park and Golf Course. This permit will not authorize a discharge of pollutants into waters in the State. The facility is located approximately 2,000 feet south-southwest of the intersection Interstate Highway 15 and Farm-to-Market Road 2248, immediately east of the Town of Darrouzett in Lipscomb County, Texas. The disposal site is located approximately 500 feet south-southwest of the intersection of Interstate Highway 15 and Farm-to-Market Road 2248, east of the Town of Darrouzett in Lipscomb County, Texas.

DRIPPING SPRINGS APARTMENTS, L.P. has applied for a renewal of Permit No. 14146- 001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 0.014 gallons per day via subsurface drip irrigation on 3.57 acres of non-public access land. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located on the north side of U.S. Route 290, approximately 13,000 feet west along U.S.

Route 290 from its intersection with State Route 12 in Hays County, Texas.

CITY OF FLOYDADA has applied for a renewal of Permit No. WQ0010170001, which authorizes the disposal of treated domestic wastewater at a volume not to exceed the a daily average flow of 500,000 gallons per day via irrigation on 128 acres of non-public access agriculture land. Application rates shall not exceed 4.37 acre-feet per year per acre irrigated. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facilities and disposal site are located 0.5 mile south of U.S. highway 70 and approximately 1.5 miles east of Farm-to-Market Road 1958 in Floyd County, Texas.

THE CITY OF FREEPORT has applied for a renewal of TPDES Permit No. 10882-002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day with provisions to irrigate 67.68 acres of golf course land. The facility is located at 123 Slaughter Road, North of State Highway 36, approximately 1 mile south of the Brazos River in Brazoria County, Texas.

GEORGIA GULF CHEMICALS & VINYLS, LLC which operates an organic chemical manufacturing plant which produces cumene, phenol, and acetone as its primary products, has applied for a major amendment to TPDES Permit No. 02067 to authorize the combination of existing Outfalls 001, 002, and 003 into one single outfall identified as new Outfall 001 and a reduction in the monitoring frequency for ammonia (as N) from twice per week to once per month at Outfall 004. The current permit authorizes the discharge of cooling tower blowdown, boiler blowdown, steam system blowdown, storm water, and previously monitored effluent consisting of treated domestic sewage at a daily maximum flow not to exceed 320,000 gallons per day; the discharge of storm water on an intermittent and flow variable basis via Outfall 002; the discharge of storm water from the dock area on an intermittent and flow variable basis via Outfall 003; the discharge of treated process wastewater, utility waters, and treated domestic sewage at a daily average flow not to exceed 450,000 gallons per day via Outfall 004; the discharge of cooling tower blowdown, steam condensate, and storm water runoff from a lay-down yard at a daily maximum dry weather flow not to exceed 500,000 gallons per day via Outfall 005; and the discharge of storm water on an intermittent and flow variable basis via Outfall 006. The facility is located at 3503 Pasadena Freeway, on the south bank of the Houston Ship Channel, approximately 7,500 feet north of State Highway 225 in the City of Pasadena, Harris County, Texas.

THE CITY OF HAMLIN has applied for a renewal of TPDES Permit No. 10491-002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 320,000 gallons per day. The facility is located approximately 1/4 mile southeast of the intersection of State Highway 92 and U.S. Highway 83 on the north bank of California Creek in Jones County, Texas.

LIBERTY-DANVILLE FRESH WATER SUPPLY DISTRICT NO. 2 has applied for a renewal of TPDES Permit No. 11833-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 31,000 gallons per day. The facility is located approximately four miles northeast of the City of Kilgore, approximately 1.1 miles east of the intersection of Interstate Highway 20 and U.S. Highway 259 in Gregg County, Texas.

CITY OF MEADOWS PLACE has applied for a renewal of TPDES Permit No. WQ0011039001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,500,000 gallons per day. The facility is located approximately 5,000 feet west of the Southwest Freeway (U.S. Highway 59) and 1,000 feet south of Keegans Bayou on the Harris County-Fort Bend County line in Fort Bend County, Texas.

CITY OF MINERAL WELLS has applied for a renewal of TPDES Permit No. 10585-001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,350,000 gallons per day. The facility is located southwest of the City of Mineral Wells at the crossing of Pollard Creek by 26th Street in Palo Pinto County, Texas.

CITY OF MOULTON has applied for a renewal of TPDES Permit No. 10227-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 242,000 gallons per day. The facility is located at 106 East First Street approximately three blocks south of the intersection of East First Street and Moore Avenue in the City of Moulton in Lavaca County, Texas.

NEWPARK SHIPBUILDING - PELICAN ISLAND, INC. which operates a general fabrication and repair facility for inland and offshore barges, supply vessels, oil rigs, and other similar vessels, has applied for a major amendment to TPDES Permit No. 00779 to authorize the removal of boiler blowdown via Outfall 001; reduced monitoring frequencies for oil and grease from once per week to once per month via Outfalls 004, 005 and 006 based on compliance history and three years of non- detect sample values; add the authorization to discharge ballast/void space water and exterior surface low pressure rinse water on an intermittent and flow variable basis via Outfalls 004, 005 and 006; and add the authorization to discharge ballast/void space water and exterior surface low pressure rinse water (without the requirement to route effluent through filter screens prior to discharge) on an intermittent and flow variable basis via new Outfall 007. The current permit authorizes the discharge of treated domestic wastewater and boiler blowdown at a daily average flow not to exceed 16,000 gallons per day via Outfall 001; and process wastewater on an intermittent and flow variable basis via outfall 004, 005 and 006. The facility is located on Pelican Island adjacent to Galveston Channel and approximately 1.5 miles east of the Pelican Island Bridge, Galveston County, Texas.

PALO PINTO COUNTY has applied for a renewal of TPDES Permit No. WQ0011698001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 50,000 gallons per day. The facility is located on the east bank of Town Branch Creek approximately 1,200 feet due north of the intersection of U.S. Highway 180 and Farm-to-Market Road 4 at the end of North Ninth Avenue in the outskirts of the town of Palo Pinto in Palo Pinto County, Texas.

CITY OF PLEASANTON has applied for a renewal of TPDES Permit No. WQ0010598-001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,420,000 gallons per day. The facility is located approximately 0.4 mile southeast of the intersection of U.S. Highway 281 and the Missouri Pacific Railroad and 0.5 mile east of the intersection of State Highway 97 and U.S. Highway 281 in the City of Pleasanton in Atascosa County, Texas.

PORTER MUNICIPAL UTILITY DISTRICT has applied for a major amendment to TPDES Permit No. 12242-001 to authorize an increase in the discharge of treated domestic wastewater from an annual average flow not to exceed 1,300,000 gallons per day to an annual average flow not to exceed 1,600,000 gallons per day; and a relocation of the point of discharge. The facility is located approximately 7,200 feet south-southeast of the intersection of U.S. Highway 59 and Farm-to-Market Road 1314, and 2,100 feet east-southeast of the intersection of Martin Drive and Loop 494 in Montgomery County, Texas.

CITY OF SCHULENBURG has applied for a renewal of TPDES Permit No. 10115-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 460,000 gallons per day. The facility is located in the 800 block of Kallus Street near its

intersection with Hillje Street in the City of Schulenburg in Fayette County, Texas.

CITY OF SKELLYTOWN has applied for a major amendment to TPDES Permit No. 10283- 001 to authorize the disposal of treated effluent either by discharge or by irrigation of 28.5 acres of nonpublic access pastureland. The proposed amendment requests to remove the Final phase. The current permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 75,000 gallons per day in the Interim phase and the irrigation of 28.5 acres at a daily average flow not to exceed 75,000 gallons per day in the Final phase. The facility is located approximately 0.25 mile west of State Highway 152 at a point approximately 1.0 mile northwest of the intersection of Farm-to-Market Road 294 and State Highway 152 in Carson County, Texas.

STRAIGHTWAY, INC. has applied for a renewal of TPDES Permit No. WQ0014040001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day. The facility will be located at the intersection of Farm-to-Market Road 1161 and County Road 218 in Wharton County, Texas.

TEXAS BARGE AND BOAT, INC. which operates a barge cleaning and marine vessel repair facility, has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004696000, to authorize the discharge of ballast and bilge water on an intermittent and flow variable basis via Outfall 004, and ballast and bilge water, drydock water and wash water from pressure washing marine vessels on an intermittent and flow variable basis via Outfall 005. The facility is located approximately 2.5 miles south of the intersection of State Highway 288 and County Road 242A, Brazoria County, Texas

CITY OF THORNDALE has applied for a renewal of TPDES Permit No. 10302-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 160,000 gallons per day. The facility is located on the west side of Farm-to-Market Road 486, approximately 0.5 miles south of the intersection of U.S. Highway 79 and Farm-to-Market Road 486 in Milam County, Texas.

UPPER TRINITY REGIONAL WATER DISTRICT has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 10698-003, to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 5,225,000 gallons per day. The facility is located approximately 0.25 mile west and 0.15 mile south of the intersection of U.S. Highway 380 and Farm-to-Market Road 1385 in Denton County, Texas.

WORLD LAND DEVELOPERS, L.P. has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14466-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 246,000 gallons per day. The facility will be located approximately 6,300 feet southeast of the intersection of State Highway 205 and State Highway 78 and approximately 5,600 feet southwest of the intersection of State Highway 78 and the St. Louis Southwestern Railroad in Collin County, Texas.

Written comments or requests for a public meeting may be submitted to the Office of the Chief Clerk, at the address provided in the information section above, WITHIN 30 DAYS OF THE ISSUED DATE OF THIS NOTICE

H.H.J., INC. has applied for a minor amendment to the Texas Pollutant Discharge Elimination System (TPDES) permit to authorize the addition of an interim phase which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 86,000 gallons per day. The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 800,000 gallons per day. The facility is located on the northeast side of State Highway 249 and on the east side of Cripple Creek Drive approximately 0.8 mile north of the intersection of State Highway 249 and Stagecoach Road and approximately 2.7 miles southeast of the intersection of Farm-to-Market Roads 149 and 1774 and approximately 4.0 miles northwest of the City of Tomball in Montgomery County, Texas.

The Texas Commission on Environmental Quality (TCEQ) has initiated a minor amendment of the Texas Pollutant Discharge Elimination System (TPDES) permit issued to NEW CANEY MUNICIPAL UTILITY DISTRICT to change the biomonitoring critical dilution. The facility is located approximately 0.4 mile east and 1.6 miles south of the intersection of Caney Creek and State Highway 59 in Montgomery County, Texas.

TRD-200403360
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 18, 2004

Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on April 16, 2004, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Joseph Endari dba Endari's Exxon; SOAH Docket No. 582-04-0757; TCEQ Docket No. 2002-0893-PST-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Joseph Endari dba Endari's Exxon 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 Paul Munguia, Office of the Chief Clerk, (512) 239-3300.

TRD-200403359
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 18, 2004

Proposed Enforcement Orders

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 (the Code), §7.075, which requires that the commission may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and 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 **June 21, 2004**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and

Safety Code (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO 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 C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on June 21, 2004**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239- 2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the commission in **writing**.

(1) COMPANY: Barber Boats and Motors Inc.; DOCKET NUMBER: 2004-0140-PST-E; IDENTIFIER: Petroleum Storage Tank (PST) Facility Identification Number 44553, Regulated Entity (RN) Identification Number RN101538072; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: boat sales and maintenance; RULE VIOLATED: 30 TAC §334.51(b)(2)(B) and (C), and the Code, §26.3475(c)(2), by failing to have overfill prevention and spill containment equipment; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to ensure that release detection equipment or procedures are provided for the underground storage tank (UST) system; 30 TAC §334.8(c)(4)(B) and (5)(A)(i), and the Code, §26.346(a), by failing to ensure that the UST registration and self-certification form was fully and accurately completed and submitted and failing to make available a valid, current delivery certificate; PENALTY: $4,480; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Brooks County; DOCKET NUMBER: 2003-0538-MSW-E; IDENTIFIER: Municipal Solid Waste Permit Number 379, RN101478501; LOCATION: Falfurrias, Brooks County, Texas; TYPE OF FACILITY: municipal solid waste landfill; RULE VIOLATED: 30 TAC §330.117(b) and (e), by failing to prevent the unloading of waste in unauthorized areas and failing to only dispose of brush and construction-demolition waste and rubbish that is free of putrescible and household waste; 30 TAC §330.111, §330.115, and Permit Number 379, by failing to have adequate fire extinguishers on-site, failing to maintain a stockpile of earth within 2,500 feet of the working face, and failing to train facility personnel in inspect loads and to recognize regulated hazardous waste; and 30 TAC §330.119, by failing to provide a sign measuring at least four feet by four feet; PENALTY: $10,605; ENFORCEMENT COORDINATOR: Jaime Garza, (956) 425- 6010; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(3) COMPANY: Cemex Cement of Texas LP; DOCKET NUMBER: 2003-1184-AIR-E; IDENTIFIER: Air Account Number EB-0121-R, RN100213305; LOCATION: Odessa, Ector County, Texas; TYPE OF FACILITY: cement manufacturing plant; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit an annual compliance certification; 30 TAC §122.145(2)(B) and THSC, §382.085(b), by failing to submit deviation reports; and 30 TAC §111.111(a), Air Permit Number O-01125, and THSC, §382.085(a), by failing to prevent unauthorized opacity air emissions; PENALTY: $64,000; ENFORCEMENT COORDINATOR: David Van Soest, (512) 239-0468; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(4) COMPANY: City of China; DOCKET NUMBER: 2003-0383-MWD-E; IDENTIFIER: Texas Pollutant Discharge Elimination System (TPDES) Permit Number 12104-001, RN101721686; LOCATION: China, Jefferson County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and (5), TPDES Permit Number 12104-001, and the Code, §26.121(a), by failing to comply with permitted effluent requirements for total suspended solids (TSS), chlorine residual, and five-day biochemical oxygen demand (BOD_5), failing to properly operate and maintain all systems of collection, treatment, and disposal, and failing to report 40% noncompliances; PENALTY: $6,012; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(5) COMPANY: City of China; DOCKET NUMBER: 2004-0173-PWS-E; IDENTIFIER: Public Water Supply (PWS) Number 1230038, RN101276855; LOCATION: China, Jefferson County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.44(h)(4)(C), by failing to make available records indicating that all backflow prevention assemblies have been tested; 30 TAC §290.46(f)(3)(D)(ii), by failing to have completed and signed monthly operating reports and failing to make available records indicating results from pressure and storage tank inspections; 30 TAC §290.45(b)(1)(D)(i), by failing to provide sufficient well capacity; and 30 TAC §288.30(3)(B), by failing to make available during an investigation an adopted drought contingency plan; PENALTY: $890; ENFORCEMENT COORDINATOR: Chris Friesenhahn, (210) 490-3096; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898- 3838.

(6) COMPANY: Debra K. Smith and Terry M. Sinclair dba City Cabinet Shop; DOCKET NUMBER: 2003-1568-WQ-E; IDENTIFIER: RN102962008; LOCATION: San Angleo, Tom Green County, Texas; TYPE OF FACILITY: cabinet manufacturing; RULE VIOLATED: 30 TAC §335.4, by failing to manage an industrial waste to prevent a discharge; and 30 TAC §281.25(a)(4) and the Code, §26.121(a), by failing to obtain authorization for storm water discharge; PENALTY: $6,300; ENFORCEMENT COORDINATOR: David Van Soest, (512) 239- 0468; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655- 9479.

(7) COMPANY: City of Clyde; DOCKET NUMBER: 2003-1498-PWS-E; IDENTIFIER: PWS Number 0300002; LOCATION: Clyde, Callahan County, Texas; TYPE OF FACILITY: surface water treatment; RULE VIOLATED: 30 TAC §290.45(b)(2)(G) and THSC, §341.0315(c), by failing to provide an elevated storage capacity; 30 TAC §290.42(d)(3) and (5), (11)(E)(v), and (e)(4)(C), by failing to prevent an unauthorized discharge of wastewater, failing to provide flow measuring devices, failing to equip each filter with operable rate-of-flow indicators, and failing to provide forced air ventilation; 30 TAC §290.46(f)(3)(B)(v), (m), and (t), by failing to maintain calibration logs for laboratory equipment, failing to post a legible sign at each production, treatment, and storage facility, and failing to initiate a maintenance program; 30 TAC §290.118(a) and (b), by failing to provide water that meets the commission's secondary constituent levels for chloride; and 30 TAC §290.43(c)(4) and (6) and THSC, §341.036(g), by failing to provide the water storage tank with a liquid level indicator and failing to ensure water storage tanks are thoroughly tight against leakage; PENALTY: $3,903; ENFORCEMENT COORDINATOR: Sandy VanCleave, (512) 239-0667; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698- 9674.

(8) COMPANY: DTG Operations, Inc. dba Dollar Rent A Car; DOCKET NUMBER: 2004- 0107-PST-E; IDENTIFIER: PST Facility

Identification Number 73144, RN101736809; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: rental car refueling station; RULE VIOLATED: 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to conduct an annual line leak detector test; and the Code, §26.121(a), by failing to prevent an unauthorized discharge into the surface waters in the state; PENALTY: $8,160; ENFORCEMENT COORDINATOR: Sushil Modak, (512) 239-2142; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(9) COMPANY: Duke Energy Field Services, L.P.; DOCKET NUMBER: 2003-0176-AIR-E; IDENTIFIER: Air Account Number PE-0051-N; LOCATION: Fort Stockton, Pecos County, Texas; TYPE OF FACILITY: natural gas compressor station; RULE VIOLATED: 30 TAC §106.512(2)(C)(ii) and THSC, §382.085(b), by failing to maintain records of the quarterly testing for oxides of nitrogen and carbon monoxide; PENALTY: $1,020; ENFORCEMENT COORDINATOR: Gilbert Angelle, (512) 239-4489; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(10) COMPANY: Duke Energy Field Services, LP; DOCKET NUMBER: 2003-1122-AIR-E; IDENTIFIER: Air Account Numbers NE-0188-T, NE-0354-D, NE-0028-T, NE-0029-R, JG-0017-B, BE-0032-M, JG-0018-W, LK-0027-R, and LE-0012-W; LOCATION: Agua Dulce, Bishop, Premont, Pettus, Three Rivers, and Hallettsville; Nueces, Jim Wells, Bee, Live Oak, and Lavaca Counties, Texas; TYPE OF FACILITY: natural gas handling stations; RULE VIOLATED: 30 TAC §122.145(2)(A) and THSC, §382.085(b), by failing to report all instances of deviations; and 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit an annual compliance certification; PENALTY: $20,475; ENFORCEMENT COORDINATOR: Ed Moderow, (512) 239- 2680; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(11) COMPANY: Bruce A. Eiles dba Echo; DOCKET NUMBER: 2003-0415-PST-E; IDENTIFIER: PST Facility Identification Number 46277; LOCATION: Quitman, Wood County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.10(b) and §334.49(e), by failing to maintain records adequate to demonstrate compliance with the corrosion protection requirements; 30 TAC §334.50(a)(1)(A), (b)(1)(A) and (2)(A)(i)(III), and the Code, §26.3475(a) and (c)(1), by failing to monitor tanks in a manner which will detect a release and failing to have the line leak detectors tested; and 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for USTs; PENALTY: $3,840; ENFORCEMENT COORDINATOR: Carolyn Lind, (903) 535-5100; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(12) COMPANY: Farmers Dairies, Ltd.; DOCKET NUMBER: 2004-0019-AIR-E; IDENTIFIER: Air Account Number EE-1311-Q, RN100818756; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: maintenance and fuel station; RULE VIOLATED: 30 TAC §115.252(2) and THSC, §382.085(b), by allowing the transfer of gasoline with a Reid vapor pressure (RVP) greater than seven pounds per square inch absolute (psia); PENALTY: $520; ENFORCEMENT COORDINATOR: Sheila Smith, (512) 239-1670; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(13) COMPANY: Groendyke Transport, Inc.; DOCKET NUMBER: 2004-0217-PST-E; IDENTIFIER: RN102407947; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to have a valid, current delivery certificate; PENALTY: $1,600; ENFORCEMENT COORDINATOR: Walter Lassen, (512) 239-0513; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588- 5800.

(14) COMPANY: H & W Petroleum Company, Inc.; DOCKET NUMBER: 2004-0272-PST-E; IDENTIFIER: PST Facility Identification Number 50854, RN101378271; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to have a valid, current delivery certificate; PENALTY: $800; ENFORCEMENT COORDINATOR: Larry King, (512) 339-2929; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(15) COMPANY: City of Hamlin; DOCKET NUMBER: 2004-0129-PWS-E; IDENTIFIER: PWS Number 1270002, RN101392504; LOCATION: Hamlin, Jones County, Texas; TYPE OF FACILITY: surface water treatment; RULE VIOLATED: 30 TAC §290.42(d)(5) and (11) and (e)(4)(B), by failing to provide meters to measure the flow of treated, recycled, and/or backwash water, failing to provide monitoring devices to measure and record turbidity, and failing to provide weather housing for the chlorine bottles stored outside; and 30 TAC §290.43(c)(6) and §290.46(m)(4), by failing to seal a gap in the elevated storage tank near the vents and failing to repair leaks in the vents and roof of the ground storage tank; PENALTY: $2,398; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(16) COMPANY: Hobas Pipe USA, LP; DOCKET NUMBER: 2004-0221-AIR-E; IDENTIFIER: Air Account Number HG-1531-T, Air Permit Number 17434, RN102540812; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: plastics pipe manufacturing; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit the annual compliance certification; and 30 TAC §116.115(b)(2)(F) and (G), Air Permit Number 17434, and THSC, §382.085(b), by failing to comply with emission limits for volatile organic compounds (VOCs); PENALTY: $2,910; ENFORCEMENT COORDINATOR: Kent Heath, (512) 239-4575; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(17) COMPANY: Robert Wittenback dba J & R Mud Pumping Service; DOCKET NUMBER: 2003-1463-MSW-E; IDENTIFIER: Sludge Transporter Registration Number 21143; LOCATION: San Benito, Cameron County, Texas; TYPE OF FACILITY: sludge transporter; RULE VIOLATED: 30 TAC §312.143, by failing to deposit wastes at an authorized facility; 30 TAC §312.145(a), by failing to maintain a record of each individual collection and deposit; 30 TAC §312.144(d) and (f), by failing to have a sight gauge on all closed vehicles, tanks, or containers used to transport liquid wastes and failing to prominently mark all discharge valves; 30 TAC §312.142(c), by failing to maintain a copy of the registration; and 30 TAC §330.5(a), by failing to prohibit the disposal of a solid waste at an unauthorized facility; PENALTY: $4,160; ENFORCEMENT COORDINATOR: Chris Friesenhahn, (210) 490-3096; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(18) COMPANY: King Fuels, Inc.; DOCKET NUMBER: 2004-0192-PST-E; IDENTIFIER: RN103004602; LOCATION: Richmond, Fort Bend County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to have a valid, current delivery certificate; PENALTY: $1,400; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(19) COMPANY: L.F. Manufacturing, Inc.; DOCKET NUMBER: 2004-0126-AIR-E; IDENTIFIER: Air Account Number LF-0053-U, RN100214642; LOCATION: Giddings, Lee County, Texas; TYPE

OF FACILITY: fiberglass tank and pipe manufacturing; RULE VIOLATED: 30 TAC §122.143(4), §122.146(2), and THSC, §382.085(b), by failing to submit the annual certification of compliance; and 30 TAC §122.143(5), §122.145(2)(C), and THSC, §382.085(b), by failing to submit a deviation report; PENALTY: $6,950; ENFORCEMENT COORDINATOR: Carolyn Lind, (903) 535-5100; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(20) COMPANY: Leverett's Chapel Independent School District; DOCKET NUMBER: 2003- 0221-MWD-E; IDENTIFIER: TPDES Permit Number 11113-001; LOCATION: Overton, Rusk County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 11113-001, and the Code, §26.121, by failing to comply with permitted limits for BOD_5, TSS, and dissolved oxygen and failing to report in writing, effluent violations which deviated from the permitted effluent limitation by more than 40%; and 30 TAC §319.1 and TPDES Permit Number 11113-001, by failing to report monthly effluent monitoring results; PENALTY: $6,197; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535- 5100.

(21) COMPANY: City of Lubbock; DOCKET NUMBER: 2003-0633-PST-E; IDENTIFIER: PST Facility Identification Number 30251; LOCATION: Lubbock, Lubbock County, Texas; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(22) COMPANY: Lufkin Industries Inc.; DOCKET NUMBER: 2003-1559-IWD-E; IDENTIFIER: TPDES Permit Number 001268-000; LOCATION: Lufkin, Angelina County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 001268-000, and the Code, §26.121(a), by failing to comply with permitted effluent limits for TSS, oil and grease, flow, and total chlorine residual and failing to report, in writing, effluent violations deviating from permitted limits by more than 40%; PENALTY: $10,676; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(23) COMPANY: Mail Contractors of America, Inc.; DOCKET NUMBER: 2004-0201-PST-E; IDENTIFIER: PST Facility Identification Number 45401, RN101536373; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: mail delivery; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and (5)(A)(i) and the Code, §26.346(a) and §26.3467(a), by failing to ensure that the UST registration and self-certification form was fully and accurately completed and failing to make available to a common carrier a valid, current delivery certificate; PENALTY: $1,440; ENFORCEMENT COORDINATOR: Steven Lopez, (512) 239-1896; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(24) COMPANY: Matrix Metals LLC dba Richmond Foundry Co.; DOCKET NUMBER: 2004- 0385-AIR-E; IDENTIFIER: Air Account Number FG-0044-H; LOCATION: Richmond, Fort Bend County, Texas; TYPE OF FACILITY: steel foundry; RULE VIOLATED: 30 TAC §122.143(4), §122.146(2), Federal Operating Permit Number O-02121, and THSC, §382.085(b), by failing to submit an annual compliance certification; PENALTY: $1,880; ENFORCEMENT COORDINATOR: Trina Grieco, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(25) COMPANY: Meadwestvaco Texas, L.P.; DOCKET NUMBER: 2003-1394-AIR-E; IDENTIFIER: Air Account Number JC-0003-K; LOCATION: Evadale, Jasper County, Texas; TYPE OF FACILITY: paper mill; RULE VIOLATED: 30 TAC §101.211(b)(5) and (9) and THSC, §382.085(b), by failing to record the agency-established facility identification number and the authorized opacity limit on the final record of non-reportable unauthorized emisisons; 30 TAC §§101.20(3), 111.111(a)(1)(B), and 116.115(c), Air Permit Number 20365/PSD-TX-785M6, and THSC, §382.085(b), by failing to limit opacity emissions to 20% averaged over a six-minute period; 30 TAC §101.201(b)(4) and (8) and THSC, §382.085(a) and (b), by failing to record the agency-established facility identification number and the authorized opacity limit on the final record for a reportable emissions event and failing to prevent unauthorized emissions of total reduced sulfur and VOCs; 30 TAC §101.4 and THSC, §382.085(a), by failing to control hydrogen sulfide (H_2S) emissions; 30 TAC §112.31 and THSC, §382.085(b), by failing to limit H_2S emissions; PENALTY: $10,715; ENFORCEMENT COORDINATOR: Laura Clark, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703- 1892, (409) 898-3838.

(26) COMPANY: Methodist Children's Home dba Methodist Home Boys Ranch; DOCKET NUMBER: 2003-0439-MWD-E; IDENTIFIER: TPDES Permit Number 14464-001; LOCATION: Waco, McLennan County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.42(a) and the Code, §26.121(a), by failing to submit a permit application for the discharge of municipal waste; PENALTY: $5,760; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710- 7826, (254) 751-0335.

(27) COMPANY: Mulberry Kaufman Enterprises, Inc. dba Mulberry Kaufman Beer & Wine Grocery; DOCKET NUMBER: 2003-0874-PST-E; IDENTIFIER: PST Facility Identification Number 0027512; LOCATION: Kaufman, Kaufman County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $1,600; ENFORCEMENT COORDINATOR: Kent Heath, (512) 239-4575; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118- 6951, (817) 588-5800.

(28) COMPANY: Munir Munawar; DOCKET NUMBER: 2003-1193-PST-E; IDENTIFIER: PST Facility Identification Number 47930, RN103019832; LOCATION: Rockport, Aransas County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.48(c), by failing to conduct inventory control procedures; and 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor the facility's USTs for releases; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Ronnie Kramer, (806) 353-9251; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(29) COMPANY: Murphy Oil USA, Inc., MC Services, Inc, and Mr. Louis Kmiec; DOCKET NUMBER: 2004-0218-EAQ-E; IDENTIFIER: Edwards Aquifer Registration Number 11-03071501, UST License Numbers CRP001317, ILP000496, and RN103771986; LOCATION: Georgetown, Williamson County, Texas; TYPE OF FACILITY: service station with retail sales of gasoline; RULE VIOLATED: 30 TAC §213.4(a)(1), by failing to obtain approval of an Edwards Aquifer protection plan; and 30 TAC §334.407(b) and §334.424(a), by failing to obtain approval of an Edwards Aquifer protection plan prior to constructing a UST facility; PENALTY: $600; ENFORCEMENT COORDINATOR: Joseph Daley, (512) 239-3308;

REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(30) COMPANY: N. K. Enterprises, Inc.; DOCKET NUMBER: 2004-0130-PST-E; IDENTIFIER: PST Facility Identification Number 39852, RN102368610; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.7(d)(3), by failing to provide written notice of any change or additional information of the UST system; and 30 TAC §334.8(c)(4)(B) and (5)(A)(i) and the Code, §26.346(a) and §26.3467(a), by failing to provide written notification prior to initiating a major UST construction activity and failing to make available to a common carrier a valid, current delivery certificate; PENALTY: $3,264; ENFORCEMENT COORDINATOR: Michael Limos, (512) 239-5839; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023- 1486, (713) 767-3500.

(31) COMPANY: Nacogdoches County Road and Bridge Department; DOCKET NUMBER: 2003-1160-MLM-E; IDENTIFIER: Facility Identification BE00062, RN102883527; LOCATION: Nacogdoches, Nacogdoches County, Texas; TYPE OF FACILITY: road and bridge repair maintenance and equipment repair; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; 30 TAC §334.51(b)(2)(B) and (C), and the Code, §26.3475, by failing to install spill and overfill equipment; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor the used oil UST system; 30 TAC §334.49(a), by failing to provide corrosion protection; 30 TAC §334.7(a)(1), by failing to register the UST system; the Code, §26.121(a)(2), by failing to prevent an unauthorized discharge of an asphalt/diesel mixture; 30 TAC §324.15, §327.4(b)(2), 40 Code of Federal Regulations (CFR) §279.22(d), and THSC, §371.041, by failing to properly remove spills of used oil; 30 TAC §324.1 and 40 CFR §279.22(c), by failing to label the used oil filter container and the fill pipe; and 30 TAC §324.4(1) and (2)(C), 40 CFR §279.24, and THSC, §371.041, by failing to use a registered transporter for the transportation of used oil; PENALTY: $13,500; ENFORCEMENT COORDINATOR: Ed Moderow, (512) 239-2680; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(32) COMPANY: New Horizons Ranch and Center, Incorporated; DOCKET NUMBER: 2003- 1540-PWS-E; IDENTIFIER: PWS Identification Number 1670009, RN101278471; LOCATION: Goldthwaite, Mills County, Texas; TYPE OF FACILITY: childcare center with surface water treatment; RULE VIOLATED: 30 TAC §290.42(d)(11)(B)(vi) and THSC, §341.0315(c), by failing to provide adequate water treatment plant pressure filtration facilities; 30 TAC §290.46(m)(2) and (s)(1), by failing to inspect pressure filters annually and failing to calibrate all flow measuring devices; 30 TAC §290.43(d)(3), by failing to equip the pressure tank with some sanitary means of determining air-to-water ratio; and 30 TAC §290.121(a), by failing to provide an up-to-date chemical and microbiological monitoring plan; PENALTY: $1,093; ENFORCEMENT COORDINATOR: Michael Meyer (512) 239-4492; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(33) COMPANY: Newpark Shipbuilding-Brady Island, Inc.; DOCKET NUMBER: 2003-1502- AIR-E; IDENTIFIER: Air Account Number HG-0076-G; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: barge cleaning and repair; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit an annual compliance certification; and 30 TAC §122.165(a)(8) and THSC, §382.085(b), by failing to include certification by a responsible official; PENALTY: $3,160; ENFORCEMENT COORDINATOR: Rebecca Johnson (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(34) COMPANY: Osteopathic Medical Center of Texas; DOCKET NUMBER: 2004-0155-PST- E; IDENTIFIER: PST Identification Number 56020; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: medical center; RULE VIOLATED: 30 TAC §334.8(c)(5)(B)(ii), by failing to submit a new UST registration and self-certification form in a timely manner; and 30 TAC §37.815(a) and (b), by failing to provide financial assurance; PENALTY: $1,280; ENFORCEMENT COORDINATOR: Kent Heath, (512) 239-4575; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(35) COMPANY: Patterson Petroleum LP; DOCKET NUMBER: 2004-0270-AIR-E; IDENTIFIER: Air Account Number FG-0040-P, RN100900893; LOCATION: Orchard, Fort Bend County, Texas; TYPE OF FACILITY: natural gas production; RULE VIOLATED: 30 TAC §101.359 and THSC, §382.085(b), by failing to submit Form ECT-1, Annual Compliance Report; PENALTY: $720; ENFORCEMENT COORDINATOR: Erika Fair, (512) 239-6673; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(36) COMPANY: Peak Sulfur, Inc.; DOCKET NUMBER: 2004-0259-AIR-E; IDENTIFIER: Air Account Number JE-0073-N; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: acid regeneration; RULE VIOLATED: 30 TAC §101.4 and THSC, §382.085(a) and (b), by allowing sulfur dioxide emissions; and 30 TAC §112.3(c) and THSC, §382.085(b), by failing to maintain sulfur dioxide net ground level concentrations; PENALTY: $16,000; ENFORCEMENT COORDINATOR: Walter Lassen, (512) 239-0513; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(37) COMPANY: Gilbert Miles dba R & S Paint and Auto Body; DOCKET NUMBER: 2003- 1561-AIR-E; IDENTIFIER: Air Account Number EE-1463-P, RN101517605; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: auto body paint and repair; RULE VIOLATED: 30 TAC §115.426(1)(B) and THSC, §382.085(b), by failing to maintain records of hours of operation and the usage of coating materials and solvents used; PENALTY: $1,050; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(38) COMPANY: City of San Angelo; DOCKET NUMBER: 2004-0322-MSW-E; IDENTIFIER: RN103948758; LOCATION: San Angelo, Tom Green County, Texas; TYPE OF FACILITY: pump station; RULE VIOLATED: 30 TAC §327.3(b), by failing to notify the TCEQ of a spill of diesel fuel; and 30 TAC §327.5(a) and the Code, §26.121(a), by failing to immediately abate and contain a spill of diesel fuel; PENALTY: $1,440; ENFORCEMENT COORDINATOR: Laurie Eaves, (512) 239-4495; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(39) COMPANY: City of San Angelo; DOCKET NUMBER: 2003-1494-IHW-E; IDENTIFIER: RN102983657; LOCATION: San Angelo, Tom Green County, Texas; TYPE OF FACILITY: warehouse; RULE VIOLATED: 30 TAC §335.4 and the Code, §26.121, by failing to prevent the discharge of hazardous waste; 30 TAC §335.62 and 40 CFR §262.11, by failing to perform a hazardous waste determination on generated paint wastes; 30 TAC §335.10(a) and 40 CFR §262.20(a), by failing to manifest the hazardous waste off-site for disposal; 30 TAC §335.2(b) and 40 CFR §270.1(c), by failing to prevent the shipment of hazardous wastes to a facility not authorized to accept it; 30 TAC §335.6(c), by failing to notify the TCEQ of hazardous waste generation activities; 30 TAC §335.63(a) and 40 CFR §262.12(a), by failing to obtain an Environmental Protection Agency (EPA) identification number; and 30 TAC §335.63(b) and 40 CFR

§262.12(c), by failing to obtain an EPA identification number prior to the transportation of hazardous waste; PENALTY: $4,000; ENFORCEMENT COORDINATOR: Brian Lehmkuhle, (512) 239-4482; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(40) COMPANY: S.D. Harrison dba San Pedro Village; DOCKET NUMBER: 2004-0313- PWS-E; IDENTIFIER: PWS Number 2330046; LOCATION: Del Rio, Val Verde County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(d)(2)(A), by failing to maintain a free chlorine residual; and 30 TAC §290.51(a)(3), §291.76(d)(1), and THSC, §341.041, by failing to pay public health service fees; PENALTY: $105; ENFORCEMENT COORDINATOR: Sandy VanCleave, (512) 239-0667; REGIONAL OFFICE: 1403 Seymour, Suite 2, Laredo, Texas 78040-8752, (956) 791-6611.

(41) COMPANY: Sitton Oil and Marine Company, Inc. And Momin Neil; DOCKET NUMBER: 2004-0168-PST-E; IDENTIFIER: PST Facility Identification Number 003141, RN101447746; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: gasoline retail sales; RULE VIOLATED: 30 TAC §334.8(c)(5)(B)(i) and (ii), by failing to ensure that a valid, current delivery certificate was posted and failing to renew a previously issued delivery certificate; PENALTY: $616; ENFORCEMENT COORDINATOR: Sunday Udoetok, (512) 239-0739; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(42) COMPANY: Sitton Oil and Marine Company, Inc.; DOCKET NUMBER: 2004-0169-PST- E; IDENTIFIER: RN100523455; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner or operator had a valid, current delivery certificate; PENALTY: $800; ENFORCEMENT COORDINATOR: Sunday Udoetok, (512) 239-0739; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(43) COMPANY: City of Somerset; DOCKET NUMBER: 2004-0234-MWD-E; IDENTIFIER: TPDES Permit Number 11822-001, RN101609139; LOCATION: Somerset, Bexar County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(2), TPDES Permit Number 11822-001, and the Code, §26.121(a), by failing to comply with permitted effluent limits for TSS and BOD_5; PENALTY: $720; ENFORCEMENT COORDINATOR: Laurie Eaves, (512) 239-4495; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(44) COMPANY: South Newton Water Supply Corporation; DOCKET NUMBER: 2004-0165- PWS-E; IDENTIFIER: PWS Number 1760022; LOCATION: Deweyville, Newton County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(g) and (q)(1) and (2), by failing to collect and submit water samples for biological analysis and failing to issue a boil water notification to affected customers; PENALTY: $424; ENFORCEMENT COORDINATOR: Sandy VanCleave, (512) 239-0667; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(45) COMPANY: Southwest Convenience Stores, LLC dba 7 Eleven 57625; DOCKET NUMBER: 2004-0033-AIR-E; IDENTIFIER: Air Account Number EE-1174-C; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.252(2) and THSC, §382.085(b), by allowing the transfer of gasoline with a RVP greater than seven psia; and 30 TAC §334.22(a), by failing to pay annual UST fees; PENALTY: $816; ENFORCEMENT COORDINATOR: Maurico Olaya, (915) 834-4949; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(46) COMPANY: Superior Manufactured Homes, Inc. Dba Garden Acres Subdivision; DOCKET NUMBER: 2003-0667-PWS-E; IDENTIFIER: PWS Number 0920031; LOCATION: Longview, Gregg County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(1)(C)(ii) and (iii) and THSC, §341.0315(c), by failing to provide a total storage capacity of 200 gallons per connection and provide two or more pumps having a total capacity of two gallons per minute per connection; PENALTY: $788; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 767-3500; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701- 3756, (903) 535-5100.

(47) COMPANY: T & C Tires, Inc.; DOCKET NUMBER: 2004-0178-AIR-E; IDENTIFIER: RN103059234; LOCATION: Garland, Dallas County, Texas; TYPE OF FACILITY: muffler and brake shop; RULE VIOLATED: 30 TAC §114.20(b)(2)(A) and THSC, §382.085(b), by failing to replace the catalyst system to the original manufacturers specification; PENALTY: $400; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(48) COMPANY: TXU Generation Company L.P.; DOCKET NUMBER: 2004-0176-IWD-E; IDENTIFIER: TPDES Permit Number 01251; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 01251, and the Code, §26.121(a), by failing to comply with the permitted limits for TSS and pH; PENALTY: $2,240; ENFORCEMENT COORDINATOR: David VanSoest, (512) 239-0468; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(49) COMPANY: Temple-Inland Forest Products Corporation; DOCKET NUMBER: 2003- 1302-AIR-E; IDENTIFIER: Air Account Number AC-0018-W, Air Permit Numbers 5207/PSD-TX- 865, O-01778, 6075, and 33426; LOCATION: Diboll, Angelina County, Texas; TYPE OF FACILITY: dimensional lumber sawmill, medium and low density fiberboard mill, a particle board mill, and laminating; RULE VIOLATED: 30 TAC §§101.20(3), 111.111(a)(1)(B), 116.115(b)(2)(G) and (c), Air Permit Number 5207/PSD-TX-865, and THSC, §382.085(b), by failing to maintain and record dryer inlet temperatures, failing to conduct daily opacity readings, failing to maintain compliance with the permitted allowable of 1.3 pounds per hour (lbs/hr) for particulate matter and zero capacity, failing to operate at maximum temperatures, failing to comply with the permitted VOC emission limit, and failing to maintain opacity at the allowable limit of 20%; 30 TAC §116.115(c), Air Permit Number 6075, and THSC, §382.085(b), by failing to maintain compliance with the fiberboard boiler fuel limitation of 486 lbs/hr of laminating biomass; 30 TAC §101.201(b)(7), §116.115(9), Air Standard Permit Number 33426, and THSC, §382.085(b), by failing to record all emission constituents; 30 TAC §116.615(2), Air Standard Permit Number 33426, and THSC, §382.085(b), by failing to maintain compliance with the emission limits in the permit representations; 30 TAC §106.433(6)(A) and (8)(B) and THSC, §382.085(b), by failing to maintain compliance with the permit by rule six pounds per hour VOC limit for surface coating and failing to record the daily coating and solvent usage; and 30 TAC §122.145(2)(A), Air Permit Number O-01778, and THSC, §382.085(b), by failing to report a deviation; PENALTY: $36,070; ENFORCEMENT COORDINATOR: Laura Clark, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(50) COMPANY: Mahammad Ataur Rahaman dba Texaco Prime Stop 2; DOCKET NUMBER: 2004-0340-PST-E; IDENTIFIER: PST Facility Identification Number 7444, RN101442820; LOCATION: Greenville, Hunt County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2)(A)(i)(III) and (d)(1)(B)(ii) and the Code, §26.3475(a), by failing to provide the piping test, failing to test the line leak detectors, and failing to maintain monthly reconciled inventory control records; PENALTY: $3,160; ENFORCEMENT COORDINATOR: Jill Reed, (915) 570-1359; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(51) COMPANY: Texas Department of Transportation; DOCKET NUMBER: 2003-1370- MWD-E; IDENTIFIER: TPDES Permit Number 11959-001; LOCATION: near Dallas, Ellis County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 11959-001, and the Code, §26.121, by failing to comply with permitted effluent limits for TSS; PENALTY: $1,600; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(52) COMPANY: Thalia Water Supply Corporation; DOCKET NUMBER: 2003-0267-PWS-E; IDENTIFIER: PWS Number 0780013; LOCATION: Thalia, Foard County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(2)(F) and (f)(3) and THSC, §341.031(a), by failing to collect and submit additional routine water samples for bacteriological analysis and exceeding the maximum contaminant level for total coliform; 30 TAC §290.122(c), by failing to provide public notice related to its monitoring violations; and 30 TAC §290.51, by failing to pay public health service fees; PENALTY: $2,800; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(53) COMPANY: Alarico Trevino; DOCKET NUMBER: 2004-0526-OSI-E; IDENTIFIER: On- Site Sewage Facility (OSSF) License Number OS0008066; LOCATION: Edinburg, Hidalgo County, Texas; TYPE OF FACILITY: on-site sewage; RULE VIOLATED: 30 TAC §285.61(3), by failing to provide true and accurate information on an application or any other documentation; and 30 TAC §§285.33(b), 285.61(6), and 285.91(13), by failing to construct on OSSF compliant with design criteria; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239- 0789; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425- 6010.

(54) COMPANY: Russell Wayne Turner; DOCKET NUMBER: 2004-0041-OSI-E; IDENTIFIER: OSSF License Number OS0007985 (Expired); LOCATION: Buffalo Gap, Taylor County, Texas; TYPE OF FACILITY: on-site sewage; RULE VIOLATED: 30 TAC §285.61(4), (5), (7), and (11), by failing to obtain documentation that the owner had the permitting authority's authorization to construct, by failing to notify the permitting authority of the date construction began, by failing to construct an OSSF that had been authorized by the permitting authority for the specific location identified, and by failing to request the initial, final, and any other required inspection or inspections from the permitting authority; 30 TAC §285.33(c)(2)(A) and (b)(1)(A)(v), §285.61(6), and THSC, §366.004, by failing to construct the OSSF to meet the minimum criteria by 30 TAC Chapter 285, use the correct formula for sizing of the leaching chambers, and to level the bottom of the excavation; and 30 TAC §285.3(b)(1) and §285.30(a), by failing to submit planning materials and a site evaluation; PENALTY: $1,400; ENFORCEMENT COORDINATOR: Christina McLaughlin, (512) 239-6589; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(55) COMPANY: U.S. Minerals, LLC dba Stan Blast Abrasives; DOCKET NUMBER: 2004- 0027-AIR-E; IDENTIFIER: Air Account Number GB-0132-B; LOCATION: Galveston, Galveston County, Texas; TYPE OF FACILITY: abrasive manufacturing; RULE VIOLATED: 30 TAC §111.111(a)(1)(B) and THSC, §382.085(b), by failing to prevent opacity from exceeding 20%; 30 TAC §116.115(b)(1), Air Permit Number 18048, and THSC, §382.085(b), by failing to maintain all air pollution abatement equipment; and 30 TAC §101.201(e) and THSC, §382.085(b), by failing to notify the regional office after the discovery of an excess opacity event; PENALTY: $2,675; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(56) COMPANY: Union Water Supply Corporation; DOCKET NUMBER: 2004-0160-MWD-E; IDENTIFIER: TPDES Permit Number 13842-001, RN102915501; LOCATION: Garciasville, Starr County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and (5) and TPDES Permit Number 13842-001, by failing to submit notice of any planned physical alterations or additions to the facility, failing to submit a closure plan, and failing to ensure that the facultative lagoon is properly operated and maintained; 30 TAC §317.4(b)(4), by failing to provide suitable containers with lids for holding waste from manual bar screens; and 30 TAC §317.7(e), by failing to ensure that the facility area is completely fenced; PENALTY: $2,520; ENFORCEMENT COORDINATOR: Chris Friesenhahn, (210) 490-3096; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(57) COMPANY: David Vrazel; DOCKET NUMBER: 2003-0401-OSI-E; IDENTIFIER: RN100843184; LOCATION: Uhland, Hays County, Texas; TYPE OF FACILITY: residences; RULE VIOLATED: 30 TAC §285.70, THSC, §366.017(a) and (b), and the Code, §26.121(1), by failing to repair two malfunctioning OSSF systems and allowing the discharge of sewage to the waters of the state; and 30 TAC §285.3(b)(1) and THSC, §366.051(a), by failing to obtain a permit and an approved plan to alter or repair two failing OSSF systems; PENALTY: $1,050; ENFORCEMENT COORDINATOR: Lori Thompson, (903) 535-5100; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(58) COMPANY: Williams Field Services Group, Inc. dba Markham Gas Processing Plan and Black Marlin Texas City; DOCKET NUMBER: 2003-1566-AIR-E; IDENTIFIER: Air Account Numbers MH-0172-S and GB-0156-K; LOCATION: Markham and Texas City, Matagorda and Galveston Counties, Texas; TYPE OF FACILITY: cryogenic plant and pipeline company; RULE VIOLATED: 30 TAC §106.352(2) and THSC, §382.085(a) and (b), by failing to obtain a permit or meet the requirements of a permit by rule; 30 TAC §101.201(a)(1)(B), by failing to notify the commission of the discovery of an emission event; THSC, §382.085(a), by failing to prevent the release of unauthorized emissions; 30 TAC §111.111(a)(4)(A)(ii), by failing to record 98% of the required daily flare observations; 30 TAC §101.6(b)(5) - (7), by failing to identify the air contaminants released; 30 TAC §101.7(c)(5) and (b)(6) and (7), by failing to identify the air contaminants released, include the estimated total quantities of each air contaminant, and identify the actions taken to minimize the emissions from scheduled maintenance; and 30 TAC §101.201(b)(1) - (11), by failing to identify in the final record the name of the owner or operator, the physical location, the estimated total quantities, the authorization governing the facility, the basis used for determining the quantity of air contaminants, and the actions taken, or being taken, to correct the emissions event; PENALTY: $86,550; ENFORCEMENT COORDINATOR: John Barry, (409) 898- 3838; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767- 3500.

(59) COMPANY: Xuan, Inc. dba Mercury Drive In; DOCKET NUMBER: 2004-0105-PST-E; IDENTIFIER: PST Facility Identification Number 0033838; LOCATION: near Jacinto City, Harris County, Texas; TYPE OF FACILITY: convenience store; RULE VIOLATED: 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one facility representative received training and instruction; 30 TAC §334.7(d)(1)(A), by failing to provide written notice of change in ownership; 30 TAC §115.246(1), (3), and (5), and THSC, §382.085(b), by failing to maintain a copy of the California Air Resources Board Executive Order, failing to maintain a record of the results of the Stage II testing, and failing to maintain a record of any maintenance conducted on the Stage II equipment; 30 TAC §115.226(1) and THSC, §382.085(b), by failing to maintain a record at the facility site of the dates on which gasoline was delivered to the dispensing facility; 30 TAC §115.244(1) and (3) and THSC, §382.085(b), by failing to conduct daily inspections for the Stage II vapor recovery system and failing to conduct monthly inspections of the components; and 30 TAC §115.242(3)(A) and THSC, §382.085(b), by failing to maintain all components of the Stage II vapor recovery system in proper operating condition and free of defects; PENALTY: $4,750; ENFORCEMENT COORDINATOR: Stacey Young, (512) 239-1899; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-200403344
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: May 18, 2004

Request for Nominations for Appointment to the Pollution Prevention Advisory Committee

The Texas Commission on Environmental Quality (commission) is soliciting nominations to fill several vacant positions on the Pollution Prevention Advisory Committee (PPAC) established under Texas Health and Safety Code, §361.0215. The legislatively created advisory committee advises the commission on the state's policy and goals for pollution prevention and waste minimization.

Individuals interested in being considered by the commission should submit a one page letter of interest and brief resume or biography. All materials must be received by the commission no later than 5:00 p.m. on June 21, 2004.

The PPAC is composed of nine voting members who offer a balanced representation of environmental and public interest groups and the regulated community. The nine official members are represented by: four environmental or public interest representatives; four regulated community representatives; and one academic representative.

The commission may appoint *ex officio* members to provide additional participation from other members of the regulated community and the public who work on pollution prevention and performance-based regulatory initiatives. The commission currently has designated eight *ex officio* positions including one representative from each of the following sectors: small business, local government, agriculture, Department of Defense, labor, and the Clean Texas, Cleaner World Program. The commission also extends *ex officio* positions to the Chairs of the House Environmental Regulation Committee and the Senate Natural Resources Committee.

The PPAC advises the commission on: the appropriate organization of state agencies and the financial and technical resources required to aid the state in its efforts to promote waste reduction and minimization; the development of public awareness programs to educate citizens about hazardous waste and the appropriate disposal of hazardous waste and hazardous materials that are used and collected by households; the provision of technical assistance to local governments for the development of waste management strategies designed to assist small quantity generators of hazardous waste; and other possible programs to more effectively implement the state's hierarchy of preferred waste management technologies as set forth in Texas Health and Safety Code, §361.023(a). The PPAC also advises the commission on the creation and implementation of the strategically directed regulatory structure developed under Texas Water Code, §5.755, and reports quarterly to the commission on its activities, including suggestions or proposals for future activities and other matters the committee considers important.

The PPAC operates under the requirements of 30 TAC Chapter 5, Advisory Committees. The PPAC meets a minimum of four times per year and as needed. Members may not miss three consecutive regularly scheduled meetings or more than half of all the regularly scheduled meetings in a one-year period. The meetings usually last one full day and are held at the commission headquarters in Austin, Texas.

Travel reimbursement for committee member expenses was not authorized by the 78th Texas Legislature and therefore committee members cannot be reimbursed by the commission. Several committee members are exploring a mechanism to provide for third party reimbursement, especially for environmental and civic organization representatives. The PPAC must report in writing to the commission a minimum of once per year, unless otherwise directed.

The commissioners invite nominations for the following positions. Each nomination should include a brief cover letter and biographical summary which includes the individual's experience and qualifications, and an agreement to serve on the committee if appointed.

Except as otherwise provide by law, advisory committee members may serve two-or four-year terms. Please submit nomination(s) for consideration by the commission for the following terms:

One representative from an environmental or public interest group to fill the open position resulting from the resignation by Reggie James, Southwest Office Consumers Union (four-year term to expire on August 31, 2005);

Two representatives from an environmental or public interest group (vacant four-year terms to expire on August 31, 2007);

Two representatives from the regulated community (four-year terms to expire on August 31, 2007);

One representative from academia (four-year term to expire on August 31, 2005); and

At least two *ex officio* positions (two-year terms to expire on August 31, 2005) to fill vacant positions, including potential appointments for local government, labor organization, and other interested parties.

Written nominations must be received in the Small Business and Environmental Assistance Division Office by 5:00 p.m. on June 21, 2004 via mail, hand delivery, email, or fax. Nominations should be directed to: Ken Zarker, Small Business and Environmental Assistance Division (MC 112), Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, e-mail to *kzarker@tceq.state.tx.us*, or fax to (512) 239-3165. Documents can be submitted via hand delivery to the Small Business and Environmental Assistance Division, 12100 Park 35 Circle, Building F, Room 1301, Austin, Texas 78753. Questions regarding the PPAC can be directed to Mr. Zarker at (512) 239-3145.

TRD-200403369

Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: May 18, 2004

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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
Frisco	Tenet Hospital LTD DBA Centennial Medical Center	L05768	Frisco	00	05/07/04
Houston	Eye Excellence	L05737	Houston	00	05/05/04
Houston	Diagnostic Nuclear Imaging	L05769	Houston	00	05/05/04
Throughout Tx	PACS Construction Laboratories and Testing Services	L05776	Houston	00	05/12/04

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Amarillo	Baptist St Anthonys Health System	L01259	Amarillo	72	05/06/04
Amarillo	Panhandle Nuclear RX LTD	L04683	Amarillo	16	04/30/04
Beaumont	Christus St Elizabeth Hospital DBA St Elizabeth Hospital	L00269	Beaumont	94	05/06/04
Beaumont	Christus St Elizabeth Hospital DBA St Elizabeth Hospital	L00269	Beaumont	93	05/06/04
Beaumont	Baptist Hospital of Southeast Texas	L00358	Beaumont	96	05/07/04
Beaumont	Exxon Mobil Corporation	L00603	Beaumont	66	05/05/04
Corpus Christi	Coastal Cardiology Association	L04754	Corpus Christi	18	05/11/04
Corpus Christi	Associates In Heart Disease DBA The Heart Clinic of Corpus Christi	L05023	Corpus Christi	10	05/05/04
Dallas	Raytheon Company	L00946	Dallas	87	05/17/04
Dallas	Medical City Dallas Hospital DBA Medical City	L01976	Dallas	149	05/07/04
Dallas	Medi Physics Inc DBA Amersham Health	L05529	Dallas	10	05/14/04
Deer Park	Equistar Chemicals LP	L00204	Deer Park	58	05/14/04
Denton	Columbia Medical Center of Denton Subsidiary LP DBA Denton Regional Medical Center	L02764	Denton	53	04/29/04
El Campo	West Wharton County Hospital District DBA El Campo Memorial Hospital	L02664	El Campo	14	04/30/04
El Paso	Providence Memorial Hospital	L02353	El Paso	79	05/11/04
El Paso	Tenet Hospitals Limited DBA Sierra Medical Center	L02365	El Paso	52	05/12/04
El Paso	El Paso Healthcare System LTD DBA Del Sol Medical Center	L02551	El Paso	45	05/06/04
El Paso	El Paso Healthcare System LP DBA Del Sol Diagnostic Center	L03395	El Paso	39	05/12/04
Fort Worth	John Peter Smith Hospital	L02208	Fort Worth	49	04/30/04
Fort Worth	Heart Center of North Texas PA	L05338	Fort Worth	06	05/05/04

CONTINUED AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Fort Worth	Physician Reliance LP DBA Texas Oncology at Klabzuba	L05545	Fort Worth	05	05/11/04
Gainesville	Gainesville Hospital District DBA North Texas Medical Center	L02585	Gainesville	23	05/06/04
Harlingen	Valley Baptist Medical Center	L01909	Harlingen	56	05/03/04
Harlingen	Heart Clinic PA	L04514	Harlingen	15	05/12/04
Houston	The Methodist Hospital	L00457	Houston	125	05/11/04
Houston	Memorial Hermann Hospital System DBA Memorial Hospital Memorial City	L01168	Houston	74	05/12/04
Houston	Memorial Hermann Hospital System DBA Memorial Hospital Memorial City	L01168	Houston	73	05/03/04
Houston	River Oaks Medical Center LP DBA Twelve Oaks Medical Center	L02432	Houston	38	04/30/04
Houston	Washington Group International Inc	L02662	Houston	93	04/30/04
Houston	Rice University Department of Earth Science	L04744	Houston	07	05/06/04
Houston	Bernardo Treistman MD PA DBA Cardiology Specialists of Houston	L05083	Houston	04	05/03/04
Houston	Guidant Corporation VI	L05178	Houston	16	05/11/04
Houston	Complete Cardiac Care	L05218	Houston	03	05/11/04
Houston	Interventional Cardiology Associates	L05294	Houston	06	04/30/04
Houston	Cardiology Clinic PA	L05710	Houston	03	05/10/04
Iowa Park	Excel Imaging Inc	L05277	Iowa Park	01	05/06/04
Jourdanton	Jourdanton Hospital Corporation DBA South Texas Regional Medical Center	L04966	Jourdanton	09	05/11/04
Killeen	George Rebecca MD FACC DBA Texas Cardiovascular Medicine	L05099	Killeen	03	04/30/04
Kingwood	KPH Consolidation Inc DBA Kingwood Medical Center	L04482	Kingwood	21	05/07/04
Laredo	Laredo Cardiovascular Consultants DBA Laredo Cardiovascular Consultants PA	L04687	Laredo	05	05/11/04
Lufkin	Memorial Medical Center of East Texas	L01346	Lufkin	73	05/13/04
Mesquite	Baylor Medical Center Mesquite DBA Baylor Diagnostic Imaging Center	L04914	Mesquite	15	05/07/04
Mexia	Parkview Regional Hospital Nuclear Medicine Department	L05144	Mexia	17	05/13/04
Midland	Memorial Hospital and Medical Center	L00728	Midland	70	05/14/04
Nacogdoches	Nacogdoches Medical Center	L02853	Nacogdoches	33	05/14/04
Nederland	The Medical Center of Southeast Texas LP DBA Mid Jefferson Hospital	L01756	Nederland	47	05/10/04
Olney	Olney Hamilton Hospital District DBA Hamilton Hospital	L03226	Olney	13	05/03/04
Point Comfort	Formosa Plastics Corporation	L03893	Point Comfort	26	05/14/04
Port Arthur	Christus St Mary Hospital DBA Christus Health	L01212	Port Arthur	81	05/12/04
Port Arthur	The Medical Center of Southeast Texas LP DBA Park Place Medical Center	L01707	Port Arthur	50	05/11/04
San Angelo	Shannon Medical Center	L02174	San Angelo	51	05/05/04
San Antonio	VHS San Antonio Partners LP DBA Baptist Health System	L00455	San Antonio	131	05/07/04
San Antonio	University Physicians Group	L05410	San Antonio	02	05/07/04

CONTINUED AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
San Antonio	Methodist Healthcare System of San Antonio DBA Southwest Texas Methodist Hospital	L00594	San Antonio	186	04/30/04
San Antonio	University Physicians Group	L05410	San Antonio	02	05/07/04
San Marcos	Texas State University	L03321	San Marcos	14	05/13/04
Terrell	Terrell Healthcare LP DBA Medical Center at Terrell	L03048	Terrell	17	05/12/04
Texas City	Marathon Ashland Petroleum LLC	L04431	Texas City	18	05/06/04
Throughout Tx	Solutia Inc	L00219	Alvin	71	05/12/04
Throughout Tx	Texas Department of Transportation	L00197	Austin	101	05/12/04
Throughout Tx	Professional Service Industries Inc	L04939	Corpus Christi	07	05/14/04
Throughout Tx	Jobe Concrete Products Inc	L04021	El Paso	11	05/14/04
Throughout Tx	Mactec Engineering and Consulting Inc	L05490	Fort Worth	04	05/12/04
Throughout Tx	Baker Hughes Oilfield Operations Inc DBA Baker Atlas	L00446	Houston	150	05/13/04
Throughout Tx	H & G Inspection Company Inc ADBA Statewide Maintenance Company	L02181	Houston	180	05/11/04
Throughout Tx	Continental Airlines Inc	L02718	Houston	37	05/14/04
Throughout Tx	D-Arrow Inspection	L03816	Houston	73	05/12/04
Throughout Tx	Mandes Inspection & Testing Services Inc	L05220	Houston	41	05/12/04
Throughout Tx	Mobile PET Systems Inc	L05295	Houston	04	05/12/04
Throughout Tx	Mandes Inspection & Testing Services Inc	L05520	Houston	40	05/10/04
Throughout Tx	Quest Trutec LP	L03913	La Porte	61	05/11/04
Throughout Tx	Non Destructive Inspection Corporation	L02712	Lake Jackson	112	05/10/04
Throughout Tx	Southern Services Inc DBA Southern Technical Services DBA BIX Testing Laboratories	L05270	Lake Jackson	32	05/14/04
Throughout Tx	Eagle X-Ray	L03246	Mont Belvieu	78	05/10/04
Throughout Tx	Fugro South Inc	L04322	Pasadena	69	05/06/04
Throughout Tx	X-R-I Non-Destructive Testing	L05275	Pearland	36	05/05/04
Throughout Tx	Nova Consulting Group Inc	L05322	San Antonio	03	05/06/04
Throughout Tx	Schlumberger Technology Corporation	L01833	Sugar Land	119	05/13/04
Tyler	East Texas Medical Center	L00977	Tyler	107	05/14/04
University Park	Cirrus Health DBA Park Cities Imaging Center	L05600	University Park	05	04/29/04
Weslaco	Knapp Medical Center	L03290	Weslaco	32	05/07/04

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Garland	Litton Electro-Optical Systems	L02155	Garland	30	05/12/04
Lufkin	Piney Woods Healthcare System DBA Woodland Heights Medical Center	L01842	Lufkin	46	05/13/04
Throughout Tx	Savage-Tolk	L02672	Earth	19	05/12/04
Throughout Tx	Glenn Fuqua Inc	L04736	Navasota	03	05/12/04
Waco	Texas State Technical College Waco	L01926	Waco	34	05/14/04
Wichita Falls	Clinics of North Texas LLP	L00523	Wichita Falls	44	05/10/04

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Fort Worth	All Saints Advanced Imaging Center	L05251	Fort Worth	09	05/05/04
Throughout Tx	Greenspan Inc	L04628	Houston	08	05/12/04
Throughout Tx	APAC Texas Inc	L04434	Beaumont	12	05/17/04

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 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 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-200403395
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: May 19, 2004

Notice of Amendment to the Schedules of Controlled Substances Removing the Substance TFMPP from Schedule I

On September 20, 2002, the Deputy Administrator of the Drug Enforcement Administration (DEA) issued a notice of intent temporarily placing the substance N-benzylpiperazine (BZP) and 1-(3-trifluoromethylphenyl) piperazine (TFMPP), including their optical isomers, salts, and salts of isomers into Schedule I of the Federal Controlled Substances Act (CSA). On March 18, 2004, the Acting Deputy Administrator of the DEA issued a final rule, vacating the orders temporarily placing BZP and TFMPP into Schedule I of the CSA. The final rule placed BZP permanently into Schedule I; however, there was insufficient evidence to place TFMPP into Schedule I permanently.

Pursuant to §481.034(g) of the Texas Controlled Substances Act, Health and Safety Code, Chapter 481, at least 31 days have expired since notice of the above referenced action was published in the Federal Register, and Eduardo J. Sanchez, M.D., M.P.H. on April 27, 2004, in his capacity as Commissioner of Health, ordered that the substance 1-(3-trifluoromethylphenyl) piperazine (TFMPP), including its optical isomers, salts, and salts of isomers be removed from Schedule I of the Texas Controlled Substances Act. Schedule I of said Act is hereby amended to read as follows. The amendment will be effective 21 days following the date of publication of this notice.

SCHEDULE I

Schedule I consists of:

Schedule I opiates ***

Schedule I opium derivatives ***

Schedule I hallucinogenic substances

unless specifically excepted or unless listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following hallucinogenic substances or that contains any of the substance's salts, isomers, and salts of isomers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation (for the purposes of this Schedule I hallucinogenic substances section only, the term "isomer" includes optical, position, and geometric isomers):

(1) Alpha-ethyltryptamine (some trade or other names: etryptamine; Monase; alpha- ethyl-1H-indole-3-ethanamine; 3-(2-aminobutyl) indole; alpha-ET; AET);

(2) 4 bromo 2,5 dimethoxyamphetamine (some trade or other names: 4 bromo-2,5 dimethoxy alpha methylphenethylamine; 4 bromo 2,5 DMA);

(3) 4-bromo-2,5-dimethoxyphenethylamine (some trade or other names: Nexus; 2C-B; 2-(4-bromo-2,5-dimethoxyphenyl)-1-aminoethane; alpha-desmethyl DOB);

(4) 2,5 dimethoxyamphetamine (some trade or other names: 2,5 dimethoxy alpha methylphenethylamine; 2,5 DMA);

(5) 2,5-dimethoxy-4-ethylamphetamine (some trade or other names: DOET);

(6) 2,5-dimethoxy-4-(n)-propylthiophenethylamine (2C-T-7), its optical isomer, salts and salts of isomers;

(7) 5 methoxy 3,4 methylenedioxy-amphetamine;

(8) 4 methoxyamphetamine (some trade or other names: 4 methoxy alpha methylphenethylamine; paramethoxyamphetamine; PMA);

(9) 1 methyl 4 phenyl 1,2,5,6 tetrahydro pyridine (MPTP);

(10) 4 methyl 2,5 dimethoxyamphetamine (some trade and other names: 4 methyl 2,5 dimethoxy alpha methyl phenethylamine; "DOM"; and "STP");

(11) 3,4 methylenedioxy-amphetamine;

(12) 3,4 methylenedioxy-methamphetamine (MDMA, MDM);

(13) 3,4 methylenedioxy-N ethylamphetamine (some trade or other names: N ethyl-alpha-methyl-3,4(methylenedioxy)phenethylamine; N-ethyl MDA; MDE; MDEA);

(14) 3,4,5 trimethoxy amphetamine;

(15) N hydroxy 3,4 methylenedioxyamphetamine (Also known as N hydroxy MDA);

(16) Bufotenine (some trade and other names: 3-(beta-Dimethylaminoethyl) 5 hydroxyindole; 3 (2 dimethylaminoethyl) 5 indolol; N,N dimethylserotonin; 5 hydroxy N,N dimethyltryptamine; mappine);

(17) Diethyltryptamine (some trade and other names: N,N Diethyltryptamine; DET);

(18) Dimethyltryptamine (some trade and other names: DMT);

(19) Ethylamine Analog of Phencyclidine (some trade or other names: N ethyl 1 phenylcyclohexylamine; (1 phenylcyclohexyl) ethylamine; N (1 phenylcyclohexyl)-ethylamine; cyclohexamine; PCE);

(20) Ibogaine (some trade or other names: 7 Ethyl 6,6-beta, 7,8,9,10,12,13 octhydro 2 methoxy 6,9 methano-5H-pyrido[1',2':1,2]azepino[5,4 b] indole; taber-nanthe iboga);

(21) Lysergic acid diethylamide;

(22) Marihuana;

(23) Mescaline:

(24) N-benzylpiperazine (some other names: BZP; 1-benzylpiperazine), its optical isomers, salts and salts of isomers;

(25) N ethyl 3 piperidyl benzilate;

(26) N methyl 3 piperidyl benzilate;

(27) Parahexyl (some trade or other names: 3 Hexyl 1 hydroxy 7,8,9,10 tetrahydro 6,6,9 trimethyl 6H dibenzo[b,d]pyran; Synhexyl);

(28) Peyote, unless unharvested and growing in its natural state, meaning all parts of the plant classified botanically as Lophophora, whether growing or not, the seeds of the plant, an extract from a part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or extracts;

(29) Psilocybin;

(30) Psilocin;

(31) Pyrrolidine analog of phencyclidine (some trade or other names: 1-(1 phenyl-cyclohexyl)-pyrrolidine, PCPy, PHP);

(32) Tetrahydrocannabinols;

(33) Synthetic equivalents of the substances contained in the plant Cannabis, or in the resinous extractives of that plant, and synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity such as: delta 1 cis or trans tetrahydrocannabinol, and their optical isomers; delta 6 cis or trans tetrahydrocannabinol, and their optical isomers; delta 3,4 cis or trans tetrahydrocannabinol, and its optical isomers; (Compounds of these structures, regardless of numerical designation of atomic positions, since nomenclature of these substances is not internationally standardized);

(34) Thiophene analog of phencyclidine (some trade or other names:1 [1 (2 thienyl)cyclohexyl]piperidine; 2 thienyl analog of phencyclidine; TPCP); and,

(35) 1 [1 (2 thienyl)cyclohexyl]pyrrolidine (some trade or other names: TCPy). *[deleted no. 36]

Schedule I stimulants * * *

Schedule I depressants * * *

Changes to the schedules are designated by an asterisk (*)

TRD-200403345
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: May 18, 2004

Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Bobby Matthews

Notice is hereby given that the Bureau of Radiation Control (bureau), Texas Department of Health (department), issued a notice of violation and proposal to assess an administrative penalty to Bobby Matthews (Texas Radiographer Identification Number 002037) of Huffman. A total penalty of $5,000 is proposed to be assessed the radiographer for alleged violations of 25 Texas Administrative Code, Chapter 289.

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-200403393
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: May 19, 2004

Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Methodist Hospitals of Dallas, dba Charlton Methodist Hospital

Notice is hereby given that the Bureau of Radiation Control (bureau), Texas Department of Health (department), issued a notice of violation and proposal to assess an administrative penalty to Methodist Hospitals of Dallas, doing business as Charlton Methodist Hospital (registrant-M00378) of Dallas. A total penalty of $4,000 is proposed to be assessed the registrant for alleged violations of 25 Texas Administrative Code, Chapter 289.

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-200403394

Susan K. Steeg
General Counsel
Texas Department of Health
Filed: May 19, 2004

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Raven Inspection and Testing, Inc.

Notice is hereby given that the Bureau of Radiation Control (bureau), Texas Department of Health (department), issued a notice of violation and proposal to assess an administrative penalty to Raven Inspection and Testing, Inc. (licensee-L05219) of Huffman. A total penalty of $10,000 is proposed to be assessed the licensee for alleged violations of 25 Texas Administrative Code, Chapter 289.

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-200403392
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: May 19, 2004

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Texas Health and Human Services Commission

Public Notice

The Health and Human Services Commission, State Medicaid Office, has received approval from the Centers for Medicare and Medicaid Services to amend the Title XIX Medical Assistance Plan by Transmittal Number 03-15, Amendment Number 650.

This amendment eliminates recalculating the standard dollar amount (SDA) and the cost-of-living update factor applied to the SDA of all hospitals for inpatient hospital admissions during state fiscal years 2004 and 2005. The amendment revises the high volume adjustment factors applied to the SDA of certain hospitals for inpatient admissions during state fiscal years 2004 and 2005. This amendment will also allow certain Medicaid hospitals with more than 100 licensed beds the option of receiving cost-based reimbursement authorized by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). Lastly, this amendment modifies the reimbursement for direct graduate medical education for admission during state fiscal years 2004 and 2005. The effective date of the amendment is September 1, 2003.

For more information, please contact Winnie Rutledge, Policy Analyst at 512 491-1320.

TRD-200403294
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Filed: May 17, 2004

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Public Notice

The Health and Human Services Commission, State Medicaid Office, has received approval from the Centers for Medicare and Medicaid Services to amend the Title XIX Medical Assistance Plan by Transmittal Number 03-18, Amendment Number 653.

This amendment eliminates the use of the proxy methodology from the Texas Medicaid Disproportionate Share Hospital Program. The state had allowed hospitals, which were unable to calculate their uninsured charges for inpatients and outpatients, to receive a proxy calculation. The elimination of the proxy methodology requires hospitals to calculate their uninsured charges for inpatients and outpatients. The effective date of the amendment is September 1, 2003.

For more information, please contact Winnie Rutledge, Policy Analyst at 512 491-1320.

TRD-200403295
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Filed: May 17, 2004

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Public Notice Statement

The Texas Health and Human Services Commission announces its intent to submit Transmittal Number 04-14, Amendment Number 678, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. Amendment Number 678 provides for supplemental payments to a publicly owned hospital or hospital affiliated with a hospital district in Potter and Randall counties for inpatient services provided to Medicaid patients. The supplemental payment shall not exceed the difference between total annual Medicaid payments and the federal upper payment limits established in 42 CFR 447.272. The purpose of the supplemental payment is to recognize the unique role of urban public safety-net hospitals play in the Texas healthcare delivery system for the Medicaid population. As a result, the State seeks to ensure that Medicaid payments are commensurate with Medicare payments and/or payment principles.

The proposed amendment is to be effective May 29, 2004. The proposed amendment is estimated to result in increased expenditures of approximately $8,778,992 for fiscal year 2004, and $14,834,870 for fiscal year 2005.

Copies of the proposed change in methodology will be available for public review at local offices of the Texas Department of Human Services.

Comments, questions or requests for additional information should be forwarded to Scott Reasonover, Texas Health and Human Services Commission, 1100 West 49th Street, Austin, Texas 78756, (512) 491-1348.

TRD-200403292
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Filed: May 17, 2004

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Public Notice Statement

The Texas Health and Human Services Commission announces its intent to amend the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

Transmittal Number 04-06, Amendment Number 673 removes targeted case management services provided to individuals who were enrolled in the Mental Retardation Local Authorities (MRLA) program. The amendment does not impact the current rate for targeted case management for persons with mental retardation or related condition or pervasive developmental disability because individuals who were enrolled in MRLA have been enrolled in Home Care Services, which already has a case management component.

There is no anticipated fiscal impact as a result of this amendment.

For further information, contact Winnie Rutledge, Texas Health and Human Services Commission, 1100 West 49th Street, Austin, Texas 78756, (512) 491-1320.

TRD-200403293
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Filed: May 17, 2004

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Houston-Galveston Area Council

Request for Proposals

FOR TRAFFIC CRASH ANALYSIS AND DATA COLLECTION IN THE CITY OF GALVESTON

The Houston-Galveston Area Council (H-GAC) of Harris County, Texas, is requesting written proposals to perform a safety planning study involving analyzing crashes and related data for 13 intersections in the City of Galveston. This study is part of H-GAC's traffic safety program and is aimed at improving safety in Galveston.

A pre-proposal meeting is scheduled at **2 p.m. on Monday, June 7, 2004**, at H-GAC offices. Please R.S.V.P. to Ned Levine, ned.levine@h-gac.com, if you plan to attend the meeting. Submittals are due by **3 p.m. on Tuesday, June 22, 2004**. Late submittals will **NOT** be accepted. Ten (10) typewritten, bound/stapled and signed copies are required.

The Request for Proposals packet can be downloaded from the H-GAC Transportation Department Web site at **www.h-gac.com/transportation**. Interested firms may also obtain the packet at the H-GAC offices at 3555 Timmons Lane, Suite 120, Houston, Texas 77027, or by contacting Ned Levine at 713-627-3200. All questions regarding the Request for Proposals must be made in writing, and can be sent to the attention of Ned Levine by email to ned.levine@h-gac.com, faxed to 713-993-4508, or mailed to the Houston-Galveston Area Council, P.O. Box 22777, Houston, TX 77227-2777. While questions regarding this request for proposals are welcome anytime, no scope of services questions will be answered before the pre-proposal meeting.

TRD-200403377
Alan Clark
MPO Director
Houston-Galveston Area Council
Filed: May 19, 2004

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Texas Department of Insurance

Company Licensing

Application to change the name of NEW YORK LIFE AND HEALTH INSURANCE COMPANY to DIRECT GENERAL LIFE INSURANCE COMPANY, a foreign life, accident and/or health company. The home office is in Aiken, South Carolina.

Application for a new organization applying for a certificate of authority in the State of Texas by U.S. SURETY, a domestic fire and/or casualty company. The home office is in Houston, Texas.

Any objections must be filed with the Texas Department of Insurance, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas, 78701, within twenty (20) days of the *Texas Register* published date.

TRD-200403396
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: May 18, 2004

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Legislative Budget Board

Notice of Contract Award

The Legislative Budget Board (LBB) announces this notice of contract award.

The original notice of request for proposals (HB7.2004.SPR.0005) was published in the April 2, 2004, issue of the *Texas Register* (29 TexReg 3530).

The consultant will advise and assist the LBB in conducting a management and performance review of the Regional Education Service Centers.

The contract is awarded to MGT of America located at 2123 Centre Pointe Blvd., Tallahassee, FL 32308. The total amount of the contract is estimated at $649,945. The contract was executed on May 7, 2004. The term of the contract is May 7, 2004 until December 31, 2004. The final report is due on August 31, 2004.

TRD-200403403
John O'Brien
Deputy Director
Legislative Budget Board
Filed: May 19, 2004

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Notice of Contract Award

The Legislative Budget Board (LBB) announces this notice of contract award.

The original notice of request for proposals (HB7.2004.SPR.0004) was published in the April 2, 2004, issue of the *Texas Register* (29 TexReg 3531).

The consultant will advise and assist the LBB in conducting a management and performance review of the South San Antonio Independent School District.

The contract is awarded to SDSM, Inc. located at P.O. Box 27619, Austin, TX 78755. The total amount of the contract is estimated at $175,000. The contract was executed on April 23, 2004. The term of the contract is April 23, 2004 until November 30, 2004. The final report is due on August 13, 2004.

TRD-200403230
John O'Brien
Deputy Director
Legislative Budget Board
Filed: May 12, 2004

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Notice of Contract Award

The Legislative Budget Board (LBB) announces this notice of contract award.

The original notice of request for proposals (HB7.2004.HE.0001) was published in the April 2, 2004, issue of the *Texas Register* (29 TexReg 3531).

The consultant will advise and assist the LBB in conducting a management and performance review of Texas A&M University.

The contract is awarded to MGT of America, located at 502 E. 11th Street, Suite 300, Austin, TX 78701. The total amount of the contract is estimated at $479,910. The contract was executed on May 7, 2004. The term of the contract is May 7, 2004 until October 31, 2004. The final report is due on September 4, 2004.

TRD-200403267
John O'Brien
Deputy Director
Legislative Budget Board
Filed: May 14, 2004

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Texas Lottery Commission

Instant Game Number 462 "Money Carlo"

1.0 Name and Style of Game.

A. The name of Instant Game No. 462 is "MONEY CARLO". The play style in Game 1: Roulette is "key number match". The play style in Game 2: Jackpot is "key symbol match". The play style in Game 3: Dice is "add up". The play style in Game 4: Poker is "key symbol match with prize legend".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 462 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 462.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol- The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: $5.00, $10.00, $15.00, $25.00, $50.00, $100, $500, $1,000, $10,000, $250,000, 1, 2, 3, 4, 5, 6, 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, CHERRIES SYMBOL, LEMON SYMBOL, HORSESHOE SYMBOL, STAR SYMBOL, BELL SYMBOL, 7 SYMBOL, 24K GOLD BAR SYMBOL, CROWN SYMBOL, DIAMOND SYMBOL, 2 HEART SYMBOL, 3 HEART SYMBOL, 4 HEART SYMBOL, 5 HEART SYMBOL, 6 HEART SYMBOL, 7 HEART SYMBOL, 8 HEART SYMBOL, 9, HEART SYMBOL, 10 HEART SYMBOL, J HEART SYMBOL, Q HEART SYMBOL, K HEART SYMBOL, A HEART SYMBOL, 2 SPADE SYMBOL, 3 SPADE SYMBOL, 4 SPADE SYMBOL, 5 SPADE SYMBOL, 6 SPADE SYMBOL, 7 SPADE SYMBOL, 8 SPADE SYMBOL, 9 SPADE SYMBOL, 10 SPADE SYMBOL, J SPADE SYMBOL, Q SPADE SYMBOL, K SPADE SYMBOL, A SPADE SYMBOL, 2 DIAMOND SYMBOL, 3 DIAMOND SYMBOL, 4 DIAMOND SYMBOL, 5 DIAMOND SYMBOL, 6 DIAMOND SYMBOL, 7 DIAMOND SYMBOL, 8 DIAMOND SYMBOL, 9 DIAMOND SYMBOL, 10 DIAMOND SYMBOL, J DIAMOND SYMBOL, Q DIAMOND SYMBOL, K DIAMOND SYMBOL, A DIAMOND SYMBOL, 2 CLUB SYMBOL, 3 CLUB SYMBOL, 4 CLUB SYMBOL, 5 CLUB SYMBOL, 6 CLUB SYMBOL, 7 CLUB SYMBOL, 8 CLUB SYMBOL, 9 CLUB SYMBOL, 10 CLUB SYMBOL, J CLUB SYMBOL, Q CLUB SYMBOL, K CLUB SYMBOL, and A CLUB SYMBOL.

D. Play Symbol Caption- the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 462 - 1.2D

PLAY SYMBOL	CAPTION
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTEEN
$25.00	TWY FIV
$50.00	FIFTY
$100	ONE HUN
$500	FIVE HUN
$1,000	ONE THOU
$10,000	10 THOU
$250,000	250 THOU
1 DICE SYMBOL	ONE
2 DICE SYMBOL	TWO
3 DICE SYMBOL	THR
4 DICE SYMBOL	FOR
5 DICE SYMBOL	FIV
6 DICE SYMBOL	SIX
01	ONE
02	TWO
03	THR
04	FOR
05	FIV
06	SIX
07	SVN
08	EGT
09	NIN
10	TEN
CHERRIES SYMBOL	CHERIES
LEMON SYMBOL	LEMON
HORSE SHOE SYMBOL	HSHOE
STAR SYMBOL	STAR
BELL SYMBOL	BELL
SEVEN SYMBOL	SEVEN
24K GOLD BAR SYMBOL	GOLD
CROWN SYMBOL	CROWN
DIAMOND SYMBOL	DIAMOND
2 HEART SYMBOL	2HRT
3 HEART SYMBOL	3HRT
4 HEART SYMBOL	4HRT
5 HEART SYMBOL	5HRT
6 HEART SYMBOL	6HRT
7 HEART SYMBOL	7HRT
8 HEART SYMBOL	8HRT
9 HEART SYMBOL	9HRT
10 HEART SYMBOL	10HRT
J HEART SYMBOL	JHRT
Q HEART SYMBOL	QHRT

K HEART SYMBOL	KHRT
A HEART SYMBOL	AHRT
2 SPADE SYMBOL	2SPDE
3 SPADE SYMBOL	3SPDE
4 SPADE SYMBOL	4SPDE
5 SPADE SYMBOL	5SPDE
6 SPADE SYMBOL	6SPDE
7 SPADE SYMBOL	7SPDE
8 SPADE SYMBOL	8SPDE
9 SPADE SYMBOL	9SPDE
10 SPADE SYMBOL	10SPDE
J SPADE SYMBOL	JSPDE
Q SPADE SYMBOL	QSPDE
K SPADE SYMBOL	KSPDE
A SPADE SYMBOL	ASPDE
2 CLUB SYMBOL	2CLUB
3 CLUB SYMBOL	3CLUB
4 CLUB SYMBOL	4CLUB
5CLUB SYMBOL	5CLUB
6 CLUB SYMBOL	6CLUB
7 CLUB SYMBOL	7CLUB
8 CLUB SYMBOL	8CLUB
9 CLUB SYMBOL	9CLUB
10 CLUB SYMBOL	10CLUB
J CLUB SYMBOL	JCLUB
Q CLUB SYMBOL	QCLUB
K CLUB SYMBOL	KCLUB
A CLUB SYMBOL	ACLUB

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 462 - 1.2E

CODE	PRIZE
FIV	$5.00
TEN	$10.00
FTN	$15.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $5.00, $10.00, $15.00.

H. Mid-Tier Prize - A prize of $25.00, $50.00, $100 or $500.

I. High-Tier Prize- A prize of $1,000, $10,000 or $250,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine

(9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (462), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 074 within each pack. The format will be: 462-0000001-000.

L. Pack - A pack of "MONEY CARLO" Instant Game tickets contains 75 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). Ticket 000 will be shown on the front of pack; the back of ticket 074 will be revealed on the back of the pack. Every other book will reverse (i.e.) the back of ticket 000 will be shown on the front of the pack and the front of ticket 074 will be shown on the back of the pack.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "MONEY CARLO" Instant Game No. 462 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "MONEY CARLO" Instant Game is determined once the latex on the ticket is scratched off to expose 36 (thirty-six) Play Symbols. In Game 1 Roulette, match any of YOUR NUMBERS to the LUCKY NUMBER and win prize shown for that number. In Game 2 Jackpot, match 3 identical symbols within the same ROW across, win prize shown for that ROW. In Game 3 Dice, if the 2 dice in any single ROLL match the numbers in the same order as reflected in the PRIZE GRID, win prize shown for that ROLL. In Game 4 Poker, if any of YOUR CARDS, match the PRIZE GRID, win that prize. Aces are high. Only the highest hand wins. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 36 (thirty-six) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 36 (thirty-six) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 36 (thirty-six) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 36 (thirty-six) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets within a book will not have identical patterns.

B. Game 1 Roulette: Players can win three (3) times in this play area.

C. Game 1 Roulette: No duplicate non-winning Your Numbers on a ticket.

D. Game 1 Roulette: Non-winning prize symbols will not match a winning prize symbol on a ticket.

E. Game 1 Roulette: There will be no duplicate non-winning prize symbols.

F. Game 1 Roulette: Your Number will never equal the corresponding Prize symbol.

G. Game 2 Jackpot: Players can win up to four (4) times in this play area.

H. Game 2 Jackpot: There will be no duplicate non-winning prize symbols.

I. Game 2 Jackpot: There will be no duplicate non-winning spins in any order on a ticket.

J. Game 2 Jackpot: There will never be three (3) identical Play Symbols in a vertical or diagonal line.

K. Game 2 Jackpot: Non-winning play symbols will never appear more than two (2) times over the entire game play area.

L. Game 2 Jackpot: Consecutive non-winning tickets should not have the same combination of 4 PRIZE values in the same order.

M. Game 2 Jackpot: Consecutive non-winning tickets will not have identical rows (e.g. If the first ticket shows Crown, Star, and Anchor in any row then the next ticket may not contain Crown, Star, and Anchor in that exact order in any row.).

N. Game 3 Dice: Players can win up to four (4) times in this play area.

O. Game 3 Dice: There will be no duplicate non-winning rolls in any order.

P. Game 3 Dice: The total value of each roll will never equal seven (7) or eleven (11) in any of Roll 1, Roll 2, Roll 3 and Roll 4 for non-winning tickets.

Q. Game 3 Dice: There will never be one (1) + one (1) (snake eyes) to avoid the appearance of eleven (11).

R. Game 3 Dice: The combined values of all four (4) rolls will never equal seven (7) or eleven (11).

S. Game 3 Dice: Non-winning rolls cannot have the winning prize grid roll combinations in any order (For example, a non-winning roll will never have a roll of 6 and 1, 5 and 2, 4 and 3 nor 6 and 5.)

T. Game 4 Poker: You can win a maximum of one (1) time in this play area.

U. Game 4 Poker: Ace is high.

V. Game 4 Poker: There should be no more than one of each card type on a single ticket.

W. Game 4 Poker: There should be no sequence of A, 2, 3.

2.3 Procedure for Claiming Prizes.

A. To claim a "MONEY CARLO" Instant Game prize of $5.00, $10.00, $15.00, $25.00, $50.00, $100 or $500 a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00,$100.00 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "MONEY CARLO" Instant Game prize of $10,000 or $250,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "MONEY CARLO" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "MONEY CARLO" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "MONEY CARLO" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of actual prizes in a game may vary based on sales, distribution, testing, and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 462. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 462 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$5	480,000	12.50
$10	480,000	12.50
$15	240,000	25.00
$25	160,000	37.50
$50	80,000	75.00
$100	4,150	1,445.78
$500	750	8,000.00
$1,000	150	40,000.00
$10,000	12	500,000.00
$250,000	3	2,000,000.00

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.15. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 462 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 462, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200403342
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: May 17, 2004

Public Utility Commission of Texas

Notice of Application for a Certificate of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on May 12, 2004, for a certificate of convenience and necessity for a proposed transmission line in Lubbock, Crosby and Floyd Counties, Texas.

Docket Style and Number: Application of Southwestern Public Service Company (SPS) for a Certificate of Convenience and Necessity for a Proposed Transmission Line Within Lubbock, Crosby and Floyd Counties, Texas. Docket Number 29391.

The Application: SPS proposed a transmission line project that would be constructed in two segments with different geographical locations. SPS proposed to build and operate 18.25 to 20.3 miles of 115 kV transmission line east of Lubbock, Texas in Crosby and Lubbock Counties, referred to as Segment 1, and 6.75 miles of 115 kV transmission line northeast of Petersburg, Texas in Floyd County referred to as Segment 2. Segment 1 is described as the Lubbock East Interchange to Crosby

County Interchange, and Segment 2 is described as the Floyd County Interchange to Floyd Tap.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by June 28, 2004, by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 29391.

TRD-200403343
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 17, 2004

Notice of Application for a Certificate to Provide Retail Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on May 11, 2004, for retail electric provider (REP) certification, pursuant to §§39.101- 39.109 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Cellatel Telecom & Energy Group for Retail Electric Provider (REP) certification, Docket Number 29695 before the Public Utility Commission of Texas.

Applicant's requested service area by geography or/service area by customers is unknown.

Persons wishing 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 June 7, 2004. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 29695.

TRD-200403350
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 18, 2004

Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On May 10, 2004, Universal Telephone Exchange, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60553. Applicant intends to expand its geographic area to include the entire State of Texas.

The Application: Application of Universal Telephone Exchange, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 29691.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than June 3, 2004. 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 29691.

TRD-200403351
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 18, 2004

Notice of Application for Name Change Amendment to Certificate of Convenience and Necessity

Notice is given to the public of an application filed on May 13, 2004, with the Public Utility Commission of Texas (commission) for a name change.

Docket Style and Number: Application of Consolidated Communications of Texas Company for a Name Change Amendment to its Certificate of Convenience and Necessity (CCN). Docket Number 29713.

The Application: Consolidated Communications of Texas Company filed an application to amend CCN Number 40054 awarded to TXU Communications (TXUC). TXUC informed the commission that on May 4, 2004, TXUC amended its articles of incorporation on file with the Texas Secretary of State. These amendments changed the legal name of the entity from TXUC to Consolidated Communications of Texas Company.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas, by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 29713.

TRD-200403349
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 18, 2004

Notice of Application for Name Change Amendment to Certificate of Convenience and Necessity

Notice is given to the public of an application filed on May 13, 2004, with the Public Utility Commission of Texas (commission) for a name change.

Docket Style and Number: Application of Consolidated Communications of Fort Bend Company for a Name Change Amendment to its Certificate of Convenience and Necessity (CCN). Docket Number 29712.

The Application: Consolidated Communications of Fort Bend Company filed an application to amend CCN Number 40031 awarded to Fort Bend Telephone Company d/b/a TXU Communications (FBTC). FBTC informed the commission that on May 4, 2004, FBTC amended its articles of incorporation on file with the Texas Secretary of State. These amendments changed the legal name of the entity from FBTC to Consolidated Communications of Fort Bend Company.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas, by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-

7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 29712.

TRD-200403348
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 18, 2004

Notice of Application to Amend a Certificate of Convenience and Necessity in Kendall and Bexar Counties, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on May 14, 2004, to amend a certificate of convenience and necessity in Kendall and Bexar Counties, Texas.

Docket Style and Number: Application of LCRA Transmission Services Corporation to Amend its Certificate of Convenience and Necessity for a 138-kV Transmission Line in Kendall and Bexar Counties. Docket Number 29684.

The Application: LCRA Transmission Services Corporation (LCRA TSC) proposed a transmission line project designated the Hill Country Substation/Transmission Line Project. The proposed line is approximately 3.8 miles long. LCRA TSC proposed a completion date of May 2006. LCRA TSC stated the proposed line is needed by the summer of 2006 to ensure electric service adequacy and reliability to loads serviced in the Kendall County area.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477, on or before June 28, 2004. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 29684.

TRD-200403352
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 18, 2004

Notice of Application to Amend Certificated Service Area Boundaries

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on May 14, 2004, for an amendment to certificated service area boundaries within Cameron County, Texas.

Docket Style and Number: Application of the Brownsville Public Utilities Board (BPUB) to Amend a Certificate of Convenience and Necessity for Service Area Boundaries within Cameron County (El Valle Grande Sections IX and X). Docket Number 29716.

The Application: The application encompasses an area of land which is singly certificated to American Electric Power Company (AEP), formerly known as Central Power & Light (CP&L), and is within the corporate limits of the City of Brownsville (City). BPUB received a letter request to provide electric utility service to two residential subdivisions called El Valle Grande Subdivision IX and El Valle Grande Subdivision X located off of FM 3248. El Valle Grande Subdivision IX is 23.452 acres and El Valley Grande Subdivision X is 25.436 acres. There are no electric distribution facilities within the proposed area. The estimated cost to BPUB to provide service to this proposed area is $323,834.41.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas no later than June 8, 2004, by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 29716.

TRD-200403353
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 18, 2004

Public Notice of Workshop on Report to the 79th Texas Legislature on Chapter 58 and Chapter 59 Incentive Regulation and Request for Comments

The staff of the Public Utility Commission of Texas (commission) will hold a workshop regarding the effects of Chapter 58 and Chapter 59 incentive regulation, on Wednesday, June 23, 2004 at 9:00 a.m. in the Commissioners' Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Pursuant to Public Utility Regulatory Act (PURA) §58.028, Project Number 29072, *Report to the 79th Texas Legislature on Chapter 58 and Chapter 59 Incentive Regulation* has been established for this proceeding. The commission must report to the Legislature on the effects of the election of Chapter 58 and Chapter 59 incentive regulation not later than January 1, 2005. Information regarding this project, including the agenda for the workshop, will be posted at the following commission website: http://www.puc.state.tx.us/telecomm/projects/29072/29072.cfm.

House Bill 2128 was enacted in 1995 and established provisions in Chapters 58 and 59 of PURA that allow incumbent telephone companies (ILECs) the option of electing into a new regulatory framework based on pricing incentives rather than on rate of return. Under this "incentive" regulation, the electing ILEC is not subject to earnings reviews or complaints as to reasonableness of its rates, revenues, or earnings. In return, the electing ILEC commits to infrastructure modernization, and to providing special rates to specified public entities (e.g., schools, libraries, and telemedicine centers of public or non-profit medical institutions) for certain private network services. These provisions of PURA were continued by Senate Bill 560 (SB 560), which was enacted in 1999 and increased flexibility for electing ILECs in pricing and packaging telecommunications services. Pricing flexibility includes customer-specific contracts, volume, term or discount pricing, zone density pricing, and other forms of promotional pricing. Under SB 560, electing ILECs must give the commission ten days' notice before changing their prices.

Currently, companies that have elected incentive regulation under Chapter 58 include Verizon, SBC, Sprint, Valor, Fort Bend Telephone, and TXU Communications (formerly Lufkin- Conroe). Companies that have elected incentive regulation under Chapter 59 include Sugar Land, Century Tel, Kerrville, Texas ALLTEL, and Big Bend.

The commission requests interested persons file comments to address the following questions:

1. For companies that have elected incentive regulation under Chapter 58 or Chapter 59, please describe in detail, using facts and concrete

examples, the effects of that election on consumer benefits, including the effects on:

(a) the Texas business community, including small, medium, and large businesses;

(b) Texas residential consumers; and

(c) libraries and educational institutions.

2. For companies that have elected incentive regulation under Chapter 58 or Chapter 59, please describe in detail, using facts and concrete examples, the effects of that election on competition.

3. For companies that have elected incentive regulation under Chapter 58 or Chapter 59, please describe in detail, using facts and concrete examples, the effects of that election on quality of service.

4. For companies that have elected incentive regulation under Chapter 58 or Chapter 59, please describe in detail, using facts and concrete examples, the effects of that election on infrastructure investments. Please include discussion as to whether the phone companies that have elected into incentive regulation have met the infrastructure commitments required by PURA Chapter 58, Subchapters F and G, and Chapter 59, Subchapters C and D, including infrastructure commitments regarding:

(a) libraries and educational institutions;

(b) telemedicine centers; and

(c) public or not-for-profit hospitals or not-for-profit heath care centers.

5. Based on the responses to questions 1 - 4 above, should the incentive regulation provided by Chapters 58 and 59 be extended, modified, eliminated, or replaced with another form of regulation? Please explain why or why not.

Responses may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 within 20 days of the date of publication of this notice. All responses should reference Project Number 29072. The commission requests that comments be limited to 30 pages.

Parties are urged to include everything they wish to discuss in their comments, however the Commission requests that parties identify the question for which a response is being provided, and respond to the questions in sequential order. If parties wish to present anything at the workshop that was not included with the comments, it must be filed in Central Records no later than 3:00 p.m. on June 21, 2004.

Prior to the workshop the commission shall make available in Central Records under Project Number 29072 an agenda for the format of the workshop.

Questions concerning the workshop or this notice should be referred to Marshall Adair, Director Telecommunications and Electric Policy Analysis, Policy Development Division, 512- 936-7214. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200403381
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 19, 2004

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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 vacancies:

Primary

* Dentist

* Employer

* General Public 1

Alternate

* Public Health Care Facility Representative

* Dentist

* Pharmacist,

* Employer

* General Public 1

* Insurance Carrier

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 R. L. Shipe, 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-200403347
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: May 18, 2004

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Texas Workforce Commission

The Texas Senior Employment Services Coordination Plan in Compliance with Title V - Section 503 of the Older Americans Act as Amended in 2000

The Texas Workforce Commission (Commission) is submitting the Texas Senior Employment Services Coordination Plan (State Plan) for comment. This notice of the Texas Senior Employment Services Coordination Plan provides the national grantees, 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 Senior Employment Services Coordination Plan will be available for public inspection from May 28 - June 11, 2004. You may view the draft at 101 East 15th Street Room 440T, Austin, Texas, or you may request a hard copy by calling Lucretia Dennis-Small at (512) 936-3150. An electronic copy is available on the Texas Workforce Commission web site at: http://www.texasworkforce.org. From this site, under "News" select "SCSEP PY 2004-2005 State Plan."

The Commission welcomes and invites all interested parties to provide input on the draft SCSEP State Plan. All comments must be submitted in writing. The deadline for submitting all comments is June 11, 2004 at 5:00 p.m. Comments may be submitted to: 101 East 15th Street, Room 440T, Attn: Lucretia Dennis-Small, Austin, Texas 78778-0001, faxed to 512-463-3258, or emailed to Ms. Dennis-Small at lucretia.dennis-small@twc.state.tx.us.

TRD-200403379
John Moore
General Counsel
Texas Workforce Commission
Filed: May 19, 2004

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How to Use the Texas Register

Information Available: The 14 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 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.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

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 29 (2004) is cited as follows: 29 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 "29 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 29 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 16, April 9, July 9, and October 8, 2004). 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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