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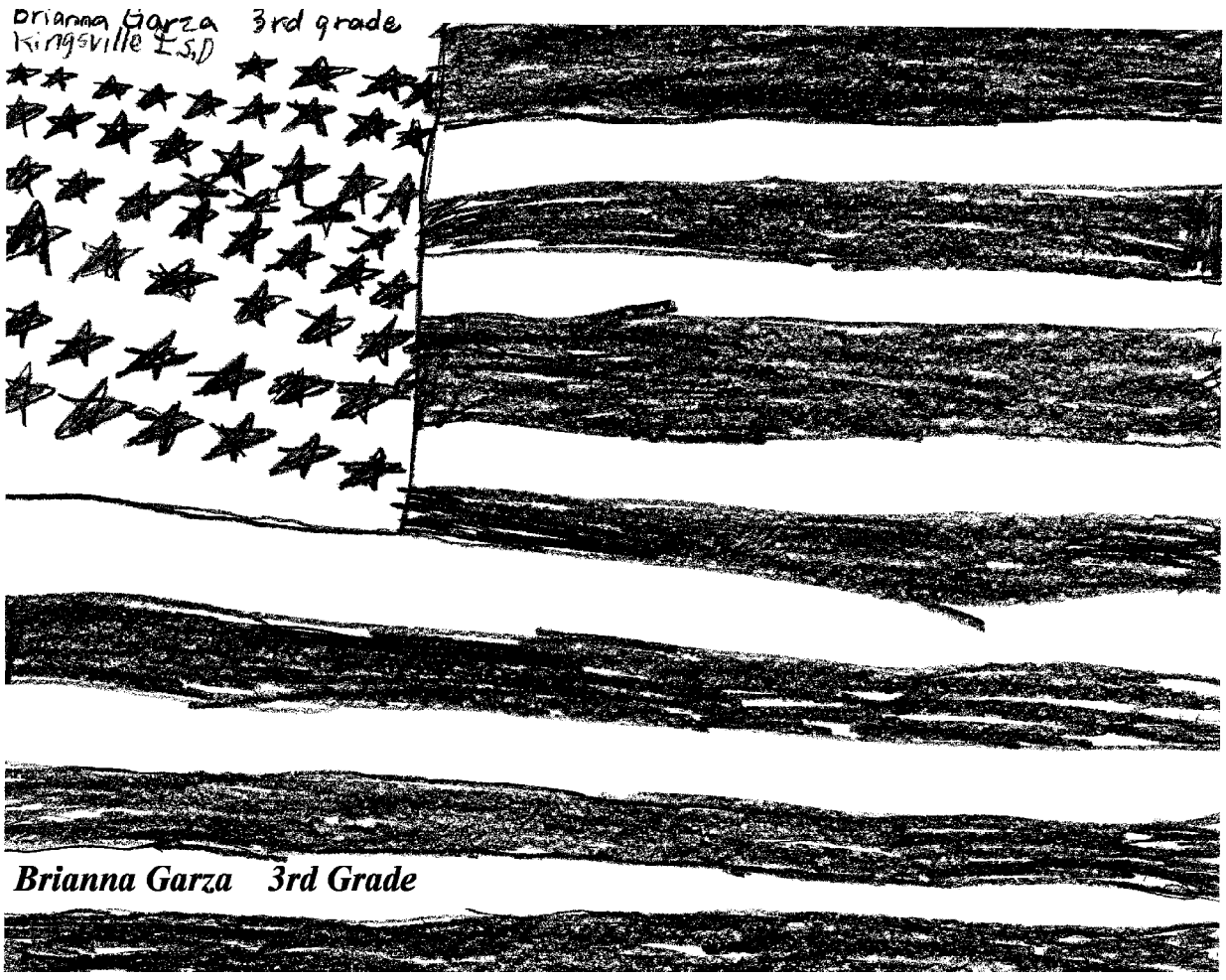

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but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

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

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IN THIS ISSUE

IN ADDITION

Open Meetings

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

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

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

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

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

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

THE GOVERNOR

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

Appointments

Appointments for May 28, 2004

Appointed to the Texas Radiation Advisory Board for a term to expire April 16, 2007, Mitchell L. Lucas of Granbury (replacing Jimmy Barker of Granbury whose term expired).

Appointed to the Texas Radiation Advisory Board for a term to expire April 16, 2007, Bradley Wayne Bunn of Andrews (replacing Don Butler of Colleyville whose term expired).

Appointed to the Texas Radiation Advisory Board for a term to expire April 16, 2009, Lawrence R. Jacobi, Jr. of Austin (replacing Dale Klein of Austin whose term expired).

Appointed to the Texas Juvenile Probation Commission for a term to expire August 31, 2009, Judge Cheryl Lee Shannon of Cedar Hill (replacing Mary Craft of Houston whose term expired).

Appointments for June 3, 2004

Appointed to the Texas State Board of Pharmacy for a term to expire August 31, 2009, Kim A. Caldwell of Plano (Mr. Caldwell is being reappointed).

Appointed to the Guadalupe-Blanco River Authority, Board of Directors, for a term to expire February 1, 2009, Clifton L. Thomas, Jr. of Victoria (replacing Catherine McHaney of Victoria whose term expired).

Appointed to the Guadalupe-Blanco River Authority, Board of Directors, for a term to expire February 1, 2009, Margaret M. Grier of Boerne (replacing Pam Hodges of Boerne whose term expired).

Appointed to the Midwestern State University Board of Regents for a term to expire February 25, 2010, Ben F. Wible of Sherman (replacing Chaunce Thompson Breckenridge whose term expired).

Appointed to the Midwestern State University Board of Regents for a term to expire February 25, 2010, Stephen A. Gustafson of Wichita Falls (replacing Jaime Davidson of Dallas whose term expired).

Appointed to the Midwestern State University Board of Regents for a term to expire February 25, 2010, Munir A. Lalani of Wichita Falls (reappointment).

Rick Perry, Governor

TRD-200403720

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THE ATTORNEY GENERAL

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

Request for Opinions

RQ-0228-GA

Requestor:

The Honorable Rodney Ellis

Chair, Committee on Government Organization

Texas State Senate

Post Office Box 12068

Austin, Texas 78711

Re: Whether a management district has the power of eminent domain (Request No. 0228-GA)

Briefs requested by June 28, 2004

RQ-0229-GA

Requestor:

The Honorable Jose R. Rodriguez

El Paso County Attorney

El Paso County Courthouse

500 East San Antonio, Room 503

El Paso, Texas 79901

Re: Whether the Border Health Institute is a state agency for various purposes (Request No. 0229-GA)

Briefs requested by June 28, 2004

RQ-0230-GA

Requestor:

Ms. Lisa Ivie Miller, Commissioner

Office of Fire Fighters' Pension Commissioner

Post Office Box 12577

Austin, Texas 78711

Re: Whether the Office of Fire Fighters' Pension Commissioner may charge an administrative fee to departments participating in its retirement program (Request No. 0230-GA)

Briefs requested by June 28, 2004

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

TRD-200403763
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: June 8, 2004

♦ ♦ ♦

Opinions

Opinion No. GA-0195

The Honorable Joe F. Grubbs

Ellis County and District Attorney

1201 North Highway 77, Suite B

Waxahachie, Texas 75165-5140

Re: Whether an employee of the City of Midlothian may simultaneously serve as a director of the Mountain Peak Water Supply Corporation (RQ-0142-GA)

SUMMARY

An employee of the City of Midlothian is not barred by Article XVI, §40 of the Texas Constitution, nor by common-law incompatibility from simultaneously serving as a director/officer of the entity formerly known as the Mountain Peak Water Supply Corporation, and now designated as the Mountain Peak Special Utility District. As a director/officer of Mountain Peak, he need not disclose his interest in or abstain from voting on matters involving the City of Midlothian.

Opinion No. GA-0196

The Honorable Mike Krusee

Chairman, Committee on Transportation

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether Transportation Code §521.126 prohibits a private security guard from running a driver's license through a device that electronically reads driver's license information to enable the Port of Houston

Authority police officers to access and use the information (RQ-0143-GA)

SUMMARY

Section 521.126 of the Transportation Code does not prohibit a private security guard from running a driver's license through a device that electronically reads driver's license information to enable the Port Authority peace officers acting in that capacity to access and use the information.

Attorney General Opinion JC-0540 (2002) is superseded in part by statute.

Opinion No. GA-0197

The Honorable Tim Curry

Tarrant County Criminal District Attorney

Justice Center

401 West Belknap

Fort Worth, Texas 76196-0201

Re: Whether an attorney who engages in certain conduct is ineligible to execute bail bonds under Occupations Code §1704.163, which exempts attorneys from Chapter 1704's general licensing requirements in certain limited circumstances (RQ-0145-GA)

SUMMARY

Occupations Code, §1704.163(a) generally permits an attorney to act as a surety for a client who the attorney represents in the criminal case without being licensed by the county bail bond board under Chapter 1704. An attorney may not act as a surety under this provision if the bail bond board has determined that the attorney has engaged in prohibited conduct under §1704.163(b). In addition, the official taking a defendant's bail bond in a particular criminal case may have cause to determine that an attorney who is not licensed under Chapter 1704 is not eligible to execute a bail bond or act as surety for the defendant under §1704.163(a) because the attorney does not represent the defendant in the criminal case.

A bail bond board may determine that an attorney is ineligible to execute a bail bond under §1704.163 if the attorney has engaged in conduct that would provide a basis for revoking or suspending the license of a licensed bondsman under §1704.252 or §1704.253. Because attorneys acting under the §1704.163 exemption are not subject to Chapter 1704's license and security requirements, a board may not disqualify such an attorney for conduct that violates a Chapter 1704 provision or board rule relating to license and security requirements.

An attorney who is not licensed under Chapter 1704 who executes a bail bond for a person who the attorney does not represent in the criminal case violates §1704.151, which is a basis for license suspension or revocation under §1704.252(1), and has therefore committed "conduct involved with that practice that would subject a bail bond surety to license suspension or revocation" under §1704.163(b). Whether an attorney represented a defendant in a particular case at the time the attorney executed the bond will depend upon the facts and is a matter for the bail bond board to determine.

Whether an attorney has remedied a violation will depend upon the disqualifying conduct. A bail bond board is authorized to determine whether an attorney has remedied a violation.

Opinion No. GA-0198

The Honorable Sonya Letson

Potter County Attorney

500 South Fillmore, Room 303

Amarillo, Texas 79101

Re: Whether a hospital district or the private entity that provides indigent care on the district's behalf may require an uninsured applicant for indigent health care, as a prerequisite to receiving the care, to obtain health insurance through the applicant's employer (RQ-0146-GA)

SUMMARY

A hospital district or the private entity that provides indigent care on the district's behalf may not require an uninsured applicant for indigent health care, as a prerequisite to receiving the care, to obtain health insurance through the applicant's employer.

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

TRD-200403778
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: June 9, 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 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 79. CORPORATIONS

SUBCHAPTER C. ENTITY NAMES

1 TAC §§79.31, 79.32, 79.34, 79.39, 79.41, 79.43 - 79.46, 79.48, 79.51 - 79.53

The Office of the Secretary of State (the Secretary of State) proposes to amend Chapter 79, Subchapter C, concerning entity names. Specifically, the Secretary of State proposes amendments to §§79.31, 79.32, 79.34, 79.39, 79.41, 79.43 - 79.46, 79.48, and 79.51 - 79.53.

The amendments are required to update terminology and to reflect current data entry procedures regarding entity names; to clarify procedures with regard to the requirement and submission of a letter of consent for the use of a similar entity name; to provide clearer examples of conflicting and non-conflicting entity names, and to conform rules to legislation passed by the 78th Legislature, Regular Session.

The proposed amendments to §79.31, which relates to the characters of print acceptable in a proposed entity name, are required to more specifically identify the capabilities and limitations in the entry of entity names into the present computer system maintained by the Secretary of State. The proposed amendments to §79.32 clarify the examples provided regarding a name that implies a purpose that would be unlawful for the proposed business entity. The proposed amendment to §79.34 is a conforming amendment to reflect the additional term of organization for limited partnerships effected by House Bill 1637, 78th Legislature, 2003, Regular Session. The proposed amendments to §79.39 clarify the circumstances and conditions under which a proposed entity name would be deemed to be deceptively similar to an existing entity name. The amendments to §79.41 provide more specific information regarding procedures relating to the request and submission of a letter of consent for use of a similar entity name. The proposed amendments to §79.43, which identifies the conditions that determine when a proposed entity name would require a letter of consent from an existing entity, are necessary to address the increased use of Internet locator designations in entity names and to clarify the conditions and circumstances requiring the submission of a letter of consent for formation of an entity with a similar entity name. The proposed amendments to §79.44 clarify the examples provided regarding entity names consisting in whole or in part of initials or letters of the alphabet. The proposed amendments to §79.45 expand the examples and comparisons of entity names comprised in whole or in part of surnames. The amendments to §79.46 clarify that the exceptions provided for entity names of churches also apply to ministries. The proposed amendments to §79.48 reflect the change in terminology used to identify an entity's inactive status. The proposed amendments to §79.51 and §79.52 are administrative in nature and address terminology used to identify the current organizational structure of Chapter 79. The proposed amendment to §79.53 provides a more useful example regarding use of a term restricted by the International Olympic Committee or the United States Olympic Committee.

Carmen Flores, Legal Counsel for the Business and Public Filings Division of the Office of the Secretary of State, has determined that for each year of the first five years that the sections are in effect there will be no fiscal implications to state or local governments as a result of enforcing or administering these sections.

Ms. Flores also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing or administering the sections as proposed will be to provide additional information, clarification, and guidance to persons seeking to form a domestic corporation, limited liability company, or limited partnership or to register a foreign corporation, limited liability company, or limited partnership regarding the statutory requirements relating to entity name availability and entity name standards. There will be no effect on small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed rules.

Comments on the proposed rules may be submitted to: Carmen Flores, Legal Counsel for the Business and Public Filings Division, Office of the Secretary of State, P.O. Box 13697, Austin, Texas 78711-3697. Comments must be received not later than the 30th day after the issue date of the *Texas Register* in which this proposal appears.

The amended sections are proposed under Article 9.03 of the Texas Business Corporation Act and Article 1396-9.04 of the Texas Non-Profit Corporation Act, which provide the Secretary of State with the power and authority reasonably necessary to efficiently administer the Acts and to perform the filing responsibilities imposed upon the Secretary of State.

The amended sections affect: Articles 2.05 and 8.03 of the Texas Business Corporation Act; Article 1396-2.04 and Article 1396-8.03 of the Texas Non-Profit Corporation Act; Articles 2.03 and 7.03 of Article 1528n, Texas Limited Liability Company Act, and §1.03 of Article 6132a-1, Texas Revised Limited Partnership Act.

§79.31. Characters of Print Acceptable in Names.

(a) Entity names may consist of letters of the Roman alphabet, Arabic numerals, and certain symbols capable of being reproduced on a standard English language typewriter, or combination thereof.

(b) No [~~Only upper case or capital letters, with no~~] distinction as to type face or font in the presentation of an entity name[~~,~~] will be recognized. Subscript or superscript characters cannot be entered into the computer records of the secretary of state; consequently, such characters will not appear above or below the other characters in the entity name. Example: H_2O will appear as H2O. The secretary of state however will recognize the use of either upper or lower case letters in the presentation of the entity name.

(c) Arabic numerals include 0, 1, 2, 3, 4, 5, 6, 7, 8, and 9.

(d) The symbols recognized as part of a name may include ! " $ % ' ( ) * ? # = @ [ ] / + & and -.

§79.32. False Implication of Governmental Affiliation; False Implication of Purpose.

(a) The entity name may not be one that might falsely imply governmental affiliation (example: Texas Real Estate Commission, Inc.).

(b) The entity name may not imply a purpose that [~~which~~] would be unlawful for the entity to conduct.

(1) The words [~~word~~] "insurance" or "surety" must be accompanied by other words that [~~which~~] remove the implication that the entity purpose is to be an insurer. The name may include the phrase "insurance agency," [~~or~~] "insurance agent," "surety agency," or "surety agent."

(A) Example: John Hancock Insurance Company or A-1 Surety Company would not be filed.

(B) Example: John Hancock Insurance Agency, Inc.[~~,~~] or A-1 Surety Agents, Company would be filed.

(2) The words "bail bond" [~~and "surety"~~] imply an unlawful purpose as entities with these powers must be organized under the Texas Insurance Code and these words may not be used in the name of a business entity.

[~~(A)~~] Example: Ace Bail Bonds, Inc. would not be filed.

[~~(B) Example: A-1 Surety Company.~~]

§79.34. Words of Incorporation or Organization.

(a) Words of incorporation include "company," "corporation," "incorporated," and, in the case of a foreign corporation, "limited," and their acceptable abbreviations. The acceptable abbreviations are, respectively: "Co.," "Corp.," "Inc.," and "Ltd." The words "companies," "corporations," "incorporation," and "unlimited" when used alone do not satisfy the statutory requirements for words of incorporation.

(b) Words of organization of a domestic or foreign limited partnership include "limited partnership," "limited," and their acceptable abbreviations. The acceptable abbreviations are, respectively: "L.P.," "LP," or "Ltd." The words "limited partnerships" or other variations of the statutory terms when used alone are not acceptable.

(c) The words of organization of a domestic or foreign limited liability company are "Limited Liability Company" or "Limited Company." The acceptable abbreviations are: "L.L.C.," "LLC," "LC," or "L.C." In addition, the word "Limited" may be abbreviated as "Ltd." or "LTD" and the word "Company" may be abbreviated as "Co." The words "Limited" or "Company" or other variations of the statutory terms when used alone are not acceptable.

(d) The words of organization of a domestic or foreign professional limited liability company are "Professional Limited Liability Company." The acceptable abbreviations are: "P.L.L.C." or "PLLC."

(e) Neither the words nor the abbreviations of the words of incorporation or organization listed in subsections (a), (b), (c), or (d) of this section may be used as a sufficient basis to distinguish among otherwise deceptively similar or same names.

§79.39. Deceptively Similar Name.

A proposed entity name is deemed to be deceptively similar to an entity name on file if any of the following conditions exist.

(1) The difference in the names consists in the use of different words of incorporation or organization. Example: Sampson, Inc., is deceptively similar to Sampson Corporation.

(2) The difference in names consists in the use of different articles, prepositions, or conjunctions [~~particles of speech~~]. Example: The Slaughter Co. is deceptively similar to Slaughter Co.

(3) The difference consists in the use of periods, spaces, or other spacing symbols that do not alter the names sufficiently to make them readily distinguishable [~~and symbols~~].

(A) Example: The following names are deceptively similar:

(i) AGX Corp.;

(ii) A G X Corp;

(iii) A.G.X. Corp;

(iv) AG*X* Corp;

(v) A/G/X Corp; [~~AG&X Corp;~~]

~~*[(vi)* A&GX Corp;]~~

(vi) [~~(vii)~~] AG-X Corp.

(B) Example: Fair View Rest Home, Inc., is deceptively similar to Fairview Rest Home, Inc.

(C) Example: A and B Trucking, Inc. is not deceptively similar to AB Trucking, LLC.

(D) Example: Double X Tire Company is not deceptively similar to XX Tires, Inc., and neither Double X Tire Company nor XX Tires, Inc. is deceptively similar to 2X Tires Incorporated.

(4) The difference consists in the presence or absence of letters that [~~which~~] do not alter the names sufficiently to make them readily distinguishable. This includes the use of singular, plural or possessive terms. [~~This applies to names that are spelled differently, but sound alike when spoken thus making the names difficult to distinguish upon hearing.~~]

(A) Example: Exon, Exxonn, [~~or~~] Exxons, or Exxon's are deceptively similar to Exxon.

(B) Example: Centennial Alarm Systems Corp. is deceptively similar to Centennial Alarm System Company. [~~Sentennial Alarm Systems, Inc.~~]

(C) Example: Medina Media Cabinets LLC is deceptively similar to Meddina's Media Cabinets, Inc.

[~~(C) Example: Chemtech Corporation is deceptively similar to Kemtek Incorporated.~~]

[~~(D) Example: AA Trucking is deceptively similar to Double A Trucking.~~]

[~~(E) Example: Four Winds, Inc., is deceptively similar to 4 Winds Corp. and IV Winds Inc.~~]

(5) The names are spelled differently or use alternative symbols, but sound alike when spoken, thus making the names phonetic equivalents and difficult to distinguish upon hearing.

(A) Example: Chemtech Corporation is deceptively similar to Kemtek Incorporated.

(B) Example: A and A Trucking, Inc. is deceptively similar to A & A Trucking Company.

(C) Example: Four Winds, Inc. is deceptively similar to 4 Winds Corp. and IV Winds Ltd.

(6) The difference in names consists of the use of common abbreviations or acronyms for the same term.

(A) Example: Johnson Bros. Company is deceptively similar to Johnson Brothers Company.

(B) Example: The Commons Northwest, Inc. is deceptively similar to The Commons NW, Company.

(C) Example: Central Texas Hideaways, LLC is deceptively similar to CenTex Hideaways, Inc.

(D) Example: DFW Carpet Cleaning, Inc. is deceptively similar to Dallas-Fort Worth Carpet Cleaning Company.

§79.41. Similar Requiring Letter of Consent Acceptable with Letter.

(a) A proposed name which is deemed to be similar requiring letter of consent cannot be filed without a letter of consent. No waiver of a required letter of consent will be allowed even though it may appear that the existing entity is not actively engaged in business, is about to change its name, be dissolved, forfeited, or merged out of existence.

(b) The letter of consent must accompany the document to which the consent relates at the time of submission.

(c) Upon the simultaneous submission of documents relating to the formation of two or more related entities, consent for the use of a name that would be considered similar requiring consent will be implied. Example: No letter of consent is required for the simultaneous formation of ABC Ventures, Ltd., a Texas limited partnership, and its general partner, ABC Ventures GP, LLC.

(d) If proposed entity name conflicts with more than one entity name, the secretary of state will request that the letter of consent be obtained from the entity with the longest continuous use of the entity name as determined by the records of the secretary of state.

§79.43. Similarity of Names Requiring Letter of Consent.

A proposed entity name is similar to an existing name and requires a letter of consent if any of the following conditions exists.

(1) The proposed entity name is the same as, or deceptively similar to, an entity name on file except for a geographical designation at the end of the name. For purposes of this paragraph, geographic designation includes the recognized name or abbreviation of a city, county, state, country, lake or ocean, a region (Permian Basin, Metroplex, Central Texas, etc.), a recognized subdivision within the state, a continent, or a compass point of reference. For purposes of this section, the term geographic designation does not include street names or non-specific location terms such as "International," "Gulf," or "Central."

(A) Example: Bull and Bear Club of San Antonio would need a letter of consent from Bull and Bear Club.

(B) Example: San Antonio Bull and Bear Club would not need a letter of consent from Bull and Bear Club.

(C) Example: Acme, Ltd. would need a letter of consent from Acme Southwest, Inc.

(D) Example: Exhibits International, LLC would not need a letter of consent from Exhibits, Inc.

(E) TempStaff, Inc. would need a letter of consent from TempStaff of Central Texas, Limited Partnership.

(2) The first two or more words of a proposed entity name are the same as, or deceptively similar to, the first two words of an entity name on file, and are not frequently used in combination.

(A) Example: Houston Service and Supply, Inc., would need a letter of consent from Houston Service, Inc.

(B) Example: Sunset Oil Co. would need a letter of consent from Sunset Oil and Gas, Inc.

(C) Example: First Texas Mortgage and Title Company would need a letter of consent from First Texas Mortgage Company.

(D) Example: Hot Dog Publications, Inc., would not need a letter of consent from Hot Dog Enterprises Corp.

~~[(E) Example: Acme Electric Corporation would need a letter of consent from Acme Electrical, Inc.]~~

(3) The proposed entity name is the same as, or deceptively similar to, an entity name on file except for a numerical expression which implies that the proposed entity is an affiliate of or in a series with the existing entity. Example: A letter of consent from an existing entity named United Company would be required in order to file any of the following:

(A) United IV;

(B) United No. 7;

(C) United Phase Two;~~[.]~~

(D) United 2005.

(4) If the entity name on file has only one significant word and the proposed entity name consists of the same word followed by some other significant word, the proposed entity name is not similar requiring letter of consent. Example: A letter of consent from an existing entity named United Company would not be required in order to file any of the following:

(A) United Sales;

(B) United Service;

(C) United Supply;

(D) United Industries;

(E) United Associates;

(F) United International;

(G) United Systems;

(H) United Products;

(I) United Productions.

(5) The proposed entity name contains the same words as an existing entity name but the words are inverted.

(A) Example: Energy Ventures, Inc., would need a letter of consent from Ventures Energy Corp.

(B) Example: Austin Auto Parts, Inc., would need a letter of consent from Auto Parts of Austin, Incorporated.

(6) The difference in the names consists in the use of the term "companies." Example: Satterwhite Companies, Ltd. would need a letter of consent from Satterwhite Corporation.

(7) The proposed entity name is the same as or deceptively similar to that of an existing entity name except for an Internet locator designation at the end or at the beginning of the name.

(A) Example: BusinessWorks.com, Inc. would need a letter of consent from Business Works, L.P.

(B) Example: WWW.ARTBEAT Company would need a letter of consent from ArtBeats, LLC.

(8) The difference in names consists of words or contractions of words that are derived from the same root word and there is no other distinguishing word in the name.

(A) Example: Magic Show, Inc. would need a letter of consent from Magical Show, Ltd.

(B) Example: Management Education Incorporated would need a letter of consent from Management.edu L.P.

(C) Example: Acme Electrical Products Incorporated would not need a letter of consent from Acme Electric Company.

§79.44. Alphabet Names.

Where a name or a unit of names consists of initials only or letters of the alphabet, the combination of initials will be considered as one word for the purpose of applying name availability rules.

(1) Example: The following are different "words" and are not considered to be similar:

(A) A & A;

(B) AA [~~AAA~~];

(C) AAA [~~AAAA~~];

(D) ABA [~~A & B~~];

(E) AAB.[~~;~~]

[~~(F) AAAC.~~]

(2) Example: A & B Supply is not similar when compared to A & B, Inc.

(3) Example: A+A [~~AA~~] Car Rental, Inc.[~~,~~] is deceptively similar to A & A [~~Double A~~] Car Rental, Corp.

(4) Example: A and B Trucking, Inc. is not similar when compared to AB Trucking, LLC.

§79.45. Surnames.

(a) A surname is considered to be a "word." Where a proposed entity name contains a surname as the second "word" and contains a given name or initials as a first "word" which is different from the first "word" of an existing entity, the name is not similar.

(1) Example: E. G. Williams Electric Company is not similar when compared to Williams Electric Company.

(2) Example: Jim Smith, Inc., is not similar when compared to Smith, Inc.

(3) Example: Ralph A. Johnson, Inc., is not similar when compared to Ralph Johnson, Inc.

(b) The use of a surname, or surnames, as part of a proposed entity name is not similar if there is some other sufficient basis for distinction of the two entity names.

(1) Example: Davis & Davis, P.C., is not similar when compared to Davis & Davis Publication, Inc.

(2) Example: Allyn Investments, Inc. is not similar when compared to Allan Investments Group, LLC.

(3) Example: Brown Manufacturing Company is deceptively similar to Brown's Manufacturing, Ltd.

(4) Example: Davis & Davis Publications, Inc. is not similar when compared to Davis Publications Company.

(5) Example: John Brown Manufacturing Company is not similar when compared to John Brown Sales, Inc.

(6) Example: Flores Family Company is not similar when compared to Flores Family Foundation.

(7) Example: Conlee Construction Company is not similar when compared to Conley Construction Incorporated.

(8) Example: Parson & Parson Company would need a letter of consent from Parson & Parson - Dallas, Inc.

§79.46. Exception for Churches and Ministries.

Entity names of churches will not be considered similar if there is some sufficient basis for distinguishing the name from an existing entity name.

(1) Example: First Baptist Church of Wimberley is not similar when compared to First Baptist Church of Austin.

(2) Example: God in Heaven Ministries is not similar when compared to God in Heaven Church.

§79.48. Matters Not Considered.

Only the proposed entity name, the current names of active (not revoked, cancelled, merged, [~~dead,~~] dissolved, or forfeited) entities, name reservations, and name registrations for entities on file are considered in determining the availability of the entity name for purposes of filing with the secretary of state. Among matters not considered are the following:

(1) whether the purpose of a proposed entity is the same as or similar to the purpose of an existing entity;

(2) whether the entities will be carrying out activities in the same or nearby locations;

(3) whether an analogous situation has previously been acted upon by the Corporations Section;

(4) whether an "opinion" as opposed to a final determination has previously been expressed by an employee of the secretary of state in response to an oral or written request;

(5) whether an existing entity is actively engaged in business, or has a telephone listing, or a location of a place of business;

(6) whether an existing entity is about to change its name, or be dissolved, or merged out of existence;

(7) whether a response to an inquiry can be obtained from an existing entity;

(8) whether the applicant has ordered stationery, opened a bank account, signed a contract, or otherwise altered his position in the expectation, hope, or belief that the proposed name would be available;

(9) whether the applicant is more or less important, extensive, widely known, or influential than an existing entity;

(10) whether the applicant has a prior or superior right to the use of a name apart from what might be shown on inspection of the names of active entities on file in the entity records of the secretary of state;

(11) whether infringement or unfair trade practice has occurred or might occur;

(12) whether an existing entity has filed [~~fled~~] for or intends to file for bankruptcy; or

(13) whether an applicant's submission of a document relating to the entity name at issue was prior to the submission of the document effecting the conflicting existing name.

§79.51. Limited Partnerships.

The name of a limited partnership as stated in its certificate of limited partnership, a reserved or registered name, or the name under which a foreign limited partnership is permitted to register in Texas as contained in its application for registration as a foreign limited partnership, is governed by the sections of this subchapter [~~under this undesignated head~~].

§79.52. Limited Liability Companies.

The name of a limited liability company as stated in its articles of organization, a reserved or registered name, or the name under which a foreign limited partnership is permitted to register to do business in Texas as contained in its application for registration as a foreign limited liability company is governed by the sections of this subchapter [~~under this undesignated head~~].

§79.53. Restricted Words.

An entity name cannot include the words, "Olympic," "Olympiad," or "Citius Altius Fortius," or a combination or simulation of those words or use a trademark, trade name, symbol or insignia of the International Olympic Committee or the United States Olympic Committee without the authorization or permission of the United States Olympic Committee. Example: Olympian Tours, Inc. would require a letter of consent, authorization, or no objection from the United States Olympic Committee. Example: Olympic Construction Company [~~Olympus Motor-Sports, LLC~~] would require a letter of consent, authorization or no objection from the United States Olympic Committee.

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

Filed with the Office of the Secretary of State on June 4, 2004.

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Lorna Wassdorf
Director, Business and Public Filings
Office of the Secretary of State
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For further information, please call: (512) 463-5561

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 371. MEDICAID AND OTHER HEALTH AND HUMAN SERVICES FRAUD AND ABUSE PROGRAM INTEGRITY

The Texas Health and Human Services Commission (the Commission) proposes a new Subchapter A ("Introduction") and a new Subchapter B ("Office of Inspector General") to implement the additions and revisions to state statutes passed in the 78th Legislature, 2003, through House Bills (HB) 2292 and 1743. The Commission proposes to repeal Subchapter F and the sections within Subchapter F. It also proposes amended, new, and repealed sections within Subchapter G in an effort to redesign and restructure the flow of the subchapter and ensure compliance with federal regulations and statutes at 42 Code of Federal Regulations (CFR), Parts 1001, 1002 and 455, the Texas Government Code, Part 531, Human Resources Code, Chapter 32, the Occupations Code, Part 102, and to implement the additions and revisions to state statutes passed through HB 2292 and 1743, all of which are designed to strengthen the state's ability to improve fraud and abuse detection, investigation, criminal referral and prosecution, and recovery of overpayments plus damages and penalties against Texas Medicaid and health and human services providers, recipients, and contractors. The rules provide an increased effort to identify fraud or abuse prior to payments being made to providers resulting in improved fiscal control of funds. HB 2292 and 1743 also established the Office of Inspector General (Inspector General) within the Commission and consolidate fraud, abuse, and waste investigations plus audit and other multiple compliance functions for Texas Medicaid and all health and human services under the Inspector General. The Commission proposes a title change of Chapter 371 to reflect the consolidation of program integrity functions within the Office of Inspector General and proposes a change to the title of Divisions 2 and 3 of Subchapter G to reflect the reorganization of the rules.

In Subchapter A, the Commission proposes new §371.1.

In Subchapter B, the Commission proposes new §§371.11, 371.13, 371.15, 371.17, 371.19, 371.21, 371.23, 371.25, 371.27, 371.29, 371.31, and 371.33.

In Subchapter F, the Commission proposes to repeal §§371.1501, 371.1503, 371.1505, 371.1507 and 371.1509.

In Subchapter G, Division 1, the Commission proposes to repeal §§371.1601, 371.1603, 371.1607, 371.1609, 371.1611, 371.1613, 371.1615, 371.1617, 371.1619, 371.1621, 371.1623, 371.1625, 371.1627, and 371.1629. The Commission proposes to amend §371.1605. The Commission proposes to add new §§371.1601, 371.1603, 371.1607, 371.1609, and 371.1611.

In Subchapter G, Division 2, the Commission proposes to add new §§371.1613, 371.1615, 371.1617, and 371.1619. The Commission proposes to repeal §§371.1641, 371.1643, and 371.1645.

In Subchapter G, Division 3, the Commission proposes to add new §§371.1629, 371.1631, and 371.1633. The Commission proposes to repeal §§371.1661, 371.1663, 71.1665, 371.1667, 371.1669, 371.1671, 371.1673, and 371.1675.

In Subchapter G, add a new Division 4, the Commission proposes to add new §§371.1643, 371.1645, 371.1647, 371.1649, 371.1651, 371.1653, 371.1655, 371.1657, 371.1659, 371.1661, 371.1663, 371.1665, 371.1667, 371.1669, 371.1671, 371.1673, 371.1675, 371.1677, 371.1679, 371.1681, 371.1683, 371.1685, 371.1687, and 371.1689.

In Subchapter G, add a new Division 5, the Commission proposes to add new §§371.1701, 371.1703, 371.1705, and 371.1707.

In Subchapter G, add a new Division 6, the Commission proposes to add new §§371.1721, 371.1723, 371.1725, 371.1727, 371.1729, 371.1731, 371.1733, 371.1735, 371.1737, 371.1739, and 371.1741.

Since one purpose of these revisions is to redesign and restructure the flow, the great majority of all language in the repealed sections is reflected in the new proposed sections in a rearranged form. There are some language changes to better clarify the intent of rules, regulations and statutes, and policies and

procedures. The great majority of these, however, reflect current rules, regulation and statutes, and policies and procedures. There are several new rules to comply with the provisions of federal and state regulations and statutes as described above and to implement the new legislation contained in HB2292 and 1743.

Tom Suehs, Deputy Commissioner of Financial Services, has determined that for the first five years that the proposed rules and repeals are in effect, there will be a substantial cost savings for state government as a result of enforcing or administering the sections. The anticipated cost savings will come from additional automated and manual enforcement tools to detect fraud and abuse, additional tools to ensure the collection of overpayments and penalties identified, and consolidating fraud and abuse program integrity staff from various agencies allowing more flexibility to utilize resources more effectively and to the best benefit of the state. There should be cost savings to the state in the first two fiscal years 2004 and 2005 of approximately $78,335,428. There should be no impact on local government.

Mr. Suehs has also determined that for each year of the first five years the proposed rules and repeals are in effect, the public will benefit from adoption of the rules and repeals. The anticipated public benefit will be to ensure that Medicaid and other health and human service providers defrauding or abusing the programs or those providing inferior quality care will be identified, investigated, and excluded from participation and that overpayments and penalties are recovered to the state. There is no anticipated impact regarding access to care and there is no anticipation of any increased cost of compliance for any size business. There are no anticipated economic costs to persons who are required to comply with the proposed rules and repeals. There is no anticipated impact on local employment.

The Commission has determined that the proposed rules are not a "major environmental rule" as defined by §2001.0225, Government Code. The proposed rules are not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Commission 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 governmental action and, therefore, do not constitute a taking under §2007.043 Government Code.

Written comments on the proposal may be submitted to Sharon Thompson, Director, Medicaid Integrity, Office of Inspector General, Texas Health and Human Services Commission, P.O. Box 13247, Austin, Texas 78711-3247 within 30 days of publication of this proposal in the *Texas Register*.

SUBCHAPTER A. INTRODUCTION

1 TAC §371.1

The new rule is proposed under §531.033 and §531.021, Texas Government Code, which provides the Commission with broad rulemaking authority; §32.021(a), (c), Human Resources Code, provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program; 531.102 establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services; the rules specifically implement the provisions of HB2292 and 1743; 42 CFR §455.13 requires the Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution; 42 CFR, Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity; 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program; 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers; and various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The proposed rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

The proposed rule affects Chapter 531, Texas Government Code, and Chapter 32, Human Resources Code.

§371.1. Purpose and Scope.

Medicaid and other Health and Human Services program integrity requires that appropriate and medically necessary covered health care services be delivered safely by qualified active providers to eligible recipients in exchange for payment at rates and pursuant to codes and/or contractual terms established prior to the delivery of services. All services billed must be provided by providers who are enrolled as a provider and have signed a contract or provider agreement. Regardless of payment methodology, program requirements, established through federal and state statutes, federal regulations, administrative rules, program rules, policies, procedures and manuals, and official explanations of those rules, policies, procedures and manuals, prescribe and govern appropriate delivery of and payment for health care services and items within Medicaid and health and human services. The Health and Human Services Commission (the Commission), through the Commission's Office of Inspector General (the Inspector General), is the state agency responsible for ensuring the integrity of the Texas Medicaid program and enforcing state administrative law related to suspected fraud, abuse, overpayments, and waste in the provision of Medicaid and health and human services. Inspector General staff are to pursue priority Medicaid and other health and human services fraud and abuse cases. This chapter sets forth the types of review, investigation, and audits performed by the Commission to ensure program integrity, as well as the Commission's administrative enforcement and appeals procedures triggered by suspected program violations.

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

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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 B. OFFICE OF INSPECTOR GENERAL

1 TAC §§371.11, 371.13, 371.15, 371.17, 371.19, 371.21, 371.23, 371.25, 371.27, 371.29, 371.31, 371.33

The new rules are proposed under §531.033 and §531.021, Texas Government Code, which provides the Commission with broad rulemaking authority; §32.021(a), (c), Human Resources Code, provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program; 531.102 establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services; the rules specifically implement the provisions of HB2292 and 1743; 42 CFR §455.13 requires the Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution; 42 CFR, Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity; 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program; 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers; and various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The proposed rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

The proposed rules affect Chapter 531, Texas Government Code, and Chapter 32, Human Resources Code.

§371.11. Purpose and Scope.

(a) The Office of Inspector General (the Inspector General) is a division within the Health and Human Services Commission (the Commission). The Inspector General is responsible for the investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services. The office administers program integrity and enforces program violations to the extent of applicable law governing Medicaid and the provision of other health and human services. This includes pursuing Medicaid and other health and human services fraud, abuse, overpayment, and waste. To accomplish this, the Inspector General has established several review processes to distinguish payment discrepancies that can be corrected through routine payment adjustment from those suspected to result from program violation requiring investigation and possible administrative enforcement or judicial action.

(b) The Inspector General establishes objectives and priorities for the office that emphasize:

(1) coordinating investigative efforts to aggressively recover funds;

(2) allocating resources to cases that have the strongest supportive evidence and the greatest potential for recovery of money; and

(3) maximizing opportunities for referral of cases to the Office of the Attorney General.

(c) In addition to performing functions and duties otherwise provided by law, the Inspector General may:

(1) assess administrative penalties otherwise authorized by law on behalf of the Commission or a health and human services agency;

(2) request that the attorney general obtain an injunction to prevent a person from disposing of an asset identified by the Inspector General as potentially subject to recovery by the Inspector General due to the person's fraud or abuse;

(3) provide for coordination between the Inspector General and special investigative units formed by managed care organizations or entities with which managed care organizations contract to identify and investigate fraudulent claims and other types of program abuse by recipients and providers, and approve the plan of the special investigative units to prevent and reduce fraud and abuse;

(4) audit the use and effectiveness of state or federal funds, including contract and grant funds, administered by a person or state agency receiving the funds from a health and human services agency;

(5) conduct investigations relating to the funds described by paragraph (4) of this subsection; and

(6) recommend policies promoting economical and efficient administration of the funds described by paragraph (4) of this subsection and the prevention and detection of fraud and abuse in the administration of those funds.

(d) The Inspector General may require employees of health and human services agencies to provide assistance to the Inspector General in connection with its duties relating to the review, investigation, and audit of fraud, abuse, and overpayment in the provision of health and human services.

(e) The Inspector General is entitled to access to any information maintained by a health and human services agency, including internal records, relevant to the functions of the office. This chapter sets forth the types of activities performed by the Inspector General to ensure program integrity.

(f) The Commission may obtain any information or technology necessary to enable the Inspector General to meet its responsibilities as mandated by state statute.

§371.13. Statutory Authority.

The statutory authority for this subchapter is provided by Texas Human Resources Code, Chapters 32 and 36, Texas Government Code §531.001 et seq., Texas Occupations Code, Chapter 102, 42 United States Code, 42 Code of Federal Regulations, and the Social Security Act.

§371.15. Confidentiality of Investigation Records.

All information and materials subpoenaed or compiled by the Inspector General in connection with an investigation are confidential and not subject to disclosure under Chapter 552 of the Texas Open Records Act, and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the Inspector General or its employees or agents involved in the investigation conducted by the Inspector General, except that this information may be disclosed to the Office of the Attorney General and law enforcement agencies.

§371.17. Detection.

The Inspector General utilizes automation as well as other techniques to detect and identify program violations and possible fraud, abuse, and overpayments. These automated detection systems are mandated by state and federal statutes. One automated system is additionally required to utilize neural network and learning technologies. These systems detect patterns of inappropriate billing from which an overpayment is identified immediately without the need for additional investigation. They also detect anomalous billing and service patterns, which then require investigation for evidence of program violations.

§371.19. Investigation.

The Inspector General initiates preliminary investigations as the result of potential cases of fraud, abuse, or overpayments detected through the automation detection tools, complaints, or referrals. If as the result of a preliminary investigation, it is determined that a full-scale investigation is

necessary, Inspector General investigators will develop all pertinent facts and evidence to identify persons defrauding and abusing Medicaid and other health and human service programs. During such investigations, it may be necessary for the Inspector General to secure patient medical records, other pertinent provider files, and files for which access may be denied. For this instance, the Inspector General has been granted subpoena authority to subpoena records and documents necessary and pertinent to fraud and abuse cases.

§371.21. Subpoena Authority.

(a) The Inspector General may, upon a determination of good cause, and with the approval of the Executive Commissioner or the Executive Commissioner's designee, issue a subpoena, in connection with an investigation conducted by the Inspector General, to compel the attendance of a relevant witness or the production of relevant evidence as determined by the Inspector General. "Good cause" will be determined from the specific circumstances of the investigation. Circumstances that may result in a determination of "good cause" include, but are not limited to, the following situations:

(1) A provider's failure to comply with an OIG investigative demand for the attendance of a relevant witness or the production of relevant evidence;

(2) A provider's past history of failing to comply with an OIG investigative demand for the attendance of a relevant witness or the production of relevant evidence;

(3) A reasonable belief that, without the issuance of a subpoena, relevant evidence will be compromised;

(4) A determination that there is an immediate threat to the health or safety of a Medicaid recipient; or

(5) A substantial likelihood of loss of state or federal funds.

(b) The subpoena may be served personally or by certified mail. Failure to comply with a subpoena will result in the Inspector General, through the Attorney General, filing suit to enforce the subpoena in a state district court.

§371.23. Surety Bond.

(a) The Inspector General may require each provider of medical assistance in a provider type that has demonstrated significant potential for fraud or abuse to file, with the Inspector General, a surety bond in a reasonable amount. The amount of the surety bond shall not exceed the maximum amount allowed by state or federal law, plus the maximum amount of penalties allowed by state and federal law.

(b) The Inspector General will require a provider of medical assistance or person to file, with the Inspector General, a surety bond in a reasonable amount if the Inspector General identifies a pattern of suspected fraud or abuse involving criminal conduct relating to the provider's services under the program that indicates the need for protection against potential future acts of fraud or abuse. The amount of the surety bond shall not exceed the maximum amount allowed by state or federal law, plus the maximum amount of penalties allowed by state and federal law.

(c) The surety bond required of a provider or person, by the Inspector General, under subsections (a) and (b) of this section must be payable to the Commission to compensate the Commission for damages resulting from, or penalties or fines imposed in connection with, an act of fraud or abuse committed by the provider or person under the program.

(d) The Inspector General may require a provider of medical assistance or person to file, with the Inspector General, a surety bond in an amount and manner specified by the Inspector General. A surety bond may be required if the Inspector General identifies a pattern of suspected fraud or abuse that involves criminal conduct that relates to the provider's services under the program and that indicates the need for protection against potential loss of recoupment of overpayments, penalties, damages, or other debts assessed against the provider by the Inspector General, due to potential default of the provider or failure of the provider to reimburse the Inspector General assessed amounts. Among other reasons, a surety bond may be imposed in connection with a settlement agreement, a provisional, probationary, or closed end contract, or as a condition of reinstatement.

(e) Subject to subsections (f) or (g) of this section, the Inspector General may require each provider of medical assistance that establishes a resident's trust fund account to post a surety bond to secure the account. The bond must be payable to the Commission to compensate residents of the bonded provider for trust funds that are lost, stolen, or otherwise unaccounted for if the provider does not repay any deficiency in a resident's trust fund account to the person legally entitled to receive the funds.

(f) For that portion of a case involving a resident's trust fund accounts, the Inspector General will not require the amount of a surety bond posted for a single facility provider under subsection (e) of this section to exceed the average of the total average monthly balance of all of the provider's resident trust fund accounts for the 12-month period preceding the bond issuance or renewal date. This limitation does not apply to any other type of violations other than resident trust fund accounts.

(g) If an employee of a provider of medical assistance is responsible for the loss of funds in a resident's trust fund account, the resident, the resident's family, and the resident's legal representative are not obligated to make any payments to the provider that would have been made out of the trust fund had the loss not occurred.

(h) Failure by a provider or person to post a surety bond timely and as required by the Inspector General may result in imposition of any of the administrative actions or sanctions, as specified in §371.1631 and §371.1643, and/or imposition of damages and penalties, as specified in §371.1721 et seq. of subchapter G.

(i) Surety bonds required by the Inspector General are considered administrative actions. Administrative actions are further described in Subchapter G, §371.1629 and §371.1631 of this title.

§371.25. Injunction to Prevent Disposing of Assets and Application to Debts.

Based on the results of investigative findings and evidence that potential fraud or abuse exists and a potential overpayment, penalty, or damage has been identified, a method that may be used by the Inspector General, as a fiduciary for the state, is injunctive relief. The purpose of the injunctive relief is to ensure assets remain to reimburse the state monies owed such as recoupment of overpayments and assessed damages and penalties. The Inspector General may request that the Attorney General obtain an injunction to prevent a provider or person from disposing of an asset identified by the Inspector General as potentially subject to recovery by the Inspector General due to the provider's or person's fraud or abuse. Upon final resolution of the case, any funds derived from the forfeited asset(s), after offsetting any expenses attributable to the sale of those assets, will be applied, by the Inspector General, to the unpaid debt.

§371.27. Prohibition against Solicitation of Medicaid or CHIP Recipients.

(a) A provider or person who furnishes services, under the Medicaid program or Child Health Insurance Plan program, must comply with Chapter 102, Occupations Code.

(b) A provider or person is prohibited from offering to pay or agreeing to accept, directly or indirectly, overtly or covertly any remuneration in cash or in kind to or from another for securing or soliciting a patient or patronage for or from a person licensed, certified, or registered

or enrolled as a provider or otherwise by a state health care regulatory or health and human service agency.

(c) A provider or person is prohibited from any of the provisions or actions relating to bribe, kickback, rebate, or inducement specified in Subchapter G, §371.1721 of this title.

(d) Providers or persons in violation of the prohibition against solicitation may be excluded from participation in the Medicaid and CHIP programs and may have their contract to participate cancelled.

§371.29. Random Prepayment Review.

The Inspector General may perform a random prepayment review of claims submitted by Medicaid providers for reimbursement to determine whether the claim involves fraud or abuse. Suspect claims identified through this process may result in:

(1) imposition of a recoupment of overpayments and/or other pertinent administrative sanctions or actions;

(2) initiation of a full-scale fraud and abuse investigation;

(3) referral for criminal or civil investigation and prosecution;

(4) withholding payment of these claims for not more than five (5) working days without notice to the provider for which claims were submitted.

§371.31. Federal Felony Match.

The Inspector General will implement a system to cross-reference data collected for the programs identified in §531.008(c) of the Government Code with the list of fugitive felons maintained by the federal government. The purpose of the data match is to identify fugitive felons who may be enrolled as providers or recipients in the Medicaid and other health and human service programs or in the assistance programs served by the health and human service agencies.

§371.33. On-Site Reviews of Prospective Providers.

(a) The Inspector General may implement procedures targeted at minimizing the potential for fraud, abuse, false statements, misrepresentations, and omissions by prospective Medicaid providers. The Inspector General may conduct on-site reviews of providers who have applied to provide services to recipients.

(b) On-Site Review Criteria and Effect.

(1) During its on-site review, the Inspector General will determine whether or not an applicant has the ability to provide the services proposed within its application. To make this determination, personnel will conduct the inspections and interviews set forth in subsection (c) of this section (relating to Scope of Review), and evaluate information gathered thereby within the context of applicable industry standards, including state or federal governmental licensing and/or certification standards that apply to the applicant under review.

(2) In the event an on-site review reveals that a provider is not capable of delivering the services proposed within its application or develops other evidence of fraud, abuse, false statements, misrepresentations, or omissions, the application may be denied. The Inspector General also may forward to the Attorney General or other appropriate law enforcement agency any information discovered during an on-site review that the Inspector General believes warrants further evaluation in a law enforcement context.

(c) Scope of Review.

(1) Inspections and interviews. During on-site reviews, Inspector General personnel may:

(A) inspect a provider's site for physical compliance with state and federal law governing Medicaid providers;

(B) review and verify licenses, certifications, and accreditation required by or relevant to the Medicaid program;

(C) interview randomly selected provider staff-members, patients, and patients' family members;

(D) review randomly selected patients' medical records;

(E) review business records, as determined necessary by the Inspector General, of prospective provider; and

(F) verify any and all items in the application for participation, contract, provider agreement, or any other documents supplied for purposes of provider enrollment.

(2) Personnel shall conduct all interviews during on-site reviews in accordance with a standard format consistent with interview procedures established for survey and investigation of existing Medicaid providers.

(3) Home Health Agencies and Durable Medical Equipment Providers. For all prospective providers of home health care and durable medical equipment, personnel must research and confirm compliance by the provider with applicable requirements of the Balanced Budget Act of 1997 and §32.024 of the Texas Human Resources Code, regarding surety bonds and the financial condition of the provider's 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.

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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. PILOT PROGRAM: ON-SITE REVIEWS OF PROSPECTIVE PROVIDERS

1 TAC §§371.1501, 371.1503, 371.1505, 371.1507, 371.1509

(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 Health and Human Services Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under §531.033 and §531.021, Texas Government Code, which provides the Commission with broad rulemaking authority; §32.021(a), (c), Human Resources Code, provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program; 531.102 establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services; the rules specifically implement the provisions of HB2292 and 1743; 42 CFR §455.13 requires the Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution; 42 CFR, Part 455 specifies all federal requirements

of the Commission to provide for Medicaid fraud and abuse program integrity; 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program; 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers; and various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The proposed rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

The proposed rules affect Chapter 531, Texas Government Code, and Chapter 32, Human Resources Code.

§371.1501. Purpose of Pilot Program.
§371.1503. On-Site Review Criteria and Effect.
§371.1505. Selection of Counties.
§371.1507. Selection of Prospective Providers To Be Reviewed.
§371.1509. Scope of Review.

This 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 G. LEGAL ACTION RELATING TO PROVIDERS OF MEDICAL ASSISTANCE

DIVISION 1. FRAUD OR ABUSE INVOLVING MEDICAL PROVIDERS

1 TAC §§371.1601, 371.1603, 371.1607, 371.1609, 371.1611, 371.1613, 371.1615, 371.1617, 371.1619, 371.1621, 371.1623, 371.1625, 371.1627, 371.1629

(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 Health and Human Services Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under §531.033 and §531.021, Texas Government Code, which provides the Commission with broad rulemaking authority; §32.021(a), (c), Human Resources Code, provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program; 531.102 establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services; the rules specifically implement the provisions of HB2292 and 1743; 42 CFR §455.13 requires the Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution; 42 CFR, Part 455 specifies all federal requirements

of the Commission to provide for Medicaid fraud and abuse program integrity; 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program; 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers; and various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The proposed rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

The proposed rules affect Chapter 531, Texas Government Code, and Chapter 32, Human Resources Code.

§371.1601. Department Responsibility.
§371.1603. Confidentiality of Fraud or Abuse Investigation Records.
§371.1607. Department Responsibilities in Relation to Provider Fraud and Abuse.
§371.1609. Grounds for Fraud Referral and Administrative Sanction.
§371.1611. Administrative Sanctions/Actions, Restitution, and Recoupment.
§371.1613. Definitions.
§371.1615. Administrative Sanctions and Actions.
§371.1617. Scope of Sanction.
§371.1619. Imposing a Sanction.
§371.1621. Notice of Adverse Action.
§371.1623. Informing Other Interested Parties.
§371.1625. Provider Education.
§371.1627. Request for Reinstatement.
§371.1629. Obligation of Health Care Practitioners and Providers.

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

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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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DIVISION 2. RECOVERY OF BENEFITS WRONGFULLY RECEIVED

1 TAC §§371.1641, 371.1643, 371.1645

(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 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 §531.033 and §531.021, Texas Government Code, which provides the Commission with broad rulemaking authority; §32.021(a) and (c), Human Resources Code, provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program; §531.102 establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for investigation of fraud and abuse in the provision of health and human services

and the enforcement of state law relating to the provision of those services; the rules specifically implement the provisions of House Bill 2292 and House Bill 1743; 42 CFR §455.13 requires the Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution; 42 CFR Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity; 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program; 42 CFR Part 1001 and Part 1002 provide all requirements relating to exclusion of providers; and various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The proposed repeal meets the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

The proposed repeal affects Chapter 531, Texas Government Code, and Chapter 32, Human Resources Code.

§371.1641. Department Responsibility.

§371.1643. Recovery from Providers.

§371.1645. Recovery When Fraud Is Involved.

This 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 3. CIVIL MONETARY PENALTIES

1 TAC §§371.1661, 371.1663, 371.1665, 371.1667, 371.1669, 371.1671, 371.1673, 371.1675

(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 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 §531.033 and §531.021, Texas Government Code, which provides the Commission with broad rulemaking authority; §32.021(a) and (c), Human Resources Code, provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program; §531.102 establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services; the rules specifically implement the provisions of House Bill 2292 and House Bill 1743; 42 CFR §455.13 requires the Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution; 42 CFR Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity; 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program; 42 CFR Part 1001 and Part 1002 provide all requirements relating to exclusion of providers; and various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The proposed repeal meets the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

The proposed repeal affects Chapter 531, Texas Government Code, and Chapter 32, Human Resources Code.

§371.1661. Definitions.

§371.1663. Liability.

§371.1665. Maximum Amount.

§371.1667. Exemptions.

§371.1669. Determining the Amount.

§371.1671. Assessment of a Civil Monetary Penalty.

§371.1673. Payment of a Civil Monetary Penalty.

§371.1675. Prohibited Use of Civil Monetary Penalties in Cost Reports or Claims.

This 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 G. LEGAL ACTION RELATING TO PROVIDERS OF MEDICAL ASSISTANCE
DIVISION 1. FRAUD OR ABUSE AND ADMINISTRATIVE ENFORCEMENT INVOLVING MEDICAID

1 TAC §§371.1601, 371.1603, 371.1605, 371.1607, 371.1609, 371.1611

The amendment and new sections are proposed under §531.033 and §531.021, Texas Government Code, which provides the Commission with broad rulemaking authority; §32.021(a) and (c), Human Resources Code, provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program; §531.102 establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services; the rules specifically implement the provisions of House Bill 2292 and House Bill 1743; 42 CFR §455.13 requires the Medicaid agency have methods and criteria for identifying suspected fraud and

abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution; 42 CFR Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity; 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program; 42 CFR Part 1001 and Part 1002 provide all requirements relating to exclusion of providers; and various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The proposal meets the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

The proposed amendment and new sections affect Chapter 531, Texas Government Code, and Chapter 32, Human Resources Code.

§371.1601. Definitions.

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

(1) Abuse--Practices that are inconsistent with sound fiscal, business, or medical practices and that result in unnecessary program cost or in reimbursement for services that are not medically necessary; do not meet professionally recognized standards for health care; or do not meet standards required by contract, statute, regulation, previously sent interpretations of any of the items listed, or authorized governmental explanations of any of the foregoing.

(2) Affiliates--Persons associated with one another so that any one of them directly or indirectly controls or has the power to control another in whole or in part or meets any portion of the definition for "Affiliate Relationship" established at §371.1643 of this subchapter (relating to Use of Sanctions).

(3) Agent--Any person, company, firm, corporation, employee, independent contractor, or other entity or association legally acting for or in the place of another person or entity.

(4) At the time of the request--A requirement to produce requested records, upon request, at that time, without delay.

(5) CHIP--Children's Health Insurance Program.

(6) Claim--Requests for payment or reimbursement related to services or items delivered within the Medicaid program, which are submitted by a provider to the Medicaid claims administrator or an operating agency either directly by a provider or indirectly through a managed care organization.

(7) Claims Administrator--The agent designated by an operating agency to process and pay Medicaid provider claims.

(8) Closed-end Contract--A contract or provider agreement for a specific period of time. It may include any specific requirements or provisions deemed necessary by the Inspector General to ensure the protection of the program. It must be renewed for the provider to continue to participate in the Medicaid Program.

(9) Commission--The Texas Health and Human Services Commission.

(10) Controlled substances--"Controlled substance" as defined by the Texas Controlled Substances Act (Texas Health and Safety Code, Chapter 481) or its successor and the Federal Controlled Substances Act (21 USCA §8.01 et seq.) or its successor.

(11) Conviction or convicted--A person is considered to have been convicted when:

(A) A judgment of conviction has been entered against an individual or entity by a federal, state, or local court, regardless of whether:

(i) There is a post-trial motion or an appeal pending, or

(ii) The judgment of conviction or other record relating to the criminal conduct has been expunged or otherwise removed;

(B) A federal, state, or local court has made a finding of guilty against an individual or entity;

(C) A federal, state, or local court has accepted a plea of guilty or nolo contendere by an individual or entity; or

(D) An individual or entity has entered into participation in a first offender, deferred adjudication or other program or arrangement where judgment of conviction has been withheld.

(12) Exclusion--Means that items or services furnished, ordered, or prescribed by a specified individual or entity will not be reimbursed under Medicare, Medicaid and all other state health care programs until the individual or entity is reinstated by the Inspector General. When excluded, any provider contract/agreement with the excluded person or in which the excluded person is affiliated is canceled. An excluded provider ceases to be a "provider", as defined in this section, upon the effective date of their exclusion, thus for purposes of this subchapter, they become a "person", as defined in this section.

(13) Failure to grant immediate access--The failure to grant access to records, documents, or premises, upon reasonable request and as requested, for the purpose of reviewing, examining, and securing custody of records, access to, disclosure of, and custody of copies or originals of any records, documents, or other requested items, and others specified in §371.1643(e) of this subchapter, as determined necessary by the Inspector General or those specified in §371.1643(e) of this subchapter to perform statutory functions. Further definition and clarification is provided in §371.1643(e) of this subchapter.

(14) False statement or misrepresentation--Any statement or representation that is inaccurate, incomplete, or not true.

(15) Federal financial participation (FFP)--The federal government's share of a state's expenditures under the Medicaid program and other benefit programs.

(16) Fraud--Any act that constitutes fraud under applicable federal or state law, including any intentional deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to that person or some other person.

(17) Health Maintenance Organization (HMO)--A public or private organization organized under state law that is a federally qualified HMO or that meets the definition of HMO within this state's Medicaid plan.

(18) HHS--A health and human service agency under the umbrella of the Health and Human Services Commission (the Commission), including the Commission, a program or service provided under the authority of the Commission or a health and human service agency.

(19) Immediate family member--A person's spouse; natural or adoptive parent; child or sibling; stepparent, stepchild, stepbrother or stepsister; father-, daughter-, son-, brother- or sister-in-law; grandparent or grandchild; or spouse of a grandparent or grandchild.

(20) Indirect ownership interest--Includes an ownership interest through any other entities that ultimately have an ownership interest in the provider or person, as defined in this section, at issue. (For example, an individual has a 10 percent ownership interest in the entity

at issue if they have a 20 percent ownership interest in a corporation that wholly owns a subsidiary that is a 50 percent owner of the entity at issue.)

(21) Inducement--An attempt to entice or lure an action on the part of another in exchange for, without limitation, a service, cash in any amount, entertainment, or any item of value.

(22) Inpatient institutional services--Inpatient services provided by hospitals and long-term care facilities.

(23) Licensing authority adverse action--Any action by a state or federal licensing entity (including other similar authority) against conduct that adversely affects the status of the license. Action includes revocation or suspension of a license as well as reprimand, censure, or probation.

(24) Managed Care Organization (MCO)--Any person that is authorized or otherwise permitted by law to arrange for or provide a managed care plan.

(25) Managed Care Plan--A plan under which a person undertakes to provide, arrange for, pay for, or reimburse any part of the cost of any health care service. A part of the plan must consist of arranging for or providing health care services on a prepaid basis through insurance or otherwise, as distinguished from indemnification against the cost of those services.

(26) Medicaid Claims Administrator--The contractor that administers the state's Medicaid program claims.

(27) Medicaid Fraud Control Unit (MFCU)--The division within the attorney general's office that is responsible for investigating suspected Medicaid provider fraud and physical abuse or neglect of patients in institutional settings.

(28) Medicaid Integrity Division (MI)--The division within the Commission's Office of Inspector General (OIG) that investigates fraud and abuse and administratively enforces program violations through administrative sanctions and/or refers for criminal investigation of suspected fraud or patient abuse related to the provision and payment of services or items within the Texas Medicaid Program.

(29) Member of Household--With respect to a person, as defined in this section, with whom they are sharing a common abode as part of a single-family unit, including domestic employees, partners, and others who live together as a family unit.

(30) Office of Inspector General (OIG)--The office within the Commission responsible for the investigation of fraud and abuse and with ensuring program integrity within the Texas Medicaid Program and other health and human services provided by the state and the enforcement of state law relating to the provision of those services.

(31) Open-end Provider Agreement--An agreement that has no specific termination date and continues in force as long as both parties agree.

(32) Operating agency--A state agency that operates any part of the Texas Medicaid Program.

(33) Overpayment--The amount paid by Medicaid to a provider or person that exceeds the amount to which the provider or person is entitled under §1902 of the Social Security Act for a service or item furnished within the Medicaid program, and that is required to be refunded under §1903 of the Social Security Act. This also includes all overpayments specified in Division 5 of this subchapter. Any funds received greater than that to which the provider is entitled, whether obtained through error, misunderstanding, abuse, or fraud is considered to be an overpayment.

(34) Ownership interest--An interest in the capital, the stock or the profits of the entity or any mortgage, deed, trust or note, or other obligation secured in whole or in part by the property or assets of the person, as defined in this section.

(35) Payment Hold (Suspension of Payments)--An administrative sanction that withholds all or any portion of payments due a provider until the matter in dispute, including all investigation and legal proceedings, between the provider and the Commission or an operating agency or its agent(s) are resolved. This is a temporary denial of reimbursement under the Medicaid program for items or services furnished by a specified provider.

(36) Person--An individual, firm, association, partnership, corporation, agency, institution, or other organization or legal entity.

(37) Probationary Contract--A contract or provider agreement for any period of time. It may include any special requirements or provisions deemed necessary by the Inspector General to ensure the protection of the program. It must be renewed by the Inspector General for the provider to continue to participate in the program.

(38) Practitioner--A physician or other individual licensed or certified under state law to practice their profession.

(39) Professionally Recognized Standards of Health Care--Statewide or national standards of care, whether in writing or not, that professional peers of the individual or entity whose provision of care is an issue, recognize as applying to those peers practicing or providing care within the State of Texas. When the Food and Drug Administration (FDA), the Centers for Medicare and Medicaid Services (CMS), or the Public Health Service (PHS), has declared a treatment modality not to be safe and effective, persons who employ such a treatment modality will be deemed not to meet professionally recognized standards of health care. This definition shall not be construed to mean that all other treatments meet professionally recognized standards.

(40) Program Violation--A failure to comply with a Medicaid provider contract or agreement, the Texas Medicaid Provider Procedures Manual or other official program publications or any state or federal statute or regulation applicable to the Texas Medicaid Program, including any official written explanation or interpretation of the above. Fraud and abuse are program violations, but not all program violations are included in fraud and abuse. Program violations are delineated in §371.1617 of this subchapter (relating to Program Violations).

(41) Provider

(A) Any person or legal entity, including a managed care organization and their subcontractors, furnishing Medicaid or other HHS services under a provider agreement or contract in force with a Medicaid or other HHS operating agency, a Medicaid Claims Administrator, and has a provider number issued by the Commission or its designee to:

(i) provide medical assistance, Medicaid, or any other HHS service in any HHS program under contract or provider agreement with the Commission or its designee; or

(ii) provide third-party billing services under a contract or provider agreement with the Commission or its designee.

(B) An excluded provider ceases to be a "provider", as defined in this section, upon the effective date of their exclusion, thus for purposes of this subchapter, they become a "person", as defined in this section.

(42) Provisional Contract--A contract or provider agreement for any period of time. It may include any special requirements or provisions deemed necessary by the Inspector General to ensure the

protection of the program. It must be renewed by the Inspector General for the provider to continue to participate in the program.

(43) Reasonable request--A request for the provider or person to provide original records and documents, or copies of original records and documents, or access to records, documents, or premises, as specified in §371.1643(e) of this subchapter, made by a properly identified agent of the Commission or another state or federal agency identified in §371.1643(e) of this subchapter, hours that the business or premises is open for business.

(44) Recipient--A person eligible for and covered by the Medicaid or any other HHS program.

(45) Recoupment of overpayment--A sanction imposed to recover funds paid to the provider or person to which they were not entitled. Recoupment of overpayments may be accomplished through a lump sum or monthly payments by the provider or person to the Inspector General or, with the approval of the Inspector General, a provider's or person's payments may be reduced by a percentage, up to 100% of payments, to apply the unpaid funds to offset the overpayment owed. The recoupment will apply to all previously submitted, pending, and subsequently submitted claims to offset overpayments previously made to the provider or person.

(46) Requesting Agency--A governmental agency (or its authorized representative or agent) that is authorized to review and reasonably is asking to see a provider's documentation or records or that is directed or otherwise authorized by federal or state statute to review medical records and/or other documentation that providers must maintain and disclose to such agencies in order to participate in the Medicaid program and records and documents necessary for the Office of Inspector General to fulfill its statutory mandates to review and investigate providers and persons for fraud and abuse; e.g., the Commission, the relevant operating agency, Texas Attorney General's Medicaid Fraud Control Unit, U.S. Department of Health and Human Services. See also the definition for "Reasonable Request" listed in paragraph (43) of this section.

(47) Restricted reimbursement--An administrative sanction that limits or denies payment of a provider's Medicaid claims for specific procedures for a specified time period for services that the provider has abused or has billed inappropriately. The provider may be eligible to be paid for certain other services.

(48) Services--The types of medical assistance specified in §1905(a) of the Social Security Act (42 U.S.C. §1396d (a)).

(49) Solicitation--Offering to pay or agreeing to accept, directly or indirectly, overtly or covertly any remuneration in cash or in kind to or from another for securing or soliciting a patient or patronage for or from a person licensed, certified, or registered or enrolled as a provider or otherwise by a state health care regulatory or health and human service agency.

(50) State health care program--Any program that has:

(A) A state plan approved under Title XIX of the Social Security Act (Medicaid);

(B) Any program receiving funds under Title V of the Act or from an allotment to a State under such title (Maternal and Child Health Services Block Grant program); or

(C) Any program receiving funds under Title XX of the Act or from any allotment to a State under such title (Block Grants to States for Social Services).

(51) Subcontractor--Means:

(A) an individual, agency or organization to which a disclosing entity (provider) has contracted or delegated some of its management functions or responsibilities of providing medical care to its patients; or

(B) an individual, agency or organization with which a fiscal agent has entered into a contract, agreement, purchase order, or lease to obtain space, equipment, or services provided under the Medicaid agreement.

(52) Suspension of payments (payment hold)--The withholding of all or any portion of payments for items or services furnished by a specified provider and due a provider until the matter in dispute between the provider and the Department or agent is resolved.

(53) Title XVIII--Title XVIII (Medicare) of the Social Security Act.

(54) Title XIX--Title XIX (Medicaid) of the Social Security Act.

(55) Title XX--Social Services Block Grant of the Social Security Act.

§371.1603. Overview of Inspector General Responsibility Relating to Investigation, Referral and Administrative Enforcement in Medicaid.

(a) The Office of Inspector General (the Inspector General), through the Medicaid Integrity division, is responsible for minimizing the opportunity for fraud, abuse, overpayments, and waste within the Medicaid and other HHS programs, whether the fraud or abuse was committed by providers, recipients, or other persons and for protecting recipients of federally funded health care programs from unsafe practitioners. Medicaid Integrity or the Inspector General may take appropriate action as authorized in Subchapters A, B, and G of this chapter to protect recipients and the program when persons have committed, or are suspected of committing, fraud or abuse. Such actions may include administrative actions and/or sanctions and referral to appropriate law enforcement agencies for criminal investigation. Medicaid Integrity or the Inspector General may take action against any provider or person associated with any HHS program or service as it relates to fraud, abuse, overpayments, waste, or program violations of those HHS programs or services, or for any of the violations for which Medicaid Integrity or the Inspector General may take action against providers or persons associated with the Medicaid program, as described in this subchapter. Additionally, to protect HHS programs, Medicaid Integrity or the Inspector General may take an administrative action, sanction, impose damages or penalties, or abate, deny, or postpone a decision to enroll a provider or person in a HHS program or for a HHS service, based upon an investigation or finding in the Medicaid or other HHS programs. To protect the Medicaid program, Medicaid Integrity may also take an administrative action, sanction, impose damages or penalties, or abate, deny, or postpone a decision to enroll a provider or person in a Medicaid or other HHS program or for a Medicaid or other HHS service, based upon the investigative findings related to an investigation or finding of a provider or person or their principals or affiliates within a HHS program or receiving a HHS service.

(b) Not all actions resulting in overpayment to a provider are necessarily fraudulent. Some circumstances could result in the referral of a Medicaid provider to the Attorney General's Medicaid Fraud Control Unit or Civil Fraud Division. Other circumstances could result in administrative action rather than referral for judicial action or criminal prosecution. These actions, or sanctions, range from an educational notice to the provider explaining their error, to contract cancellation and/or exclusion from participation in the Medicaid (Title XIX), Title XX, and Title V programs.

(c) Investigation. When Medicaid Integrity receives information regarding a possible program violation either from its review

systems or through a complaint or referral filed by another agency or person, Medicaid Integrity initiates an investigation. After completing its preliminary investigation, Medicaid Integrity or the Inspector General may, at its discretion, initiate settlement discussions with the person who is the subject of the investigation. If the matter cannot reasonably be settled or if Medicaid Integrity determines that further investigation is required before the propriety of settlement or other enforcement can be evaluated, Medicaid Integrity may conduct a full investigation of the case. A Medicaid Integrity case remains open until the investigation is complete, the case is reasonably settled, Medicaid Integrity makes an administrative determination that closes the case for lack of evidence or appropriate administrative enforcement, and/or legal action is completed. At any time during the investigative or enforcement process, the Inspector General maintains the authority to settle administrative cases, impose payment holds, or request the Office of the Attorney General to obtain an injunction to prevent a person from disposing of an asset identified by the OIG as potentially subject to recovery by the OIG due to the person's fraud or abuse.

(d) Referral for Legal Action. Medicaid Integrity refers all cases of suspected Medicaid fraud or patient abuse or neglect to the Medicaid Fraud Control Unit (MFCU) or the Civil Fraud Division (CFD) at the Office of the Attorney General (OAG) for investigation regarding the need for criminal or civil prosecution. If the MFCU fails to act on a matter within 30 days of receiving a referred case from Medicaid Integrity or returns a case to Medicaid Integrity without initiating prosecution, Medicaid Integrity may refer the matter to an appropriate prosecuting authority or a collection agency. Nothing in these rules is intended to prevent concurrent administrative, civil, and/or criminal investigation and action regarding suspected fraud or patient abuse or neglect. Subject to express statutory limitations, Medicaid Integrity and the Inspector General may proceed with recoupment and/or administrative enforcement concurrently with judicial prosecution of the same matter.

(e) Administrative Enforcement. Based upon the nature and severity of the program violation, the provider's previous history of violations, evidence of the provider's knowledge and intent, and other relevant factors, Medicaid Integrity and the Inspector General select enforcement measures from the three categories set forth below and in more detail infra at §§371.1629, 371.1631, 371.1633, 371.1643, 371.1645, 371.1647, 371.1649, 371.1651, 371.1653, 371.1655, 371.1657, 371.1659, 371.1661, 371.1663, 371.1665, 371.1667, 371.1669, 371.1671, 371.1673, 371.1675, 371.1677, 371.1679, 371.1681, 371.1683, 371.1685, 371.1687, 371.1689, 371.1701, 371.1703, 371.1705, 371.1707, 371.1721, 371.1723, 371.1725, 371.1727, 371.1729, 371.1731, 371.1733, 371.1735, 371.1737, 371.1739, and 371.1741 of this subchapter.

(1) Administrative Actions--Medicaid Integrity or the Inspector General may impose an administrative action to provide safeguards for future compliance or refer a matter for additional review or enforcement; e.g., education, referral to licensing board, referral for judicial action. The imposition of administrative actions does not give rise to due process notice or hearing requirements.

(2) Sanctions--Sanctions may directly impact a person's ability to keep or receive payments and/or the person's participation in the Medicaid program; e.g., exclusion from program participation, recoupment of overpayments, or payment hold. Imposition of sanctions triggers due process notice and hearing requirements.

(3) Damages and Penalties (formerly "Civil Monetary Penalties")--The imposition of damages or penalties for program violations (e.g., false claims, specified managed care acts or omissions) directly impacts a person's property interests and, therefore, triggers due process notice and hearing requirements.

§371.1605. Statutory Authority ~~[Bases]~~.

The statutory authority ~~[bases]~~ for this subchapter is provided by ~~[Medicaid fraud and abuse investigation and prosecution are]~~ Texas Human Resources Code, Chapters ~~[Chapter]~~ 32~~[,]~~ and 36, Texas Government Code §531.001 et seq., Texas Occupations Code, Chapter 102, 42 United States Code, 42 Code of Federal Regulations, and the Social Security Act ~~[§§1396b(q) and 1396h. State and federal officials may also act under other statutes, including, but not limited to, the Deceptive Trade Practices and Consumer Protection Act, the Texas Penal Code, the Civil Monetary Penalties Law, and Public Law 100-93]~~.

§371.1607. Confidentiality of Investigation Records.

All information and materials subpoenaed or compiled by the Inspector General in connection with an investigation are confidential and not subject to disclosure under Chapter 552 of the Texas Open Records Act, and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the Inspector General or its employees or agents involved in the investigation conducted by the Inspector General, except that this information may be disclosed to the Office of the Attorney General and law enforcement agencies.

§371.1609. Medicaid Integrity and the Inspector General Responsibilities in Relation to Medicaid Provider Fraud and Abuse.

The Inspector General's responsibilities in relation to Medicaid fraud and abuse include the following:

(1) establishing rules for minimizing the opportunity for fraud and abuse;

(2) establishing and maintaining methods and criteria for detecting and identifying cases of possible fraud or abuse;

(3) establishing the methods for referring suspected fraud or physical abuse and neglect cases for investigation;

(4) referring cases where fraud or physical abuse appears to exist to the appropriate law enforcement agencies for prosecution;

(5) cooperating with the Medicaid Fraud Control Unit, Office of the Attorney General, by furnishing information and data and serving as witnesses, when requested;

(6) recouping all overpayments and taking other administrative sanctions and actions;

(7) investigating cases of possible fraud or abuse;

(8) conducting an integrity review on complaints of Medicaid fraud, abuse, or physical abuse or neglect involving criminal conduct and referring suspected cases of Medicaid provider fraud and physical abuse or neglect to the Attorney General's Medicaid Fraud Control Unit, provided that the criminal referral does not preclude the Inspector General from continuing its investigation of the provider, which investigation may lead to the imposition of appropriate administrative or civil sanctions;

(9) referring a Medicaid provider to the Attorney General's Medicaid Fraud Control Unit when a provider's records are being withheld, concealed, destroyed, fabricated, or falsified. Such referral does not preclude the Inspector General from continuing its investigation of the provider;

(10) investigating Medicaid recipient fraud; and

(11) imposing administrative monetary penalties and damages against providers, individuals, contractors, or recipients involved with fraud, abuse, or physical abuse or neglect.

§371.1611. Award for Reporting Medicaid Fraud, Abuse, or Overcharges.

(a) The Inspector General may grant an award to a person who reports activity that constitutes fraud or abuse of funds in the Medicaid

program or reports overcharges in the program if the Inspector General determines that the disclosure results in the recovery of a damage or penalty imposed under §32.039, Human Resources Code, and described in §371.1721 et seq. of this subchapter. The Inspector General may not grant an award to a person in connection with a report, if the Inspector General or the Attorney General had:

(1) independent knowledge of the activity; or

(2) an open complaint or investigation on the provider or person.

(b) A person, who brings an action under Chapter 36, Subchapter C, Human Resources Code, is not eligible for an award under this section.

(c) A person who makes a report under this section must make known at the time of the report of the complaint that they are reporting the potential fraud or abuse in accordance with this section.

(d) This section applies only to a report that occurs on or after the effective date of the administrative rule for this section. A report that occurs before the effective date of this section is governed by the law in effect at the time of the report.

(e) The Inspector General shall determine, at their discretion, the amount of an award. The award may not exceed five percent (5%) of the amount of the administrative damage or penalty collected under §371.1721 et seq. of this subchapter that resulted from the person's disclosure. In determining the amount of the award, the Inspector General shall consider how important the disclosure is in ensuring the fiscal integrity of the program. The Inspector General may also consider whether the individual participated in the fraud, abuse, or overcharge.

(f) Any award made to a person is contingent on collection of the funds to be awarded, prior to the payment of the award to the person. Recovery of funds including overpayments, damages and penalties, and any other collections from the provider or person committing the fraud or abuse will be applied in the following order:

(1) the overpayment;

(2) the Inspector General's "method of finance" from the collected damages and penalties;

(3) the Inspector General's investigative costs from the collected damages and penalties;

(4) other costs of recovery from the collected damages and penalties;

(5) the person's award from the collected damages and penalties; and

(6) any other collections.

(g) The priority of application and distribution of the collected funds delineated in subsection (f) of this section may be altered, at the discretion of the Inspector General, due to state or federal statute or other unforeseen issues.

(h) The Inspector General may only calculate awards based on the collected state general revenue portion of the penalties and damages. If the Commission enters into global or national settlements where the federal government or other agencies receive a portion of the amount of damages or penalties, the award may only be calculated on the remaining state general revenue share collected.

(i) The Inspector General may not award a distribution unless the Inspector General has met their "method of finance", for the biennium, from damages and penalties collected under §371.1721 et seq. of this subchapter.

(j) The person reporting a complaint has no discretion or authority over an Inspector General decision to allow a payment plan or to decide the terms of that payment plan.

This 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 2. MEDICAID PROGRAM AUTHORITY AND VIOLATIONS

1 TAC §§371.1613, 371.1615, 371.1617, 371.1619

The new rules are proposed under §§531.033 and §531.021, Texas Government Code, which provides the Commission with broad rulemaking authority; §32.021(a), (c), Human Resources Code, provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program; 531.102 establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services; the rules specifically implement the provisions of HB2292 and 1743; 42 CFR §455.13 requires the Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution; 42 CFR, Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity; 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program; 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers; and various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The proposed rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

The proposed rules affect Chapter 531, Texas Government Code, and Chapter 32, Human Resources Code.

§371.1613. Program Authority.

When established by prima facie evidence, all Medicaid program violations (defined supra at §371.1617 of this subchapter) are subject to administrative enforcement and/or criminal or other appropriate judicial action. The method of enforcement reflects the evidence of the intent of the non-compliant provider or person. Unintentional program violations are subject to administrative actions and sanctions. Violations the provider or person knew or should have known were false and involved program or patient abuse or fraud are also subject to administrative monetary penalties, as well as criminal or other judicial prosecution. In accordance with 42 Code of Federal Regulations (CFR) §455.13(a), the Inspector General, through Medicaid Integrity, has established methods and criteria for identifying suspected fraud cases. Criteria to establish

suspected fraud is based upon evidence of intentional deception or misrepresentation or upon a program violation or violation of other governing statutory law, including without limitation neglect, that appears to have been committed intentionally or with knowing and willful disregard for program rules.

§371.1615. Provider Responsibility.

(a) Participation in the Medicaid program charges all providers and persons, including managed care organizations, with knowledge of the federal and state law that governed Medicaid during the period of time that the program was billed. This includes knowledge of the Texas Medicaid Provider Procedures Manual and other official program manuals and publications, including all official interpretations or explanations given to the provider or person regarding the services that they provide.

(b) Providers are charged with the responsibility of ensuring and acquiring appropriate Medicaid enrollment and required licenses or certifications of all individuals providing services in the provider's office or operation. Providers are also responsible for ensuring, through review of the Commission's Exclusion Database, that all employees, contractors, and other Medicaid providers, within the provider's office or operation, are not excluded from participation in the Medicaid program. The potential sanctions, damages, and penalties imposed for failure to ensure compliance with these requirements are addressed more specifically in §371.1677 of this subchapter.

(c) A Medicaid provider is responsible for the provider's own actions and omissions, as well as the actions and omissions of the provider's employees, contractors, and agents. This responsibility, however, does not absolve a provider's employees, contractors, and agents from their own personal responsibility and liability.

§371.1617. Program Violations.

Following is a non-exclusive list of grounds/criteria for Medicaid Integrity's and the Inspector General's administrative enforcement and/or referral for criminal, civil, or licensure or certification investigation and judicial action regarding program violations by any provider or person. Violations result from a provider or person who knew or should have known the following were violations. The headings of each group listed below are provided solely for organization and convenience and are not elements of any program violation.

(1) Claims and Billing.

(A) submitting or causing to be submitted a false statement or misrepresentation, or omitting pertinent facts when claiming payment under Medicaid or when supplying information used to determine the right to payment under Medicaid;

(B) submitting or causing to be submitted a false statement, information or misrepresentation, or omitting pertinent facts to obtain greater compensation than the provider is legally entitled to;

(C) submitting or causing to be submitted a false statement, information or misrepresentation, or omitting pertinent facts to meet prior authorization requirements;

(D) submitting or causing to be submitted under Title XVIII (Medicare) or a state health care program claims or requests for payment containing unjustified charges or costs for items or services that substantially exceed the person's usual and customary charges or costs for those items or services to the public or the private pay patients unless otherwise authorized by law;

(E) submitting or causing to be submitted claims with a pattern of inappropriate coding or billing that results in excessive costs to the Medicaid Program;

(F) billing or causing claims to be filed for services or merchandise that were not provided to the recipient;

(G) submitting or causing to be submitted a false statement or misrepresentation that, if used, has the potential of increasing any individual or state provider payment rate or fee;

(H) submitting or causing to be submitted to the Medicaid Program a cost report containing costs not associated with the Medicaid Program or not permitted by Medicaid program policies;

(I) presenting or causing to be presented to an operating agency or its agent a claim that contains a statement or representation that the person knows or should have known to be false;

(J) billing or causing claims to be submitted to the Medicaid program for services or items furnished personally by, at the medical direction of, or on the prescription or order of a person who is excluded from the Texas Medicaid program or Medicare or has been excluded from and not reinstated within the Texas Medicaid program or Medicare;

(K) billing or causing claims to be submitted the Medicaid program for services or items that are not reimbursable by the Medicaid program;

(L) billing or causing claims to be submitted to the Medicaid program for a service or item which requires a prior order or prescription by a licensed health care practitioner when such order or prescription has not been obtained;

(M) billing or causing claims to be submitted to the Medicaid program for an item or service substituted without authorization for the item or service ordered, prescribed or otherwise designated by the Medicaid program;

(N) billing or causing claims to be submitted to the Medicaid program by a provider or person who is owned or controlled, directly or indirectly, by an excluded person; and

(O) billing or causing claims to be submitted to the Medicaid program by a provider or person for charges in which the provider discounted the same services for any other types of patient.

(2) Records and Documentation.

(A) failing to maintain for the period of time required by the rules relevant to the provider in question records and other documentation that the provider is required by federal or state law or regulation or by contract to maintain in order to participate in the Medicaid program or to provide records or documents upon written request for any records or documents determined necessary by the Inspector General to complete their statutory functions related to a fraud and abuse investigation. Such records and documentation include, without limitation, those necessary:

(i) to verify specific deliveries, medical necessity, medical appropriateness, and adequate written documentation of items or services furnished under Title XIX or Title XX;

(ii) to determine in accordance with established rates appropriate payment for those items or services delivered;

(iii) to confirm the eligibility of the provider to participate in the Medicaid program; e.g., medical records (including, without limitation, x-rays, laboratory and test results, and other documents related to diagnosis), billing and claims records; cost reports, managed care encounter data, financial data necessary to demonstrate solvency of risk-bearing providers, and documentation (including, without limitation, ownership disclosure statements, articles of incorporation, by-laws, and corporate minutes) necessary to demonstrate ownership of corporate entities; and

(iv) to verify the purchase and actual cost of products;

(B) failing to disclose fully and accurately or completely information required by the Social Security Act and by 42 CFR Part 455,

Subpart B; 42 CFR Part 420, Subpart C. 42 CFR §1001.1101; and 42 CFR Part 431;

(C) failing to provide immediate access, upon request by a requesting agency, to the premises or to any records, documents, and other items or equipment the provider is required by federal or state law or regulation or by contract to maintain in order to participate in the Medicaid program (see subparagraphs (A) and (B) of this paragraph), or failing to provide records, documents, and other items or equipment upon written request that are determined necessary by the Inspector General to complete their statutory functions related to a fraud and abuse investigation, including without limitation all requirements specified in §371.1643(e) of this subchapter. "Immediate access" is deemed to be within 24 hours of receiving a written request, unless the requesting agency has reason to suspect fraud or abuse or to believe that requested records, documents, or other items or equipment are about to be altered or destroyed, thereby necessitating access at the actual time the request is presented or, in the opinion of the Inspector General, the request may be completed at the time of the request and/or in less than 24 hours;

(D) developing false source documents or failing to sign source documents or to retain supporting documentation or to comply with the provisions or requirements of the operating agency or its agents pertaining to electronic claims submittal; and

(E) failing as a provider, whether individual, group, facility, managed care or other entity, to include within any subcontracts for services or items to be delivered within Medicaid all information that is required by 42 CFR §434.10(b).

(3) Program-Related Convictions.

(A) pleading guilty or nolo contendere, agreeing to an order of probation without adjudication of guilt under deferred adjudication, or being a defendant in a court judgment or finding of guilt for a violation relating to performance of a provider agreement or program violation of Medicare, the Texas Medicaid Program, or any other state's Medicaid Program;

(B) pleading guilty or being convicted of a violation of state or federal statutes relating to dangerous drugs, controlled substances, or any other drug-related offense;

(C) pleading guilty of, being convicted of, or engaging in conduct involving moral turpitude;

(D) pleading guilty or being convicted of a violation of state or federal statutes relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct relating to the delivery of a health care item or service or relating to any act or omission in a program operated or financed by any federal, state, or local government agency;

(E) being convicted in connection with the interference with or obstruction of any investigation into any criminal offense that would support mandatory exclusion under §371.1655 of this subchapter or any offense listed within paragraph (3) of this subsection regarding program-related convictions; and

(F) being convicted of any offense that would support mandatory exclusion under §371.1655 of this subchapter.

(4) Provider Eligibility.

(A) failing to meet standards required for licensure, when such licensure is required by state or federal law, administrative rule, provider agreement, or provider manual for participation in the Medicaid Program;

(B) being excluded, suspended or otherwise sanctioned within any federal program involving the provision of health care;

(C) being excluded, suspended or otherwise sanctioned under any state health care program for reasons bearing on the person's professional competence, professional performance or financial integrity;

(D) failing to fully and/or correctly complete a Provider Enrollment Agreement, Provider Re-Enrollment Agreement or other enrollment form prescribed by the relevant operating agency or its agent for enrollment; and.

(E) loss or forfeiture of corporate charter.

(5) Program Compliance

(A) failing to comply with the terms of the Medicaid contract or provider agreement, assignment agreement, the provider certification on the Medicaid claim form, or rules or regulations published by the commission or a Medicaid operating agency;

(B) violating any provision of the Human Resources Code, Chapter 32 or 36, or any rule or regulation issued under the Code;

(C) submitting a false statement or misrepresentation or omitting pertinent facts on any application or any documents requested as a prerequisite for Medicaid participation;

(D) refusing to execute or comply with a provider agreement or amendments when requested;

(E) failing to correct deficiencies in provider operations after receiving written notice of them from an operating agency, the commission or their authorized agents;

(F) failing to abide by applicable federal and state law regarding handicapped individuals or civil rights;

(G) failing to comply with Medicaid policies, published Medicaid bulletins, policy notification letters, provider policy or procedure manuals, contracts, statutes, rules, regulations, or interpretation previously sent to the provider by an operating agency or the commission regarding any of the authorities listed above, including statutes or standards governing occupations;

(H) failing to fully and accurately make any disclosure required by the Social Security Act, §1124 or §1126;

(I) failing to disclose information about the ownership of a subcontractor with whom the person has had business transactions in an amount exceeding $25,000 during the previous 12 months or about any significant business transactions (as defined by HHS) with any wholly-owned supplier or subcontractor during the previous five years;

(J) failing, as a hospital, to comply substantially with a corrective action required under the Social Security Act, §1886(f)(2)(B);

(K) failing to repay or make arrangements that are satisfactory to the commission to repay identified overpayments or other erroneous payments or assessments identified by the commission or any Medicaid operating agency;

(L) committing an act described in the Social Security Act, §1128A (mandatory exclusion) or §1128B (permissive exclusion);

(M) defaulting on repayments of scholarship obligations or items relating to health profession education made or secured, in whole or in part, by HHS or the state when they have taken all reasonable steps available to them to secure repayment;

(N) soliciting or causing to be solicited, through offers of transportation or otherwise, Medicaid recipients for the purpose of delivering to those recipients health care items or services;

(O) marketing, supplying or selling confidential information (e.g., recipient names and other recipient information) for a use that is not expressly authorized by the Medicaid program; and

(P) failing to abide by applicable statutes and standards governing providers.

(6) Delivery of Health Care Services.

(A) failing to provide health care services or items to Medicaid recipients in accordance with accepted medical community standards or standards required by statute, regulation, or contract, including statutes and standards that govern occupations;

(B) furnishing or ordering health care services or items for a recipient-patient under Title XVIII or a state health care program that substantially exceed the recipient's needs, are not medically necessary, are not provided economically or are of a quality that fails to meet professionally recognized standards of health care; and

(C) engaging in any negligent practice that results in death, injury, or substantial probability of death or injury to the provider's patients;

(7) Improper Collection and Misuse of Funds.

(A) charging recipients for services when payment for the services was recouped by Medicaid for any reason;

(B) misapplying, misusing, embezzling, failing to promptly release upon a valid request, or failing to keep detailed receipts of expenditures relating to any funds or other property in trust for a Medicaid recipient;

(C) failing to notify and reimburse the relevant operating agency or the commission or their agents for services paid by Medicaid if the provider also receives reimbursement from a liable third party;

(D) rebating or accepting a fee or a part of a fee or charge for a Medicaid patient referral;

(E) requesting from a recipient in payment for services or items delivered within the Medicaid program any amount that exceeds the amount Medicaid paid for such services or items, with the exception of any cost-sharing authorized by the program; and

(F) requesting from a third party liable for payment of the services or items provided to a recipient under the Medicaid program, any payment other than as authorized at 42 CFR §447.20.

(8) Licensure Actions

(A) having a voluntary or involuntary action taken by a licensing or certification agency or board that requires the provider or employee to comply with professional practice requirements of the board after the board receives evidence of noncompliance with licensing or certification requirements; and

(B) having its license to provide health care revoked, suspended, or probated by any state licensing or certification authority, or losing a license or certification, because of action based on assessment of the person's professional competence, professional performance, or financial integrity, non-compliance with Health and Safety Code, statutes governing occupations, or surrendering a license or certification while a formal disciplinary proceeding is pending before licensing or certification authorities when the proceeding concerns the person's professional competence, professional performance, or financial integrity;

(9) Managed Care Organizations and Persons Providing Services or Items Through Managed Care. (Note: This subsection includes those program violations that are unique to managed care; paragraphs (1) through (8) and (11) of this subsection also apply to managed care.)

(A) failing, as a managed care organization (MCO), primary care case management system (PCCM), an association, group or individual health care provider furnishing services through an MCO, to provide to recipient enrollee a health care benefit, service or item that the organization is required to provide under its contract with an operating agency;

(B) failing, as a managed care organization, a PCCM or an association, group or individual health care provider furnishing services through an MCO, to provide to an individual a health care benefit, service or item that the organization is required to provide by state or federal law, regulation or program rule;

(C) engaging, as a managed care organization, in actions that indicate a pattern of wrongful denial or payment for a health care benefit, service or item that the organization is required to provide under its contract with an operating agency;

(D) engaging, as a managed care organization, in actions that indicate a pattern of wrongful delay of at least 45 days or a longer period specified in the contract with an operating agency, not to exceed 60 days, in making payment for a health care benefit, service or item that the organization is required to provide under its contract with an operating agency;

(E) engaging, as a managed care organization, a PCCM or an association, group or individual health care provider furnishing services through managed care, in a fraudulent activity in connection with the enrollment in the organization's managed care plan of an individual eligible for medical assistance or in connection with marketing the organization's services to an individual eligible for medical assistance.

(F) discriminating against enrollees or prospective enrollees on any basis, including, without limitation, age, gender, ethnic origin or health status;

(G) failing as a managed care organization, to comply with any term within a contract with a Medicaid operating agency to provide health care services to Medicaid recipients; and

(H) failing, as a managed care organization, reasonably to provide to the relevant operating agency, upon its written request, encounter data and/or other data contractually required to document the services and items delivered by or through the MCO to Medicaid recipients.

(10) Cost Report Violations.

(A) reporting costs of noncovered or nonchargeable services as covered items; e.g., incorrectly apportioning or allocating costs on cost reports; including costs of noncovered services, supplies or equipment in allowable costs; arrangements between providers and employees, related parties, independent contractors, suppliers, and others that appear to be designed primarily to overstate the costs to the program through various devices (such as commissions or fee splitting) to siphon-off or conceal illegal profits;

(B) reporting costs not incurred or which were attributable to nonprogram activities, other enterprises or personal expenses;

(C) including unallowable cost items on a cost report;

(D) manipulating or falsifying statistics that result in overstatement of costs or avoidance of recoupment, such as incorrectly reporting square footage, hours worked, revenues received, or units of service delivered;

(E) claiming bad debts without first genuinely attempting to collect payment;

(F) depreciating assets that have been fully depreciated or sold or using an incorrect basis for depreciation; and

(G) reporting costs above the cost to the related party.

(11) Kickbacks and Referrals.

(A) violating any of the provisions specified in §371.1721(b) of this subchapter relating to kickbacks, bribes, rebates, referrals, inducements, or solicitation;

(B) as a physician, referring a Medicaid patient to an entity with which the physician has a financial relationship for the furnishing of designated health services, payment for which would be denied under Title XVIII (Medicare) pursuant to §1877 and §1903(s) of the Social Security Act (Stark I and II). Neither federal financial participation nor this state's expenditures for medical assistance under the state Medicaid plan may be used to pay for services or items delivered within the program and within a relationship that violates Stark I or II. The Commission hereby references and incorporates within these rules the federal regulations promulgated pursuant to Stark I and II, and expressly recognizes all exceptions to the prohibitions on referrals established within those rules.

(C) failing to disclose documentation of financial relationships necessary to establish compliance with Stark I and II, as set forth in subparagraph (B) of this paragraph; and

(D) offering to pay or agreeing to accept, directly or indirectly, overtly or covertly any remuneration in cash or in kind to or from another for securing or soliciting a patient or patronage for or from a person licensed, certified, or registered or enrolled as a provider or otherwise by a state health care regulatory or health and human service agency.

§371.1619. Prima Facie Evidence.

Prior to imposing an administrative action, sanction, or damage or penalty (set forth in Divisions 3-6 of this Subchapter), the Inspector General shall establish by prima facie evidence the occurrence of the program violation(s) or affiliate relationships on which the administrative enforcement will be based.

This 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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DIVISION 3. ADMINISTRATIVE ACTIONS

1 TAC §§371.1629, 371.1631, 371.1633

The new rules are proposed under §531.033 and §531.021, Texas Government Code, which provides the Commission with broad rulemaking authority; §32.021(a), (c), Human Resources Code, provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program; 531.102 establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services; the rules specifically implement the provisions of HB2292 and 1743; 42 CFR §455.13 requires the Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution; 42 CFR, Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity; 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program; 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers; and various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The proposed rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

The proposed rules affect Chapter 531, Texas Government Code, and Chapter 32, Human Resources Code.

§371.1629. Use of Administrative Actions.

(a) The Inspector General utilizes administrative actions to address identified program violations through preventive means or by referral for review by an appropriate state or federal agency. The Inspector General may impose an administrative action independently or in conjunction with other enforcement measures. An administrative action need not be taken prior to the imposition of an administrative sanction.

(b) Administrative actions do not trigger due process. Subsequent sanctions taken by the Inspector General or another enforcement body as a result of a referral for additional review made pursuant to an administrative action may require due process, but the administrative action itself does not.

§371.1631. Non-exclusive List of Administrative Actions.

(a) The Inspector General may take any of the following administrative actions, singly or in combination, to prevent future program violations and/or to verify compliance with program requirements:

(1) transfer to a closed-end contract or provider agreement for a specified period of time or a provisional or probationary contract or provider agreement with variable case-by-case options applied to the terms and conditions;

(2) attendance at provider education sessions;

(3) prior authorization of selected services--Failure to submit and receive prior authorization prior to the service being rendered and billed would result in denial of the claim;

(4) prepayment review - Entails a review of all, or certain specific services of an individual provider before payment. It is a different process than the Random Prepayment Review specified in Subchapter B, §371.29;

(5) postpayment review - Entails a review of all, or certain specific services of an individual provider after payment;

(6) attendance in informal or formal provider corrective action meetings;

(7) submission of additional documentation or justification that is not normally required to accompany submitted claims. Failure to submit legible documentation or justification requested would result in denial of the claim;

(8) oral, written, or personal educational contact with the provider;

(9) posting of a surety bond or providing a letter of credit, as provided in Subchapter B, §371.23; and

(10) having a subpoena served to compel an appearance for testimony or the production of relevant evidence, as determined by the Inspector General, and as provided in Subchapter B, §371.21 and §371.1633 of this subchapter.

(b) Referral for additional review or investigation:

(1) referral to peer review outside the Commission or operating agency;

(2) referral to the appropriate state licensing board;

(3) referral to the Department of Health and Human Services, including referral for action under the Civil Monetary Penalties Law (the Social Security Act, §1128);

(4) referral for fraud investigation and criminal fraud prosecution;

(5) referral for civil fraud prosecution and imposition of civil damages or penalties;

(6) referral for recovery of overpayments and administrative penalties and damages through judicial means;

(7) referral to a collection agency, or any other collection authority, for recovery of overpayments and administrative penalties and damages;

(8) referral to credit bureaus for failure to pay all imposed recoupments and damages and penalties; and

(9) all other referrals required to perform statutory or regulatory functions.

§371.1633. Subpoena Authority.

(a) The Inspector General may, upon a determination of good cause, and with the approval of the Executive Commissioner or the Executive Commissioner's designee, issue a subpoena, in connection with an investigation conducted by the Inspector General, to compel the attendance of a relevant witness or the production of relevant evidence as determined by the Inspector General. "Good cause" will be determined from the specific circumstances of the investigation. Circumstances that may result in a determination of "good cause" include, but are not limited to, the following situations:

(1) A provider's failure to comply with an OIG investigative demand for the attendance of a relevant witness or the production of relevant evidence;

(2) A provider's past history of failing to comply with an OIG investigative demand for the attendance of a relevant witness or the production of relevant evidence;

(3) A reasonable belief that, without the issuance of a subpoena, relevant evidence will be compromised;

(4) A determination that there is an immediate threat to the health or safety of a Medicaid recipient; or

(5) A substantial likelihood of loss of state or federal funds.

(b) The subpoena may be served personally or by certified mail. Failure to comply with a subpoena will result in the Inspector General, through the Attorney General, filing suit to enforce the subpoena in a state district court.

This 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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DIVISION 4. ADMINISTRATIVE SANCTIONS

1 TAC §§371.1643, 371.1645, 371.1647, 371.1649, 371.1651, 371.1653, 371.1655, 371.1657, 371.1659, 371.1661, 371.1663, 371.1665, 371.1667, 371.1669, 371.1671, 371.1673, 371.1675, 371.1677, 371.1679, 371.1681, 371.1683, 371.1685, 371.1687, 371.1689

The new rules are proposed under §531.033 and §531.021, Texas Government Code, which provides the Commission with broad rulemaking authority; §32.021(a), (c), Human Resources Code, provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program; 531.102 establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services; the rules specifically implement the provisions of HB2292 and 1743; 42 CFR §455.13 requires the Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution; 42 CFR, Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity; 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program; 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers; and various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The proposed rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

The proposed rules affect Chapter 531, Texas Government Code, and Chapter 32, Human Resources Code.

§371.1643. Use of Sanctions.

(a) In response to program violations in the Medicaid and other HHS programs, including but not limited to any substantiated reason specified in §371.1617 of this subchapter, the Inspector General may impose against a provider or person, as defined in §371.1601 of this subchapter, any one or combination of sanctions specified in subsection (b) of this section. Any sanctions imposed for violations of non-Medicaid, HHS programs will be in accordance with the applicable law governing the specific HHS program. The imposition of an administrative action is not prerequisite to the use of a sanction, although sanctions may be imposed in conjunction with other administrative enforcement measures.

(b) Administrative sanctions include:

(1) exclusion from participation in the Titles V, XIX (Medicaid), XX, CHIP, and other HHS programs for a specified period of time, permanently, or indefinitely; (In this subchapter, exclusion from Medicaid automatically precipitates concurrent exclusion from Titles V, XX, and CHIP.)

(2) suspension of payments (payment hold) to a provider in Titles V, XIX (Medicaid), XX, CHIP, and other HHS programs;

(3) recoupment of overpayments in Titles V, XIX (Medicaid), XX, CHIP, and other HHS programs;

(4) recoupment of overpayments projected from a sampling process in Titles V, XIX (Medicaid), XX, CHIP, and other HHS programs;

(5) restricted reimbursement for a specified period of time or indefinitely in Titles V, XIX (Medicaid), XX, CHIP, and other HHS programs - Specific services will not be reimbursed to an individual provider during the time the provider is on restricted reimbursement; however, other services, as determined by the Inspector General, will be reimbursed; and

(6) cancellation of provider contract or provider agreement in Titles V, XIX (Medicaid), XX, CHIP, and other HHS programs.

(c) Providers or Persons Subject to Sanctions.

(1) Providers or persons furnishing services or items directly or indirectly for the Medicaid or other HHS programs are subject to sanctions for violations of the program;

(2) Any affiliates of a provider or person as specified in subsection (d) of this section.

(3) Providers or persons in violation of any of the violations set forth in Subchapter G of this Chapter; and

(4) Providers or persons committing other program violations for which the Inspector General determines that sanctions are appropriate.

(d) Affiliate Relationship.

(1) A provider or person, as defined in §371.1601 of this Subchapter, is deemed to have an affiliate relationship with another provider or person, if they:

(A) have a direct or indirect ownership interest (or any combination thereof) of 5% or more in the entity;

(B) are the owner of a whole or part interest in any mortgage, deed of trust, note or other obligation secured (in whole or in part) by the entity or any of the property assets, thereof, in which whole or part interest is equal to or exceeds 5% of the total property and assets of the entity;

(C) are an officer or director, if organized as a corporation;

(D) are a partner, if organized as a partnership;

(E) are an agent or consultant;

(F) are a managing employee, that is, a person (including a general manager, business manager, administrator or director) who exercises operational or managerial control over a person or part thereof, or directly or indirectly conducts the day-to-day operations of the entity or part thereof;

(G) are providers or person(s) associated with one another so that any one of them, directly or indirectly, controls or has the power to control another in whole or in part;

(H) share any of the following: e.g. tax identification numbers, social security numbers, bank accounts, telephone number, business location. (This is not an all inclusive list); or

(I) was formerly described in subsection (d)(1) of this section, but is no longer described, because of a transfer of ownership or control interest to an immediate family member or a member of the person's household as defined in subsection (d)(3) of this section, in anticipation of, or following a conviction, assessment of damages or penalties under §371.1721 et seq. of this subchapter, or imposition of a sanction.

(2) The Inspector General may sanction an affiliate of a provider or person, as defined in §371.1601 of this subchapter, if a provider or person with an affiliate relationship:

(A) has been convicted of a criminal offense related to the Medicaid or Medicare program or as described in §§1128(a) and 1128(b)(1), (2), or (3) of the Social Security Act;

(B) has had damages and penalties or assessments imposed under §371.1721 et seq. of this subchapter or §1128A of the Social Security Act; or

(C) has been excluded from participation in Medicaid, Medicare, or any state's health care program.

(3) For purposes of this section, the following terms are defined as:

(A) Agent means any person who has express or implied authority to obligate or act on behalf of a provider or person, as defined in §371.1601 of this subchapter.

(B) Immediate family member means, a person's husband, wife, or spouse; natural or adoptive parent; child or sibling; stepparent, stepchild, stepbrother or stepsister; father-, daughter-, son-, brother- or sister-in-law; grandparent or grandchild; or spouse of a grandparent or grandchild.

(C) Indirect ownership interest includes an ownership interest through any other entities that ultimately have an ownership interest in the provider or person in issue. (For example, an individual has a 10 percent ownership interest in the entity at issue if they have a 20 percent ownership interest in a corporation that wholly owns a subsidiary that is a 50 percent owner of the entity in issue.)

(D) Member of household means, with respect to a person, with whom they are sharing a common abode as part of a single-family unit, including domestic employees, partners, and others who live together as a family unit.

(E) Ownership interest means an interest in the capital, the stock or the profits of the entity or any mortgage, deed, trust or note, or other obligation secured in whole or in part by the property or assets of the person.

(e) Failure to Grant Immediate Access.

(1) The Inspector General may sanction any provider or person, including managed care organizations and their subcontractors, as defined in §371.1601 of this subchapter, that:

(A) fails to grant immediate access upon reasonable request to:

(i) the Inspector General;

(ii) the Attorney General's Medicaid Fraud Control Unit or Civil Fraud Division;

(iii) any state or federal agency authorized to conduct compliance, regulatory, or program integrity functions on the provider, person, or the services rendered by the provider or person; or

(iv) any agent or consultant of any agency or division within an agency formerly described in subparagraph (A) of this paragraph;

(B) fails to allow the Inspector General or any other federal or state agency, division, agent or consultant as described in subparagraph (A) of this paragraph to conduct any duties that are necessary to the performance of their statutory functions;

(C) fails to provide to the Inspector General or any other federal or state agency, division, agent or consultant as described in subparagraph (A) of this paragraph, upon request and as requested, for the purpose of reviewing, examining, and securing custody of records, access to, disclosure of, and custody of copies or originals of any records, documents, or other requested items, as determined necessary by the Inspector General or those specified in subparagraph (A) of this paragraph to perform statutory functions, any records the provider or person is required to maintain; any records necessary to verify items or services furnished and delivered under Medicaid, any other HHS program, or any state health care program to determine whether payment for those items or services is due or was properly made. This includes, without limitation: clinical medical patient records, other records pertaining to the patient, any other records of services provided to Medicaid or other HHS program recipients and payments made for those services, documents related to diagnosis, treatment, service, lab results, charting, billing records, invoices, documentation of delivery of items, equipment, or supplies, and radiographs and all requirements of §371.1617(a)(2) of this subchapter. It also includes the business and accounting records with backup support documentation, statistical documentation, computer records and data, patient sign in sheets, and schedules. Accessible information must include information that is necessary for the agencies specified in this paragraph to perform statutory functions. It includes those elements described in §371.1601 of this subchapter (definition of "failure to provide immediate access").

(2) For purposes of paragraphs (1)(A) and (1)(B) of this subsection, the term:

(A) Failure to grant immediate access means the failure to grant access at the time of a reasonable request.

(B) Reasonable request means a request made by a properly identified agent of the Inspector General or another state or federal agency identified in paragraph (1)(A) of this subsection, during hours that the business or premises is open for business.

(3) For purposes of paragraph (1)(C) of this subsection, the term Failure to grant immediate access means:

(A) The failure to produce or make available records within 24 hours of the request for production, for the purpose of reviewing, examining, and securing custody of records upon reasonable request, as determined by the requestor, Inspector General and all other state and federal agencies, except where the Inspector General or another state or federal agency identified in paragraph (1)(A) of this subsection reasonably believes that requested documents 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;

(B) The failure to provide access to requested records at the time of the request, for the purpose of reviewing, examining, and securing custody of records upon reasonable request, when the Inspector General or another state or federal agency identified in paragraph (1)(A) of this subsection, has reason to believe that requested documents are about to be altered or destroyed or the request, in the opinion of the Inspector General or the other requestor, determined that the request could be met at that time and/or in less than 24 hours.

(C) Reasonable request means a request for records or documents made by a properly identified agent of the Inspector General or another state or federal agency identified in paragraph (1)(A) of this subsection, during hours that the business or premises is open for business.

(4) In most instances, providers or persons required to produce records or documents will be required to complete a Records Affidavit, Business Records Affidavit, Evidence Receipt, and/or Patient Record Receipt, at the direction of the requestor, and to attach these documents to the records provided.

(5) As directed by the requestor, and in accordance with the provisions of subsection (e) of this section, the provider or person will relinquish custody of the records and documents and the requestor will take custody of the records and remove them from the premises. If the requestor should allow longer than "at the time of the request" to produce the records, the provider or person will be required to produce all records completed, at the time of completion or at the end of each day of production, as directed by the requestor, to the requestor who will take custody of the records. Failure to comply with the provisions of this part will result in a finding of Failure to grant immediate access.

(6) Nothing in this section shall in any way limit access otherwise authorized under State or Federal law.

(7) Exclusion.

(A) A program exclusion imposed against a provider or person under this section may be for a period equal to the sum of:

(i) The length of the period during which the immediate access was not granted, and

(ii) An additional period of up to one year.

(B) The exclusion of a provider or person may be for a longer period than the period in which immediate access was not granted based on consideration of the following factors:

(i) The impact of the failure to grant the requested immediate access on Medicaid;

(ii) The circumstances under which such access was refused; and

(iii) Whether the provider or person has a documented history of criminal, civil, or administrative wrongdoing. The lack of any prior record is to be considered neutral.

(C) For purposes of this section, the length of the period in which immediate access was not granted will be measured from the time the request is made.

(D) The exclusion will be effective as of the date immediate access was not granted.

(8) The Inspector General will work with the provider or person, within the limitations necessitated by the circumstances of the investigative case, to provide the provider or person, within a reasonable time, as determined by the Inspector General, and at the provider or person's expense, with copies of the records necessary for the provider to continue their immediate business. Nothing herein shall be interpreted to impede the Inspector General's or other requestor's ability to obtain all records and documents as required and to which the requestor is entitled under this section.

§371.1645. Imposing a Sanction.

(a) In determining the sanction or combination of sanctions to be imposed, the Inspector General may consider the seriousness of the program violation, the extent of the violation, degree and severity of the violation, prior non-compliance issues, prior imposition of sanctions, damages, or penalties, pattern of non-compliance, willingness to comply with

program rules, efforts to interfere with an investigation or witnesses, recommendations of peer review groups, program violations within Medicaid, Medicare, Titles V, XX, CHIP, and other HHS programs, pertinent affiliate relationships, past and present compliance with licensure and certification requirements, or any other pertinent information deemed appropriate by Medicaid Integrity or the Inspector General .

(b) With regard to those exclusions for which no specific period of time is mandated by law or regulation, the Inspector General will determine the length of exclusion based upon the criteria in subsection (a) of this section.

§371.1647. Notice of Sanction.

(a) The Inspector General provides written notice of a potential sanction(s) by certified mail with return receipt or by facsimile transmission with confirmation page. A recoupment requires both an initial written notice of potential sanction and a subsequent written notice of final sanction; therefore, any additional sanctions of any type in the same notice letter with a recoupment will require both notice letters. Additional provisions regarding notice of an exclusion are provided in §371.1649 of this subchapter. If there is no specific requirement in Subchapter G for a written notice of a potential sanction for an individual specific situation, the only sanction notice letter required is the notice of final sanction.

(b) Potential sanction. The written notice of potential sanction includes:

(1) a description of the potential sanction;

(2) the basis of the potential sanction;

(3) the effect of the potential sanction;

(4) its duration (duration could be indefinite or until a certain event occurred), if appropriate; and

(5) if the sanction is an exclusion, the notice must contain a description of the method the provider uses to request reinstatement, unless the exclusion is permanent.

(c) In the case of a recoupment, a statement of the provider's or person's right to request a formal appeal hearing of the potential sanction is not provided in the initial notice letter, since this is not a final sanction. A statement of the provider's or person's right to request a formal appeal hearing of the final sanction will be subsequently provided with the final written notice of the Inspector General's final overpayment determination.

(d) Final sanction. The written notice of final sanction includes:

(1) a description of the final sanction;

(2) the basis of the final sanction;

(3) the effect of the final sanction;

(4) its duration (duration could be indefinite or until a certain event occurred), if appropriate;

(5) a statement of the provider's or person's right to request a formal appeal hearing of the sanction; and

(6) if the sanction is an exclusion, the notice must contain a description of the method the provider or person uses to request reinstatement, unless the exclusion is permanent.

(e) The sanctions will take effect in the following manner:

(1) Recoupment - The provider or person will receive a notice of a potential sanction to impose recoupment. The provider or person may request an informal review, to informally discuss the issues and allow the provider or person an opportunity to provide information they deem appropriate. Subsequently, the Inspector General will make a final determination regarding the amount to be recouped. Upon that determination, the Inspector General will send final determination and notice of recoupment to the provider or person.

(2) Payment hold - A payment hold on payments of future claims submitted for reimbursement will be imposed, without prior notice, as specified in §371.1703(b) of this subchapter. The provider will be notified of the payment hold not later than the fifth (5th) working day after the date the hold is imposed. The payment hold will remain in effect until all issues regarding the provider's billing practices are finally resolved, including all litigation and judicial processes.

(3) Restricted reimbursement - The provider will receive final notice of intent to impose restricted reimbursement unless the provider meets one of the exception criteria enumerated in §371.1649 and §371.1651 of this subchapter. The provider may request an informal review and/or an administrative appeal hearing as described in paragraph (1) of this subsection.

(4) Exclusion - The provider or person will receive a notice of potential imposition of exclusion unless the provider meets one of the exception criteria enumerated in §371.1649 and §371.1651 of this subchapter. The provider or person may request an informal review, to informally discuss the issues and allow the provider or person an opportunity to provide information they deem appropriate. This process will occur before the Inspector General submits it's final notice of exclusion to the provider or person. At that time, the provider or person may request an administrative appeal hearing as described in paragraph (1) of this subsection.

(5) Cancellation of contract or provider agreement - The provider or person will receive a notice of potential cancellation of contract or provider agreement unless the provider meets one of the exception criteria enumerated in §§371.1649 and 371.1651 of this subchapter. The provider may request an informal review as described in paragraph (1) of this subsection. This process will occur before the Inspector General submits it's final notice of cancellation of contract or provider agreement to the provider or person. If a provider or person is excluded who also has a contract or provider agreement, prior notice of the cancellation of contract or provider agreement is not a requirement, since the scope and effect of the exclusion, as specified in §371.1673 of this subchapter, does not allow that person to participate in Titles XIX, V, XX, CHIP, and other HHS programs. The contract or provider agreement in that instance would be cancelled effective the effective date of the exclusion.

§371.1649. Exceptions to Prior Notice of Exclusion, Cancellation of Contract or Provider Agreement, and Restricted Reimbursement.

When the decision to impose an exclusion, cancellation of contract or provider agreement, or restricted reimbursement is based upon circumstances that indicate the occurrence of any of the following, the Inspector General provides written notice as specified in §371.1647 of this subchapter:

(1) any criminal conduct;

(2) any act or omission by a provider or person directly or indirectly furnishing services or items or with authority or control over the business or the furnishing of services or items within the Medicaid, Medicare, or other HHS programs or any other reason that results in the preclusion of federal financial participation (FFP) with regard to claims submitted by the provider or person committing the act or omission or otherwise. Medicaid is prohibited from paying 100% state general revenue funds when a loss of FFP has occurred, e.g. provider's or person's exclusion from Medicare or loss of licensure or certification;

(3) any act or omission by a provider or person directly or indirectly furnishing services or items within the Medicaid or other HHS

programs that presents a significant health, safety, or security hazard to a recipient receiving services or items from that person;

(4) any act or omission by a provider or person directly or indirectly furnishing items or services within the Medicaid or other HHS programs that causes financial loss to a recipient receiving those services and that is a violation of the Medicaid or other HHS program;

(5) any act or omission by a provider or person directly or indirectly furnishing items or services within the Medicaid or other HHS programs that indicates a pattern of repeated violations of any one or combination of those programs;

(6) any act or omission by a provider or person directly or indirectly furnishing services or items within the Medicaid or other HHS programs that causes a significant overpayment due to billing for services not provided or not provided according to the requirements of the Medicaid or other HHS program;

(7) any act or omission by a provider or person directly or indirectly that prevents a requesting agency from obtaining immediate access, in accordance with §371.1643 of this subchapter, to premises, records, documents, or other requested items that must be maintained in order to participate in the Medicaid or other HHS programs or have been determined to be necessary for the complete investigation by the Inspector General or any of the other agencies and agents specified;

(8) any loss of a condition that is a requirement of the Medicaid or other HHS program, e.g. loss of license, certification, Medicare participation, etc.; or

(9) if the Inspector General determines that the health or safety of individuals receiving services under Medicaid or other HHS program warrants an exclusion taking place immediately in accordance with §371.1651 of this subchapter.

§371.1651. Immediate Sanctions Due to Health and/or Safety.

The Inspector General may immediately exclude a provider or person, place on restricted reimbursement, and/or cancel a contract or provider agreement of a provider or person if the Inspector General determines that the provider or person is or may be placing the health and/or safety of individuals receiving services, under Medicaid or any HHS program, at risk. In accordance with 42 CFR §1001.2003(c), the Inspector General may immediately exclude the provider or person. This may occur prior to the initiation or completion of a hearing at the State Office of Administrative Hearings (SOAH). In this situation, the provider or person's exclusion, restricted reimbursement, and/or cancellation of contract or provider agreement would be effective immediately upon notice of immediate exclusion or cancellation of contract or provider agreement.

§371.1653. Exclusion.

(a) The Inspector General's authority to exclude providers or persons from participation in federally funded state health care programs emanates from federal and state law. With regard to exclusion, federal law defines "state health care programs" to include Titles V, XIX, and XX, and exclusion from Medicare or any one of the state health care programs requires exclusion as to all of the programs within the definition. The Inspector General determines the necessity for exclusion according to federal regulations set forth at 42 CFR Part 1001, and pursuant to this state's authority, as acknowledged by 42 CFR Part 1002.

(b) Types of exclusion. Exclusion may be:

(1) mandatory, which requires the Inspector General to exclude persons based upon specific occurrences set forth in this subchapter or at 42 CFR §1001.101; or

(2) permissive, with regard to which the Inspector General maintains discretion to exclude persons for circumstances set forth at 42 CFR §1001.201 or for other program violations for which the Inspector General determines that exclusion is an appropriate sanction.

(c) When the basis for exclusion is derivative of a final order, judgment, action by a court or another governmental agency, or any other prior determination (e.g. a conviction, plea, licensure board order, settlement or repayment agreement, administrative law judge decision), the Inspector General need not re-establish the factual or legal basis for the underlying determination. The basis for the underlying determination is not reviewable and the provider or person, as defined in §371.1601 of this subchapter, may not collaterally attack the underlying determination, either on substantive or procedural grounds, in an administrative hearing. Non-derivative exclusions are based on factual determinations made initially by the Inspector General and supported by prima facie evidence.

(d) On and after the effective date of exclusion, providers who were excluded cease to be providers and, for purposes of Subchapter G, are considered persons, as defined in §371.1601 of this subchapter.

§371.1655. Mandatory Exclusion.

The Inspector General will exclude from participation in Titles V, XIX, XX, and other HHS programs:

(1) any provider or person who must be excluded pursuant to grounds set forth at 42 USC §1320a-7(a) or 42 CFR §1001.101. The length of exclusion under this subsection will be equivalent to: the length of exclusion required by federal statute or regulation plus, pursuant to state authority, a minimum period of one year beyond the federally mandated period of exclusion, determined according to the severity of the offense.

(2) any managed care organization or other entity furnishing services under a §1915 (b)(1) waiver of the Social Security Act, if such organization or entity could be excluded under 42 CFR §1001.1001 ("Exclusion of Entities Owned or Controlled by a Sanctioned Person") or §1001.1051 ("Exclusion of Individuals with Ownership or Control Interest in Sanctioned Entities") or, directly or indirectly, has a substantial contractual relationship (as defined in 42 CFR §1002.203) with an individual or entity that could be excluded under 42 CFR §1001.1001 or §1001.1051. Length of exclusion under this subsection will be equivalent to that of the person whose relationship with the entity is the basis for the exclusion, subject to the exceptions established at 42 CFR §1001.3002(c).

(3) any provider or person who is found liable for a false claim or a managed care violation set forth within the state's damages and penalties statute at section 32.039(b) of the Human Resources Code. Term of exclusion under this subsection is as follows:

(A) except as provided by subparagraph (B) of this paragraph , when the violation resulted in injury to an elderly person (as defined by Human Resources Code §48.002(a)(1), a disabled person (as defined by Human Resources Code §48.002(a)(8)(A)), or a person younger than 18 years of age, the provider or person may not provide or arrange to provide health care services under Medicaid for a minimum period of ten (10) years to a maximum period of permanent exclusion. The period of exclusion begins on the date on which the determination that the provider or person is liable becomes final.

(B) except as provided by subparagraph (A) of this paragraph, when the violation did not result in injury to anyone in those categories of persons listed in paragraph (1) of this section, the provider or person may not provide or arrange to provide health care services under Medicaid for a period of three (3) years to a maximum period of permanent exclusion. The period of exclusion begins on the date on which the determination that the provider or person is liable becomes final.

(C) any provider or person who is convicted, as defined in §371.1601, or pleads guilty or nolo contendere of an offense arising from

a fraudulent act under the Medicaid program, which results in injury to an elderly person (as defined by Human Resources Code §48.002(1)), a disabled person (as defined by Section 48.002 (8)(A), or a person younger than 18 years of age. Exclusion under this subsection is permanent. A person excluded under this subsection shall not be eligible for reinstatement to the program. The period of exclusion begins on the date on which the provider or person is convicted.

(4) any provider or person whose health care services or items are ineligible for federal financial participation. The period of exclusion begins on the date the provider's or person's health care services or items became ineligible for federal financial participation.

(5) any provider or person whose health care license, certification, or other qualifying requirement to perform certain types of service is revoked, suspended, or otherwise terminated such that the provider or person may not perform their profession due to the loss of the license, certification, or other qualifying requirement. The period of exclusion begins on the date the person lost their license, certification, or other qualifying requirement.

§371.1657. Permissive Exclusion.

The Inspector General may exclude from participation in Titles V, XIX, XX, CHIP and other HHS programs -

(1) any provider or person who commits a program violation as established by prima facie evidence, including but not limited to those set forth at §371.1617 of this subchapter, Human Resources Code §32.039(b), (u), (v) or §371.1721 et seq. of this subchapter, and Human Resources Code §36.002; and

(2) any provider or person, as defined in §371.1601 of this subchapter, who may be excluded for any reason for which the Secretary of the U.S. Department of Human Services or its agent could exclude such person under 42 USC §1320a-7(b) or 42 CFR Parts 1001 or 1003.

(3) any provider, entity, or person, if another provider, entity, or person, with whom they have a relationship:

(A) has been convicted of a criminal offense as described in §§1128(a) and 1128(b)(1), (2), or (3) of the Social Security Act;

(B) has had civil money penalties or damage and penalties assessments imposed under §371.1721 et seq. of this subchapter or §1128A of the Social Security Act; or

(C) has been excluded from participation in any one of the Titles V, XVIII, XIX, XX, CHIP, or other HHS program and such person:

(i) has a direct or indirect ownership interest (or any combination thereof) in the provider or person, as defined in §371.1601 of this subchapter;

(ii) is the owner of a whole or part interest in any mortgage, deed of trust, note or other obligation secured (in whole or in part) by the entity or any of the property assets thereof;

(iii) is an officer or director of the provider or person, if the entity is organized as a corporation;

(iv) is partner in the provider or person, if the provider or person is organized as a partnership;

(v) is an agent or consultant of the provider or person; or

(vi) is a managing employee, that is, a person (including a general manager, business manager, administrator, or director) who exercises operational or managerial control over the provider or person or part thereof; or

(D) was formerly described in paragraph (3) of this section, but is no longer so described, because of a transfer of ownership or control interest to an immediate family member or a member of the person's household, as defined in §371.1643 of this subchapter, in anticipation of or following a conviction, assessment of a CMP, or imposition of an exclusion or other sanction.

(4) any person that:

(A) has a direct or indirect ownership or control interest in a sanctioned entity, and who knows or should know, as defined in §1128A(i)(6) of the Social Security Act, of the action constituting the basis for the conviction or exclusion set forth in paragraph (2) of this section; or

(B) is an officer or managing employee, as defined in §371.1643 of this subchapter, of such provider, entity, or person.

§371.1659. Notice of Intent to Exclude.

Except as provided in paragraph (3) of this section, when the Inspector General proposes to exclude any person on mandatory grounds for a period exceeding 5 years or on permissive grounds, it gives written notice of its intent to exclude.

(1) Notice of potential to exclude includes:

(A) the basis for the potential exclusion;

(B) the potential effect of the exclusion; and

(C) whether the Inspector General also proposes to cancel any provider agreement held by the provider or person to be excluded.

(2) Within 30 days of receipt of the notice of potential exclusion, which is deemed to be 5 days from the date of the notice, the provider or person receiving notice may submit to the Inspector General, any documentary evidence or written argument regarding whether exclusion is warranted and any related issues. Submission of documentary evidence or written argument, however, is no guarantee that the Inspector General will not ultimately exclude the provider or person.

(3) If the Inspector General proposes to exclude a provider or person on grounds set forth at 42 CFR §1001.1301 (failure to grant immediate access to records), §1001.1401 (hospital's failure to comply with corrective action plan required by the Health Care Finance Administration (HCFA), or §1001.1501 (default on health education loan or scholarship obligations), it need not send a notice of intent to exclude and may effect exclusion upon providing notice of exclusion (as set forth below).

§371.1661. Notice of Exclusion.

Except as provided in §371.1665 (Notice of Proposal to Exclude) of this subchapter, if the Inspector General determines, after review of any evidence or argument offered by a provider or person entitled to provide same, that exclusion is warranted, it will send a written notice of final exclusion to the affected provider or person. Such notice will state:

(1) the basis for the final exclusion;

(2) the length of the final exclusion and, where applicable, the factors considered in determining the length;

(3) the effect of the final exclusion;

(4) the earliest date on which the Inspector General will consider a request for reinstatement;

(5) the requirements and procedures for reinstatement; and

(6) the appeal rights available to the excluded person.

§371.1663. Effective date of Exclusion.

Except for immediate exclusion based upon grounds set forth at 42 CFR §1001.1301 (failure to grant immediate access to records) and §§371.1649 or 371.1651 of this subchapter, exclusion will be effective 20 days from the date of the notice of exclusion.

§371.1665. Notice of Proposal to Exclude.

(a) Except as provided in subsection (e) of this section, if the Inspector General proposes to exclude a provider or person on grounds set forth at:

(1) 42 CFR §1001.901 (false or improper claims),

(2) 42 CFR §1001.951 (fraud and kickbacks and other prohibited activities), §1001.1601 (violations of the limitations on physician charges), or

(3) 42 CFR §1001.1701 (billing for services of assistant at surgery during cataract operations); the Inspector General will send written notice of this decision to the affected person.

(b) The written notice of proposal to exclude includes the same information that must be included in a notice of exclusion set forth in §371.1661 of this subchapter, as well as an indication of whether the Inspector General intends to terminate any provider agreement or contract of the affected provider or person.

(c) The exclusion will be effective 20 days after the date of the notice of proposal to exclude, unless, within that period, the affected person files with the Inspector General, a written request for a hearing by SOAH. A request for hearing must set forth:

(1) the specific issues or statements in the notice of proposal to exclude with which the person disagrees;

(2) the basis for the disagreement;

(3) the defenses on which reliance is intended;

(4) any reasons why the proposed length of exclusion should be modified; and

(5) reasons why the health or safety of individuals receiving services from the relevant state health care program(s) does not warrant the exclusion going into effect prior to the completion of the requested hearing.

(d) If the affected person does not file a timely written request for hearing as provided in subsection (c) of this section, the Inspector General will send a notice of exclusion as described in §371.1661 of this subchapter. If the affected person makes a timely written request for a hearing and the Inspector General determines that the health or safety of individuals receiving services under the relevant state health care program(s) does not warrant an immediate exclusion, an exclusion will not go into effect unless the hearing officer or administrative law judge at the hearing upholds the decision to exclude.

(e) If, prior to issuing a notice of proposal to exclude under subsection (a) of this section, the Inspector General determines that the health and safety of individuals receiving services under the relevant state health care program(s) warrants the exclusion taking place prior to the completion of the hearing by the relevant operating agency, the Inspector General will proceed under §371.1659 (Notice of Intent to Exclude) and §371.1661 (Notice of Exclusion) of this subchapter.

§371.1667. Due Process for Administrative Sanctions.

(a) The Inspector General affords, to any provider or person against whom it imposes sanctions, all administrative and judicial due process remedies applicable to administrative sanctions. Pursuant to its own rules governing hearings and appeals, the State Office of Administrative Hearings (SOAH) provides formal appeal hearings for those persons who appeal final sanctions imposed by the Inspector General.

(b) The person is also offered, in the sanction notice letter, an opportunity to request an informal review of the imposition of sanction. The provider or person is given an opportunity to submit documentary evidence and written argument concerning whether the sanction is warranted and other related issues. Submission of documentary evidence or written argument, however, is no guarantee that the Inspector General will not ultimately impose administrative sanctions against the provider or person. The provider or person may choose to request an informal review, a formal appeal hearing, or both. If both an informal review and formal appeal hearing are chosen, the formal appeal hearing and all pertinent discovery, prehearing conferences, and all other issues and activities regarding the formal appeal hearing will be abated until all informal review discussions have ended without settlement or resolution of the issues. In certain situations, the informal review will not be offered.

(c) When the exclusion is based on the existence of a criminal conviction, a civil fraud finding, a civil judgment imposing liability by federal, state, or local court, a determination by another government agency or board, any other prior determination, or provisions within a settlement agreement, the basis for the underlying determination is not reviewable and the individual or entity may not collaterally attack the underlying determination, either on substantive or procedural grounds, in an administrative appeal.

§371.1669. Notice of Appeal.

(a) To appeal a final sanction imposed by the Inspector General, a provider or person shall file a written request for appeal with the Inspector General within twenty (20) calendar days of the date of the person's receipt of the notice of final sanction, unless specified otherwise in other sections of this subchapter. The Inspector General will then forward the notice of appeal to the Commission's Office of General Counsel for docketing at SOAH. If an informal review has also been requested, the appeal will be abated until all efforts to resolve or settle the sanction have been unsuccessful. At the conclusion of the informal review process, the Inspector General will then forward the notice of appeal to the Commission's Office of General Counsel for docketing at SOAH.

(b) The letter requesting an appeal hearing or informal review will contain a statement as to the specific issues, findings, and/or legal authority in the notice letter with which the sanctioned provider or person disagrees, and the basis for their contention that the specific issues or findings and conclusions are incorrect. The request for a hearing must be made in writing to the Director of Medicaid Integrity. The request must be signed by the provider or person sanctioned or by their attorney and sent by certified mail to arrive in Medicaid Integrity by the filing deadline. No other person or party may appeal for or on behalf of the sanctioned provider or person.

§371.1671. Settlement.

The Inspector General has authority to settle any issues or case, without consent of the SOAH Administrative Law Judge.

§371.1673. Scope and Effect of Exclusion.

(a) Excluded Person and Affiliated Entities. Unless and until a person is reinstated into the Texas Medicaid program in accordance with §371.1689 of this subchapter, no payment will be made by any Texas health care program, Medicaid, or any HHS program for any item or service furnished by an excluded person on or after the effective date of exclusion.

(1) A person excluded pursuant to this subchapter must neither personally nor through a clinic, group, corporation, or other association or entity, bill or otherwise request or receive payment for any Title V, XIX, XX, CHIP, or other HHS programs for items or services provided on or after the effective date of the exclusion. Exclusion also prevents the excluded person from providing any services pursuant to the Medicaid and

other HHS programs, whether or not the excluded person directly requests Medicaid or other HHS program payment for such services (e.g., a person excluded may not, until reinstated, conduct TILE case assessments for an employer participating within the program).

(2) A person excluded pursuant to this subchapter must not assess care or order or prescribe services, directly or indirectly, to Title V, XIX, XX, CHIP, or other HHS recipients after the effective date of exclusion. A clinic, group, corporation, or other association or entity must not submit to Title V, XIX, XX, CHIP, or other HHS programs claims for any assessments, services or items provided by a person within such organization or entity who is excluded from participation, unless the services or supplies were provided before the effective date of exclusion.

(3) An entity that employs or otherwise associates with a person excluded from participation in Titles V, XIX, XX, CHIP, or other HHS program pursuant to this subchapter must not include within a cost report or any documents used to determine an individual payment rate, a statewide payment rate or a fee, the salary, fringe, overhead, or any other costs associated with the person excluded.

(b) Persons other than person excluded and affiliated entities. Unless and until a person is reinstated into the Texas Medicaid program in accordance with §371.1689 of this subchapter, no payment will be made by any Texas health care program, Medicaid, or any HHS program for any item or service furnished pursuant to the medical direction, prescription or assessment of a person excluded under this subchapter on or after the effective date of exclusion, when the person furnishing the item or service knew or had reason to know of the exclusion.

(c) An order or prescription written before the exclusion of a physician is valid for the duration of the order.

(d) If, after the effective date of an exclusion, the excluded person submits or causes to be submitted claims for services (including case assessments) or items furnished within the period of exclusion, they may be subject to civil monetary penalty liability under §1128A(a)(1)(D), and criminal liability under §1128B (a)(3) of the Social Security Act and an administrative damage and penalty as set forth in §371.1721 et seq. of this subchapter.

§371.1675. Informing Other Interested Parties.

(a) In accordance with federal and state requirements, when the Inspector General excludes a person, the Inspector General shall promptly notify each appropriate state agency administering or supervising each state health care program, as well as the appropriate state or local authority or agency responsible for licensing or certifying the person excluded. Notification shall include:

(1) the facts, circumstances, and period of exclusion;

(2) a request that appropriate investigations be made and any necessary sanctions be invoked in accordance with applicable law and policy; and

(3) a request that the state or local authority or agency fully and timely inform the commission with respect to any actions taken in response to the commission's request.

(b) Through procedures and means it establishes, the Inspector General also notifies providers, recipients, and the public regarding persons excluded.

§371.1677. Obligation of All Health Care Providers regarding Exclusion.

(a) Each provider or person is responsible for ensuring that items or services furnished personally by, at the medical direction of, or on the prescription or order of an excluded person are not billed to the Titles V, XIX, XX, CHIP, and other HHS programs after the effective date of exclusion, as specified in this subchapter. This section applies regardless of whether an excluded person has obtained a program provider number or equivalent, either as an individual or as a member of a group, prior to being reinstated. Failure to ensure excluded providers are not participating in the activities above and/or billing for services rendered by an excluded person will result in exclusion of the currently active providers and persons allowing the forbidden activity, plus recoupment of all funds paid to the currently active provider or person for those activities, and imposition of damages and penalties against both the currently active provider or person and the excluded person. The damages and penalties are delineated in §371.1721 et seq. of this subchapter.

(b) Providers or persons must not bill recipients for services or items specified in subsection (a) of this section unless:

(1) the recipient is informed, before delivery of the item or service, that those services are not reimbursed by Medicaid; and

(2) the provider obtains and retains, before delivery of the item or service, a written signed consent from the recipient indicating that the recipient understands they are responsible for payment for the services and that the services or items are still desired.

(c) Providers or persons who violate these rules by billing recipients without the required disclosure and consent are subject to sanctions described in this subchapter.

§371.1679. Waiver of Exclusion.

The Inspector General may request a waiver of an exclusion mandated by federal law only in accordance with the requirements of 42 CFR §1001.1801. Waiver of an exclusion mandated by state law is limited to those circumstances of public health necessity set forth at 42 CFR §1001.1801. The Inspector General is not obligated to request a waiver of exclusion by virtue of a request for waiver from an excluded person. The decision to grant, deny, or rescind a request for a waiver is not subject to administrative or judicial review.

§371.1681. Provider Enrollment.

(a) Basis for Initial Provider Enrollment or Request for Additional Provider Numbers.

(1) The Commission, health and human services agencies, and their contractors determine the need for and approve individual provider participation through initial provider enrollment and enrollment for additional provider number(s), including managed care organizations and their subcontractors.

(2) The request for initial provider enrollment and enrollment for additional provider numbers could result in an abatement, denial, or postponement of approval by the Commission, through the Inspector General, as specified in §371.1603(a) of this subchapter, health and human services agencies, or their contractors. These actions do not give rise to due process notice and hearing requirements. In making the enrollment determination, the following will be considered

(A) accessibility of other health care to the recipient population;

(B) the provider's current or previous conduct, including conduct during participation in the Titles XVIII, XIX, XX, and V, CHIP, and any HHS programs in any state, or any conduct or action for which a sanction could have been taken, as described in subchapter G;

(C) the investigative findings in any current or previous investigation of the provider or person or their affiliates;

(D) licensure or certification actions against the provider or person or any provider or person with which they are affiliated, as described in §371.1643(d) of this subchapter;

(E) criminal history background check; and

(F) consideration of all of the above, in relation to the provider's or person's family member and member of household, as specified in §371.1643(d)(3) of this subchapter.

(b) Providers, persons, principals, or affiliates of providers or persons under investigation, who have sanctions pending, or have been sanctioned previously, by the Inspector General or any HHS program, may have any application for enrollment or new provider number decisions abated until all investigations, sanctions, and legal proceedings are finally resolved, as specified in §371.1603(a) of this subchapter.

§371.1683. Criminal History Checks.

The Commission, any HHS operating agency, or their contractors may conduct a criminal history check on any Medicaid, Title XX or V, CHIP, or any other HHS program provider or on any person or business entity who meets the definition of "indirect ownership interest" as defined in §371.1601 who are applying to become Medicaid, Title XX or V, CHIP, or other HHS providers, or who are applying to obtain new provider numbers or performing provider numbers. The Commission, operating agency, or their contractors may require the provider or applicant to provide a report from the Texas Department of Public Safety or other appropriate law enforcement agency of the criminal history of the provider or applicant in such form as the Commission or operating agency may require.

(1) If the Medicaid, Title XX or V, CHIP, or other HHS program provider or applicant is a corporation this requirement may be extended to officers and directors of the corporation, or to shareholders of 5% or more of the outstanding shares of such corporation, or who are required to disclose their ownership interest pursuant to federal law or regulation.

(2) If the Medicaid, Title XX or V, CHIP, or other HHS program provider or applicant is a partnership, whether general or limited, this requirement extends to all persons or corporations owning a beneficial interest in the partnership.

(3) If the Medicaid, Title XX or V, CHIP, or other HHS program provider or applicant is an individual or an unincorporated association of individuals the requirement shall extend to all persons and members of the association or who are applicants or providers.

(4) Medicaid, Title XX or V, CHIP, or other HHS program providers and applicants shall disclose and provide complete information regarding all misdemeanor and felony convictions of offenses on the Medicaid, Title XX or V, CHIP, or other HHS program provider application form. Failure to make full and accurate disclosure will be grounds for immediate denial of an application or termination of a contract with a provider in the Medicaid, Title XX or V, CHIP, or other HHS program.

(5) The Commission, operating agency, or their contractors may exempt from this requirement any person or entity which is licensed under the laws of this State and which licensure requires a criminal history check.

§371.1685. Use of Criminal History Record Information.

(a) If the Commission, operating agency, or their contractors determines through a criminal history check from the application for provider or performing provider status that the provider or applicant has been convicted of one of the following crimes the provider or applicant will not be eligible to participate in the Medicaid program, and if enrolled, the Commission, operating agency, or their contractors will terminate the provider's contract, or deny the application.

(1) An offense under chapter 19, Texas Penal Code (criminal homicide);

(2) An offense under chapter 20, Texas Penal Code (kidnapping and false imprisonment);

(3) An offense under section 21.11, Texas Penal Code (indecency with a child);

(4) An offense under section 22.011, Texas Penal Code (sexual assault);

(5) An offense under section 22.02, Texas Penal Code (aggravated assault);

(6) An offense under section 22.04, Texas Penal Code (injury to a child, elderly individual, or disabled individual);

(7) An offense under section 22.041, Texas Penal Code (abandoning or endangering a child);

(8) An offense under section 22.08, Texas Penal Code (aiding suicide);

(9) An offense under section 25.031, Texas Penal Code (agreement to abduct from custody);

(10) An offense under section 25.08, Texas Penal Code (sale or purchase of a child);

(11) An offense under section 28.02, Texas Penal Code (arson);

(12) An offense under section 29.02, Texas Penal Code (robbery);

(13) An offense under section 29.03, Texas Penal Code (aggravated robbery);

(14) An offense under chapter 31, Texas Penal Code (theft);

(15) An offense under chapter 32, Texas Penal Code (fraud);

(16) An offense under chapter 34, Texas Penal Code (money laundering);

(17) An offense under chapter 35, Texas Penal Code (insurance fraud);

(18) An offense under chapter 36, Texas Penal Code (bribery and corrupt influence);

(19) An offense under chapter 37, Texas Penal Code (perjury and other falsifications);

(20) An offense under chapter 71.02, Texas Penal Code (engaging in organized criminal activity);

(21) A federal offense under the Racketeer Influenced and Corrupt Organizations Act, mail fraud, wire fraud, insurance fraud, Medicare Fraud, Medicaid Fraud, tampering with a government document, and/or violation of Federal False Claims Act.

(b) The prohibition shall also include convictions for aiding and abetting any of the above-listed offenses or for conspiracies to commit any of the above offenses.

(c) The prohibition shall also include any conviction under the laws of another state, which prohibits the conduct described in the above listed offenses.

§371.1687. Administrative Review of Rejection of Provider Enrollment by reason of Criminal History.

(a) Should the Commission, any operating agency, or their contractors determine from information furnished by the applicant or Medicaid, Title XX or V, CHIP, or other HHS program provider, or from an independent criminal history check that the Medicaid, Title XX or V, CHIP, or other HHS program provider or applicant has been convicted of an offense described in section 371.1685, a notice of denial of the application or cancellation of the Medicaid, Title XX or V, CHIP, or other HHS program provider enrollment shall be sent to the Medicaid, Title XX or V, CHIP, or

other HHS program provider or applicant. The notice shall state the action taken and the basis for the action, including the conviction, the jurisdiction reporting the conviction, and the source of the information.

(b) The applicant or Medicaid, Title XX or V, CHIP, or other HHS program provider, upon receipt of the notice of denial or cancellation, may determine that the action is based on a mistake in identity. If so, the applicant or Medicaid, Title XX or V, CHIP, or other HHS program provider has thirty (30) calendar days from the date of receipt of the notice to provide the Commission, operating agency, or their contractors with documentation from the reporting agency correcting the mistake in identification.

(c) If the applicant or Medicaid, Title XX or V, CHIP, or other HHS program provider, upon receipt of the notice of denial or cancellation, determines that, although the information is correct, there exists factors, which should be considered in mitigation of the prohibition, the applicant or Medicaid, Title XX or V, CHIP, or other HHS program provider may request an informal desk review within twenty (20) calendar days from the receipt of the notice. The request for an informal desk review should be made in writing and addressed as directed to the Office of Inspector General (OIG), the operating agency, or their contractors and should set out the reasons which the applicant or Medicaid, Title XX or V, CHIP, or other HHS provider believes are relevant to the issue of mitigation.

(d) The following factors may be considered in the informal desk review:

(1) the nature and seriousness of the crime;

(2) the relationship of the crime to the purposes of providing medical services, supplies, or equipment;

(3) the extent to which approving an application or retaining a provider in the Medicaid, Title XX or V, CHIP, or other HHS program would offer the applicant or provider the opportunity to engage in further criminal activity;

(4) the relationship of the crime to the ability, capacity, or fitness required of the provider or provider applicant to perform the duties and discharge the responsibilities of a provider in the Medicaid, Title XX or V, CHIP, or other HHS program;

(5) the age of the provider or applicant at the time each crime was committed;

(6) the conduct and work history of the applicant or provider before and after the criminal conviction(s);

(7) evidence of the applicant's or provider's rehabilitation efforts and outcome;

(8) the number and nature of the criminal conviction(s);

(9) the length of time since the end of the sentence imposed for the conviction; and

(10) other evidence of fitness that may be relevant.

§371.1689. Reinstatement following Exclusion.

(a) A person who has been excluded from Medicaid, any HHS program, or any state health care program, as defined in §371.1601 of this subchapter, may be reinstated only by the Inspector General, the division that imposed the exclusion. The request for reinstatement may be abated, denied, or postponed by Medicaid Integrity or the Inspector General as specified in §371.1603(a) of this subchapter.

(b) A person excluded from Medicaid or any HHS program may submit to the Inspector General a request for reinstatement at any time after the period of exclusion has ended. An excluded person may not be granted a contract or provider agreement in any HHS program until and unless reinstatement is approved by the Inspector General and the exclusion status is removed.

(c) The Inspector General will grant reinstatement only if it is reasonably certain that the types of actions that formed the basis for the original exclusion have not recurred and will not recur. In making this determination, the agency will consider:

(1) The conduct of the provider or person before and after the date of the notice of exclusion;

(2) Whether all fines, damages, penalties and any other debts due and owing (including e.g. overpayments, penalties, damages, appeal hearing costs) to any federal, state or local government, have been paid, or satisfactory arrangements have been made that fulfill these obligations;

(3) The accessibility of other health care to the recipient population that would be served by the person who has been excluded;

(4) The person's previous conduct, including conduct during participation in the Titles XVIII, XIX, XX, and V, CHIP, and any HHS programs in any state, or any conduct or action for which a sanction could have been taken, as described in subchapter G of this chapter;

(5) Any previous convictions, as defined in §371.1601, of the person regardless of it's relation to Titles XVIII, XIX, XX, V, CHIP, or other HHS programs;

(6) Whether the Inspector General has determined that the individual or entity complies with or has made satisfactory arrangements to fulfill, all of the applicable conditions of participation or supplier conditions for coverage under the statutes and regulations;

(7) Whether the person has, during the period of exclusion, submitted claims, or caused claims to be submitted or payment to be made by Medicaid or any state health care program, for items or services the excluded party furnished, ordered or prescribed, including health care administrative services; and

(8) Any other factors or circumstances deemed by the Inspector General to be relevant to the determination of reinstatement.

(d) Submitting claims or causing claims to be submitted or payments to be made by the programs for items or services furnished, ordered or prescribed, including administrative and management services or salary, may serve as the basis for denying reinstatement. This section applies regardless of whether a person has obtained a program provider number or equivalent, either as an individual or as a member of a group, prior to being reinstated. The person is subject to imposition of recoupment of any payments made and administrative penalties.

(e) If a person circumvents the reinstatement requirements specified in subsections (a) and (b) of this section and receives a Medicaid provider number, they may be excluded immediately, without the due process afforded providers specified in §371.1667 of this subchapter. They may also be subject to recoupment of all of the Medicaid payments made to that provider number and imposition of administrative penalties.

(f) Upon receipt of a written request, the Inspector General may require the requestor to furnish specific information and authorization for the Inspector General to obtain information from private health insurers, peer review bodies, probation officers, professional associates, investigative agencies, and others as may be necessary to determine whether reinstatement should be granted.

(g) If the Inspector General determines that the request for reinstatement should be approved from an entity, association, or affiliation whose principals were also excluded for the same violations or surrounding or regarding the same violations, that entity, association, or affiliation may be reinstated if the Inspector General determines that the principal for the entity or association:

(1) has terminated their ownership or control interest in the entity;

(2) is no longer an Officer, Director, Agent, Consultant, managing employee, or any other title with the same duties, ownership, or control of the entity; or

(3) has been reinstated in accordance with this section.

(h) Notice of action on request for reinstatement.

(1) Approval of Request for Reinstatement. If the Inspector General approves the request for reinstatement, it shall give written notice to the excluded person, and to all others who were informed of the exclusion pursuant to this subchapter, specifying the date on which Medicaid and other HHS program participation may resume. The Inspector General may condition reinstatement upon the completion of a specified course of education regarding Medicaid and other HHS claims and/or services or on any other basis deemed appropriate (e.g., requirement for closed-end, probationary or provisional provider agreement or contract, or any other action specified in §371.1631 of this subchapter).

(2) Denial of Request for Reinstatement.

(A) If the Inspector General denies the request for reinstatement, it will give written notice to the requesting person. Within 30 days of the date of the notice, the excluded person may submit:

(i) Documentary evidence and written argument against the continued exclusion,

(ii) A written request to present written evidence and oral argument to an Inspector General official, or

(iii) Both documentary evidence and a written request.

(B) After evaluating any additional evidence submitted by the excluded person (or at the end of the 30-day period, if none is submitted), the Inspector General will send written notice either that a subsequent request for reinstatement will not be considered until at least one year after the date of denial, or approving the request consistent with the procedures set forth in paragraph (1) of this subsection.

(C) The denial of reinstatement is not a sanction as specified in §371.1643 of this subchapter and may not be appealed to SOAH. It is subject only to informal review by the Inspector General. It is not subject to administrative or judicial review.

(i) Reinstatement will not be effective until Medicaid Integrity or the Inspector General grants the request and provides notice under this section. Reinstatement will be effective as provided in the notice.

(j) A determination with respect to reinstatement is not appealable or reviewable.

(k) A SOAH Administrative Law Judge may not require reinstatement of an individual or entity in accordance with this section.

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

Filed with the Office of the Secretary of State on June 7, 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

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DIVISION 5. RECOVERY OF OVERPAYMENTS

1 TAC §§371.1701, 371.1703, 371.1705, 371.1707

The new rules are proposed under §531.033 and §531.021, Texas Government Code, which provides the Commission with broad rulemaking authority; §32.021(a), (c), Human Resources Code, provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program; 531.102 establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services; the rules specifically implement the provisions of HB2292 and 1743; 42 CFR §455.13 requires the Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution; 42 CFR, Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity; 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program; 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers; and various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The proposed rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

The proposed rules affect Chapter 531, Texas Government Code, and Chapter 32, Human Resources Code.

§371.1701. Medicaid Integrity Investigation of Overpayments.

When an overpayment appears to result from a program violation that may involve misuse, waste, abuse or fraud, Medicaid Integrity investigates the circumstances precipitating the overpayment. When no wrongdoing is established through investigation, Medicaid Integrity, at the discretion of its director, may refer the matter for routine payment correction by the fiscal agent or an operating agency or may offer a payment plan, as discussed in §371.1671 of this subchapter. Prima facie cases of misuse, waste, abuse or fraud require appropriate administrative enforcement, including recoupment and other necessary administrative action, sanction or penalty. As set forth above, fraud also is subject to criminal prosecution.

§371.1703. Recovery of Overpayments.

(a) The Inspector General and its agents recover all overpayments made to providers within the Medicaid program, whether the overpayment resulted from error (by the provider, the claims administrator, or an operating agency), misunderstanding, or a program violation proven to result from fraud or abuse. When Medicaid Integrity's investigation reveals evidence of a program violation (which may or may not include an overpayment), Medicaid Integrity and the Inspector General determine and impose the appropriate administrative enforcement.

(b) Payment Hold. A payment hold on payments of future claims submitted for reimbursement will be imposed, without prior notice, after it is determined that prima facie evidence exists to support the payment hold. The payment hold may be imposed prior to completion of an investigation. It is used to withhold payments to providers that may be used subsequently to offset the overpayment or penalty amount when the investigation is complete. The provider or person will be notified of the

payment hold not later than the fifth (5th) working day after the date the hold is imposed. With the exception of a payment hold imposed as a result of paragraph (2) of this subsection, the provider or person may request an informal review and/or an expedited administrative appeal hearing. These requests must be received in writing in the method prescribed by the Inspector General not later than the 10th day after the date the active provider receives notice of the payment hold. A provider's decision to seek an informal resolution under this subsection does not extend the time by which the provider must request an expedited administrative appeal hearing. On timely written request by a provider subject to a payment hold, the Inspector General will file a request with the State Office of Administrative Hearings (SOAH) for an expedited administrative hearing regarding the payment hold. Should the provider request both an informal review and an expedited administrative appeal hearing, the expedited administrative appeal hearing will be abated until the informal review process is completed. The instances in which a payment hold may be imposed without prior notice are:

(1) to compel production of records;

(2) when requested by the Attorney General's Medicaid Fraud Control Unit, as applicable;

(3) in the instance of fraud or willful misrepresentation;

(4) when the U.S. Health and Human Services (HHS) imposes a payment hold (suspension of payments) against the provider for Medicare violations and that provider or person is also a provider in Medicaid;

(5) for any reasons specified in §§371.1609, 371.1617, 371.1621 of this title, or any other provisions delineated in these rules; or for any other reason specified by statute or regulation.

(c) Injunction to Prevent Disposing of Assets and Application to Debts. Based on the results of investigative findings and evidence that potential fraud exists and a potential overpayment, penalty, or damage has been identified, a method that may be used by the Inspector General, as a fiduciary for the state, is injunctive relief. The purpose of the injunctive relief is to ensure assets remain to reimburse the state funds owed such as recoupment of overpayments and assessed damages and penalties, investigative costs, and other costs specified in §371.1705 of this subchapter. The Inspector General for purposes of Medicaid reimbursement, will request that the Attorney General obtain an injunction to prevent a provider or person from disposing of an asset(s) identified by the Inspector General as potentially subject to recovery due to the provider's or person's fraud or abuse. Upon final resolution of the case, any funds derived from the forfeited asset(s), after offsetting any expenses attributable to the sale of those assets, will be applied, by the Inspector General, to the unpaid debt.

(d) Payment of recoupments. At the Inspector General's discretion, overpayments may be collected in a lump sum or through installments. The Inspector General may collect recoupments by deducting them incrementally from prospective or retrospective payments owed to the provider. If collection is made through installments, the provider must comply with the payment plan established by the Inspector General. A payment plan will be for a reasonable length of time as determined by the Inspector General considering the circumstances of each individual case.

(e) Other collection methods. When providers have not paid funds owed to the Medicaid program, the Inspector General will utilize numerous means necessary to aggressively collect funds owed. Some of these tools are: utilizing a collection agency, collecting from Medicare for Medicaid provider debts, requesting the State Comptroller to place a hold on all state voucher revenue for a provider or person from all state agencies, requesting the Attorney General's Collection Division to file suit in district court, and receiving and reporting credit information on providers and persons with outstanding debts.

(f) Overpayments caused by an Order. An ordering provider or person causes an overpayment to be made to themselves or to another provider as a result of a false statement, misrepresentation, or omission of pertinent facts:

(1) on a claim, attachments to a claim, medical records, document serving as an order for services, or any other documentation used to adjudicate a claim for payment;

(2) any documentation submitted or maintained by the provider to support representations made on claims;

(3) any documentation submitted or maintained by the provider to support the need or the medical necessity of the service; or

(4) other documents used to establish fees, daily payment rates, or payments.

§371.1705. Other Funds Subject to Recoupment.

In the following circumstances, the Inspector General is authorized to recover the funds specified, although no claims overpayment is involved:

(1) to recover a recipient's trust fund money for distribution to appropriate recipients or their responsible parties if those funds were misapplied, misused, embezzled or not distributed as required by program rule or by law;

(2) to recover funds previously collected by a provider or person from recipients if collection was not allowed by legal authority related to the Medicaid Program;

(3) to recover from a provider or person who has unsuccessfully appealed an administrative sanction or damage or penalty, when a final order has been entered against that provider or person, the Commission's costs related to the administrative appeal. For the purpose of this paragraph, costs related to the administrative appeal is defined as and includes, without limitation:

(A) the hourly State Office of Administrative Hearings (SOAH) costs;

(B) court reporter costs and the costs of transcripts and copies thereof developed in preparation for, during, or after the hearing;

(C) the Commission's costs associated with discovery, including the costs of depositions, subpoenas, service of process, and witness expenses;

(D) witness expenses incurred at any time related to the administrative appeal, including during discovery or the case in chief;

(E) travel and per diem for witnesses and Commission staff and witness fee and loss of pay for witnesses;

(F) cost of preparation time, including salaries, travel and per diem;

(G) any additional costs associated with the appeal hearing or the preparation for the appeal hearing; and

(H) all costs associated with any further litigation on the case and the preparation for that litigation;

(4) to recover from a provider or person against whom a recoupment or administrative penalty is assessed all investigative and administrative costs related to the investigation that resulted in the recoupment or administrative penalty;

(5) to recover an unpaid debt plus any interest owed to any state Medicaid program or to the Medicare program as the result of fraudulent or abusive actions by a person participating in such a program. After deducting its own administrative costs incurred in recovering the funds, the Inspector General shall distribute the balance of the recovered amount

to Medicare or the state Medicaid program. Recoveries will be made as required by state or federal law or pursued only upon receipt of a final adjudicated order, notice of administrative enforcement or settlement agreement (acknowledging waiver of due process) that validates the debt. Any appeal by the person from whom funds are recovered is based solely upon whether there is or is not an unpaid balance owed to the program in question; the Inspector General need not re-establish the factual or legal basis for the underlying debt.

(6) to recover from an ordering provider or person that causes, as the result of the order or prescription, an overpayment to be made to themselves or to another provider as a result of a false statement, misrepresentation, or omission of pertinent facts on a claim, attachments to a claim, medical records, or any other documentation used to adjudicate a claim for payment; any documentation submitted or maintained by the provider to support payment on individual claims or to support representations made on cost reports; any order or prescription used by the provider to show the medical necessity of the service or item provided by themselves or any other provider; or other documents used to establish fees, daily payment rates, or vendor payments.

§371.1707. Recovery When Fraud or Abuse Is Involved.

(a) Decision to recover funds. When fraud is involved, a case may be worked administratively and criminally simultaneously. When abuse or waste is involved, a case will be worked administratively by the Inspector General. At the completion of the investigation, by Medicaid Integrity, of the administrative case, the Inspector General will determine appropriate sanctions and impose those sanctions in accordance with §371.1643 of this subchapter. This process could include imposing payment hold during the pendency of the investigation after sufficient evidence is developed. After the investigation, any or all sanctions including imposing recoupment, damages and penalties, and exclusions will proceed. The criminal investigation and prosecution may proceed throughout this process.

(1) Recovery of funds that are obtained through fraudulent means by a provider or person may be recommended by the prosecuting attorney or by an administrative determination by Medicaid Integrity or the Inspector General.

(2) After a possible fraud referral is made to Medicaid Integrity, health and human service program agency staff may not attempt to recover funds without prior approval from Medicaid Integrity. Provider payments may be withheld to coincide with the investigation according to Medicaid Integrity procedures. If fraud cannot be determined or if the prosecuting attorney declines the case, the Attorney General's relevant fraud unit returns the case to Medicaid Integrity for administrative sanction or action.

(3) The prosecuting attorney may settle a case through a plea bargain and decide to accept restitution payments before or after an indictment, or a court may order restitution to the Commission for the amount of the full overpayment or only a portion of the overpayment. In this situation or upon conviction, a repayment schedule is developed by the court or the probation office. Whether restitution is made in lieu of a prosecution or following a court order, all restitution payments are ultimately returned to Medicaid Integrity and the Inspector General to reimburse the Medicaid program for the overpayment. If the court orders restitution that is less than the full amount of the overpayment, Medicaid Integrity or the Inspector General may impose a recoupment for the remaining amount of the overpayment. They may also impose additional sanctions and/or damages and penalties.

(4) The Inspector General is responsible for recoupment and/or additional sanctions, as appropriate, when referred cases do not result in prosecution. These cases are returned to Medicaid Integrity for further administrative action.

(b) Manner of repayment. When fraud is involved, repayment is arranged based on an administrative hearing, a recommendation by the district or county attorney, or a court order. Claims are collected in one lump sum whenever possible. If the provider is financially unable to pay the indebtedness in this manner, however, payment may be accepted in regular installments. Installment payments are expected to be sufficiently large to re-pay the debt within one 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.

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Steve Aragón
General Counsel
Texas Health and Human Services Commission
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DIVISION 6. ADMINISTRATIVE DAMAGES AND PENALTIES

1 TAC §§371.1721, 371.1723, 371.1725, 371.1727, 371.1729, 371.1731, 371.1733, 371.1735, 371.1737, 371.1739, 371.1741

The new rules are proposed under §§531.033 and §531.021, Texas Government Code, which provides the Commission with broad rulemaking authority; §32.021(a), (c), Human Resources Code, provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program; 531.102 establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services; the rules specifically implement the provisions of HB2292 and 1743; 42 CFR §455.13 requires the Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution; 42 CFR, Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity; 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program; 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers; and various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The proposed rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

The proposed rules affect Chapter 531, Texas Government Code, and Chapter 32, Human Resources Code.

§371.1721. Violations.

(a) Violations subject to penalties. The Inspector General may assess administrative damages and penalties against a provider or person who knew or should have known the claims submitted were false.

(b) A person commits a violation if the person:

(1) presents or causes to be presented to the Commission or its fiscal agent a claim that contains a statement or representation the person knows or should know to be false;

(2) engages in conduct that violates Section 102.001, Occupations Code;

(3) solicits or receives, directly or indirectly, overtly or covertly any remuneration, including any kickback, bribe, rebate, or inducement, in cash or in kind, for referring an individual to any item or service for which payment may be made, in whole or in part, under the medical assistance program, provided that this subdivision does not prohibit the referral of a patient to another practitioner within a multi-specialty group or university medical services research and development plan (practice plan) for medically necessary services;

(4) solicits or receives, directly or indirectly, overtly or covertly any remuneration, including any kickback, bribe, rebate, or inducement, in cash or in kind, for purchasing, leasing, or ordering, or arranging for or recommending the purchasing, leasing, or ordering of, any good, facility, service, or item for which payment may be made, in whole or in part, under the medical assistance program;

(5) offers or pays, directly or indirectly, overtly or covertly any remuneration, including any kickback, bribe, rebate, or inducement, in cash or in kind, to induce a person to refer an individual to another person for the furnishing of, or for arranging the furnishing of, any item or service for which payment may be made, in whole or in part, under the medical assistance program, provided that this subdivision does not prohibit the referral of a patient to another practitioner within a multi-specialty group or university medical services research and development plan (practice plan) for medically necessary services;

(6) offers, or pays, directly or indirectly, overtly or covertly any remuneration, including any kickback, bribe, rebate, or inducement, in cash or in kind, to induce a person to purchase, lease, or order, or arrange for or recommend the purchase, lease, or order of, any good, facility, service, or item for which payment may be made, in whole or in part, under the medical assistance program;

(7) provides or offers an inducement in a manner or for a purpose not otherwise prohibited by this section or §102.001, Occupations Code, to an individual, including a person, recipient, provider, or employee of a provider, for the purpose of influencing a decision regarding selection of a provider or receipt of a good or service under the medical assistance program or for the purpose of otherwise influencing a decision regarding the use of goods or services provided under the medical assistance program or for the purpose of otherwise influencing a decision regarding the use of goods or services provided under the medical assistance program;

(8) is a managed care organization that contracts with the Department to provide or arrange to provide health care benefits or services to individuals eligible for medical assistance and:

(A) fails to provide to an individual a health care benefit or service that the organization is required to provide under the contract with the Department;

(B) fails to provide to the Department information required to be provided by law, Department rule, or contractual provision;

(C) engages in a fraudulent activity in connection with the enrollment in the organizations managed care plan of an individual eligible for medical assistance or in connection with marketing the organization's services to an individual eligible for medical assistance; or

(D) engages in actions that indicate a pattern of:

(i) wrongful denial of payment for a health care benefit or service that the organization is required to provide under the contract with the Commission or it's fiscal agent; or

(ii) wrongful delay of at least 45 days or a longer period specified in the contract with the Department, not to exceed 60 days, in making payment for a health care benefit or service that the organization is required to provide under the contract with the Commission or it's fiscal agent.

§371.1723. Liability.

A person who commits a violation under §371.1721 of this subchapter is liable to the Commission for:

(1) the amount paid, if any, as a result of the violation and interest on that amount determined at the rate provided by law for legal judgments (Texas Civil Statutes, Article 5069-1.05) and accruing from the date on which the payment was made; plus

(2) payment of an administrative penalty of an amount not to exceed twice the amount paid, if any, as a result of the violation, plus an amount:

(A) not less than $5,000.00 or more than $15,000.00 for each violation that results in injury to an elderly person, as defined by §48.002(1), Human Resources Code, a disabled person, as defined by §48.002(8)(a), Human Resources Code, or a person younger than 18 years of age; or

(B) not more than $10,000.00 for each violation that does not result in injury to a person described by subparagraph (A) of this paragraph.

§371.1725. Exemptions.

(a) The requirements of §371.1721 of this subchapter do not apply to a claim based on a voucher unless the provider or person submitted information to the Commission or its fiscal agent for use in preparing a voucher that the provider or person knew or should have known was false or failed to correct information that the provider or person knew or should have known was false when provided an opportunity to do so. This section does not apply to a claim based on the voucher if the Commission or fiscal agent calculated and printed the amount of the claim on the voucher and then submitted the voucher to the provider for the provider's signature. The provider's or person's signature on the voucher alone does not constitute fraud.

(b) The Department allows a 30-day grace period during which the provider or person may correct errors in a voucher prepared by the Department without penalty.

§371.1727. Calculating Damages and Penalties.

To determine the amount of damages and penalties, the Inspector General considers the following:

(1) the seriousness of the violation;

(2) the provider's or person's compliance history in submitting claims; and

(3) the amount necessary to deter the person from submitting false claims in the future.

§371.1729. Assessment of Damages and Penalties.

Preliminary report. If after examining the facts Medicaid Integrity concludes that the provider or person committed a violation, the Inspector General will issue a preliminary report. The report includes the facts upon which the recommendation to assess a penalty were based and the amount of the proposed penalty.

§371.1731. Notice of Intent to Assess Damages and Penalties.

The Inspector General must give the provider or person charged with submitting a false claim a written notice of the preliminary report and the Department's intent to assess a civil monetary penalty. The notice must include the following information:

(1) a brief summary of the facts;

(2) the amount of the recommended damages and penalties; and

(3) a statement of the person's right to an informal review of the alleged violation, the penalty amount, or both.

§371.1733. Due Process.

(a) Within 10 days of receiving the notice, the provider or person may send the Inspector General either:

(1) a written consent to the report, including the recommended damages and penalties; or

(2) a written request for an informal review by the Inspector General. The provider or person must specify whether they are contesting the false claim charge or the penalty amount. They must present all information and documentation to support their position.

(b) Informal review process. If the provider or person requests a review within the 10-day period, Medicaid Integrity conducts the review and sends the person a written notice. The notice includes:

(1) the results of the review;

(2) the procedures to request a hearing.

(c) Contract hearing.

(1) The person may request a hearing by writing to the Inspector General. The Inspector General must receive the request within 15 days after the person receives the notice specified in §371.1731 of this subchapter.

(2) The hearing is conducted by the State Office of Administrative Hearings (SOAH).

§371.1735. Notice of Assessment of Damages and Penalties.

The Inspector General assesses damages and penalties by sending the person written notice of the assessment in the following circumstances:

(1) after the Inspector General receives the person's written consent to the preliminary report and recommended damages and penalties as specified in §371.1733(a) of this subchapter;

(2) if the person does not request an informal review as specified in §371.1733(b) of this subchapter;

(3) if the person does not request a contract hearing as specified in §371.1733(c) of this subchapter after receiving the results of the informal review and the statement of the recommended damages and penalties; or

(4) if the contract hearing decision orders the assessment of damages and penalties against the provider or person.

§371.1737. Payment of Damages and Penalties.

(a) Within 30 days after the date on which the Administrative Law Judge's appeal hearing decision becomes final, the provider or person shall:

(1) pay the amount of the damages and penalties;

(2) pay the amount of the damages and penalties and file a petition for judicial review contesting the occurrence of the violation, the amount of the damages and penalties, or both the occurrence of the violation and the amount of the damages and penalties; or

(3) without paying the amount of the damages and penalties, file a petition for judicial review contesting the occurrence of the violation, the amount of the damages and penalties, or both the occurrence of the violation and the amount of the damages and penalties.

(b) A provider or person who acts under §371.1673(a)(3) of this subchapter within the 30-day period may:

(1) stay enforcement of the damages and penalties by:

(A) paying the amount of the damages and penalties to the court for placement in an escrow account; or

(B) giving to the court a supersedeas bond that is approved by the court for the amount of the penalty and that is effective until all judicial review of the SOAH order is final; or

(2) request the court to stay enforcement of the penalty by:

(A) filing with the court a sworn affidavit of the provider or person stating the provider or person is financially unable to pay the amount of the damages and penalties and is financially unable to give the supersedeas bond; and

(B) giving a copy of the affidavit to the Inspector General by certified mail.

(c) If the Inspector General receives a copy of an affidavit under subsection (b)(2) of this section, the Inspector General may file with the court, within 5 days after the date the copy is received, a contest to the affidavit. The court shall hold a hearing on the facts alleged in the affidavit as soon as practicable and shall stay the enforcement of the damages and penalties on finding that the alleged facts are true. The person who files an affidavit has the burden of proving that the person is financially unable to pay the amount of the penalty or to give a supersedeas bond.

(d) If the provider or person charged does not pay the amount of the damages and penalties and the enforcement of the penalty is not stayed, the Inspector General may forward the matter to the attorney general for enforcement of the damages, penalties, and interest as provided by law for legal judgments. An action to enforce a penalty order under this section must be initiated in a court of competent jurisdiction in Travis County or in the county in which the violation was committed.

(e) Judicial review. Judicial review of the SOAH appeal decision assessing a penalty is under the substantial evidence rule. A suit may be initiated by filing a petition with a district court in Travis County, as provided by subchapter G. chapter 2001, Government Code.

(f) If the damages and penalties are reduced or not assessed, the Inspector General shall remit to the provider or person the appropriate amount plus accrued interest if the damages and penalties have been paid or shall execute a release of the bond if a supersedeas bond has been posted. The accrued interest on amounts remitted by the Inspector General under this section shall be paid at a rate equal to the rate provided by law for legal judgments and shall be paid for the period beginning on the date the damages and penalties were paid to the Inspector General under this section and ending on the date the damages and penalty are remitted.

§371.1739. Exclusion.

A finding of a violation under §371.1721 of this subchapter may result in mandatory exclusion of the provider or person. These circumstances are delineated in §371.1655 (Mandatory Exclusion) of this subchapter.

§371.1741. Prohibited Use of Damages and Penalties in Cost Reports or Claims.

A damage, cost, or penalty collected under this subchapter is not an allowable expense in a claim or cost report that is or could be used to determine a rate or payment under the medical assistance 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.

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Steve Aragón
General Counsel
Texas Health and Human Services Commission
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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS
SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING SCHOOL FACILITIES

19 TAC §61.1034

The Texas Education Agency (TEA) proposes an amendment to §61.1034, concerning school facilities. The section establishes provisions related to the allotment for new instructional facilities as authorized under Texas Education Code (TEC), §42.158. The proposed amendment replaces an earlier version that was filed as proposed in the March 19, 2004, issue of the *Texas Register* (29 TexReg 2840), which has been withdrawn. Like the earlier version, the proposed amendment would modify existing provisions in order to accommodate an electronic, web-based application for funding. The new proposed changes restore language regarding the requirements to send documents by certified mail that were inadvertently omitted in the originally proposed amendment. Additional changes also clarify the deadline for submitting on-line applications and the supporting documentation.

Senate Bill 4, 76th Texas Legislature, 1999, created the new instructional facility allotment (NIFA) within the first tier of the Foundation School Program pursuant to TEC, Chapter 42. The NIFA provides funding of $250 for each student in average daily attendance at a new instructional facility during the first school year of operation, and $250 for each new student in attendance at the facility for the second school year. The specifications for this program were adopted in 19 TAC §61.1034 in January 2000 and have not been amended since. The proposed amendment to 19 TAC §61.1034 would add language related to campus qualifications and the new electronic, web-based application and would remove outdated language related to specifications for the 1999-2000 school year. This proposed amendment restores language inadvertently omitted in the original proposal regarding sending documents by certified mail, clarifies the submission deadline, and makes minor punctuation corrections.

Language is added in subsection (a)(1) to specify the qualification requirements for first-year, follow-up, and one-year funding.

Language in subsection (b) is modified to establish provisions related to the first-year application, including electronic submissions and submission of materials by certified mail; to address the deadline for submitting on-line applications and supporting documents; and to specify requirements for second-year applications.

Language in subsection (c)(3) is deleted to remove specifications related to the 1999-2000 school year. Minor punctuation changes are proposed in subsection (c)(5).

Joe Wisnoski, Deputy Associate Commissioner for School Finance and Fiscal Analysis, 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 or administering the section.

Mr. Wisnoski 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 section would be the streamlining of the application process. School districts would submit their applications for funding via a secure web-based application. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of a proposed change in the section has been published in the *Texas Register*.

The amendment is proposed under the Texas Education Code, §42.158(f), which authorizes the commissioner of education to adopt rules as necessary to implement the new instructional facilities allotment.

The amendment implements the Texas Education Code, §42.158.

§61.1034. New Instructional Facility Allotment.

(a) Definitions and eligibility. The following definitions and eligibility criteria apply to the new instructional facility allotment (NIFA) in accordance with Texas Education Code (TEC), §42.158.

(1) A facility eligible for the NIFA is a newly constructed instructional site (campus)[~~, not occupied prior to the 1999-2000 school year,~~] used for teaching the curriculum required by TEC, Chapter 28. To qualify for first-year funding, a new campus will not have been occupied in the prior school year. To qualify for follow-up funding, the campus will have been occupied for the first time in the prior school year and funded for the NIFA for that first year. A special case of one-year funding pertains to facilities that were occupied for the first time in the prior school year but did not receive NIFA funds because of a failure to apply. Any such eligible campus will receive funds for one year of operation only.

(2) The facility must have its own principal or will receive an accountability rating through the standard or the optional alternative rating procedures as described in the most current accountability manuals, published by the Texas Education Agency (TEA).

(3) The facility must have its own unique campus ID number as designated by the TEA, its own record of expenditures that is not a subset of another school budget, and attendance data that can be reported for those students who are assigned to its campus.

(4) With the exception of a covered walkway connecting the new facility to another building, the new facility must be physically separate from other existing school structures.

(5) The facility must have its own assigned instructional staff and instructional program distinct from other facilities, and cannot be a program for students enrolled in another public school (summer school, evening school, etc.).

(6) Expansion or renovation of existing facilities, as well as portable and temporary structures, are not eligible for the NIFA.

(b) Application process. School districts must complete the TEA's on-line [an] application process requesting funding pursuant to the NIFA.

(1) The initial (first-year) application must include the following:

(A) the electronic submission of the TEA's on-line application for initial funding; and

(B) the submission of the following materials by certified mail through the U.S. Postal Service or other common postal carrier:

(i) a brief description and photograph of the newly constructed instructional site; and

(ii) a copy of a legal document that clearly describes the nature and dates of the new construction.

[(A) a written request for funds;]

[(B) a brief description and photograph of the newly constructed instructional site;]

[(C) a copy of contracts that document the nature and dates of the construction; and]

[(D) an estimate of the number of students in average daily attendance (ADA).]

(2) On-line [For the 1999-2000 school year,] applications must be submitted electronically no later than July 15 and supporting documents must be postmarked no later than July 15 of the year preceding the applicable school year [by the last day in December in order to qualify for the allotment. For school years beginning with 2000-2001, applications must be postmarked by July 15].

[(3) All applications must be submitted to the TEA by certified mail through the U.S. Postal Service or other common postal carrier.]

(3) [(4)] Second-year applications require only the electronic submission of the TEA's on-line application for follow-up funding no later than July 15 of the year preceding the applicable school year [an estimate of students in ADA].

(c) Costs and payments. The cost and payments for the NIFA are determined by the commissioner of education.

(1) The allotment for the NIFA is a part of the cost of the first tier of the Foundation School Program (FSP). This allotment is not counted in the calculation of weighted average daily attendance (WADA) for the second tier of the FSP.

(2) If, for all eligible districts combined, the total cost of the NIFA exceeds the amount appropriated, each allotment is reduced so that the total amount to be distributed equals the amount appropriated. Reductions to allotments are made by applying the same number of cents of tax rate in each district to the district's taxable value of property so that the reduced total for all districts equals the amount appropriated. For each district, the taxable value of property is the property value certified by the Comptroller of Public Accounts for the preceding school year as determined under Government Code, Chapter 403, Subchapter M, or, if applicable, a reduced property value that reflects either a rapid decline pursuant to TEC, §42.2521, or a grade level adjustment pursuant to TEC, §42.106.

(3) Allocations [For the 1999-2000 school year, districts not subject to the requirements of wealth equalization pursuant to TEC, Chapter 41, will begin receiving payments of the NIFA in January based on the estimate of ADA submitted in the funding application. For the remainder of 1999-2000 and for subsequent years, allocations] will be made in conjunction with allotments for the FSP in accordance with the district's payment class. For districts that are not subject to the requirements of TEC, Chapter 41, and do not receive payments from the Foundation School Fund, NIFA distributions will correspond to the schedule for payment class 3.

(4) For districts that are required to reduce wealth pursuant to TEC, Chapter 41, any NIFA funds for which the district is eligible are applied as credits to the amounts owed to equalize wealth.

(5) For all districts receiving the NIFA, a final (settle-up) amount earned is determined by the commissioner when final counts of ADA, as reported through the Public Education Information Management System (PEIMS), are available for the eligible campus[,] at the close of business for the school year.

(6) The amount of funds to be distributed for the NIFA to a school district is in addition to any other state aid entitlements.

This 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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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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TITLE 34. PUBLIC FINANCE

PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 41. HEALTH CARE AND INSURANCE PROGRAMS

SUBCHAPTER A. RETIREE HEALTH CARE BENEFITS (TRS-CARE)

34 TAC §41.7, §41.11

The Teacher Retirement System of Texas (TRS) proposes amendments to §41.7, relating to effective date of coverage and a new §41.11, relating to years of service credit used to determine premiums, each relative to the Texas Public School Retired Employees Group Insurance Program (TRS-Care). These proposed amendments and the new section implement Senate Bill 1369 and House Bill 3459, 78th Legislature, Regular Session, 2003, and House Bill 7, 78th Legislature, 3rd Called Session, 2003. The proposed amendments to §41.7 implement changes to the effective date of coverage based on the new TRS-Care eligibility criteria set out in House Bill 7 for those TRS members taking a service retirement after September 1, 2004.

They also address when TRS-Care coverage begins for those retirees taking advantage of the additional enrollment opportunity provided by the referenced legislation. The proposed new §41.11 addresses which years of service credit will be used in determining premiums for TRS retirees, surviving spouses, and divorced spouses who elect COBRA coverage pursuant to Senate Bill 1369 and House Bill 3459.

Ronnie Jung, Executive Director, has determined that for each year of the first five-year period that the proposed amendments and the new section are in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the amendments or the new section. There is no foreseeable effect on local employment or local economies as a result of the proposed amendments or new section.

Mr. Jung has also determined that for each year of the first five years that the proposed amendments to §41.7 are in effect, the public benefit anticipated as a result of the amendments will be that TRS rules will comply with the statutory changes and that those TRS members taking a retirement after September 1, 2004 will have notice of when their coverage will be effective. Mr. Jung has determined that for each year of the first five years that the proposed new §41.11 is in effect, the public benefit anticipated as a result of the new section will be notice to retirees, surviving spouses, and divorced spouses electing COBRA of the years of service credit that will be used to determine their TRS-Care premiums. There is no anticipated adverse economic effect on small businesses or micro-businesses as a result of compliance with the proposed amendments or new section. Mr. Jung has determined that there is no potential economic costs to persons required to comply with the proposed amendments. Mr. Jung has determined that the potential economic costs to persons required to comply with the proposed new section for each year of the first five years the proposal will be in effect may be the difference in the amount of premium paid based on their years of service credit as provided by the new section.

Written comments on the proposal may be submitted to Ronnie Jung, Executive Director, 1000 Red River, Austin, Texas 78701.

These sections are proposed under Insurance Code §1575.052, which gives TRS the authority to adopt rules as necessary to administer and operate the TRS-Care program. The sections are also proposed under Government Code, Chapter 825, §825.102, which authorizes the Board of Trustees of the Teacher Retirement System to adopt rules for the transaction of business of the Board.

There are no other codes affected.

§41.7. Effective Date of Coverage.

(a) The following words and phrases, when used in this section, [~~shall~~] have the following meanings, unless the context clearly indicates otherwise.

(1) Noncontributory coverage means TRS-Care[~~--The~~] coverage provided at no cost to eligible TRS retirees and surviving spouses.

(2) Contributory coverage means TRS-Care coverage[~~--Coverage~~] for which eligible TRS retirees, surviving spouses, and surviving dependent children must pay at least some part of the cost [~~a contribution is required~~].

(b) For those TRS members who take a service or disability retirement before September 1, 2004, and who enroll or are enrolled in noncontributory coverage during their initial enrollment period as described in §41.1 of this chapter relating to Enrollment Periods for the Texas Public School Retired Employees Group Insurance Program (TRS-Care), the [~~The~~] effective date of such [~~noncontributory~~] coverage is [~~for a retiree shall be~~] the first day of the month following the effective date of retirement unless the retiree has waived coverage in writing.

(c) This subsection applies to the following TRS members: those who take a service or disability retirement after September 1, 2004, and enroll in noncontributory coverage during their initial enrollment period as described in §41.1 of this chapter and those who, regardless of their retirement date, enroll in contributory coverage during their initial enrollment period as described in §41.1. For such members, the [~~The~~] effective date of [~~contributory~~] coverage is [~~for the retiree shall be~~]:

(1) the first day of the month following the effective date of retirement if the application for coverage is received by TRS-Care on or before the effective retirement date; or

(2) the first day of the month following the receipt of the application by TRS-Care if the application is received after the effective retirement date but within the initial [~~31-day~~] enrollment period.

(d) Retirees who, due to their effective retirement date, have a choice of beginning [~~contributory~~] coverage in two different months may defer the effective date of coverage to the first day of the latter month if that election is made in writing and is received by TRS-Care before [~~in advance of~~] the beginning of the first month in which the effective date of coverage could have taken place.

(e) The effective date of coverage for a surviving spouse or for a surviving dependent child is [~~shall be~~] the first day of his or her [~~their~~] eligibility if TRS-Care receives an application within the initial enrollment period as described in §41.1 of this chapter and the deceased participant had the surviving spouse or the surviving dependent child enrolled in TRS-Care [~~covered under the program~~] before the participant [~~he or she~~] died.

(f) If [~~Where~~] the surviving spouse or the surviving dependent child was not enrolled in TRS-Care [~~covered under the program~~] immediately preceding his or her becoming eligible for coverage, the effective date of coverage will be the first day of the month following TRS-Care's receipt of an application during the initial enrollment period as described in §41.1 of this chapter [~~by TRS-Care~~].

(g) The effective date of coverage for an eligible dependent [~~dependents who are eligible to be enrolled and~~] who is [~~are~~] enrolled under a retiree's or surviving spouse's TRS-Care coverage during the initial enrollment period is the same date as the retiree or surviving spouse's effective date of coverage unless the dependent is enrolled after the retiree's effective retirement date and after the retiree has enrolled but within the initial enrollment period, in which case the dependent's effective date of coverage will be the first day of the month following TRS-Care's receipt of the application to enroll the dependent.[~~will be:~~]

[~~(1) the same date as the retiree or surviving spouse if the enrollment is during the initial enrollment period;~~]

[~~(2) the first day of the month following receipt of the application by TRS-Care if the enrollment of the dependents is after the initial enrollment period; or~~]

[~~(3) the day on which a child is born, if the participant has coverage for children already in effect under TRS-Care.~~]

(h) The effective date of coverage for an eligible dependent who is enrolled under a retiree's or surviving spouse's TRS-Care coverage as a result of a special enrollment event under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) is the date specified by HIPAA.

(i) The effective date of coverage for a retiree, a surviving spouse, and an eligible dependent who have a second initial enrollment period as described in §41.1 of this chapter relating to Enrollment Periods for the Texas Public School Retired Employees Group Insurance Program (TRS-Care) and who enroll during the time period prescribed by §41.1 is:

(1) the first day of the month following the date that the retiree or surviving spouse becomes eligible for TRS-Care under subsections (c)(1), (c)(2), or (c)(3) of §41.10 of this chapter relating to Eligibility to Enroll in the Texas Public School Retired Employees Group Insurance Program if the application for coverage is received by TRS-Care on or before the date of eligibility for TRS-Care under subsections (c)(1), (c)(2), or (c)(3) of §41.10; or

(2) the first day of the month following the receipt of the application by TRS-Care if the application is received after the date on which the retiree or surviving spouse becomes eligible for TRS-Care under subsections (c)(1), (c)(2), or (c)(3) of §41.10 of this chapter but within the enrollment period.

(j) The effective date of coverage for a retiree, a surviving spouse, and an eligible dependent who have an additional enrollment opportunity as described in §41.2(b) of this chapter relating to Additional Enrollment Opportunity and who submit an application within the time period described by §41.2 is:

(1) September 1, 2004, if the application for coverage is received by TRS-Care by August 31, 2004; or

(2) October 1, 2004, if the application is received on or after September 1, 2004 but within the enrollment period.

(k) The effective date of coverage for a retiree, a surviving spouse, and an eligible dependent who have an additional enrollment opportunity as described in §41.2(c) or §41.2(d) of this chapter relating to Additional Enrollment Opportunity and who submit an application within the time period described by §41.2 is:

(1) the first day of the month following the retiree's or surviving spouse's 65th birthday if the application for coverage is received by TRS-Care on or before the retiree's or surviving spouse's 65th birthday; or

(2) the first day of the month following the receipt of the application by TRS-Care if the application is received after the retiree's or surviving spouse's 65th birthday but within the enrollment period.

(l) [~~(h)~~] Except as provided in subsections (o), (p), and (q) [~~(l), (m), and (n)~~] of this section, the effective date of changes in coverage due to the acquisition of Medicare is [~~shall be on~~] the first of the month following the date of TRS-Care's receipt of a copy of the participant's or dependent's Medicare card [~~by TRS-Care~~].

(m) [~~(i)~~] Except as provided in subsections (o), (p), and (q) [~~(l), (m), and (n)~~] of this section, the effective date of reduction in coverage shall be the first day of the month following TRS-Care's receipt of a signed request [~~by TRS-Care~~] for reduced coverage.

(n) [~~(j)~~] A retiree, surviving spouse, or surviving dependent child may cancel any coverage by submitting the appropriate cancellation notice to TRS-Care.

(1) Cancellations will be effective on: [~~at midnight on the last day of the month in which the signed notice is received by the program.~~]

(A) the first day of the month following the date printed on the notice of cancellation form ("notice date") sent to the retiree at the retiree's last known address, as shown in the TRS-Care records, if TRS-Care receives the completed notice of cancellation within fourteen days of the notice date; or

(B) the first day of the month following TRS-Care's receipt of the retiree's completed notice of cancellation form if the form is received more than fourteen calendar days after the notice date; or

(C) the first day of the month following TRS-Care's receipt of a written request to cancel coverage from a surviving spouse or from or on behalf of a surviving dependent child.

(2) This subsection [~~section~~] shall also apply to waivers of noncontributory coverage by retirees who take a TRS retirement before September 1, 2004.

[~~(k) All participants and dependents shall be entitled to all applicable rights under the Federal Public Health Service Act (COBRA), Title XXII.~~]

(o) [~~(l)~~] Where a participant who has Medicare Part A coverage incorrectly enrolls in an insurance coverage option that provides for coverage without corresponding Medicare Part A coverage and [~~as a result~~] payment is made by Medicare and TRS-Care in a manner that violates the provisions of Chapter 1575, Insurance Code, [~~Article 3.50-4,~~] which requires TRS-Care to be secondary to Medicare, TRS may [~~the Teacher Retirement System of Texas (TRS) is authorized to~~] seek the recovery of funds paid in violation of Chapter 1575 [~~Article 3.50-4~~] and may [~~to~~] make the effective date of the correct coverage retroactive to the first day of the earliest month for which recovery of such overpaid funds is possible under Medicare rules.

(p) [~~(m)~~] Where a participant who has Medicare Part A coverage incorrectly enrolls in a TRS-Care coverage option that provides for coverage without corresponding Medicare Part A and there is no claim made upon TRS-Care or the legitimate claim is less than the amount of overpaid contributions, TRS-Care may [~~is authorized to~~] refund or credit the amount due to the participant and may [~~to~~] make the effective date of the correct coverage retroactive to when the participant was first enrolled in both Medicare and TRS-Care to a maximum retroactive period of twelve months, including the month in which proof of Medicare Part A is received by TRS-Care.

(q) [~~(n)~~] Upon TRS-Care's discovery that [~~by TRS-Care of~~] a participant [~~who~~] does not have Medicare Part A coverage and [~~who~~] is incorrectly enrolled in a TRS-Care coverage option that requires [~~provides for corresponding~~] Medicare Part A coverage, TRS-Care will contact the participant and advise the participant [~~them~~] that the cost of coverage and the coverage will be adjusted prospectively effective the first day of the next month unless a copy of a Medicare card showing Part A coverage is received prior to that date. Claims will [~~shall~~] be paid based upon the coverage in effect at the time the services were provided. Any claims already paid as if Part A were [~~was~~] in effect will[~~shall~~] not be adjusted.

§41.11. Years of Service Credit Used to Determine Premiums.

(a) In addition to other criteria that TRS may use to determine premiums, pursuant to section 1575.212, Insurance Code, TRS may use years of service credit to determine applicable premium rates.

(b) To determine the applicable premium for those retirees who take a TRS retirement before September 1, 2004, TRS will use the retiree's years of service credit to which the retiree is entitled under the Chapter 823, Government Code, at the time of the TRS retirement.

(c) To determine the applicable premium for those retirees who take a TRS retirement after September 1, 2004, TRS will use the retiree's years of service credit that can be considered in determining eligibility for TRS-Care benefits at the time of the TRS retirement.

(d) To determine the applicable premium for surviving spouses and divorced spouses who elect COBRA coverage, TRS will use the retiree's years of service credit as determined by either subsection (b) or subsection (c) of this section, as applicable.

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

Filed with the Office of the Secretary of State on June 7, 2004.

TRD-200403715
Ronnie G. Jung
Executive Director
Teacher Retirement System of Texas
Proposed date of adoption: July 23, 2004
For further information, please call: (512) 542-6115

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SUBCHAPTER C. TEXAS SCHOOL EMPLOYEES GROUP HEALTH (TRS-ACTIVECARE)

34 TAC §41.38, §41.50

The Teacher Retirement System of Texas (TRS) proposes amendments to §41.38, relating to termination date of coverage and to §41.50, relating to adjudication of claims, both concerning the Texas School Employees Uniform Group Health Coverage Program known as TRS-ActiveCare. The proposed amendments to §41.38 clarify that coverage for an individual enrolled in a TRS-ActiveCare health maintenance organization (HMO) terminates for the reasons and on the date specified in the individual's evidence of coverage from the HMO. The proposed amendments to §41.38 also add a termination provision for participants whose participating entity fails to make all premium payments for at least 90 days. The proposed amendments to §41.50 clarify that appeals from enrollees participating in a TRS-ActiveCare health maintenance organization (HMO) are not included within this appeal process but follow the HMO's appeal process.

Ronnie Jung, Executive Director, has determined that for each year of the first five-year period the amendments are in effect, there will be no determinable fiscal implications to state or local governments as a result of enforcing or administering the amended sections. There is no foreseeable effect on local employment or local economies as a result of the proposed amendments.

Mr. Jung has also determined that for each year of the first five years that the proposed amendments are in effect the public benefit anticipated as a result of the amendments to §41.38 will be that the rules are consistent with current HMO practice and that TRS-ActiveCare can limit its financial exposure when participating entities fail to make any premium payments for an extended period of time. Mr. Jung has determined that for each year of the first five years that the proposed amendments are in effect the public benefit anticipated as a result of the amendments to §41.50 will be that those enrolled in a TRS-ActiveCare HMO have clearer notice of what appeal process applies to them. There is no anticipated adverse economic effect on small businesses or micro-businesses as a result of compliance with the proposed amendments.

Mr. Jung has also determined that the anticipated economic costs to persons required to comply with the proposed amendments that address termination for a participating entity's failure to pay all premiums for at least 90 days for each year of the first five years the proposal will be in effect could include an individual whose coverage has been terminated and who does not elect COBRA coverage being required to pay for health care services the individual received after coverage was terminated. Mr. Jung has determined that there are no anticipated economic costs to persons required to comply with the other proposed amendments for each year of the first five years the proposal will be in effect.

Written comments on the proposal may be submitted to Ronnie Jung, Executive Director, 1000 Red River, Austin, Texas 78701.

These amendments are proposed under §1579.052, Insurance Code, which gives TRS authority to adopt rules relating to the TRS-ActiveCare program as necessary. The amendments are also proposed under Government Code, Chapter 825, §825.102, which authorizes the Board of Trustees of the Teacher Retirement System to adopt rules for the administration of the funds of the retirement system and for the transaction of business of the Board.

There are no other codes affected by the proposal.

§41.38. Termination Date of Coverage.

(a) Unless otherwise required by law or this section, coverage shall terminate at the earliest of:

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

(3) 11:59 p.m. Central Time on the last calendar day of the month in which a covered individual, or the individual under whom a dependent qualified for coverage, is no longer eligible for coverage under the TRS-ActiveCare program under §41.34 of this title (relating to Eligibility for Coverage under the Texas School Employees Uniform Group Health Coverage Program); [~~or~~]

(4) 11:59 p.m. Central Time on the date specified by the trustee if the covered individual, or the individual under whom a dependent qualified for coverage, is expelled from the program;[.]

(5) 11:59 p.m. Central Time on the last calendar day of the month immediately preceding the month in which TRS receives a notification from a participating entity, in the form prescribed by TRS, that a covered individual failed to make a required monthly premium payment to the participating entity;[.]

(6) 11:59 p.m. Central Time on the last calendar day of the month in which a covered individual enters into active, full-time military, naval, or air service, except as provided under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) or other applicable law; or[.]

(7) 11:59 p.m. Central Time on the last day of the month for which TRS-ActiveCare received payment if the participating entity employing the covered individual, or the individual under whom a dependent qualified for coverage, has failed to make all premium payments due for a period of 90 days or longer; or

(8) the termination date that a health maintenance organization participating in the TRS-ActiveCare program provides for in its Evidence of Coverage for the reasons listed in that Evidence of Coverage.

(b) (No change.)

§41.50. Adjudication of Claims.

(a) A person enrolled in the TRS-ActiveCare program, other than a person enrolled in a health maintenance organization (HMO) participating in TRS-ActiveCare, who is denied payment of a claim or other benefit ("Claimant") may submit a written request to the administering firm for reconsideration of the claim. The claimant shall submit a request for reconsideration according to procedures established by the administering firm. All relevant medical information should be submitted to the administering firm prior to a final decision. Persons enrolled in a TRS-ActiveCare HMO follow the appeal procedures set out by the HMO.

(b) - (n) (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 June 7, 2004.

TRD-200403716
Ronnie G. Jung
Executive Director
Teacher Retirement System of Texas
Proposed date of adoption: July 23, 2004
For further information, please call: (512) 542-6115

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 4. COMMERCIAL VEHICLE REGULATIONS AND ENFORCEMENT PROCEDURES

SUBCHAPTER A. REGULATIONS GOVERNING HAZARDOUS MATERIALS

37 TAC §4.1

The Texas Department of Public Safety proposes an amendment to Chapter 4, Subchapter A, §4.1, Regulations Governing Hazardous Materials. The amendment to §4.1 adds "as amended through May 1, 2004" to subsection (a). The amendment is necessary to ensure that the Federal Hazardous Material Regulations, incorporated by reference in the section, reflects all amendments made through that particular date.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the amendment is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also determined that for each year of the first five-year period the amendment is in effect the public benefit anticipated as a result of enforcing the amended rule will be to ensure to the public greater compliance by motor carriers with all of the statutes and regulations pertaining to the safe operation of commercial vehicles in this state. There is no adverse economic impact anticipated for individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted to Mark Rogers, Major, Texas Highway Patrol Division, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0500, (512) 424-2116.

The amendment is proposed pursuant to Texas Government Code, §411.018, which authorizes the director to adopt all or part of the federal hazardous materials rules by reference; and Texas Transportation Code, §644.051, which authorizes the director to adopt all or part of the federal safety regulations by reference.

Texas Government Code, §411.018 and Texas Transportation Code, §644.051 are affected by this proposal.

§4.1. Transportation of Hazardous Materials.

(a) The director of the Texas Department of Public Safety incorporates, by reference, the Federal Hazardous Materials Regulations, Title 49, Code of Federal Regulations, Parts 107 (Subpart G), 171-173, 177, 178, and 180, including all interpretations thereto, for commercial vehicles operated in intrastate, interstate, or foreign commerce, as amended through May 1, 2004.

(b) (No change.)

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

Filed with the Office of the Secretary of State on June 2, 2004.

TRD-200403658
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: July 18, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER B. REGULATIONS GOVERNING TRANSPORTATION SAFETY

37 TAC §§4.11, 4.12, 4.18

The Texas Department of Public Safety proposes amendments to Chapter 4, Subchapter B, §§4.11, 4.12 and 4.18, concerning Regulations Governing Transportation Safety.

The amendment to §4.11 adds "as amended through May 1, 2004" to subsection (a). The amendment is necessary to ensure that the Federal Motor Carrier Safety Regulations, incorporated by reference in the section, reflects all amendments made through that particular date.

The amendment to §4.12 is necessary in order to further clarify department policy concerning the 34 hour restart provision and the requirements for 150 air-mile radius drivers.

The amendment to §4.18 is necessary in order to correct the mailing address of the Motor Carrier Bureau.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the amendments are in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also determined that for each year of the first five-year period the amendments are in effect the public benefit anticipated as a result of enforcing the amended rules will be to ensure

to the public greater compliance by motor carriers with all of the statutes and regulations pertaining to the safe operation of commercial vehicles in this state. There is no adverse economic impact anticipated for individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted to Mark Rogers, Major, Texas Highway Patrol Division, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0500, (512) 424-2116.

The amendments are proposed pursuant to Texas Transportation Code, §644.051, which authorizes the director to adopt rules regulating the safe transportation of hazardous materials and the safe operation of commercial motor vehicles; and authorizes the director to adopt all or part of the federal safety regulations by reference.

Texas Transportation Code, §644.051 is affected by this proposal.

§4.11. General Applicability and Definitions.

(a) General. The director of the Texas Department of Public Safety incorporates, by reference, the Federal Motor Carrier Safety Regulations, Title 49, Code of Federal Regulations, Parts 40, 382, 385, 386, 387, 390-393, and 395-397 including all interpretations thereto, as amended through May 1, 2004. The rules adopted herein are to ensure that:

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

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

§4.12. Exemptions and Exceptions.

(a) (No change.)

(b) Exceptions. Exceptions adopted by the director of the Texas Department of Public Safety not specified in Texas Transportation Code, §644.053, are as follows:

(1) (No change.)

(2) Drivers of vehicles under this section operating in intrastate transportation shall not be permitted to drive after having worked and/or driven for 70 hours in any consecutive seven-day period. A driver may restart a consecutive seven-day period after taking 34 or more consecutive hours off-duty.

(3) Drivers of vehicles operating in intrastate transportation claiming the 150 air mile radius exemption in subsection (a)(4) of this section must return to the work reporting location; [and] be released from work within 12 consecutive hours; and have at least 8 consecutive hours off-duty separating each 12 hours on-duty.

(4) - (8) (No change.)

§4.18. Intrastate Operating Authority Out-of-Service Review.

(a) A motor carrier may request a review of the out-of-service order within 10 business days of the issuance of the out-of-service order. A request for a review does not stay the out-of-service order. A request for an out-of-service review must be made in writing and forwarded to the manager of the Motor Carrier Bureau. If requested, a review will be scheduled and conducted by the manager of the Motor Carrier Bureau or the director's designee within 10 business days of the issuance of the out-of-service order. A request for review should be addressed to the Texas Department of Public Safety, Motor Carrier Bureau, P.O. Box 4087, Austin, Texas 78773-0521 [~~78773-0571~~] or may be sent by facsimile transmission to (512) 424-5712 or via electronic mail at MotorCarrierBureau@txdps.state.tx.us. The department may conduct the review by telephone conference call. An out-of-service review should be conducted within 3 business days of the date of receipt of the request for a review.

(b) A request for review under subsection (a) of this section [~~subsection~~] must contain the following: a concise statement of the issues to be contested at the review.

(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 June 2, 2004.

TRD-200403659
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: July 18, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER C. COMMERCIAL VEHICLE REGISTRATION AND INSPECTION ENFORCEMENT

37 TAC §4.37

The Texas Department of Public Safety proposes an amendment to Chapter 4, Subchapter C, §4.37, concerning Acceptance of Out-of-State Commercial Vehicle Inspection Certificate. The amendment to the section is necessary in order to correct the name of the federal agency listed in the rule.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the amendment is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also determined that for each year of the first five-year period the amendment is in effect the public benefit anticipated as a result of enforcing the amended rule will be to ensure to the public greater compliance by motor carriers with all of the statutes and regulations pertaining to the safe operation of commercial vehicles in this state. There is no adverse economic impact anticipated for individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted to Mark Rogers, Major, Texas Highway Patrol Division, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0500, (512) 424-2116.

The amendment is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §548.002, which authorizes the department to adopt rules to administer and enforce the compulsory inspection of vehicles.

Texas Government Code, §411.004(3), and Texas Transportation Code, §548.002 are affected by this proposal.

§4.37. Acceptance of Out-of-State Commercial Vehicle Inspection Certificate.

(a) Texas-registered commercial vehicles. Acceptance of commercial vehicle inspection certificates issued outside of Texas. A valid commercial vehicle inspection certificate issued in a jurisdiction having an inspection program that has been certified by the Federal Motor Carrier Safety Administration under the provisions of Title 49, Code of Federal Regulations, §396.23(b)(1) as meeting the requirements of §396.17 is acceptable on a Texas-registered commercial vehicle.

(b) (No change.)

(c) Jurisdictions certified under the provisions of Title 49, Code of Federal Regulations, §396.23(b)(1). The following jurisdictions have been certified by the Federal Motor Carrier Safety Administration as meeting the requirements of Title 49, Code of Federal Regulations, §396.23(b)(1): Alabama (LPG Board), Arkansas, California, Connecticut, District of Columbia, Hawaii, Illinois, Louisiana, Maine, Maryland, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio (Bus Inspection Program), Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, or any of the ten Canadian Provinces and the Yukon Territory.

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

Filed with the Office of the Secretary of State on June 2, 2004.

TRD-200403660

Thomas A. Davis, Jr.

Director

Texas Department of Public Safety

Earliest possible date of adoption: July 18, 2004

For further information, please call: (512) 424-2135

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

SUBCHAPTER X. REQUIREMENTS FOR MEDICAID-CERTIFIED FACILITIES

40 TAC §19.2320

The Texas Department of Human Services (DHS) proposes to amend §19.2320, concerning medical transportation, in its Nursing Facility Requirements for Licensure and Medicaid Certification chapter. The purpose of the amendment is to comply with the requirements of House Bill 2292, 78th Texas Legislature, which amended Human Resources Code, §32.024. The amendment will allow nursing facilities to use the state's Medicaid community-based Title XIX medical transportation program to transport recipients for renal dialysis treatments.

Gordon Taylor, DHS's Chief Financial Officer, has determined that, for the first five-year period the proposed amendment is in effect, there are no fiscal implications for DHS as a result of enforcing or administering the section. However, there are fiscal implications for the state in the related policy proposed by the Texas Health and Human Services Commission (HHSC) in the May 28, 2004, issue of the *Texas Register*. Tom Suehs, Deputy Executive Commissioner for Financial Services, HHSC, has determined that during the first five years the proposed amendments to 1 Texas Administrative Code (TAC) §380.203 and §380.207 (HHSC, Medical Transportation Program) are in effect, there will be an estimated fiscal impact to the state for State Fiscal Year 2004 of $104,784 in general revenue and for the State Fiscal Year 2005 of $418, 926 in general revenue. There are no foreseeable fiscal implications for local governments.

Bettye M. Mitchell, Deputy Commissioner for Long Term Care, 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 nursing facility residents will have improved access to dialysis services because they can access medical transportation services for renal dialysis treatments.

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 rule does not add an expense for the facility but instead allows transportation to be funded through the Title XIX program for facilities that transport residents to dialysis treatments. There is no anticipated economic cost to persons who are required to comply with the proposed section for the same reason. 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 Marcia Bowen at (512) 438- 3161 in DHS's Long-Term Care Regulatory Policy section. Written comments on the proposal may be submitted to Supervisor, Rules Unit-191, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Under Government Code, §2007.003(b), DHS has determined that Chapter 2007 of the Government Code does not apply to this rule. The change this rule makes does not implicate a recognized interest in private real property. Accordingly, DHS is not required to complete a takings impact assessment regarding this rule.

This rule is proposed by DHS, subject to the subsequent transfer of rulemaking authority to HHSC. DHS is currently scheduled to transition sometime in 2004 into two successor agencies, the existing HHSC and a new agency, the Texas Department of Aging and Disability Services (DADS).

This reorganization is mandated by House Bill 2292, 78th Leg., R.S. (2003). At the inception of operations of DADS, the authority to adopt all rules for the operation and provision of health and human services by DADS will lie with HHSC. These changes may result in the migration of this rule from one title of the Texas Administrative Code to another or other changes.

The amendment is proposed under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs; and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment affects the Human Resources Code, §§22.0001-22.040 and §§32.001-32.067.

§19.2320. Medical Transportation.

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

(d) The facility may not charge the state's Medicaid health insuring agent, the recipient, the family, or responsible party for normal transportation as defined in this section. Normal transportation charges are covered in the monthly vendor rate. The facility may not use the state's Medicaid community-based Title XIX medical transportation program except to transport recipients for renal dialysis treatments.

(e)-(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 June 4, 2004.

TRD-200403694
Carey Smith
Deputy Commissioner, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: July 18, 2004
For further information, please call: (512) 438-3734

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TITLE 43. TRANSPORTATION

PART 9. NORTH TEXAS TOLLWAY AUTHORITY

CHAPTER 201. PROCUREMENT OF GOODS AND SERVICES AND PROPERTY DISPOSITION

The North Texas Tollway Authority (Authority or NTTA) proposes new §§201.1 - 201.13; 201.20 - 201.25 and 201.30 rules, concerning its policy regarding procurement and disposition of goods. These sections provide a statement of general policy and procedures; identify conflicts of interest; provide a summary of procurement options; note when board approval is required; note encouragement of disadvantaged business participation; provide procedures for emergency procurement; outline procedures for electronic bidding; outline the confidentiality of bid or proposal information; list the standard implied contract provisions; note the Authority's authority to interrupt, delay or cancel procurement; provide information as to nonresident bidders and prior employees; provide procedures for bid protests; and define words and terms used in the sections. The policy also includes appendices regarding construction and maintenance contracts; professional services; general goods and services; participation in state and cooperative purchasing programs and intergovernmental agreements; and consulting services and disposition of salvage or surplus property.

FISCAL NOTE

Jerry Hiebert, the executive director, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications for the state or units of local government as a result of enforcing or administering the sections.

PUBLIC BENEFIT

Mr. Hiebert has also determined that for each year of the first five years the sections are in effect, the public benefit of enforcing or administering the new sections will be that the Authority's procurement shall be based solely on economic and business merit in order to best promote the interests of the citizens served by the Authority. These sections as proposed should have no adverse affect on small businesses, or possible economic cost to persons who are required to comply with the sections.

SUBMITTAL OF COMMENTS

Comments may be submitted in writing to Jerry Hiebert, Executive Director, North Texas Tollway Authority, 5900 W. Plano Parkway, Suite 100, Plano, Texas 75093. The deadline for receipt of comments is 5:00 p.m. on July 19, 2004.

SUBCHAPTER A. PROCUREMENTS AND DISPOSITIONS

43 TAC §§201.1 - 201.13

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, Title 6, Subtitle G, Chapter 366, §366.033(j), which authorizes the NTTA to adopt written procedures governing its procurement of goods and services that are consistent with general laws applicable to the Authority.

CROSS REFERENCE TO STATUTE

Transportation Code, §366.033, Transportation Code, §366.184, Transportation Code, §366.185, Local Government Code, Chapter 271, Local Government Code, Chapter 272, Government Code, Chapter 791, Government Code, Chapter 2252, and Government Code, Chapter 2258.

§201.1. Purpose, Organization and Applicability of this Policy; Procedures; Conflicts.

(a) Pursuant to Texas Transportation Code, §366.033(j), the Authority must adopt written procedures governing its procurement of goods and services that are consistent with general laws applicable to the Authority. This policy and the procedures referenced below are adopted for that purpose.

(b) This policy is organized in two (2) basic parts: §201.1 through §201.13 of Subchapter A, which are applicable to all of the Authority's procurements and dispositions covered by this policy, and Appendices A through F of Subchapter B, which relate to the Authority's award of certain types of contracts, procurement of certain types of goods and services, and disposition of certain types of property. Definitions of terms used throughout this policy and in the procedures are contained in Subchapter C.

(c) The board authorizes the executive director to adopt a separate set of internal procedures to assist in the implementation of this policy. To the extent of any conflict between this policy and the procedures, the former shall control. Further, the Authority may implement an administrative code, administrative resolutions, administrative policy, or similar document pertaining to the procurement or disposition of property. To the extent of any conflict between this policy or the procedures and any such code, resolutions, policy, or similar document, the policy and the procedures shall control.

(d) This policy does not apply to:

(1) the acquisition or disposition of any interest in real property or

(2) the procurement or other provisions of any agreement with a public or private entity pursuant to Texas Transportation Code, §366.302. "Agreements to Construct, Maintain, and Operate Turnpike Projects".

§201.2. Summary of Procurement Options.

(a) Contracts for the construction or maintenance of a turnpike project shall be let by competitive bidding as provided in Appendix A.

(b) Professional services shall be procured pursuant to the Professional Services Procurement Act as provided in Appendix B.

(c) The Authority may procure general goods and services costing, or anticipated to cost, no more than twenty-five thousand dollars ($25,000.00) by any method and on any terms as the executive director determines to be in the best interest of the Authority. General goods and services costing, or anticipated to cost, more than twenty-five thousand dollars ($25,000.00) shall be procured using competitive bidding, competitive sealed proposals, or a proprietary purchase as provided in Appendix C. General goods and services also may be procured pursuant to the catalog purchasing procedure or other program established by the commission to provide purchasing services for governmental entities, through a cooperative purchasing program with governmental entities or through an interlocal agreement with TxDOT or other governmental entity as provided in Appendix D.

(d) The Authority may procure consulting services costing, or anticipated to cost, no more than fifty thousand dollars ($50,000.00) by any method and on any terms as the executive director determines to be in the best interest of the Authority. Consulting services costing or anticipated to cost more than fifty thousand dollars ($50,000.00) shall be procured by the Authority's issuance of an RFQ or pursuant to a single-source contract as provided in Appendix E.

§201.3. Required Board Approval, Generally.

Except as otherwise provided in this policy with respect to certain emergency procurements, every procurement governed by this policy, whether made through contract awards, contract change orders, contract supplements, purchase orders, or otherwise that costs or is anticipated to cost more than three hundred thousand dollars ($300,000.00) shall require the approval of or ratification by the board, evidenced by a resolution adopted by the board. A procurement may not be divided into smaller contracts, purchases, or lots to avoid any dollar limits prescribed in this policy.

§201.4. Conflict of Interest; Contact with the Authority.

(a) A member of the board, an employee or agent of the Authority shall not:

(1) contract with the Authority or be directly or indirectly interested in a contract with the Authority or the sale of property to the Authority;

(2) accept or solicit any gift, favor or service that might reasonably tend to influence that board member, employee or agent in the making of procurement decisions or that the board member, employee or agent knows or should have known is being offered with the intent to influence the board member's, employee's or agent's making of procurement decisions; or

(3) accept other compensation that could reasonably be expected to impair the board member's, employee's or agent's independence of judgment in the making of procurement decisions.

(b) No bidder, offeror or respondent shall offer any interest, gift, favor, service or compensation described in the preceding sentence, and any such offer may disqualify the bidder, offeror or respondent from consideration for the applicable procurement.

(c) A bidder, offeror or respondent shall be required to complete a conflict of interest disclosure statement disclosing any business or familial relationships with board members, employees or agents of the Authority. Such relationship may disqualify the bidder, offeror or respondent from consideration for the applicable procurement.

(d) Once a bidder, offeror or respondent has submitted a bid, proposal or response, it shall refrain from contacting any member of the staff, board, or consultants of the Authority regarding that procurement or disposition, except in accordance with the bid documents, RFP or RFQ. If the bidder, offeror or respondent has an existing contract with the Authority or other business, communications between that party and the Authority's staff, board and consultants shall be limited to that which is necessary to service or implement the existing contract or other business. The failure of a bidder, offeror or respondent to comply with this section may disqualify it from consideration for the applicable procurement.

§201.5. Disadvantaged Business Participation; Compliance with Policy.

Disadvantaged businesses will be encouraged to participate in the procurement process through the implementation of the BOPP. Specific BOPP requirements, if any, applicable to a particular procurement shall be described in the bid documents, RFP, or RFQ for that procurement.

§201.6. Emergency Procurements, Generally.

(a) Except for the procurement of construction or maintenance services, the Authority may employ any alternate procedure compliant with this section for the expedited award of a contract necessary to procure or provide goods or services to meet emergency conditions in which essential corrective or preventive action would be unreasonably hampered or delayed by compliance with the requirements otherwise applicable under this policy. Types of work which may qualify for emergency contracts include, but are not limited to, the restoration of the Authority's technology-based systems or other equipment necessary to prevent unreasonable loss of toll revenue or interference with the Authority's operations. The Authority may utilize such alternate procedure both if it is procuring goods and services to meet emergency conditions affecting its own operations or is procuring and providing such goods and services to meet emergency conditions affecting a third party's operations in accordance with the Authority's contractual obligations to that party.

(b) Before a contract is awarded under this section, the executive director, the deputy executive director or other administrator authorized under the CEMP or BCP must certify in writing the facts and nature of the emergency giving rise to the alternative procedure. The Authority shall make such efforts to assure a fair and competitive price for the applicable goods or services as the executive director, deputy executive director or other authorized administrator deems reasonable under the circumstances.

(c) If any such emergency procurement of goods and services costs, or is anticipated to cost, more than three hundred thousand dollars ($300,000.00), the executive director will provide each member of the board written notification of the emergency condition and the award on or before the next regular meeting of the board.

(d) The Authority's alternative criteria for the emergency procurement of construction or maintenance services are set forth in Appendix A.

§201.7. Electronic Bidding.

(a) The Authority may receive bids, proposals or responses through electronic transmission in a manner and format described in the procedures or otherwise designated by the Authority. Any bidder seeking to submit an electronic bid, proposal or response must do so via a network and/or software approved by the Authority. Under no circumstances shall the Authority be required to modify its network or software to receive an electronic bid or proposal.

(b) Any electronic submittal system must ensure the identification, security, and confidentiality of bids, proposals or responses, and that the electronic bids, proposals or responses remain effectively unopened until the time designated for the opening. Notwithstanding any other provision of this policy, an electronic bid, proposal or response is not required to be sealed.

(c) The Authority may accept the electronic submittal of signatures and verification of a bid guaranty check by a financial institution.

§201.8. Confidentiality of Information in Bids or Proposals.

(a) All bids, proposals, or responses shall be open for public inspection after the contract is awarded, unless indicated by the bid, proposal or response that the documents contain trade secrets, proprietary information and/or confidential information.

(b) To the extent permitted by law, information designated as and constituting a trade secret or proprietary and/or confidential information is not open for public inspection, and shall be opened in a manner that avoids disclosure of the contents to competing bidders, offerors or respondents.

(c) If a bid, proposal or response indicates that it contains trade secrets, proprietary information or confidential information, the Authority will notify the bidder, offeror or respondent of any request from the public for inspection of the bid, proposal or response in accordance with the Texas Public Information Act and similar "open records" laws. The bidder, offeror or respondent shall be responsible for asserting to the Attorney General or other reviewing authority or court any right to prevent disclosure of the documents to the public. The Authority may elect to seek approval of the Attorney General for the non-disclosure of the trade secret or confidential and/or proprietary information.

§201.9. Standard, Implied Contract Provisions.

(a) Unless otherwise expressly stated in the bid documents, RFP or RFQ, the following provisions shall apply to every procurement or disposition undertaken pursuant to this policy.

(b) The Authority is a tax-exempt entity under the Texas Tax Code. §151.309. All payments to be made by the Authority under any contract shall be deemed inclusive of federal, state, or other taxes, if any, however designated, levied or based. The contractor, provider, vendor or consultant shall be responsible for the payment of all federal, state, local, and other taxes, impositions and assessments imposed in connection with the contract.

(c) No payment by the Authority shall relieve the contractor, provider, vendor or consultant of its obligation to deliver timely the services, products or other deliverables required under a contract. If after approving or paying for any service, product or other deliverable, the Authority determines that said service, product or deliverable does not satisfy the requirements of the contract, the Authority may reject same and, if the contractor, provider, vendor or consultant fails to correct or cure same within a reasonable period of time and at no additional cost to the Authority, the contractor, provider, vendor or consultant shall return any compensation received therefor. The Authority shall have the right to set off any amounts owed by the contractor, provider, vendor or consultant pursuant to the terms of the contract.

(d) Any contractor, provider, vendor or consultant of the Authority shall be deemed to be and shall operate entirely as an independent contractor in the delivery of goods or the performance of services rendered under a contract.

(e) All records, memoranda, logs, recommendations, reports, and other data and materials generated or compiled by or on behalf of any contractor, provider, vendor or consultant in connection with any goods, services, or other work provided to the Authority, together with all materials and data furnished to it by the Authority, shall at all times be and remain as follows:

(1) the property of the Authority,

(2) free from, and not subject to, any restriction or limitation on their further use by or on behalf of the Authority, and

(3) subject to immediate delivery to the Authority upon its written request.

(f) The contractor, provider, vendor or consultant shall not sublet, assign, or transfer any part of any work or obligations under a contract without the prior written approval of the Authority. Responsibility for sublet, assigned or transferred work shall remain with the contractor, provider, vendor or consultant.

(g) Each contractor, provider, vendor or consultant shall comply with all federal, state, and local laws, statutes, ordinances, rules, regulations, codes and with the orders and decrees of any courts or administrative bodies or tribunals in any matter affecting its performance under a contract with the Authority.

(h) The contractor, provider, vendor or consultant shall not commence any work or obligations unless and until a written notice to proceed or similar instruction is issued. Any work undertaken, goods furnished or expenses incurred by the contractor, provider, vendor or consultant prior to the issuance of the notice to proceed or similar instruction is issued shall be at its sole risk. Without limiting the foregoing, no contractor, provider, vendor or consultant shall commence any activities within or in the vicinity of turnpike or other traffic lanes without fully satisfying the insurance requirements in the contract. After issuance of the notice to proceed or similar instruction, the contractor, provider, vendor or consultant shall promptly begin work pursuant to the provisions of the contract and shall continuously prosecute same with such diligence as will enable it to comply with any timetable or term set forth therein. Time is of the essence with respect to the performance and completion of all services, and the delivery of all goods, to be furnished to the Authority.

§201.10. Interruption, Delay, or Cancellation of Procurement.
At the sole discretion of the Authority, a process to solicit bids, proposals or responses may be interrupted, postponed, delayed or cancelled at any time without liability to the Authority. At the sole discretion of the Authority, the need for requested work under a procurement may be reevaluated or postponed, delayed or cancelled at any time without liability to the Authority. The Authority may determine to terminate a procurement process or make any adjustments to the bid documents, RFP, or RFQ that the Authority deems necessary and in its best interest.

§201.11. Nonresident Bidders.
In accordance with Texas Government Code, Chapter 2252, Subchapter A, the Authority will not award a contract to a nonresident bidder, offeror or respondent unless the nonresident underbids the lowest responsible bid, offer, proposal or response submitted by a responsible resident bidder, offeror or respondent by an amount that is not less than the amount by which a resident bidder, offeror or respondent would be required to underbid the nonresident to obtain a comparable contract in the state in which the nonresident's principal place of business is located. By executing a contract with the Authority, any successful bidder, offeror or respondent shall be deemed to have represented to the Authority that the foregoing requirement has been satisfied.

§201.12. Prior Employees.
Except as otherwise provided by state or federal law, nothing shall prohibit the Authority from procuring professional, general or consulting services from an individual who has previously been employed by the Authority or by any other political subdivision of the state or by any state agency; provided, that if a prospective provider has been employed by the Authority, another political subdivision or a state agency at any time during the two (2) years preceding the making of an offer to provide services to the Authority, the prospective provider shall disclose in writing to the Authority the nature of his or her previous employment with the Authority, other political subdivision or state agency; the date such employment was terminated; and his or her annual rate of compensation for the employment at the time of termination.

§201.13. Bid Protests.

(a) All protests relating to: advertising of bid notices, RFPs or RFQs; alleged improprieties or ambiguities in bid documents, RFPs or RFQs; deadlines; openings of bids, proposals or responses; contract awards; and all other procurement-related procedures and actions must be made in writing and submitted to the executive director within five (5) days of the applicable contract award. Each protest must include the following:

(1) the name and address of the protester, and the contractor, provider, vendor or consultant it represents, if different;

(2) the identification number, reference number, or other identifying criteria specified in the bid documents, RFP or RFQ to identify the procurement in question;

(3) a statement of the grounds for protest; and

(4) all documentation supporting the protest.

(b) A decision and response to the protest will be prepared by the executive director within a reasonable time after receipt of a properly prepared written protest that is timely submitted in accordance with this policy.

(c) Appeals of responses and decisions regarding protests must be made to the board in writing, and must be filed with the secretary of the Authority, with a copy provided to the executive director, within ten (10) days after the issuance of a response and decision regarding the original protest. Written appeals shall include all information contained in the original written protest, as well as any newly discovered documentation supporting the protest that was not reasonably available to the protester when the original protest was filed. The decision of the board regarding an appeal shall be final.

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

Filed with the Office of the Secretary of State on June 4, 2004.

TRD-200403691
Marcelle S. Jones
General Counsel
North Texas Tollway Authority
Earliest possible date of adoption: July 18, 2004
For further information, please call: (214) 461-2043

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SUBCHAPTER B. APPENDICES

43 TAC §§201.20 - 201.25

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, Title 6, Subtitle G, Chapter 366, §366.033(j), which authorizes the NTTA to adopt written procedures governing its procurement of goods and services that are consistent with general laws applicable to the Authority.

CROSS REFERENCE TO STATUTE

Transportation Code, §366.033, Transportation Code, §366.184, Transportation Code, §366.185, Local Government Code, Chapter 271, Local Government Code, Chapter 272, Government Code, Chapter 791, Government Code, Chapter 2252, and Government Code, Chapter 2258.

§201.20. Appendix A. Construction and Maintenance Contracts.

(a) Competitive Bidding. A contract requiring the expenditure of public funds for the construction or maintenance of a turnpike project must be let by competitive bidding in which the contract is awarded to the lowest responsible bidder that complies with the Authority's criteria for such contract.

(b) Qualification of Bidders. Unless otherwise provided in the bid documents, a potential bidder must be qualified to bid on construction and maintenance contracts of the Authority. With respect to contracts requiring qualification, unless the Authority elects, in its sole discretion, to separately qualify bidders on a construction or maintenance project, only bidders qualified by TxDOT to bid on TxDOT's construction or maintenance contracts (including, however, if expressly permitted under the applicable bid documents, bidders qualified to bid on so-called "waived projects" through the use of TxDOT's "Bidder's Questionnaire" form) will be deemed qualified by the Authority to bid on the Authority's construction or maintenance contracts. At its election, the Authority may waive this subsection (b) with respect to bidders on any construction or maintenance contracts, including any building contract.

(c) Notice of Contract Letting. The Authority shall determine the content and method of advertising for all notices of contract letting. If any newspaper advertisement is used, the notice must appear in the officially designated newspaper of the Authority, in addition to the other newspapers used, if any.

(d) Issuance of Bid Documents. Except as otherwise provided in this policy, the Authority will issue bid documents for a construction or maintenance contract upon request and only after proper notice has been given regarding the contract letting. If otherwise required by law, a request for bid documents for a federal-aid project must be submitted in writing and must include a statement in a form prescribed by the Authority certifying whether the bidder is currently disqualified by an agency of the federal government as a participant in programs and activities involving federal financial and non-financial assistance and benefits. A request for bid documents for any other construction or maintenance contract may be made orally or in writing. Unless otherwise prohibited under this policy, the Authority will, upon receipt of a request, issue bid documents for a construction or maintenance contract as follows:

(1) upon the Authority's receipt of payment for the bid documents, if applicable;

(2) to a bidder qualified by TxDOT, if the estimated cost of the project is within that bidder's available bidding capacity as determined by TxDOT;

(3) to a bidder qualified by the Authority, if the estimated cost of the project is within that bidder's available bidding capacity as determined by the Authority; and

(4) to a bidder who has substantially complied with the Authority's requirements for qualification, if any, as determined by the Authority.

(e) Withholding Bid Documents. The Authority will not issue bid documents for a construction or maintenance contract if:

(1) the bidder is suspended or debarred from contracting with TxDOT or the Authority;

(2) the bidder is prohibited from rebidding a specific project because of default under a previously awarded bid;

(3) the bidder has not fulfilled the requirements for qualification under this policy, if any, unless the bidder has substantially complied with the requirements for qualification, as determined by the Authority;

(4) the bidder is disqualified by an agency of the federal government as a participant in programs and activities involving federal assistance and benefits, and the contract is for a federal-aid project; or

(5) the bidder or its subsidiary or affiliate has received compensation from the Authority to participate in the preparation of the plans or specifications on which the bid or contract is based.

(f) Completion and Submission of Bid Documents.

(1) At the option of the Authority, an optional or mandatory pre-bid conference may be held before opening bids to allow potential bidders to seek clarification regarding the procurement and/or the bid documents or for any other purpose the Authority deems appropriate. Alternatively, the Authority may permit bidders to submit written requests for clarification. A bidder that fails to attend a mandatory pre-bid conference may be disqualified from submitting its bid or proposal.

(2) Except for bids submitted electronically, bidders shall complete all information requested in the bid documents by typing, printing by computer printer, or printing in ink. The bidder shall submit a unit price, expressed in numerals, for each item for which a bid is requested (including zero dollars and zero cents, if appropriate), except in the case of a regular item that has an alternate bid item. In such case, prices must be submitted for the base bid and/or with the set of items of one or more of the alternates. Unit prices shown on acceptable computer printouts will be the official unit prices used to tabulate the official total bid amount and used in the contract if awarded.

(3) Except for bids submitted electronically, each set of bid documents shall be executed in ink in the complete and correct name of the bidder making the bid and shall be signed by the person or persons authorized to bind the bidder.

(4) If required by the bid documents, the bidder must submit a bid guaranty with the bid. The bid guaranty shall be in the amount specified in the bid documents, shall be payable to the Authority, and shall be in the form of a cashier's check, money order or teller's check drawn by or on a state or national bank, savings and loan association, or a state or federally chartered credit union (collectively referred to as "bank") and payable at or through a branch of the issuing bank located in a county of the Authority. The form of the instrument must be identified on the instrument's face. The Authority will not accept cash, credit cards, personal checks or certified checks or other types of money orders. Failure to submit the required bid guaranty in the form set forth in this subsection shall disqualify a bidder from bidding on the project described in the bid documents.

(5) A bidder may submit a bid bond, in lieu of providing the guaranty required in Appendix A, subsection (f)(4). The bid bond shall be on the form and in the amount specified by and acceptable to the Authority. A bid bond will only be accepted from a surety company authorized to execute a bond under and in accordance with state law. The bond must bear the impressed seal of the surety company and the name of the bidder, and be signed by the bidder and an authorized representative of the surety company. Powers of attorney must be attached to the bid bond. The bid bond amount required by the Authority must be within the surety company's authorized bonding limit. The Authority may require a greater amount for a bid bond in order to compensate for increased administrative costs associated with bid bonds.

(6) A bid on a federal-aid project shall include, in a form prescribed by the Authority, a certification of eligibility status. The certification shall describe any suspension, debarment, voluntary exclusion, or ineligibility determination actions by an agency of the federal government, and any indictment, conviction, or civil judgment involving fraud or official misconduct, each with respect to the bidder or any person associated therewith in the capacity of owner, partner, director, officer, principal investor, project director/supervisor, manager, auditor, or a position involving the administration of federal funds; such certification shall cover the three-year period immediately preceding the date of the bid. Information adverse to the bidder as contained in the certification will be reviewed by the Authority and by the Federal Highway Administration, and may result in rejection of the bid and disqualification of the bidder.

(7) The bidder shall place each completed set of bid documents in a sealed envelope which shall be clearly marked "Bid Documents for (name of the project or service)". When submitted by mail, this envelope shall be placed in another envelope which shall be sealed and addressed as indicated in the notice. Bids must be received at the location designated in the notice on or before the hour, as established by the official clock of the Authority, and date set for the receipt. The official clock at the administrative office of the Authority shall serve as the official determinant of the hour for which the bid shall be submitted and whether a bid is deemed timely or late.

(g) Revision of Bid by Bidder. Unless submitted electronically, a bidder may change a bid price before it is submitted to the Authority by changing the price and initialing the revision in ink. A bidder may change a bid price after it is submitted to the Authority by requesting return of the bid in writing prior to the expiration of the time for receipt of bids. The request must be made by a person authorized to bind the bidder. The Authority will not accept a request by telephone, telegraph or electronic mail, but will accept a properly signed facsimile request. The revised bid must be resubmitted prior to the time specified for the close of the receipt of bids to be considered.

(h) Withdrawal of Bid. A bidder may withdraw a bid by submitting a request in writing before the time and date of the bid opening. The request must be made by a person authorized to bind the bidder. Except for an electronic bid, which may be withdrawn in accordance with the electronic withdrawal procedures, if any, provided for that bid, the Authority will not accept telephone, telegraph or electronic mail requests, but will accept a properly signed facsimile request.

(i) Acceptance, Rejection, and Reading of Bids. Bids will be opened and read at a public meeting held at the time, date and place designated in the notice, as may have been extended by direction of the executive director or the director of the department issuing the bid documents. The Authority will not accept, and will not read, a bid if:

(1) the bid is submitted by an unqualified bidder;

(2) the bid is in a form other than the official bid documents issued to the bidder;

(3) the form and content of the bid do not comply with the requirements of the bid documents and/or subsection Appendix A, subsection (f);

(4) the bid or, if required, the federal-aid project certification is not signed;

(5) the bid was received after the time specified in the notice, as may have been extended, or at some location other than as specified in the notice;

(6) the bid guaranty, if required, does not comply with subsection Appendix A, subsection (f);

(7) the contract provides for the payment of state funds and any individual or entity owning at least twenty-five percent (25%) of the bidder is more than thirty (30) days delinquent in providing child support under a court order or a written repayment agreement;

(8) the bidder was not authorized to be issued bid documents under this policy;

(9) the bid did not otherwise conform with the requirements of this policy; or

(10) more than one bid involves to a material degree a bidder under the same or different names, as determined by the Authority.

(11) Further, the Authority may elect to disqualify a bidder if the bidder did not attend a specified mandatory pre-bid conference.

(j) Tabulation of Bids. Except for lump sum building contracts bid items, the official total bid amount for each bidder will be determined by multiplying the unit bid price written in for each item by the respective quantity and totaling those amounts. Bid entries such as "no dollars and no cents" or "zero dollars and zero cents" will be interpreted to be one-tenth of a cent ($.001) and will be entered in the bid tabulation as $.001. Any entry less than $.001 will be interpreted and entered as $.001. If a bidder submits both a completed set of bid documents and a properly completed computer printout of unit bid prices, the Authority will use the computer printout to determine the total bid amount of the bid. If the computer printout is incomplete, the Authority will use the completed bid documents to determine the total bid amount of the bid. If a bidder submits multiple computer printouts reflecting different totals, each printout will be tabulated, and the Authority will use the lowest tabulation. If a unit bid price is illegible, the Authority will make a documented determination of the unit bid price for tabulation purposes. If a unit bid price has been entered for both the regular bid and a corresponding alternate bid, the Authority will select the bid that, in its judgment, provides the best value to the Authority, unless otherwise provided in the bid documents.

(k) Award of Contract. Except as otherwise provided in this Appendix A, if the Authority does not reject all bids, it will award the contract to the lowest responsible bidder. In determining the lowest responsible bidder, in addition to price the Authority shall consider:

(1) the bidder's ability, capacity and skill to perform the contract or provide the service required;

(2) the bidder's ability to perform the contract or provide the service promptly, or in the time required, without delay or interference;

(3) the bidder's character, responsibility, integrity, reputation and experience;

(4) the quality of performance by the bidder of previous contracts or services;

(5) the bidder's previous and existing compliance with laws relating to the contract or service; and

(6) the sufficiency of the bidder's financial resources and ability to perform the contract or provide the service.

(l) Rejection of Bids. The Authority may reject for any reason any and all bids opened, read and tabulated under this policy. It will reject all bids if there is reason to believe collusion may have existed among the bidders. The Authority may reject all bids if the lowest responsible bid is higher than the Authority's estimate and the Authority determines that re-advertising the project for bids may result in a significantly decreased lowest responsible bid or that the work should be done by the Authority.

(m) Contract Execution; Submission of Ancillary Items.

(1) Within the time limit specified by the Authority, the successful bidder must execute and deliver the contract to the Authority, together with all information required by the Authority relating to the participation of Disadvantaged Businesses to be used to determine compliance with the BOPP or as otherwise specified in the bid documents and the contract.

(2) After the Authority sends written notification of its acceptance of the successful bidder's compliance with the BOPP, the successful bidder must furnish to the Authority within the time limit specified by the Authority:

(A) a performance bond and a payment bond, if required, as provided in Texas Government Code, Chapter 2253, with powers of attorney attached, each in the full amount of the contract price, executed by a surety company or surety companies authorized to execute surety bonds under and in accordance with state law; and

(B) a certificate of insurance on form ACORD-28, or such other form as indicated by the Authority, showing coverages in accordance with contract requirements; provided, however, that the Authority may permit a successful bidder on a construction contract to postpone delivery of the certificate of insurance until prior to the date the bidder begins work as specified in the Authority's order to begin work.

(n) Unbalanced Bids. The Authority will examine the unit bid prices of the apparent lowest responsible bid for reasonable conformance with the Authority's estimated prices. The Authority will evaluate, and may reject, a bid with extreme variations from the Authority's estimate, or where obvious unbalancing of unit prices has occurred.

(o) Bid Guaranty. Not later than seven (7) days after bids are opened, the Authority will mail the bid guaranty of all bidders to the address specified on each bidder's bid documents, except that the Authority will retain the bid guaranty of the apparent lowest responsible bidder, second-lowest responsible bidder and third-lowest responsible bidder until after the contract has been awarded, executed and bonded, and all other provisions of Appendix A, subsection (m) have been satisfied. If the successful bidder (including a second-lowest responsible bidder or third-lowest responsible bidder that ultimately becomes the successful bidder due to a superior bidder's failure to comply with this policy or to execute a contract with the Authority) does not comply with Appendix A, subsection (m), the bid guaranty will become the property of the Authority, not as a penalty but as liquidated damages; each bidder by submitting its bid acknowledges and agrees that the actual amount of damages the Authority will suffer as a result of the successful bidder's failure to comply with Appendix A, subsection (m) is difficult or impossible to determine, and that the bid guaranty is a fair and reasonable estimate of those damages. A bidder that forfeits a bid guaranty will not be considered in future bids for the same work unless there has been a substantial change in the design of the project subsequent to the forfeiture of the bid guaranty.

(p) Escrowed Bid Documents.

(1) The Authority may require the successful bidder and its subcontractors to submit copies of all information, whether in documentary or electronic form, that is generated or utilized in the preparation of a bid to be held in escrow, and may condition the award of the contract upon its receipt of the escrowed bid documents. The purpose of the escrowed bid documents is to assist in the settlement or determination of any disputes, claims, change orders or price adjustments. By executing the contract, the bidder shall warrant that the escrowed bid documents constitute all of the information used in preparation of its bid, offer or proposal, and that no other bid preparation information will be utilized in resolving disputes or for any other purpose in connection with the contract.

(2) The Authority shall indicate in its bid documents the time, place and manner in which the escrowed bid documents are to be submitted. Information contained in the escrowed bid documents shall not alter or modify the contract, nor be considered a part of the contract.

(3) The escrowed bid documents shall be submitted in a sealed container clearly marked on the outside with the bidder's name, date of submittal, project name, contract number, and the words "Escrowed Bid Documents." Certification shall accompany the submission of the escrowed bid documents and must be signed by an individual

authorized to execute the bid. The bidder also shall deliver a lockable fireproof cabinet of sufficient size to contain the escrowed bid documents. The bidder shall retain custody of the cabinet key(s).

(4) The Authority will maintain the escrowed bid documents in a safe physical condition; however, the escrowed bid documents are, and shall remain, the property of the bidder. Any portion of the escrowed bid documents that the bidder believes comprises trade secrets or other proprietary or confidential information should be clearly marked as such by the bidder.

(5) Before the award of the contract to the apparent lowest responsible bidder and the execution of the contract by the parties, the escrowed bid documents will be examined and inventoried by representatives of the Authority and the bidder. To ensure that the escrowed bid documents are authentic, legible and complete, the bidder's representative must be knowledgeable in how the bid was prepared. The Authority's review of the escrowed bid documents shall not constitute approval of the bidder's proposed methods, estimating assumptions or prices, contract interpretations or any other matters contained in the escrowed bid documents. If the Authority determines that any information required to be included in the escrowed bid documents is not contained in the bidder's original submittal of escrowed bid documents, the bidder shall promptly supply all missing documentation prior to award and execution of the contract. The bidder's failure to comply with this requirement within the time specified by the Authority may cause the bidder's proposal to be rejected and its bid guaranty to be forfeited. Material errors or discrepancies in the escrowed bid documents may cause the bidder's bid, offer or proposal to be rejected and may result in the forfeiture of the bidder's bid guaranty.

(6) The escrowed bid documents shall be examined by both the Authority and the bidder, at any time deemed necessary by either the Authority or the bidder, to assist in the settlement of disputes, claims and other matters with the contractor, and, if determined to be appropriate by the Authority, in its consideration of price adjustments and change orders. Examination of the escrowed bid documents is subject to the following conditions:

(A) Prior to examination, the Authority and the bidder shall each designate in writing to the other party the representatives who are authorized to examine the escrowed bid documents. No other person(s) shall have access to the escrowed bid documents, except as required by law or under the rules or orders of any legal proceeding.

(B) Examination of the escrowed bid documents will take place only in the presence of duly designated representatives of both the Authority and the bidder.

(C) Examination of the escrowed bid documents will be for the sole purpose of obtaining information concerning the bases for the contractor's bid amounts. It will not obligate the Authority to modify or amend any provision of the contract, including provisions pertaining to price adjustments, change orders or completion deadlines.

(7) If the contractor wishes to subcontract any portion of the work after the contract award, the Authority may require the bidder to submit escrowed bid documents from the subcontractor before the subcontract is approved.

(8) The escrowed bid documents will be returned to the bidder, along with the lockable fireproof cabinet provided by the bidder, within ninety (90) days after the Authority determines that all work has been satisfactorily performed. If any dispute regarding any matters related to the contract or the work exists or is threatened on such date, the escrowed bid documents may be retained at the Authority's office until final settlement of all matters relating to the contract.

(q) Progress Payments; Retainage and Liquated Damages.

(1) In addition to other provisions required by the Authority, construction and maintenance contracts may provide for the Authority to make progress payments, which may be reduced by retainage, as work progresses and is approved by the Authority.

(2) If a retainage is required, it shall be in the amount of five percent (5.0%) of the contract price until the entire work has been completed and accepted. In the Authority's sole discretion, the retainage may be released proportionally to completion of the work. Unless the Authority agrees otherwise in writing, retainage shall not bear interest or be segregated from other funds held by the Authority.

(3) Without limiting the Authority's right to require any other contract provisions, the Authority, at its sole discretion, may elect to require that a liquidated damages provision be made a part of any contract.

(r) Alternative Criteria for Emergency Awards.

(1) The Authority may employ alternative criteria for the expedited award of any contract for construction or maintenance services to meet emergency conditions in which essential corrective or preventive action would be unreasonably hampered or delayed by compliance with the criteria otherwise applicable under this Appendix A. Types of work which may qualify for emergency contracts include, but are not limited to: emergency repair or reconstruction of streets, roads, highways, buildings, facilities, bridges, toll collection systems and other Authority property; clearing debris or deposits from the roadway or in drainage courses within the right-of-way; removal of hazardous materials; restoration of stream channels outside the right-of-way; temporary traffic operations; and mowing to eliminate safety hazards.

(2) Before a contract is awarded under this subsection, the executive director, the deputy executive director or other administrator designated by either of them must certify in writing the facts and nature of the emergency giving rise to the alternative criteria.

(3) After an emergency is certified, the Authority shall take measures necessary to identify and locate an available contractor that is able to provide the required construction or maintenance service. Consistent with and contingent upon the nature of the emergency, the Authority may contact by telephone, letter, facsimile, the internet or any other means one or more contractors qualified to perform the services to obtain a bid. The Authority will inform the prospective bidder(s) of the nature of the emergency and the construction or maintenance services sought, time constraints and bonding and insurance requirements, if any. The information shall be sufficient to allow the prospective bidder to prepare a basic work plan and cost estimate.

(4) If the Authority determines that the magnitude and extremity of the emergency require instantaneous action by the contractor in order to alleviate an immediate and substantial detrimental impact on the Authority's or third parties' health, safety, or property and the executive director, the deputy executive director or designated administrator has so noted in the certification of the emergency, the executive director, the deputy executive director or designated administrator may authorize a contractor to begin work prior to executing a contract and receiving proof of bonding and insurance.

(5) With respect to any such emergency award requiring approval or ratification of the board, the executive director, the deputy executive director or designated administrator will provide each member of the board written notification of the emergency condition and the award on or before the next meeting of the board at which the matter can be legally scheduled for action, and seek ratification of the procurement or contract award at said meeting.

(s) Change Orders and Supplemental Agreements. Subsequent to the issuance of a notice to proceed under a construction or maintenance contract, the executive director is authorized to approve any change order

or supplemental agreement to the contract in an amount of no more than three hundred thousand dollars ($300,000.00), provided adequate funds are budgeted and available for the project for which the contract was let or are available from approved contingencies for that project. If either

(1) the change order or supplemental agreement exceeds three hundred thousand dollars ($300,000.00), or

(2) adequate funds are not budgeted and available or contained in approved project contingencies, either

(A) the change order or supplemental agreement shall require the approval or ratification of the board, evidenced by a resolution adopted by the board, or

(B) the services which are the subject of the change order or supplemental agreement shall be separately procured in accordance with this policy.

§201.21. Appendix B. Professional Services.

(a) Professional Services Procurement Act. The Authority shall procure all professional services governed by the Professional Services Procurement Act in accordance with the requirements of the Act. If due to the subsequent amendment of the Professional Services Procurement Act or for any other reason any provision of this Appendix or of this policy conflicts with the Act, the latter shall control.

(b) Selection Criteria. The Authority shall not select a provider of professional services or a group or association of providers, or award a contract for professional services on the basis of competitive bids submitted for the contract or for the services, but shall make the selection and award on the basis of demonstrated competence and qualifications to perform the services for a fair and reasonable price.

(c) Professional Fees. The professional fees under the contract must comply with the recommended practices and fees prescribed by the Act, if any, and may not exceed any maximum provided by law.

(d) Request for Qualifications. Each RFQ prepared by the Authority shall describe the professional services required by the Authority and invite prospective providers to submit their qualifications to provide such services, as specified in the RFQ.

(e) Notice of RFQs.

(1) Notice of the issuance of an RFQ shall contain such information as the Authority determines is relevant to the procurement. The date specified in the RFQ as the deadline for submission of responses may be extended if the executive director determines that the extension is in the best interest of the Authority. All responses, including those received before an extension is made, must be opened at the same time.

(2) Notice of the issuance of an RFQ shall be given in the manner determined by the Authority.

(f) Opening and Filing of Responses; Public Inspection. The Authority shall avoid disclosing the contents of each response to an RFQ on opening the response and during negotiations with competing respondents. The Authority shall file each response and, subject to the Authority's document retention policy, such filed responses shall be open for public inspection after a contract is awarded, unless those materials contain information that is excepted from disclosure.

(g) Selection and Contract Negotiations For Certain Professional Services. In procuring architectural, engineering or land surveying services, the Authority shall:

(1) first select the most highly qualified provider of those services on the basis of demonstrated competence and qualifications; and

(2) then attempt to negotiate with that respondent a contract at a fair and reasonable price.

(3) If a satisfactory contract cannot be negotiated with the most highly qualified provider of the foregoing professional services, the Authority shall:

(A) formally end negotiations with that respondent,

(B) select the next most highly qualified provider, and

(C) attempt to negotiate a contract with that respondent at a fair and reasonable price.

(4) The Authority shall continue the foregoing process to select and negotiate with respondents until a contract is entered into, provided the Authority shall have no obligation to submit a contract to the next highest-ranked provider if the Authority determines that none of the remaining responses is acceptable or otherwise elects to terminate the procurement.

(h) Selection and Contract Negotiations for Other Professional Services. In procuring professional services other than architectural, engineering or land surveying services, the Authority may use any procurement method consistent with the Professional Services Procurement Act and the provisions of this Appendix B.

(i) Mixed Contracts. This Appendix B applies to a contract that involves professional services together with goods or other services otherwise subject to competitive bid requirements, if the primary objective of the contract is the acquisition of professional services.

(j) Evergreen Program. The Authority may issue an RFQ to pre-qualify a pool of individuals, entities or combinations of individuals or entities to provide professional services for the Authority. The RFQ shall specify: the types of services required; the pre-qualification requirements, including, but not limited to, years of experience, size of firm, financial capacity and areas of specialty; manner under which the pre-qualified firm will be selected to perform a specific service; and the term of the pre-qualification. Pre-qualification is for the sole purpose of assisting the Authority in the efficient procurement of services and expedited completion of projects. No member of the Evergreen Program shall have an expectation or right to a contract award.

(k) Change Orders, Supplement Agreements, and Amendments. Subsequent to the issuance of a notice to proceed or other authorization to begin work under a contract for professional services, the executive director is authorized to approve any change order, supplemental agreement or amendment to the contract in an amount of no more than the lesser of thirty percent (30%) of the original contract amount or three hundred thousand dollars ($300,000.00), provided adequate funds are budgeted and available for the contract or are available from approved contingencies for that contract. If either

(1) the change order, supplemental agreement or amendment exceeds the lesser of thirty percent (30%) of the original contract amount or three hundred thousand dollars ($300,000.00) or

(2) adequate funds are not budgeted and available or contained in approved contract contingencies, either

(A) the change order, supplemental agreement or amendment shall require the approval or ratification of the board, evidenced by a resolution adopted by the board, or

(B) the services which are the subject of the change order, supplemental agreement or amendment shall be separately procured in accordance with this policy.

§201.22. Appendix C. General Goods and Services.

(a) Purchase Threshold Amounts. The Authority may procure general goods and services costing twenty-five thousand dollars ($25,000.00) or less by such method and on such terms as the executive director determines to be in the best interest of the Authority. General

goods and services costing more than twenty-five thousand dollars ($25,000.00) shall be procured using competitive bidding, competitive sealed proposals or a proprietary purchase as provided in this Appendix.

(b) Competitive Bidding Procedures.

(1) Competitive bidding for general goods and services shall be conducted using substantially the same procedures specified for the competitive bidding of construction and maintenance contracts, except that:

(A) with respect to a particular procurement, the executive director may waive the qualification requirements for all prospective bidders;

(B) the executive director may waive the submission of payment or performance bonds (or both) and/or insurance certificates by the successful bidder;

(C) with respect to the procurements estimated to be more than one hundred thousand dollars ($100,000.00), in addition to newspaper advertisement of the procurement as set forth in this policy or the procedures, the Authority may solicit bids by direct mail, telephone, the internet or any other means; with respect to procurements estimated to be one hundred thousand dollars ($100,000.00) or less, the Authority may solicit bids by any of the foregoing methods, which may, but need not, include newspaper advertising; and

(D) a purchase may be proposed on a lump-sum or unit price basis; if the Authority chooses to use unit pricing in its notice, the information furnished to bidder must specify the approximate quantities estimated on the best available information, but the compensation paid the successful bidder must be based on the actual quantities purchased.

(2) Contracts for general goods and services procured using competitive bidding shall be awarded to the lowest responsible bidder based on the same criteria used in awarding construction and maintenance contacts, together with the following additional criteria:

(A) the quality and availability of the goods or services to be provided and their adaptability to the Authority's needs and uses; and

(B) the bidder's ability to provide, in a timely manner, future maintenance, repair parts and service for goods being purchased, if applicable.

(c) Competitive Sealed Proposals.

(1) The Authority may solicit offers for the provision of general goods and services by issuing an RFP. Each RFP shall contain the following information:

(A) the Authority's specifications for the goods or services to be procured;

(B) an estimate of the various quantities and kinds of goods and services to be furnished;

(C) a schedule of items for which unit prices are requested;

(D) the time within which the contract is to be performed;

(E) any special provisions and special specifications; and

(F) the applicable requirements under the BOPP or other policies relating to Disadvantaged Businesses.

(2) The Authority shall give public notice of an RFP in the manner provided for requests for competitive bids for general goods and services.

(3) At the option of the Authority, an optional or mandatory pre-proposal conference may be held before opening proposals to allow potential offerors to seek clarification regarding the procurement and/or the bid documents or for any other purposes the Authority deems appropriate. Alternatively, potential offerors may submit written requests for clarification. A potential offeror that fails to attend a mandatory pre-proposal conference may be disqualified from submitting its proposal.

(4) The Authority shall avoid disclosing the contents of each proposal upon opening the proposal and during negotiations with competing offerors. The Authority shall file each proposal and, subject to the Authority's document retention policy, after a contract is awarded, such filed proposals shall be open for public inspection unless those materials contain information that is excepted from disclosure as an open record.

(5) After receiving a proposal but before making an award, the Authority may permit an offeror to revise its proposal to obtain the best final offer. The Authority may discuss acceptable or potentially acceptable proposals with offerors to assess an offeror's ability to meet the solicitation requirements. The Authority shall avoid disclosing information derived from proposals submitted from competing offerors.

(6) The Authority shall refuse all proposals if none of those submitted is acceptable or for any other reason.

(7) The Authority shall submit a contract to the offeror (the "first-choice candidate") whose proposal is the most advantageous to the Authority, considering price and the evaluation factors in the RFP. The terms of the contract shall incorporate the terms set forth in the RFP and the proposal submitted by the first-choice candidate, but if the proposal conflicts with the RFP, the RFP shall control unless the Authority elects otherwise. If the Authority and the first-choice candidate cannot agree on the terms of a contract, the Authority may elect not to contract with the first-choice candidate, and at the exclusive option of the Authority, may submit a contract to the offeror ("second-choice candidate") whose proposal is the next most favorable to the Authority. If agreement is not reached with the second-choice candidate, the process may be continued with other offerors in like manner, but the Authority shall have no obligation to submit a contract to the next highest-ranked offeror if the Authority determines at any time during the process that none of the remaining proposals is acceptable or otherwise elects to terminate the procurement.

(d) Proprietary Purchases.

(1) If the executive director finds that the Authority's requirements for the procurement of a general good or service describe a product or service that is proprietary to one vendor and do not permit an equivalent product or service to be supplied, the Authority may solicit a bid for the general good or service solely from the proprietary vendor, without using the competitive bidding or competitive proposal procedures. For any procurement costing, or anticipated to cost, more than twenty-five thousand dollars ($25,000.00), the executive director shall notify the board in the manner determined by the executive director. For any procurement costing, or anticipated to cost, more than three hundred thousand dollars ($300,000.00), the executive director shall justify in writing the Authority's requirements and shall submit the written justification to the board. The written justification must

(A) explain the need for the particular good or service that is proprietary to the vendor;

(B) explain why competing goods or services from other vendors (if any) are not satisfactory; and

(C) provide other information requested by the board.

(2) As otherwise provided in this policy, any such procurement costing, or anticipated to cost, more than three hundred thousand dollars ($300,000.00) shall require the approval of or ratification by the board, evidenced by a resolution adopted by the board.

(3) Goods or services may be acquired by proprietary purchase if they constitute

(A) goods or services available from only one source because of patents, copyrights, secret processes or natural monopolies,

(B) films, manuscripts or books, or

(C) captive replacement parts or components for equipment.

(4) Subsequent purchases from a proprietary purchase vendor of the same good or service, including replacement parts or components, will not require a separate or additional justification from the executive director that the good or service is proprietary to that vendor.

(5) The Authority may acquire by proprietary purchase those goods and services, including replacement parts or components for equipment, that are necessary to ensure the compatible integration of the Authority's technology-based equipment, computer network or software system.

(e) Other Goods and Services.

(1) The Authority may procure or pay for

(A) electricity, gas, water and other utility services,

(B) professional dues, membership fees, subscriptions and similar charges,

(C) application, permitting, licensing and other regulatory fees and charges, and

(D) other goods and services generally available at a set, non-negotiable price or otherwise not susceptible to competitive pricing upon the terms determined by the executive director, the deputy executive director or other administrator designated by either of them.

(2) The executive director, deputy executive director or designated administrator also may authorize, and determine the terms for, the procurement of goods sold at

(A) an auction by a state-licensed auctioneer or

(B) a going-out-of-business sale held in compliance with the Texas Business and Commerce Code, Chapter 17, Subchapter F.

(3) As otherwise provided in this policy, any such procurement costing or anticipated to cost more than three hundred thousand dollars ($300,000.00) shall require the approval of or ratification by the board, evidenced by a resolution adopted by the board.

(f) Extension of Quantities or Services.

(1) The executive director is authorized to extend quantities or services or similarly amend a contract for general goods and services up to an amount equal to three hundred thousand dollars ($300,000.00) in each instance, provided adequate funds are budgeted and available for the procurement of the applicable goods and services. If either

(A) the effect of the amendment exceeds three hundred thousand dollars ($300,000.00) or

(B) adequate funds are not budgeted and available, either

(i) the amendment shall require the approval or ratification of the board, evidenced by a resolution adopted by the board, or

(ii) the goods and services which are the subject of the amendment shall be separately procured in accordance with this policy.

(2) Nothing provided in this Appendix C, subsection (f), shall limit the ability of the Authority to procure general goods and services costing, or anticipated to cost, no more than twenty-five thousand dollars ($25,000.00) by any method and on any terms as determined by the executive director as otherwise provided in this policy, including by change order, supplemental agreement, or similar extension of quantities or services or amendment.

§201.23. Appendix D. Participation in State and Cooperative Purchasing Programs; Intergovernmental Agreements.

(a) Voluntary Commission Program. Pursuant to and in accordance with Texas Government Code, § 2155.204 and Local Government Code, Chapter 271, Subchapter D, the Authority may request the Texas Building and Procurement Commission to allow the Authority to participate on a voluntary basis in the program established by the Commission by which the Commission performs purchasing services for governmental entities.

(b) Catalog Purchase of Automated Information Systems. Pursuant to and in accordance with the Government Code, § 2157.067, the Authority may utilize the catalogue purchasing procedure established by the Commission with respect to the purchase of automated information systems.

(c) Cooperative Purchases. Pursuant to and in accordance with the Local Government Code, Chapter 271, Subchapter F, the Authority may participate in one or more cooperative purchasing programs with governmental entities or governmental cooperative programs.

(d) Interlocal Agreements with TxDOT. Subject to any limitations imposed by general law, the Authority may enter into interlocal agreements with TxDOT or with one or more other governmental entities to procure goods and services from TxDOT or those entities.

(e) Exempted Purchases. Purchases made through the Commission (including, without limitation, catalog purchases), a cooperative program or by interlocal agreement shall be deemed to have satisfied the procurement requirements of this policy and shall be exempted from the procurement requirements contained in this policy.

§201.24. Appendix E. Consulting Services.

(a) Contracting for Consulting Services. The Authority may contract for consulting services if the executive director reasonably determines that the Authority cannot adequately perform the services with its own personnel.

(b) Selection Criteria. The Authority shall base its selection on demonstrated competence, knowledge and qualifications, and on the reasonableness of the proposed fee for the services.

(c) Contract Amounts. The Authority may procure consulting services costing, or anticipated to cost, no more than fifty thousand dollars ($50,000.00) by such method and on such terms as the executive director determines to be in the best interests of the Authority. Consulting services costing, or anticipated to cost, more than fifty thousand dollars ($50,000.00) shall be procured by the Authority's issuance of an RFQ or RFP, except as provided in Appendix E, subsection (h), for single-source contracts.

(d) Request for Qualifications or Proposal. Each RFQ or RFP prepared by the Authority shall describe the services required by the Authority and invite prospective consultants to submit their qualifications and/or proposal to provide such services, as specified in the request documents.

(e) Notice.

(1) Notice of the issuance of an RFQ or RFP shall contain such information as the Authority determines is relevant to the procurement. The date specified in the RFQ of RFP as the deadline for submission of responses may be extended if the executive director determines that the extension is in the best interest of the Authority. All responses, including

those received before an extension is made, must be opened at the same time.

(2) Notice of the issuance of an RFQ or RFP shall be given in the manner determined by the Authority.

(f) Opening and Filing of Responses; Public Inspection. The Authority shall avoid disclosing the contents of each response to an RFQ or RFP on opening the response and during negotiations with competing respondents. The Authority shall file each response and, subject to the Authority's document retention policy, such filed responses shall be open for public inspection after a contract is awarded, unless those materials contain information that is excepted from disclosure.

(g) Contract Negotiations. The Authority shall submit a contract to the respondent (the "first-choice candidate") whose response best satisfies the Authority's selection criteria. If the Authority and the first-choice candidate cannot agree on the terms of a contract, the Authority may terminate negotiations with the first-choice candidate, and, at the exclusive option of the Authority, the Authority may enter into contract negotiations with the respondent ("second-choice candidate") whose response is the next most favorable to the Authority. If agreement is not reached with the second-choice candidate, the process may be continued with other respondents in like manner, but the Authority shall have no obligation to submit a contract to the next highest-ranked respondent if the Authority determines that none of the remaining responses is acceptable or otherwise elects to terminate the procurement.

(h) Single-Source Contracts. If the executive director determines that only one prospective consultant possesses the demonstrated competence, knowledge and qualifications to provide the services required by the Authority at a reasonable fee and within the time limitations required by the Authority, consulting services from that consultant may be procured without issuing an RFQ or RFP. For any such procurement estimated to be more than fifty thousand dollars ($50,000.00), the executive director shall justify in writing the basis for classifying the consultant as a single-source and shall submit the written justification to the board. The justification shall be submitted for board consideration prior to contracting with the consultant if the anticipated cost of the services exceeds three hundred thousand dollars ($300,000.00). If the anticipated cost of services is more than fifty thousand dollars ($50,000.00) but less than three-hundred thousand dollars ($300,000.00), the executive director may enter into a contract for the services and shall submit the justification to the board at its next regularly scheduled board meeting.

(i) Evergreen Program. The Authority may issue an RFQ to pre-qualify a pool of individuals, entities, or combinations of individuals or entities to provide consulting services for the Authority. The RFQ shall specify: the types of services required; the pre-qualification requirements, including, but not limited to, years of experience, size of firm, financial capacity, and areas of specialty; manner under which the pre-qualified firm will be selected to perform a specific service; and the term of the pre-qualification. Pre-qualification is for the sole purpose of assisting the Authority in the efficient procurement of services and expedited completion of projects. No member of the Evergreen Program shall have an expectation or right to a contract award.

(j) Mixed Contracts. This Appendix E applies to a contract that involves consulting services together with goods or other services otherwise subject to competitive bid requirements, if the primary objective of the contract is the acquisition of consulting services.

(k) Change Orders, Supplemental Agreements, and Amendments. Subsequent to the issuance of a notice to proceed or other authorization to begin work under a contract for consulting services, the executive director is authorized to approve any change order, supplemental agreement or amendment to the contract in an amount of not more than the lesser of thirty percent (30%) of the original contract amount or three hundred thousand dollars ($300,000.00), provided adequate funds are budgeted and available for the contract or are available from approved contingencies for that contract. If either

(1) the change order, supplemental agreement or amendment exceeds the lesser of thirty percent (30%) of the original contract amount or three hundred thousand dollars ($300,000.00) or

(2) adequate funds are not budgeted and available or contained in approved contract contingencies, either

(A) the change order, supplemental agreement or amendment shall require the approval or ratification of the board, evidenced by a resolution adopted by the board, or

(B) the services which are the subject of the change order, supplemental agreement or amendment shall be separately procured in accordance with this policy.

(3) Nothing in this Appendix E, subsection (k) shall limit the ability of the Authority to procure consulting services costing, or anticipated to cost, no more than fifty thousand dollars ($50,000.00) by any method and on any terms as determined by the Executive director as otherwise provided in this policy, including by change order, supplemental agreement or amendment.

§201.25. Appendix F. Disposition of Salvage or Surplus Property.

(a) Sale by Bid or Auction. The Authority may periodically sell the Authority's salvage or surplus property by competitive bid or auction. Salvage or surplus property may be offered as individual items or in lots at the Authority's sole discretion.

(b) Trade-In for New Property. Notwithstanding Appendix F, subsection (a), the Authority may offer salvage or surplus property as a trade-in for property of the same general type if the executive director considers that action to be in the best interest of the Authority.

(c) Heavy Equipment. If the salvage or surplus property is earth-moving, material-handling, road maintenance, construction or similar equipment, the Authority may exercise a repurchase option in a contract in disposing of such types of property. The repurchase price of equipment contained in a previously accepted purchase contract is considered a bid under subsection Appendix F, subsection (a).

(d) Sale to State, Counties, etc. Notwithstanding subsection Appendix F, subsection (a), competitive bidding or an auction is not necessary if the purchaser is the state, or a county, municipality or other political subdivision of the state, or an agency or department of the state of the United States. The Authority may accept an offer made by any of the foregoing governmental entities before offering the salvage or surplus property for sale at auction or by competitive bidding.

(e) Failure to Attract Bids. If the Authority undertakes to sell property under Appendix F, subsection (a), and is unable to do so because no bids are made for the property, the executive director may order such property to be destroyed or otherwise disposed of as worthless. Alternatively, the Executive director may cause the Authority to dispose of such property by donating it to a civic, educational or charitable organization located in the state or elsewhere in the United States.

(f) Terms of Sale. Unless otherwise expressly provided in the sale or disposition documents, all salvage or surplus property sold or otherwise disposed of by the Authority shall be conveyed on an "AS IS, WHERE IS" basis. The location, frequency, payment terms, inspection rights and all other terms of sale shall be determined by the Authority in its sole discretion.

(g) Rejection of Offers. The Authority or its designated representative conducting a sale of salvage or surplus property may reject any offer to purchase such property if the executive director or the Authority's

designated representative finds the rejection to be in the best interests of the Authority.

(h) Public Notices of Sale. The Authority shall publish the address and telephone number from which prospective purchasers may request information concerning an upcoming sale in at least one issue of the officially designated newspaper of the Authority, or any other newspaper of general circulation in each county of the Authority, and the Authority may, but shall not be required to, provide additional notices of a sale by direct mail, telephone, facsimile, the internet or any other means.

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

Filed with the Office of the Secretary of State on June 4, 2004.

TRD-200403692
Marcelle S. Jones
General Counsel
North Texas Tollway Authority
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For further information, please call: (214) 461-2043

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SUBCHAPTER C. DEFINITIONS

43 TAC §201.30

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, Title 6, Subtitle G, Chapter 366, §366.033(j), which authorizes the NTTA to adopt written procedures governing its procurement of goods and services that are consistent with general laws applicable to the Authority.

CROSS REFERENCE TO STATUTE

Transportation Code, §366.033, Transportation Code, §366.184, Transportation Code, §366.185, Local Government Code, Chapter 271, Local Government Code, Chapter 272, Government Code, Chapter 791, Government Code, Chapter 2252, and Government Code, Chapter 2258.

§201.30. Definitions.

As used in this policy and the procedures, the following words and terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) Administrator--The executive director, deputy executive director, assistant executive director, comptroller, chief accountant, and such other positions designated by the executive director, including any director of one of the Authority's several departments.

(2) Available bidding capacity--Bidding capacity less uncompleted work under a construction or maintenance contract.

(3) Authority--The North Texas Tollway Authority.

(4) BCP--The Business Continuity Plan of the Authority.

(5) Bid or quote--The response to a request for the pricing of products, goods, or services, including construction and maintenance services (but other than consulting services or professional services) that the Authority proposes to procure.

(6) Bid documents--Forms promulgated by the Authority which the bidder completes and submits to the Authority to document the bidder's bid on a contract to be let by the Authority. Bid documents include forms furnished to and completed by the Authority to procure goods and services.

(7) Bid guaranty--The security (which may be a bid bond) designated in the bid documents for a construction or maintenance contract to be furnished by the bidder as a guaranty that the bidder will enter into a contract if awarded the work.

(8) Bidder--An individual, entity, or combination of individuals or entities submitting a bid or offer to provide any goods or services, including construction or maintenance services.

(9) Bidding capacity--The maximum dollar value of a construction or maintenance contract that may be awarded to a contractor at any given time, as determined by the Authority.

(10) Board--The Board of Directors of the Authority.

(11) BOPP--The Business Opportunity Program and Policy of the Authority.

(12) Building contract--A contract for the construction or maintenance of one or more buildings, toll plazas, or appurtenant facilities for the Authority.

(13) CEMP--The Comprehensive Emergency Management Plan of the Authority.

(14) Commission--The Texas Building and Procurement Commission.

(15) Competitive bidding--A procurement process under which a contract is awarded to the lowest responsible bidder that complies with the Authority's criteria for such contract.

(16) Competitive sealed proposals--A procurement method in which offers are solicited and a selection is made using criteria in addition to cost, although reasonableness of cost is a selection criterion.

(17) Construction or maintenance contract--A contract for the construction, reconstruction, maintenance or repair of a turnpike project or any portion thereof.

(18) Consulting service--The service of advising or preparing studies or analyses for the Authority under a contract that does not involve the traditional relationship of employer and employee. Consulting services do not include professional services as defined in this policy.

(19) Contract--A written or oral agreement by which the Authority procures goods and services or disposes of property, including, without limitation, a purchase order.

(20) Counties of the Authority--Counties that are members of the Authority.

(21) Deputy executive director--The deputy executive director of the Authority.

(22) Disadvantaged Businesses--Minority-owned, woman-owned or small-business enterprises as defined in the BOPP.

(23) Emergency--Any situation or condition affecting a turnpike project or any other operations of the Authority resulting from a natural or man-made cause, which poses an imminent threat to life, the property of the Authority or the traveling public or which substantially disrupts or may disrupt the safe and efficient flow of traffic and commerce or which has caused unforeseen damage to machinery, equipment or other property that would substantially interfere with or prohibit the collection of tolls in accordance with the Authority's bonding obligations and requirements. A situation or condition similarly affecting the operations of a third party which are subject to a contract with the Authority to provide goods and services shall likewise constitute an emergency.

(24) Escrowed bid documents--Information, whether in documentary or electronic form, that is generated or utilized by the bidder in the preparation of a bid, offer or proposal and is preserved for possible inspection by the Authority following the award of a contract.

(25) Evergreen program--A procurement process by which the Authority pre-qualifies a pool of individuals, entities or combinations of individuals and entities to provide certain professional or consulting services.

(26) Executive director--The executive director of the Authority.

(27) Federal-aid project--A contract funded in whole or in part with funds provided by the government of the United States or any department thereof.

(28) First-choice candidate--The top-ranked offeror or respondent considering the evaluation factors and criteria in an RFP or RFQ.

(29) General goods and services--Goods, services, equipment, personal property and any other items procured by the Authority that are not procured under a construction or maintenance contract and that are neither consulting services nor professional services.

(30) Lowest responsible bidder--A bidder who submits a bid or offer to provide the requested goods and services at a cost that is lower than all other bids or offers received from responsible bidders and which meets other requirements of the Authority. In determining the lowest responsible bidder, the Authority may consider:

(A) the purchase price;

(B) the reputation of the bidder and of the bidder's goods or services;

(C) the quality of the bidder's goods or services;

(D) the extent to which the goods or services meet the Authority's needs;

(E) the bidder's past relationship with the Authority;

(F) the bidder's compliance with the BOPP and with other goals and policies of, or binding on, the Authority, if any, regarding the participation by Disadvantaged Businesses;

(G) the total long-term cost to the Authority to acquire the bidder's goods or services; and

(H) any relevant criteria specifically listed in the bid documents.

(31) Materially unbalanced bid--A bid on a construction or maintenance contract that generates a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost to the Authority.

(32) Mathematically unbalanced bid--A bid on a construction or maintenance contract containing lump sum or unit bid items that do not reflect reasonable actual costs plus a reasonable proportionate share of the bidder's anticipated profit, overhead costs and other indirect costs.

(33) Offeror--An individual, entity, or combination of individuals or entities submitting a proposal in response to an RFP to provide general goods and services.

(34) Officially designated newspaper of the Authority--A general circulation newspaper published in one or more counties of the Authority that is designated as the official newspaper of the Authority from time to time by the board.

(35) Policy--This Policy Regarding Procurement of Goods and Services and Disposition of Property by the North Texas Tollway Authority.

(36) Procedures--The Procedures Regarding Procurement of Goods and Services and Disposition of Property by the North Texas Tollway Authority adopted as an internal guide, and as a supplement to the policy, for use by the Authority's staff.

(37) Professional services--Services that political subdivisions of this State must procure pursuant to the Professional Services Procurement Act.

(38) Professional Services Procurement Act--Texas Government Code, Chapter 2254, Subchapter A, as amended from time to time.

(39) Proposal--An offeror's response to an RFP.

(40) Proprietary purchase--A contract with a vendor for a general good or service that is proprietary to that single vendor.

(41) Response--A respondent's response to an RFQ.

(42) Respondent--An individual, entity, or combination of individuals or entities submitting a response to an RFQ to provide professional or consulting services.

(43) RFP--A request for proposals issued for the provision of general goods and services by competitive sealed proposals.

(44) RFQ--A request for qualifications issued for the provision of professional or consulting services.

(45) Salvage property--Personal property (including, without limitation, supplies, equipment and vehicles), other than items routinely discarded as waste, that through use, time or accident is so damaged, used, consumed or outmoded that it has little or no value to the Authority.

(46) Second-choice candidate--The second-ranked offeror or respondent considering the evaluation factors and criteria in an RFP or RFQ.

(47) Single-source contract--A contract with a consultant uniquely qualified to provide the services required by the Authority at a reasonable fee and within the time limitations required by the Authority.

(48) Surplus property--Personal property (including, without limitation, supplies, equipment and vehicles) that is not currently needed by the Authority and is not required for the Authority's foreseeable needs. The term includes used or new property that retains some usefulness for the purpose for which it was intended or for another purpose.

(49) Turnpike project--A facility of any number of lanes, with or without grade separations, owned or operated by the Authority, and any improvement, extension, or expansion to that highway, including those improvements described in Texas Transportation Code, §366.003(11).

(50) TxDOT--Texas Department of Public Transportation.

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

Filed with the Office of the Secretary of State on June 4, 2004.

TRD-200403693

Marcelle S. Jones
General Counsel
North Texas Tollway Authority
Earliest possible date of adoption: July 18, 2004
For further information, please call: (214) 461-2043

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 12. COAL MINING REGULATIONS

SUBCHAPTER A. GENERAL

DIVISION 1. GENERAL

16 TAC §12.3

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.38(d), the proposed amended section, submitted by the Railroad Commission of Texas has been automatically withdrawn. The amended section as proposed appeared in the November 28, 2003 issue of the *Texas Register* (28 TexReg 10593).

Filed with the Office of the Secretary of State on June 3, 2004.

TRD-200403678

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

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

16 TAC §12.142, §12.145

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.38(d), the proposed amended section's, submitted by the Railroad Commission of Texas have been automatically withdrawn. The amended section's as proposed appeared in the November 28, 2003 issue of the *Texas Register* (28 TexReg 10604).

Filed with the Office of the Secretary of State on June 3, 2004.

TRD-200403679

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

16 TAC §12.187, §12.197

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.38(d), the proposed amended section's, submitted by the Railroad Commission of Texas have been automatically withdrawn. The amended section's as proposed appeared in the November 28, 2003 issue of the *Texas Register* (28 TexReg 10604).

Filed with the Office of the Secretary of State on June 3, 2004.

TRD-200403680

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SUBCHAPTER K. PERMANENT PROGRAM PERFORMANCE STANDARDS

DIVISION 2. PERMANENT PROGRAM PERFORMANCE STANDARDS--SURFACE MINING ACTIVITIES

16 TAC §12.384, §12.385

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.38(d), the proposed amended section's, submitted by the Railroad Commission of Texas have been automatically withdrawn. The amended section's as proposed appeared in the November 28, 2003 issue of the *Texas Register* (28 TexReg 10605).

Filed with the Office of the Secretary of State on June 3, 2004, 2004.

TRD-200403681

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

16 TAC §12.552

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.38(d), the proposed amended section, submitted by the Railroad Commission of Texas has been automatically withdrawn. The amended section as proposed appeared in the November 28, 2003 issue of the *Texas Register* (28 TexReg 10606).

Filed with the Office of the Secretary of State on June 3, 2004.

TRD-200403682

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING SCHOOL FACILITIES

19 TAC §61.1034

The Texas Education Agency has withdrawn from consideration the proposed amendments to §61.1034 which appeared in the March 19, 2004, issue of the *Texas Register* (29 TexReg 2840).

Filed with the Office of the Secretary of State on June 7, 2004.

TRD-200403702
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: June 7, 2004
For further information, please call: (512) 475-1497

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 4. TEXAS COMMISSION FOR THE BLIND

CHAPTER 171. MEMORANDA OF UNDERSTANDING

40 TAC §171.3

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.38(d), the proposed repealed section, submitted by the Texas Commission for the Blind has been automatically withdrawn. The repealed section as proposed appeared in the November 28, 2003 issue of the *Texas Register* (28 TexReg 10683).

Filed with the Office of the Secretary of State on June 3, 2004.

TRD-200403683

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 1. OFFICE OF THE GOVERNOR

CHAPTER 4. TEXAS MILITARY PREPAREDNESS COMMISSION

SUBCHAPTER A. TEXAS MILITARY VALUE REVOLVING LOAN FUND PROGRAM

1 TAC §§4.1, 4.3, 4.5, 4.7, 4.9, 4.11, 4.13, 4.15, 4.17, 4.19

The Office of the Governor adopts new Chapter 4, Subchapter A, §§4.1, 4.3, 4.5, 4.7, 4.9, 4.11, 4.13, 4.15, 4.17, and 4.19, relating to the Texas Military Value Revolving Loan Fund Program. Sections 4.1, 4.7, 4.9, 4.11, and 4.13 are adopted with changes to the proposed text as published in the April 16, 2004, issue of the *Texas Register* (29 TexReg 3729). Sections 4.3, 4.5, 4.15, 4.17, and 4.19 are adopted without changes to the proposed text and will not be republished. The new sections are being adopted to implement the new program and disseminate program practices to potential users. The program is authorized by Texas Government Code, Chapter 436, Subchapter D, Fiscal Provisions.

The adopted new §4.1 provides the introduction and purpose of the program by providing a background, goal, and definitions applicable to the loan fund.

The adopted new §4.3 states the period of time in which loan funds must be expended.

The adopted new §4.5 provides eligibility requirements communities must meet to apply for loan funds.

The adopted new §4.7 provides the maximum and minimum loan amounts that may be awarded, the percentage amount of the cost of the project that may be provided in the loan, and a certification requirement demonstrating local efforts to obtain funding from other sources.

The adopted new §4.9 provides application procedures and guidelines for loan funds and sets out the documentation that will be required from loan fund applicants, including the general, legal, and financial information requirements to be in the application package. The financial information is divided into requirements for debt to be secured by ad valorem taxes and other generally accepted fees and for debt to be secured by enterprise or fee or service revenues.

The adopted new §4.11 provides the processing and review criteria that will be used to determine the creditworthiness of the loan fund applicant in the areas of general obligation debt, revenue debt, sales tax bonds, and special assessment bonds. The section details the actions that will be taken by the office of the TMPC and the Commission in evaluating the applications.

The adopted new §4.13 provides availability of funds commitment procedures if the project has been approved by the Commission.

The adopted new §4.15 provides awardees responsibilities that must be met in order to receive disbursement of loan funds that have been encumbered to them.

The adopted new §4.17 provides Commission responsibilities that will be performed by the Commission in carrying out its duties and responsibilities under the Act.

The adopted new §4.19 requires awardees to provide written reports on the status of projects and expenditures related to the loan will be as determined by the Commission.

Comments on the proposed new sections were received from McCall, Parkhurst & Horton, L.L.P., and the Texas Public Finance Authority. The agency also made changes to correct grammatical and typographical errors within this chapter. The comments are summarized as follows:

Comment: It is unclear whether only Defense Dependent Communities or any local governmental entity may submit an application.

Response: The agency changed references to "local governmental entities" and "local governing entities" throughout to "Defense Dependent Communities" to clarify that Defense Dependent Communities, as that term is defined in §4.1(c)(1), are eligible to submit applications under the program.

Comment: Change §4.7(c) to allow either the Chief Executive Officer or the Chief Financial Officer to provide the certification, because in many communities, there is no Chief Financial Officer.

Response: The agency changed the proposed text for §4.7(c) to provide that either the Chief Executive Officer or the Chief Financial Officer may provide the certification.

Comment: Correct grammatical and typographical errors in §4.9(b) and (d).

Response: The agency corrected grammatical and typographical errors in §4.9.

Comment: Clarify the legal citation in §4.9(b)(4).

Response: The agency rewrote §4.9(b)(4) to clarify the legal citation by deleting references to the bill number and legislative session.

Comment: In §4.9(b)(12), clarify that the required plan is the plan for the Defense Dependent Community.

Response: The agency added language to §4.9(b)(12) to clarify that the required plan is the plan for the Defense Dependent Community.

Comment: Change §4.9(b)(14) to require the applicant to disclose not all issues that may affect the ability to repay debt, which is overly broad, but only issues that the applicant believes are issues material to the process. That way, the Commission and its staff can focus questions on those issues.

Response: The agency changed the proposed text for §4.9.(b)(14) by adding the word "materially" to require disclosure of all issues that may materially affect the applicant's ability to repay the debt.

Comment: In §4.9(c)(1)(C), clarify that the board of the political subdivision is the body of the applicant.

Response: The agency changed the proposed text for §4.9(c)(1)(C) for clarity as suggested.

Comment: The application should require the applicant to state what the legal authority is for the applicant to finance the project for which financial assistance is sought. For example, some of the projects that may be proposed may require an election.

Response: The agency added new paragraph (3) to §4.9(c), requiring the applicant to state the legal authority to finance the project for which the funds are requested.

Comment: Change §4.9(d)(1)(I) to clarify that the financial information requested includes the description of any credit agreements with financial institutions and bond insurers.

Response: The agency changed the proposed text of §4.9(d)(1)(I) for clarity as suggested.

Comment: In §4.9(d)(2)(N), require the submission of material limitations or issues, rather than all potential issues, related to continuing to provide services for debt secured by enterprise or fee or service revenues, and correct a typographical error.

Response: The agency changed the proposed text for §4.9(d)(2)(N) by adding the word "material" and deleting the word "potential."

Comment: In §4.9(d)(2)(P), require the submission of a list of the ten largest customers of the systems from which the revenues securing the loan are generated, rather than the electrical, water and wastewater systems.

Response: The agency rewrote §4.9(d)(2)(P) by replacing the text electrical, water and wastewater systems" with "systems from which the revenues securing the loan are generated," as suggested.

Comment: The financial information requested to be submitted as part of the application process is quite detailed, and there is inconsistency and a lack of clarity regarding some of the information requested. It would seem to be appropriate to provide an applicant the ability to provide such financial information as is filed by political subdivisions in connection with continuing disclosure undertakings incurred in the issuance of debt under Rule 15c2-12, promulgated by the U.S. Securities and Exchange Commission, which is information of a financial and statistical nature. Some of the other information, such as housing starts and office space occupancy could be misleading. Two communities could have office space occupancy of 75%, but what does that mean if one applicant is a community of 5,000 and the other a community of 500,000? Also, one must take into consideration the administrative burden of determining some of the information requested. A large urban area applicant could readily submit information such as a consumer price index, but a rural applicant may not have such information readily available. Perhaps the items to be submitted could be fine-tuned to reflect information regarding the project, and information regarding the financial ability of the applicant to repay the loan made to finance the project.

Response: The agency added new §4.9(e) to this chapter relating to alternative financial information, to address some of the commenter's concerns. The agency does not plan to request information based on community population.

Comment: It is unclear how the criteria in §4.11, in the discussion of Creditworthiness Criteria, are to be applied. For example, would an unfunded city pension liability of $1 billion adversely affect the review of an application, to the detriment of funding a loan that may be needed to retain a major military installation? The rules should not be so specific on the criteria of making loans. The agency will receive and review applications, and make judgments more on the project as opposed to what an unfunded pension liability would be or whether an entity is GASB compliant.

Response: The agency is requesting detailed information in the rules so that it may make a comprehensive assessment of the applicant's ability to repay the loan, whether or not the base remains open or is closed under BRAC. This evaluation must take into consideration the applicant's overall financial position as well as the specific impact of the project itself. Because of the diverse nature of the projects that can be financed and financial situations of the applicants, the agency is requesting a comprehensive set of information to ensure that it will have the necessary data to make a thorough evaluation of each application.

Comment: Clarify the application due date.

Response: The agency added an application due date in §4.11(a).

Comment: Requiring the review panel to consider whether all parties involved in a project are acceptable to the Commission is too subjective and open to interpretation.

Response: The requirement has been deleted from §4.11(d)(5)(B)(ix).

Comment: General law governing the Commission does not require a supermajority to decide matters. A majority of a quorum should be adequate to make decisions on loan applicants.

Response: The agency changed the proposed text for §4.11(e) to allow a simple majority of the commission to approve loan awards.

Comment: It is not clear whether the term "bonds" in §4.13(b) means the general obligation bonds issued by the state, or the bonds issued by the local governmental entity.

Response: The agency added the phrase "state-issued" in §4.13(b) to clarify that the reference means the bonds issued by the state.

The new sections are adopted pursuant to the Texas Government Code §436.154(a) which directs the commission to adopt rules for administration of the loan program and Texas Government Code, Chapter 2001, Subchapter B, which prescribes the standards for rulemaking by state agencies.

Texas Government Code, Chapter 436, Subchapter D, is affected by the new sections.

§4.1. Introduction and Purpose.

(a) Background. The Texas Military Value Revolving Loan Fund was authorized by Senate Bill 652 of the 78th Legislature adding

Texas Government Code, Chapter 436, Subchapter D. The purpose of the fund is to assist defense communities in enhancing the military value of the military facility in their area. Constitutional amendment Proposition 20 passed on September 13, 2003 authorized the issuance of general obligation bonds or notes not to exceed $250 million payable from the general revenues of the state to provide loans, which must be repaid, to defense communities for projects that enhance the military value of military installations.

(b) The primary goal of the program is to enhance the military value of the military facility to make it operate as efficiently as possible.

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

(1) A Defense Dependent Community--A defense dependent community in Texas that is a political subdivision, including a municipality, county, or special district, that is adjacent to, is near, or encompasses any part of a defense base, and that has a currently operating defense facility employing 2,500 or more workers in an urban area or 1,000 workers outside an urban area;

(2) Agency--The Office of the Governor;

(3) Awardee--The Defense Dependent Community whose loan application is approved by the Commission;

(4) Commission--The Texas Military Preparedness Commission;

(5) Commissioners--Members of the Texas Military Preparedness Commission;

(6) Defense worker--

(A) An employee of the United States Department of Defense (DoD), including a member of the armed forces or a federal civilian worker; or

(B) An employee of a government agency or private business, or entity providing a Department of Defense related function, who is employed on a defense facility;

(7) Defense worker job--

(A) A DoD authorized permanent position, such as a position contained on the appropriate unit manning documents; or

(B) A position held or occupied by one or more defense workers for more than 12 months;

(8) Executive director--The executive director of the Texas Military Preparedness Commission;

(9) Financial partners--Federal and state agencies, private and public non-profit foundations, local taxing authorities, and private investors who agree to provide money for projects eligible for funding under this program;

(10) Fund--The Texas Military Value Revolving Loan Fund; and

(11) Panel--The Revolving Loan Fund Review Panel, made up of Commissioners who will evaluate loan applications and make loan recommendations to the Commission.

§4.7. Maximum and Minimum Awards.

(a) Amount. The minimum amount of a loan will be $500,000 while the maximum amount of a loan will be determined by the availability of funds and the creditworthiness of the applicant.

(b) Percentage. The state may provide up to 100% of the cost of the described project, dependent upon the creditworthiness of the applicant.

(c) Certification. Defense Dependent Communities are encouraged to acquire financial assistance for eligible development projects from a variety of sources, including federal, state, local and private/public foundations. The Chief Executive Officer or the Chief Financial Officer of the Defense Dependent Community making application shall provide certification demonstrating reasonable local community efforts to acquire funding from other sources when the state is the only other financial partner.

§4.9. Application for Funds.

(a) Introduction:

(1) The Commission will develop a formal application form to be included in the process to assist in the evaluation of the loan request. The application may require certain attachments and certifications. A complete application consists of the *Military Value Enhancement Statement* and the general, legal, and fiscal information as outlined below.

(2) Ten (10) copies and two (2) unbound, double sided copies of an application containing the following general, legal, and fiscal materials should be submitted to the Texas Military Preparedness Commission.

(b) General Information:

(1) Full legal name and description of requesting loan "applicant" and each participating political subdivision under which debt is being issued.

(2) Description of the governing body and contact information for person authorized to represent the political subdivision ("applicant contact"). Include name, title, address, phone, fax number, and e-mail address.

(3) Name, address, phone, fax number, e-mail address, and contact person for legal counsel, financial advisor, contract administrator, project engineer, and any other consultant representing the applicant before the Commission.

(4) A *Military Value Enhancement Statement* containing the information described in §397.002 of the Local Government Code.

(5) Description of the project, including a description of the use of the project by general public, private business, etc.

(6) A summary overview of the use of the funds including the total amount of loan required and partners involved in financing the project, including their shares.

(7) Applicant shall submit an engineering feasibility report signed and sealed by a professional engineer registered in the State of Texas. The report shall provide: description and purpose of the project; entities to be served; current and future population of the entity or project; the cost of the project; a description of innovative technology considered and reasons for the selection of the project proposed; sufficient information to evaluate the engineering feasibility; and maps and drawings as necessary to locate and describe the project area. The Commission may request additional information or data as necessary to evaluate the project.

(8) The total number of jobs to be created or retained as a result of the project.

(9) Project timeline, including description of when loan proceeds will be needed. If possible, include an anticipated draw or expenditure schedule of loan proceeds on a monthly or quarterly basis.

(10) For each participating political subdivision and federal and state agency, provide a breakdown of ownership interest in the project and an allocation of project costs including financing sources and current project status.

(11) Project budget, including most current itemized project cost estimates (include all costs, specifically construction, engineering services, legal, and fiscal costs, and funding sources and percentage contribution in a Sources and Uses Statement format). Identify source of these estimates, i.e., engineer, finance director, financial advisor, etc.

(12) A current Capital Improvement Plan, for the Defense Dependent Community, which addresses at least five (5) years of the applicant's future infrastructure construction needs.

(13) Three (3) years of audited financial statements of the applicant and current unaudited year to date information.

(14) Disclose all issues (i.e., lawsuits, injunctions, etc.) that may materially affect the applicant's ability to repay debt.

(15) Other uses for the project in the event of base closure or realignment.

(16) General economic and demographic information for the area being served. Provide five (5) years of history for such items as:

(A) Population; and

(B) Economic statistics such as:

(i) Consumer price indexes;

(ii) Non-agricultural employment broken down by sector;

(iii) Unemployment rate;

(iv) Housing starts;

(v) Apartment occupancy rates;

(vi) Non-residential building permits;

(vii) Office space occupancy; and

(viii) Top ten employers.

(c) Legal Information:

(1) One (1) certified original of:

(A) A resolution/ordinance requesting financial assistance from the Commission, authorizing the submission of the application and designating the official representative(s) for submitting the application, executing any necessary documents and appearing before the Commission.

(B) An affidavit executed by the official representative stating that the facts contained in the application are true and correct to the best of their knowledge and belief.

(C) An affidavit executed by the official representative stating that the application was approved by the governing body of the applicant in an open meeting.

(D) A certificate of compliance executed by an official representative which warrants compliance by the participating political subdivision with all representations in the application, all federal (where applicable), state, and local laws, and all rules/published policies of the Commission.

(E) A statement of pending claims or litigation against the applicant that might affect the ability of the applicant to issue debt or that could affect the Commission's ability to recover its investment.

(2) One (1) copy of the following executed documents:

(A) Any option, sales, or lease agreement(s) necessary for the project.

(B) Any actual or proposed service contracts for electrical, water supply, or sewer service indicating adequate supply or capacity for the life of the proposed loan.

(C) Any actual or proposed contracts between the applicant and any other entity which will generate revenues pledged to the repayment of the proposed debt.

(D) All executed contracts for consultant services included in the total project cost.

(3) Describe the legal authority for the applicant to finance the project through the proposed debt.

(d) Financial Information: The financial information being requested is broken down into two categories, ad valorem tax supported debt and debt supported by a specific revenue stream. Please fill out the basic information regarding the nature of the entity and then the information for the relevant revenue stream pledge.

(1) Financial Information for debt secured by ad valorem taxes and other generally applicable fees:

(A) Description of the legal authorization for levying a tax. (i.e. Bond Authorization, or Certificates of Obligation).

(B) Description of taxing procedures and property exempt from taxation.

(C) Current credit rating(s), if any, and copies of most recent rating reports from major rating agencies.

(D) Description of pledged revenues (i.e. ad valorem tax, sales and use tax, franchise charges and fees).

(E) Disclosure of any tax rate limitations.

(F) Total outstanding debt of the political subdivision. Segregate by type (G.O. or Revenue) and present a consolidated schedule for each, showing total annual debt service requirements.

(G) Schedule of authorized, but unissued debt, and schedule of projected issuance dates.

(H) Amount of variable rate debt outstanding, if any and description of interest rate mode and liquidity facilities for each program.

(I) Description of any credit agreements with financial institutions and bond insurers.

(J) Description of any leases over $1 million that are paid from the general fund.

(K) Current adopted budget and capital improvement program, if any.

(L) Direct and overlapping tax rate table.

(M) Overlapping debt table.

(N) Full description of any derivatives products outstanding, such as interest rate swaps.

(O) Description of any defaults and circumstances surrounding the default.

(P) Historical information for the last five (5) years for:

(i) Tax rolls or other taxes;

(ii) Top ten taxpayers;

(iii) Tax rate and collection history;

(iv) Debt issuance including issuance of tax and revenue anticipation notes;

(v) Description of transfers into the general fund from other funds;

(vi) General Fund Undesignated Fund Balance; and

(vii) Rating reports, if any.

(Q) Pro forma debt service schedule, with tax rate impact. Describe assumptions related to growth and tax collection rates.

(2) Financial Information for debt secured by enterprise or fee or service revenues:

(A) Description of the authorization to charge or collect fees (i.e. water and sewer charges, developer impact fees, hotel occupancy tax). Full legal name and a description of the *security* for the proposed debt.

(B) Description of revenue collection process and ability to change rates.

(C) Current credit rating(s), if any, and copies of most recent rating reports from major rating agencies.

(D) Current adopted budget of the enterprise system, and capital improvement program, if separately prepared.

(E) Description of future additional bonds contemplated to be issued and secured by the revenue stream.

(F) Description of existing debt secured by revenue stream including rate covenants.

(G) Description of the proposed flow of funds.

(H) Description of debt service reserve funds and their investments.

(I) Description of additional bonds tests.

(J) Amount of variable rate debt outstanding, if any and description of interest rate mode and liquidity facilities for each program.

(K) Full description of any derivatives products outstanding, such as interest rate swaps.

(L) Historical information for the last five (5) years for:

(i) Consumption data related to volume of services or product provided (e.g. how much water provided to customers);

(ii) Description of the top ten customers;

(iii) Rate history related to revenue stream being pledged (e.g. water rates on a water system);

(iv) Revenues collected;

(v) Collection rates;

(vi) Capital expenditure;

(vii) Capital reserves;

(viii) Undesignated Fund Balance; and

(ix) Rating reports, if any.

(M) Description of the facilities of the system used to generate revenues and their physical condition (age, etc.).

(N) Any material limitation or issues related to continuing to provide service.

(O) Pro forma financials: detailing projected gross revenues, operating and maintenance expenditures, net revenues available for debt service showing coverage of current and proposed debt paid from revenues, as well as on a net basis taking into consideration expenses and required contributions to capital reserves.

(P) List of ten (10) largest customers of the systems from which the revenues securing the loan are generated.

(Q) Five-year comparative utility system operating statement, including audited prior years and un-audited year-to-date, with number of customers for each year.

(R) State whether applicant is a *4A* or *4B* community for economic development tax purposes.

(e) If the applicant has bonds or other long term debt obligations outstanding, secured by the same revenue pledge as the requested loan, and such bonds carry an investment grade rating from a major rating agency, the applicant may submit the Final Official Statement from such bonds and all information filed with the Nationally Recognized Municipal Securities Information Repositories pursuant to SEC Rule 15c2-12 in the past 12 months in lieu of the information required in subsection (d) of this section.

§4.11. Processing and Review of Applications.

(a) The Defense Dependent Community will submit applications for the program to the Executive Director of the Commission. To be considered for the award of a loan in calendar year 2004, applications must be received by August 31, 2004. The Commission further reserves the right to establish quarterly periods of application due dates for subsequent years.

(b) The Commission may request any additional information needed to evaluate the application, and may return any incomplete applications.

(c) Creditworthiness Criteria: The following criteria will be used to determine the creditworthiness of an application:

(1) General Obligation Debt

(A) Economic Base:

(i) Demographics.

(ii) Tax Base.

(iii) Employment Base:

(I) The industry mix and employment by sector to identify diversification trends or structural changes in the economy over time. Specifically, contributions from manufacturing, services, trade, construction, government, and agriculture sectors and how these have changed over time relative to national and state trends.

(II) Concentration in major employers or reliance on particular industries.

(III) Employer commitment to the community importance of local facilities and employees to the overall strategy of local employers, business development plans, age of plant, and industry prospects.

(IV) Unemployment rates over the last decade and labor force growth. The match between jobs and the skill level of the labor force.

(V) The regional patterns of employment and growth.

(VI) The level of retail sales as well as growth trends over time.

(B) Financial Indicators:

(i) Accounting and financial reporting methods (GAAP, GASB compliant, etc).

(ii) Annual operating and budgetary performance.

(iii) Financial leverage and equity position.

(iv) Budget and financial planning practices.

(v) Revenue and expenditure structure and patterns:

(I) The composition of the municipalities' revenue stream over a three- to five-year period and the stability of major revenues, such as: property, sales, and income taxes; user charges; intergovernmental aid; and investment income.

(II) The composition and stability of expenditures; the nature and impact of large expenditure items; and the existence of extraordinary or nonrecurring expenditures.

(III) The existence and effect of any revenue transfers among other governmental and capital funds. The level of general fund and/or debt service fund support from interfund transfers; policy guidelines and historical transfer practices.

(vi) Balance sheet position--liquidity, fund balance position, and the composition of assets and liabilities, including: the volatility and patterns of the tax revenue stream, the predictability of government spending, the availability of unencumbered reserves or contingency funds, and the ability of public officials to sustain a strong financial position.

(vii) Use of cash flow borrowing or other short-term financing.

(viii) Pensions and other long-term liabilities.

(C) Existing Debt Burden:

(i) Amount and type of existing debt.

(ii) Nature of security pledge.

(iii) Repayment structure.

(iv) Current debt service burden as a percentage of current expenditures.

(v) Future capital needs.

(D) Management and Administration:

(i) Financial management.

(ii) Annual budget process.

(iii) Long-term capital program.

(iv) Property tax administration.

(v) Labor settlements and litigation.

(vi) Investment guidelines.

(2) Revenue Debt

(A) Engineer's report, feasibility study, rate study.

(B) Regulatory approvals (local, state, federal).

(C) Amount of existing debt and legal provisions/restrictions of existing loan covenants tied to the revenue stream.

(D) Population trends.

(E) Income trends.

(F) Composition of employment by sector.

(G) Unemployment rates.

(H) Largest employers in the service area.

(I) Tax base trend (property, sales).

(J) Building permit activity.

(K) System connections.

(3) Sales Tax Bonds

(A) Size and Diversity of Tax base.

(B) History of Sales tax collections.

(C) Ten largest retail sales generators.

(D) Amount of debt already supported by the sales tax, if any.

(4) Special Assessment Bonds

(A) Make-up and economic base of the assessment district.

(B) Assessment basis.

(C) Collection methods.

(D) Loan-to-value ratios.

(E) Lien position.

(F) Security interest in the property.

(G) Foreclosure/bankruptcy provisions.

(d) The Commission will:

(1) Publicize the program to potential applicants and provide loan solicitation information.

(2) Evaluate each application for completeness. The Office will work closely with the applicant to ensure all relevant information is included in the application.

(3) Evaluate the creditworthiness of the Defense Dependent Community or revenue stream pledged to repay the loan, as appropriate, based on the above criteria and application procedures.

(4) Appoint a review panel consisting of five members to evaluate applications and appoint a review panel chairman.

(5) The review panel will:

(A) Review applications and make recommendations to the Commission.

(B) Provide evaluations and recommendations for all loan applications received based on the following criteria:

(i) Did the community complete a *Military Value Enhancement Statement*?

(ii) Will the project enhance the *military value* of the installation?

(iii) What is the anticipated value (in terms of use) of the project if the installation is closed or realigned?

(iv) Is this a joint use (community and military installation) project?

(v) What is the overall benefit of the project to:

(I) State;

(II) Community; and

(III) Military installation.

(vi) What percentage of the total project cost is the community requesting in funding from the Fund? Are there federal funds involved? Other state funds?

(vii) What is the timeline or schedule for completion of this project?

(viii) Are there any environmental concerns? Any negative factors that will affect the community or military installation?

(ix) Based on the value of the project and creditworthiness of the applicant, what is the likelihood that the loan will be repaid on schedule and be sufficient to pay the debt service on the bonds?

(e) The Commission will approve or disapprove the award of the loan by a vote of a simple majority of the commission.

§4.13. Availability of Funds.

(a) Funds commitment. If the project has been approved by the Commission, funds become committed to the awardee subject to the sale of the general obligation bonds by the state.

(b) Upon sale of state-issued bonds, funds will be disbursed to the awardee by the Office of the Comptroller.

This agency 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 June 2, 2004.

TRD-200403676
Robin Abbott
Assistant General Counsel
Office of the Governor
Effective date: June 22, 2004
Proposal publication date: April 16, 2004
For further information, please call: (512) 936-0517

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PART 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 55. CHILD SUPPORT ENFORCEMENT

SUBCHAPTER G. AUTHORIZED COSTS AND FEES IN IV-D CASES

1 TAC §55.154

The Office of the Attorney General adopts Subchapter G, Authorized Costs and Fees in IV-D Cases, §55.154 without changes to the proposed text as published in April 30, 2004, issue of the *Texas Register* (29 TexReg 4037). Texas Family Code, §231.109 which provides the State's IV-D agency the authority to require a court to order a respondent to pay attorney's fees if the respondent is found to be in contempt of court for failure or refusal to pay child support and the respondent owes $20,000 or more in child support arrearages.

No comments were received regarding adoption of the new rule.

The new rule is adopted under Texas Family Code §157.167 and §231.109.

This agency 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 June 4, 2004.

TRD-200403696
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Effective date: June 24, 2004
Proposal publication date: April 30, 2004
For information regarding this publication, you may contact A.G. Younger, Agency Liaison, at (512) 463-2110

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TITLE 22. EXAMINING BOARDS

PART 37. TEXAS BOARD OF ORTHOTICS AND PROSTHETICS

CHAPTER 821. ORTHOTICS AND PROSTHETICS

22 TAC §§821.2, 821.3, 821.5 - 821.7, 821.23, 821.25, 821.27, 821.29, 821.39, 821.41, 821.43

The Texas Board of Orthotics and Prosthetics (board) adopts amendments to §§821.2, 821.3, 821.5 - 821.7, 821.23, 821.25, 821.27, 821.29, 821.39, 821.41, and 821.43, concerning the licensure and regulation of orthotists, prosthetists, assistants, technicians, students, and orthotic and prosthetic facilities. Section 821.29 is adopted with changes to the proposed text as published in the March 5, 2004, issue of the *Texas Register* (29 TexReg 2182). Sections 821.2, 821.3, 821.5 - 821.7, 821.23, 821.25, 821.27, 821.39, 821.41, and 821.43 are adopted without changes and the sections will not be republished.

The sections are amended to add a definition for safety manager; incorporate amendments to the Sunset Advisory Commission's Occupational Licensing Model; ensure that fee increases mandated by the 2003 Texas Legislature are billed and collected; add a fee to change the safety manager at accredited facilities; correct citations; add requirement that scaled floor plans for new facility applications clearly show the location of parallel bars; require the on-site practitioner in charge to list all facilities where they are the practitioner in charge and submit a work schedule; require new facility applications to list the licensee or registrant who is designated as the safety manager; require that all photographs submitted with facility applications be labeled; require that labeled photographs of the facility entrance showing wheelchair accessibility be submitted with new facility applications; require that labeled photographs of lab and fabrication areas be submitted with new facility applications; include the authority for emergency suspensions; and add the imposition of administrative penalties as a disciplinary action. The sections

are also amended to implement House Bill 2985, 78th Legislature, 2003, which added Occupations Code, Chapter 101, Subchapter G relating to fees; Senate Bill 1152, 78th Legislature, 2003, which amends Government Code, Chapter 2054, to require participation in Texas Online; Senate Bill 161, 78th Legislature, 2003, which amends Occupations Code, Chapter 605, relating to emergency suspensions and administrative penalties.

No comments were received during the comment period concerning the proposed amendments. However, a revision was made due to a staff comment.

Change: Concerning §821.29(c)(1)(H), second sentence, a hyphen was deleted between the words "in " and "charge" which now reads "practitioner in charge" for clarity.

The amendments are adopted under Texas Occupations Code, Chapter 605, which provides the Texas Board of Orthotics and Prosthetics with the authority to adopt rules concerning the regulation of orthotists and prosthetists.

§821.29. Accreditation of Prosthetic and Orthotic Facilities.

(a) Requirement for practice setting of licensees.

(1) A person licensed under the Orthotics and Prosthetics Act, (Act), Texas Occupations Code, Chapter 605, who practices in Texas shall practice only in facilities accredited under the Act, unless the type of practice is exempted by the Act, §§605.301 - 605.305, or the facility is exempted by the Act, §605.260(e).

(2) A facility shall not be required to achieve accreditation under this section if the facility or person(s) providing health care services at the facility do not perform or hold itself or themselves out as performing or offering to perform prosthetics and/or orthotics as defined in the Act, §605.002, or §821.2 of this title (relating to Definitions).

(b) Purpose of facility accreditation. The purpose of accreditation is to identify for prospective patients, referral sources, and third-party payers which prosthetic and/or orthotic facilities meet the board's requirements. This section is adopted under the Act, §605.260. All facilities where orthotics and prosthetics are provided by persons licensed or registered under this title must be accredited under these rules, unless the facility is exempted under the Act, §605.260(e).

(c) Accreditation application.

(1) Accreditation applications must include the following information:

(A) name of the facility;

(B) street address of the facility (must be in Texas);

(C) mailing address, if different from the street address;

(D) if a corporation:

(i) the name, address, social security number and percentage of ownership of persons who directly or indirectly own or control 5.0% or more of the outstanding shares of stock in the facility in a privately held corporation; or

(ii) the name and address of the director(s); or

(E) the name, address, telephone number, and social security number of the sole proprietor or partners;

(F) if another type of organization, the type of organization, the name, address, and telephone number of the owner(s);

(G) a scaled floor plan indicating the total square feet in the facility and clearly showing the location of parallel bars;

(H) the name and Texas license number of the prosthetist, orthotist, or prosthetist/orthotist who is designated as the on-site practitioner in charge and his or her notarized signature. If the on-site practitioner in charge is in charge of more than one facility, a list of all facilities at which the practitioner is in charge and a work schedule for the practitioner in charge must be included. A person who holds a temporary or provisional license or a student registration may not serve as the on-site practitioner in charge;

(I) the name and Texas license number of the licensee or registrant that is designated as the safety manager;

(J) the name and Texas license number of other licensees of this Act who practice in the facility;

(K) the signature of the on-site practitioner(s) in charge of the facility;

(L) labeled photographs of each room and hallway clearly showing wheelchair accessibility and privacy for patients;

(M) labeled photographs of the facility entrance clearly showing wheelchair accessibility; and

(N) labeled photographs of all lab and fabrication areas.

(2) The board will not consider an application as officially submitted until the applicant pays the accreditation fee as set out in §821.5 of this title (relating to Fees). The fee must accompany the application form.

(3) If an individual, partnership, corporation or other entity owns one or more facilities, the board requires one primary application and separate addendum pages for additional sites to be accredited.

(4) The executive director, acting for the board, shall determine whether the facility complies with the Act and these rules of the rules.

(5) If the board does not grant accreditation to the entity that applies to be an accredited facility, the accreditation fee will not be returned.

(6) The executive director shall give the applicant written notice of the reason(s) for the proposed decision and of the opportunity for a formal hearing. The formal hearing shall be conducted according to the board's formal hearing procedures in §821.39 of this title (relating to Complaints). Procedures relating to the notice and request for hearing shall be governed by the same section.

(d) Denial of accreditation. An application may be denied for one or more of the following reasons:

(1) nonpayment of an accreditation fee;

(2) failure to submit the required information on the application form;

(3) falsification of information on the application form; or

(4) violation of the Act or rules.

(e) Requirements for accredited facilities.

(1) The entire facility building and property must meet applicable federal, state, and local laws, codes, and other applicable requirements.

(2) Prosthetic and/or orthotic facilities must apply for accreditation with the board and pay an accreditation fee by February 1, 1999, or within 60 days of the first patient treatment date, whichever is later.

(3) An accredited facility must display the accreditation certificate in a prominent location in the facility where it is available for inspection by the public. An accreditation certificate issued by the board is the property of the board and must be surrendered on demand by the board.

(4) An accredited facility is subject to random inspection to verify compliance with the Act and these rules at any time by authorized personnel of the board. The board may also conduct inspections if a complaint is received regarding the facility.

(5) An accredited facility must be under the clinical on-site direction of a prosthetist, orthotist, or prosthetist/orthotist licensed by the board in the discipline in which the facility sought accreditation. The person shall supervise the provision of prosthetics or orthotics in accordance with the Act and rules and shall be considered the person in charge. To change the designation of the on-site practitioner(s) in charge, the facility shall notify the board in writing of the name and license number of the new on-site practitioner(s) and the date the effective date of the change. The written notice shall be accompanied by the appropriate fee as set out in §821.5 of this title (relating to Fees). The notice and fee shall be submitted to the board before the change is effective.

(6) A facility accredited under the Act is required to comply with the Act and rules of the board at all times.

(7) A facility accredited under the Act shall always prominently display a sign in letters equal to or larger in size or font as the sign provided by the board to each accredited facility, containing the name, mailing address and telephone number of the board, a statement informing consumers that complaints against licensees of the facility may be directed to the board, and the toll-free telephone number for presenting complaints to the board about a person or facility regulated or requiring regulation under the Act.

(8) An accredited facility is required to report to the board any change regarding the on-site prosthetist, orthotist, or prosthetist/orthotist who is clinically directing the facility within 30 days after it occurs. The information provided to the board shall be accompanied by the appropriate fee as set out in §821.5 of this title (relating to Fees).

(9) An accredited facility may advertise as a "Prosthetic and/or Orthotic Facility Accredited by the Texas Board of Orthotics and Prosthetics." A facility which is exempt or which the board does not accredit may not advertise or hold itself out as a facility accredited by the Texas Board of Orthotics and Prosthetics.

(10) An accreditation issued under these rules shall not be transferred or sold to another facility or owner. An accreditation issued under these rules may not be transferred to a different location without written approval of the executive director.

(11) An accredited facility must designate at least one licensee or registrant as the safety manager. The safety manager is responsible for developing, carrying out, and monitoring the safety program for the accredited facility. To change the designation of the safety manager(s), the facility shall notify the board in writing of the name and license number of the safety manager(s) and the effective date of the change. The written notice shall be accompanied by the appropriate fee as set out in §821.5 of this title (relating to Fees). The notice and fee shall be submitted to the board before the change is effective.

(f) Change in ownership. A change of ownership of a facility occurs when there is a change in the person(s) legally responsible for the operation of the facility, whether by lease or by ownership.

(1) The new owner of a prosthetic and/or orthotic facility must receive accreditation within 90 days of the change in ownership.

(2) The former owner of the facility must return the accreditation certificate to the board within 90 days of the sale or transfer of the facility to a new owner.

(g) Exemptions to accreditation. A facility licensed under the Health and Safety Code, Title 4, Subtitle B, is exempt from this accreditation. This includes hospitals, convalescent and nursing homes, ambulatory surgical centers, birthing centers, abortion centers, continuing care facilities, personal care facilities, special care facilities, maternity homes, and end-stage renal disease facilities. These types of facilities are automatically exempt and are not required to obtain a formal exemption from the board.

(h) Renewal of accreditation.

(1) When issued, an accreditation is valid for two years from the date the initial accreditation was issued.

(2) An accredited facility must renew an accreditation every two years by completing a renewal application and submitting the required fee.

(3) The renewal date of an accreditation shall be the last day of the month in which the accreditation was originally issued.

(4) The board shall not renew the accreditation of a facility that is violating or has violated the Act or these rules until the facility has corrected the violation(s) to the satisfaction of the board.

(5) At least 30 days before the expiration of a facility's accreditation, the board will send notice to the facility of the accreditation expiration date and the amount of the renewal fee due and an accreditation renewal form. Failure to receive a renewal application from the board does not exempt the facility from renewing its accreditation. A facility that fails to receive a renewal application by the first day of its renewal month should contact the board immediately.

(6) The board shall issue an accreditation renewal to a facility that has met the requirements for renewal. It shall be affixed to or displayed with the original accreditation and is the property of the board.

(i) Failure to achieve accreditation. Facilities that fail to achieve accreditation as required by the Act and the rules are noncompliant with the Act and rules and are subject to disciplinary actions proposed by the executive director on behalf of the board. Additionally, the licensed prosthetist, orthotist, or prosthetist/orthotist in charge of the facility may be violating the Act and rules and subject to disciplinary action.

(j) Reinstatement of accreditation. When a facility fails to renew its accreditation by the expiration date, the facility is subject to the procedures and fees as follows:

(1) If the facility accreditation has been expired for 90 days or less, the facility may renew by paying the required renewal fee and a restoration fee that is one-half of the renewal fee.

(2) If the facility accreditation has been expired for more than 90 days but less than one year, the facility may renew by paying the unpaid renewal fees and a restoration fee that is equal to the renewal fee.

(3) If the facility accreditation has been expired for more than one year, the facility may not renew the accreditation. The facility must submit an application for accreditation as described in subsection (c) of this section in order to obtain board accreditation.

(k) Disciplinary actions.

(1) The executive director, on behalf of the board, may propose disciplinary action against a facility for violation of the Act or

rules. The disciplinary action may include imposition of an administrative penalty, letter of reprimand, revocation or suspension of the accreditation, probation, or other appropriate disciplinary action.

(2) The processing of complaints against accredited facilities or applicants for accredited facilities is accomplished in accordance with §821.39 of this title (relating to Complaints).

(3) A revocation or suspension of an accreditation may affect all facilities accredited under the same name, the same owners, or the same corporation.

(4) The executive director shall give the facility written notice of the proposed disciplinary action and of the opportunity for a formal hearing. The formal hearing shall be conducted according to the board's formal hearing procedures in §821.39 of this title. Procedures relating to the notice and request for hearing shall be governed by the same section.

(l) Facility cleanliness. The facility shall be constructed and maintained appropriately to provide safe and sanitary conditions for the protection of the patient and the personnel providing prosthetic and orthotic care.

(1) Patient examination and treatment rooms shall be cleaned after each patient is seen.

(2) Hand soap, hand towels or hand dryers must be available at the sinks used by employees and patients.

(3) Exam tables must have disposable covers or disinfected surfaces.

(4) Appropriate gloves and disinfectants for disease control must be available in examination rooms and treatment areas.

(m) Patient waiting area.

(1) Patient waiting area must be separate from the other areas.

(2) Chairs with armrests must be provided in waiting room.

(3) A telephone must be made available for patient use.

(n) Examination/treatment rooms.

(1) Rooms in which patients are seen must maintain privacy and have permanent, floor-to-ceiling walls or dividers and rigid doors. Windows must assure privacy.

(2) At least one set of parallel bars and a mirror for patient ambulation trials must be provided in each facility.

(3) Chairs with armrests must be provided in examination/treatment rooms.

(o) Safety.

(1) Safety equipment (safety glasses or goggles and dust masks) must be available to persons working in an accredited facility.

(2) Proper machine use and training must be provided.

(3) Safety guards on machines must be in place.

(4) Lab/Fabrication area must be separated from other areas by walls and/or rigid doors and have adequate ventilation and lighting.

(5) If smoking is permitted, appropriate policies and procedures are required to control smoking materials.

(6) A minimum of one licensee or registrant must be assigned to each facility to act as safety manager. The safety manager is responsible for developing, carrying out, and monitoring the safety program.

(p) Business office area.

(1) Patient records must include accurate and current progress notes.

(2) Patient records must be kept private.

(3) Patient records shall not be made available to anyone outside the facility without the patient's signed consent or as required by law.

(4) Records must be kept a minimum of five years.

(q) General.

(1) Restroom and hand washing facilities must be available to the patient.

(2) Facility must have the capabilities to provide casting, measuring, fitting, repairs, and adjustments.

(r) Adding a category to a facility accreditation. To add the prosthetic or orthotic category to a facility accreditation, which is not expired, suspended or revoked, an application shall be completed and submitted to the board on a form provided by the board. The application shall be accompanied by the appropriate fee as set out in §821.5 of this title.

This agency 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 June 3, 2004.

TRD-200403688
Scott B. Atha
Presiding Officer
Texas Board of Orthotics and Prosthetics
Effective date: June 23, 2004
Proposal publication date: March 5, 2004
For further information, please call: (512) 458-7236

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TITLE 25. HEALTH SERVICES

PART 2. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

CHAPTER 405. CLIENT (PATIENT) CARE

SUBCHAPTER H. BEHAVIOR MANAGEMENT--FACILITIES SERVING PERSONS WITH MENTAL RETARDATION

25 TAC §§405.156 - 405.169

The Texas Department of Mental Health and Mental Retardation (department) adopts the repeals of §§405.156 - 405.169 of Chapter 405, Subchapter H, governing behavior management--facilities serving persons with mental retardation, without changes as published in the January 30, 2004, issue of the *Texas Register* (29 TexReg 901).

The subject matter of the repealed subchapter is addressed in two new subchapters contemporaneously adopted in this issue

of the *Texas Register*. The repeal of the existing subchapter and the adoption of two new subchapters is in response to recent and considerable interest at the federal and state levels by legislators and advocate/stakeholder groups, and by Texas and national media in the use of restraint in all institutional settings.

New Chapter 415, Subchapter I, governing behavior therapy in state mental retardation facilities, and Chapter 415, Subchapter H, governing the use of restraint in state mental retardation facilities, ensures that the health, safety, welfare, rights, and privileges of an individual residing in a state mental retardation facility (state MR facility) are protected during the use of restraint and when staff recommend utilizing highly restrictive procedures or restricting rights or privileges to address the individual's inappropriate behavior.

No comments on the proposed repeals were received.

These rules are adopted for repeal under the Texas Health and Safety Code (THSC), §532.015(a), which provides the Texas Mental Health and Mental Retardation Board (board) with broad rulemaking authority; THSC, §591.004, which requires the board to ensure the implementation of the Persons with Mental Retardation Act (THSC, Title 7, Subtitle D); and THSC, §592.002, which requires the board to ensure the implementation of certain rights enumerated in THSC, Chapter 592.

This agency 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 June 3, 2004.

TRD-200403687
Rodolfo Arredondo
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: June 23, 2004
Proposal publication date: January 30, 2004
For further information, please call: (512) 206-5232

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CHAPTER 414. PROTECTION OF CONSUMERS AND CONSUMER RIGHTS SUBCHAPTER P. RESEARCH IN TDMHMR FACILITIES

25 TAC §§414.751 - 474.764

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts the repeal of §§414.751 - 414.764 of Chapter 414, Subchapter P, concerning research in TDMHMR facilities, without changes to the proposal as published in the January 2, 2004, issue of the *Texas Register* (29 TexReg 40). New §§414.751 - 414.765 of Chapter 414, Subchapter P, concerning the same, which replace the repealed sections, are contemporaneously adopted in this issue of the *Texas Register*.

The repeal allows for the adoption of new sections governing the same matters.

No comments on the proposal were received.

The repeal is adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board (board) with broad rulemaking authority, and §576.021, which states that a patient receiving mental health services under Subtitle C has the right to refuse to participate in a research program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 2, 2004.

TRD-200403675
Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: June 22, 2004
Proposal publication date: January 2, 2004
For further information, please call: (512) 206-4516

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25 TAC §§414.751 - 414.765

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts new §§414.751 - 414.765 of Chapter 414, Subchapter P, concerning research in TDMHMR facilities, without changes to the proposed text as published in the January 2, 2004, issue of the *Texas Register* (29 TexReg 40). The repeal of existing §§414.751 - 414.764 of Chapter 414, Subchapter P, concerning the same, which the new sections replace, are contemporaneously adopted in this issue of the *Texas Register*.

The new sections establish uniform guidelines for the review, approval, conduct, and oversight of research in TDMHMR facilities. The new sections describe TDMHMR's general principles for research in its facilities; describe four options under which a facility may choose an institutional review board (IRB) as its designated IRB; describe the functions and operations of a designated IRB, including the responsibilities and requirements for reviewing, approving, and monitoring research; and describe the requirements for procedures for obtaining informed consent from prospective human subjects. The new sections also adopt by reference Title 45, Code of Federal Regulations (CFR), Part 46 (Protection of Human Subjects), Subparts A, B, and D, to ensure the protection of human subjects involved in research; "The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research, Report of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research" (April 18, 1979), to ensure ethical principles are maintained when research involving human subjects is conducted; and 42 CFR Part 50, Subpart A (Responsibility of PHS Awardee and Applicant Institutions for Dealing With and Reporting Possible Misconduct in Science), to ensure all research undertaken at TDMHMR facilities is conducted with a fundamental commitment to high ethical standards regarding the conduct of scientific research.

The key difference between the new sections and the repealed sections is that the new sections incorporate requirements related to privacy of health information by adopting by reference the Federal Standards for Privacy of Individually Identifiable Health Information, 45 CFR Part 160 and Part 164, Subparts A and E, which are promulgated by the U.S. Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Additionally, the new sections do not adopt by reference 45 CFR Part 46, Subpart C (Additional DHHS Protections Pertaining to Biomedical and Behavioral Research Involving Prisoners as Subjects); however, they

contain all the subpart's requirements that are applicable to a TDMHMR facility.

No comments on the proposal were received.

The new sections are adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board (board) with broad rulemaking authority, and §576.021, which states that a patient receiving mental health services under Subtitle C has the right to refuse to participate in a research program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 415. PROVIDER CLINICAL RESPONSIBILITIES
SUBCHAPTER H. USE OF RESTRAINT IN STATE MENTAL RETARDATION FACILITIES

25 TAC §§415.351 - 415.366

The Texas Department of Mental Health and Mental Retardation (department) adopts new §§415.351 - 415.366 of new Chapter 415, Subchapter H, governing the use of restraint in state mental retardation facilities. The department adopts §§415.353 - 415.357, 415.359 - 415.363, and 415.365 with changes to the text as published in the January 23, 2004, issue of the *Texas Register* (29 TexReg 587). The department adopts §§415.351, 415.352, 415.358, 415.364, and 415.366 without changes.

The new subchapter describes policies and procedures that a state mental retardation facility (state MR facility) must implement to ensure that the rights physical well-being of an individual residing in the state MR facility are protected during the use of restraint. Currently, the use of restraint in state MR facilities is addressed briefly in Chapter 405, Subchapter H, governing behavior management--facilities serving persons with mental retardation, the repeal of which is adopted contemporaneously in this issue of the *Texas Register*.

Although most provisions in the new subchapter describe existing policies and procedures followed by state MR facilities, a few notable requirements are new. For example, §415.355(b) requires a state MR facility's interdisciplinary team (IDT), with the involvement of a physician, to identify a newly admitted individual's known physical or medical conditions that might constitute a risk to the individual during the use of restraint. Further, the IDT is required to identify other factors, such as the individual's cognitive functioning level, size, weight, emotional condition (including whether the individual has a history of having been physically or sexually abused), and age, which must be taken into account if the use of restraint is considered. The IDT must document this information, as well as any limitations on specific techniques or mechanical devices for restraint identified by the IDT, in the individual's record. Subsection (c) requires that at least annually, or whenever significant changes occur in the identified conditions and factors, that the IDT must, with the involvement of a physician, advanced practice nurse, or physician assistant, review and update the identified conditions, factors, and limitations in the individual's record. Other new requirements of note: in §415.356(e)-(g), the state MR facility must designate staff as "restraint monitors" who, upon being notified that restraint is in use in a behavioral emergency, must go to the site of the restraint to provide supervision and oversight; and, in §415.362(a), when an individual receives a serious physical injury or dies while in restraint an report must be made immediately to the head of the state MR facility or designee who must, within 24 hours of receiving the report, notify the department's Central Office and initiate an investigation.

Restraint is defined in new §415.353(13) as the use of manual pressure, except for physical guidance or prompting of brief duration, or a mechanical device to restrict: (1) the free movement or normal functioning of the whole or a portion of an individual's body or (2) normal access by the individual to a portion of the individual's body. This definition is more prescriptive than the prevailing operational definition of the term, i.e., restraint is an intervention employed to address an individual's inappropriate behavior. The premise of the new subchapter is that the use of certain techniques or mechanical devices constitute restraint whether they are used to prevent injury when an individual engages in voluntary, inappropriate behavior such as head banging or to protect an individual who experiences involuntary movements, such as violent seizures. The definition effectively re-categorizes as restraint some techniques commonly used by state MR facilities to protect an individual from involuntary self-injury, provide postural support to an individual, or assist an individual in obtaining and maintaining normative bodily functioning. The department explicitly states in §§415.355, 415.359, and 415.360 that some, but not all, techniques used by a state MR facility to protect an individual from involuntary self-injury, provide postural support, or assist in obtaining and maintaining normative bodily functioning meet the definition of restraint. Techniques that do not meet the definition of restraint and are not subject to the provisions of this subchapter include the placement of wedges, bolsters, or cushions to position an individual in a bed or chair.

In §415.354, a state MR facility is required to develop and implement written policies and procedures that, among other things, emphasize the department's commitment to: providing treatment that is the least restrictive and most effective alternative available for an individual; staff training that emphasizes early recognition of situations and behaviors that, if not appropriately addressed, could necessitate the use of restraint in a behavioral emergency; and reducing the necessity for the use of restraint in the state MR facility.

General requirements for the use of restraint are detailed in §415.355, many of which describe existing practices that all state MR facilities follow to ensure the protection of an individual's rights and well-being. Most of these practices have their basis in the federal regulations governing the Intermediate Care Facilities for Persons with Mental Retardation (ICF/MR) Program at Code of Federal Regulations (CFR), Title 42, §483.450(d), concerning physical restraints, in the Conditions of Participation for Intermediate Care Facilities for Persons with Mental Retardation.

In the next five sections, the department describes the five circumstances under which the use of restraint is permitted: in a behavioral emergency (§415.356); as an intervention in a behavior therapy program to address inappropriate behavior exhibited voluntarily by an individual (§415.357); during a medical or dental procedure if necessary to protect the individual or others and to promote the healing of wounds (§415.358); to protect the individual from involuntary self-injury (§415.359); and to provide postural support to the individual or to assist the individual in obtaining and maintaining normative bodily functioning (§415.360).

In §415.361, the department specifies that only those mechanical devices designed specifically for the safe and relatively comfortable restraint of humans may be used in the restraint of an individual in a state MR facility. Such devices include commercially available devices acquired by the state MR facility, devices that have been developed independently by or on behalf of the state MR facility, or commercially available mechanical devices that have been altered to accommodate an individual's specific physical needs (e.g., a physical impairment or obesity). In subsection (b), the department describes the process a state MR facility must follow to obtain approval for use of a mechanical device developed independently by or on behalf of the state MR facility or the alteration of a commercially available device to accommodate an individual's specific physical needs. The section also describes precautions that staff must take in the use of mechanical devices, lists and describes mechanical devices that are acceptable for use in a state MR facility, and lists devices that must not be used.

Additional reporting and documentation requirements are described in §415.362 relative to the use of restraint. As noted earlier in this preamble, the most significant provision is the requirement that the head of the state MR facility must be notified immediately, but in no case more than one hour, after staff learn of a serious injury to or death of an individual that occurs while the individual is in restraint. The head of the state MR facility is required to report the death or serious injury within one working day to the State MR Facilities Division in the department's Central Office and to designate staff to investigate the incident.

Requirements for initial and refresher training are set forth in §415.363.

The department developed the new subchapter and related new Subchapter 412, Subchapter I, governing behavior therapy in state mental retardation facilities, which is adopted in this issue of the *Texas Register*, in response to recent and considerable interest at the national and state levels by legislators and advocate/stakeholder groups and by state and national media concerning the use of restraint in all institutional settings.

Although recent new federal statutes and regulations have addressed the use of restraint in acute care and psychiatric hospitals and residential care facilities, new regulations have not been issued by the Centers for Medicare and Medicaid Services (CMS) regarding ICFs/MR. State MR facilities' polices and procedures concerning the use of restraint are based on the current federal regulations governing the ICF/MR Program (42 CFR, §483.450(d), concerning physical restraints) and on licensure rules issued by the Texas Department of Human Services (Texas Administrative Code, Title 40, §90.42, governing standards for facilities serving persons with mental retardation or related conditions). Senate Bill 59 was introduced during the 78th Legislature in spring 2003 addressed the use of restraint in certain health care facilities, including state MR facilities and, although the bill was not passed, certain provisions have been incorporated in this subchapter. One of those provisions is found in §415.355(f), which forbids the use of restraint in a manner that obstructs an individual's airway, impairs an individual's breathing by putting pressure on the individual's torso, or interferes with an individual's ability to communicate. A second provision of the failed bill is addressed in §415.356(d), which directs that staff must avoid placing an individual in a prone or supine position during the use of personal restraint and, if the individual should roll into a prone or supine position during personal restraint, restore the individual to a standing, sitting, or side position as soon as possible. The department's Prevention and Management of Aggressive Behavior (PMAB) curriculum addresses these concerns in detail.

The new subchapter is more prescriptive than the federal regulations governing the ICF/MR Program. For example, the interpretive guidelines to the federal regulations at 42 CFR §483.440(c)(6)(iv) specifically state that the use of mechanical devices to protect an individual from injury due to the individual's involuntary movements (i.e., during a seizure) or to position or support an individual does not constitute restraint. As noted earlier in this preamble, the new subchapter specifies that if the use of a mechanical device to protect an individual from involuntary self-injury or to position or support an individual meets the definition of restraint (i.e., a vest or seat belt that restricts the free movement or normal functioning of the whole or a portion of an individual's body or restricts normal access by the individual to a portion of the individual's body), then that use constitutes restraint.

Minor language changes have been made throughout the subchapter to update or correct references, for grammatical and organizational purposes, and for consistency and clarification. The definition of "behavioral emergency" in §415.353 has been revised to add "self-injurious behavior" and to delete the phrase "or overt or continual threats made by an individual." Definitions of "medical intervention," "non-serious physical injury," and "serious physical injury" have been added. Language has been added to the definition of "restraint monitor" to mean the monitor meets the training requirements described in §415.363.

All references to "serious injury" in §415.355, §415.356, and §415.362 have been clarified as "serious physical injury." Language has been added to §415.355(a)(5) stating that "... not all techniques used by a state MR facility to provide postural support or assist in obtaining and maintaining normative bodily functioning constitute the use of restraint (e.g., placement of wedges, bolsters, or cushions to position an individual in a bed or chair)." The general principle in subsection (k)(5) relating to when an individual falls asleep while being restrained has been deleted and added as part of new §415.356(n) under use of restraint in a behavioral emergency. The provision in §415.355(l) concerning communications of staff at shift change has been expanded to include specific documentation requirements. The provision in §415.355(n) relating to an individual in restraint who experiences a medical emergency has been expanded to include the requirement to obtain a new order for restraint if the use of restraint at the time of the medical emergency had been in response to a behavioral emergency and, after resolution of the medical emergency, the individual continues to exhibit behavior that constitutes a behavioral emergency. A provision has been added as new subsection (q) stating that a state MR facility must ensure at least one restraint monitor is on duty at all times to respond as required by the subchapter.

Language has been added as new §415.356(c)(2)(A) that requires documentation of any action taken in accordance with (c)(2). Language was added to §415.356(g) limiting the timeframe to no "later than one hour" for the restraint monitor to report the use of restraint to a nurse. A new §415.356(k) has been added to address situations in which personal items are removed from the individual during the use of restraint in a behavioral emergency. A new §415.356(n) has been added to address situations in which an individual falls asleep while being restrained for a behavioral emergency. The requirement for the restraint monitor to debrief staff who actively participated in the use of restraint in a behavioral emergency has been added as new paragraph (4) of subsection (p). Provisions have been added as new subsection (r) that relate to use of restraint in a behavioral emergency when an individual is away from the state MR facility.

Language has been added as a new §415.357(b) stating that the provisions of the section must be followed by staff when implementing restraint as directed in an individual's behavior therapy program both on and off the state MR facility campus. References to "restraint monitor" in subsection (e) have been replaced with "staff." Proposed subsection (h) concerning use of psychotropic medications as part of a behavior therapy program has been deleted as unnecessary because the use of psychotropic medications is addressed in other department rules.

Language regarding obtaining legally adequate consent in §415.359(a)(3) and (d)(4)(B) and §415.360(a)(3) and (d)(4)(B) has been modified to clarify that the individual provides legally adequate consent and the LAR provides consent. Sections 415.359(a)(3)(C) and 415.360(a)(3)(C) have been expanded to allow the head of the state MR facility to authorize the use of restraint with a mechanical device in situations in which the individual's LAR has not responded to the facility's attempts to obtain consent and the LAR has been notified that the head of the state MR facility may authorize the use if the LAR does not respond.

Reference to "non-serious injuries" in §415.362(d)(2) has been changed to "non-serious physical injuries." Language has been modified in §415.363(c)(1) to clarify that a restraint monitor must have successfully completed only those sections of the department's PMAB curriculum that address the procedures used at the state MR facility. A training requirement for a restraint monitor in conducting and documenting staff debriefing has been added as new subsection (c)(2)(E).

A hearing to accept oral and written testimony from members of the public concerning the proposal was held on February 13, 2004, in Austin. Testimony was offered by Advocacy, Inc., Austin; and Crisis Prevention Institute (CPI), Brookfield, Wisc.

Written comments concerning the proposal were submitted by the parent/guardian of a state MR facility resident, Garland; Advocacy, Inc., Austin; Crisis Prevention Institute (CPI), Brookfield, Wisc.; Parent Association for the Retarded of Texas (PART), Austin; The Arc of Texas, Austin; and Texas Council for Developmental Disabilities, Austin.

Two commenters questioned why the new subchapter applies only to state MR facilities. The commenters stated that state requirements for use of restraint should be applied consistently in all ICFs/MR, and reflect the less restrictive environments typical of smaller public and private ICFs/MR. The department responds that the new subchapter has been promulgated by the department in its role as a provider of residential services and is consistent with Texas Department of Human Services standards for ICF/MR licensure at Texas Administrative Code, Title 40, §90.42(e)(4), concerning the use of restraint, which apply to all ICFs/MR in Texas. The department further explains that state MR facilities are intended to serve individuals who cannot be adequately and appropriately habilitated in less restrictive settings.

Two commenters observed that the subchapter does not describe how the state MR facility will safeguard an individual's personal possessions while that individual is in restraint. The department agrees and has added new §415.356(k) describing steps to be taken by staff when personal items, including clothing must be removed from an individual during the use of restraint in a behavioral emergency.

A commenter stated that restraint should not be used as part of treatment, punishment, or as coercive means to force compliance, but should be used only to protect the individual and assure that the state MR facility provides the individual with quality care. The department agrees and directs the commenter to §415.355(e)(1)-(3), which states that staff are prohibited from using restraint for "disciplinary purposes, for the convenience of staff or other individuals, or as a substitute for effective treatment or habilitation".

A commenter stated that the subchapter should require a debriefing process after every occurrence of restraint. The commenter stated that during debriefing, staff must evaluate and reinforce the prevention and intervention strategies learned during training, determine what measures can be taken to reduce or eliminate the use of restraint in the future, and carefully scrutinize and revise, as necessary, the individual's treatment plan. The department agrees that staff members who actively participate in the use of restraint in a behavioral emergency should be "debriefed" and has added new §415.356(o)(4), which requires the restraint monitor who responds to the report of restraint used in a behavioral emergency to perform this function. The department also has revised the training requirements for a restraint monitor in §415.363(c) to require a restraint monitor to successfully complete a course on conducting and documenting a debriefing.

A commenter stated that the subchapter should require that a state MR facility employ a multidisciplinary team approach to the use of restraint, as well as to debriefing techniques, in order to identify medical, psychological, and emotional trauma risks for an individual who has been restrained. The department responds that, as required by federal ICF/MR Program regulations, each state MR facility employs an interdisciplinary team approach to treatment and care issues. The department also explains that, as described in the previous paragraph, new §415.356(o)(4) requires the restraint monitor who responds to the report of restraint used in a behavioral emergency to debrief staff who actively participated in the restraint.

A commenter recommended that the department consider permitting state MR facilities the flexibility of choosing from other training programs in addition to Prevention and Management of Aggressive Behavior (PMAB), the department's proprietary risk management curriculum. The commenter explained that individuals and state MR facility staff who may respond more positively to a crisis moment through a different approach have limited access to other nationally recognized best practices. The commenter noted that the subchapter allows for the use of state MR facility developed, as well as commercially produced mechanical devices. The department disagrees with the commenter's

recommendation and responds that the concurrent use of different risk management systems by a state MR facility would result in confusion among staff and a reduction in the effective and appropriate use of verbal and physical interventions in a behavioral emergency.

Two commenters recommended that §415.351(1) be revised to state that the subchapter's purpose includes protecting the rights of an individual's LAR as well as those of the individual. The commenters stated that many of the rights of the individual are transferred to the guardian by the court and that the subchapter must acknowledge this. The department disagrees with the commenters' recommendation and responds that the rights of the individual protected by the rules do not "transfer" to a court-appointed guardian. These rights include protection from exploitation and abuse, access to appropriate treatment and services, freedom from mistreatment, and freedom from unnecessary medication.

Concerning the definition of "behavioral emergency" in §415.353, two commenters stated that the language seems to allow for a restraint in response to destruction of property. The commenters stated that this is very problematic and that while a state MR facility's concerns about property are valid, the possible risk of bodily harm to or death of an individual as a result of restraint does not seem warranted. The department does not agree that the definition permits the use of restraint if an individual's "severely aggressive, destructive, or violent behavior" results in the destruction of property. The department notes that subparagraph (A) of the definition states that the individual's behavior must pose "a substantial risk of imminent probable death of or substantial bodily harm to the individual or others" before the use of restraint may be used.

Also concerning the definition of "behavioral emergency" in §415.353, a commenter stated that the phrase "overt or continual threats made by an individual" implies that an individual may be restrained for making threats if a behavior therapy program addressing "overt or continual" threats has not been approved for that individual. The commenter expressed concern that the definition might encourage the inappropriate use of restraint. The department agrees with the commenter's objection and has deleted the phrase from the definition.

Two commenters stated that the department, in attempting to reduce the use of restraint in state MR facilities, has deliberately created processes that are burdensome to staff and do not ensure the protection of an individual who is restrained or of others. The commenters stated that the definition of "behavioral emergency" in §415.533, which prohibits the use of restraint unless an individual's behavior poses "a substantial risk of imminent death of or substantial bodily harm to the individual or others" is too extreme. The department does not agree with the commenters' assessment that the processes described in the proposed rules are burdensome to staff. The department explains that most of the requirements in the proposed rules currently are being followed at the state MR facilities. The department also does not agree that the definition of "behavioral emergency" is "extreme" because data collected by state MR facilities, other Texas agencies, and agencies in other states concerning injuries to individuals and staff during the use of restraint in behavioral emergencies indicate that the use of restraint presents significant risks. The department declines to make any changes to the language as proposed.

Two commenters stated that the definition of "mechanical device" in §415.353 describes a process on the use and application of a mechanical device, but does not define the term. The commenters stated that the confusion is caused by the use of the term "device" instead of "restraint," and recommended that the subchapter should instead define "mechanical restraint" as the application of a device restricting the movement of the whole or a portion of an individual's body to control physical activity. The commenters stated that this definition is consistent with the language in the Federal regulations that apply to psychiatric hospitals and residential treatment facilities. The department responds that the rules do not use the term "mechanical restraint" and declines to include the recommended definition.

Concerning the definition of "restraint" in §415.353, two commenters stated that physical guidance or prompting can be restraint if it is involuntary and the individual resists. The commenters recommended that the definition should focus, not on the length of time involved, but on whether the intervention is voluntary. The commenters further recommended that the definition should be consistent with the Children's Health Act of 2000, the federal condition of participation concerning patient's rights (Code of Federal Regulations, Title 42, §482.13(f)(1)), the department's recently adopted rules which address the use of restraint in mental health facilities (Texas Administrative Code (TAC), Title 25, Chapter 415, Subchapter F), and rules of the Texas Department of Family and Protective Services concerning child care licensing (40 TAC §720.1001). The commenters also recommended including a definition of "escort or brief physical prompt", to read as follows "An individual may be assisted to move from one location to another when guidance is needed. The individual must agree verbally or with gestures and be able to cooperate with the staff member who is attempting to assist the individual to move." The department responds that the proposed definition of restraint is consistent with current federal regulations governing the ICF/MR Program (42 CFR, §483.450(d), concerning physical restraints) and declines to make the recommended revisions. The department also declines to add the recommended definition of "escort or brief physical prompt" because the term is not used in the rules.

Also concerning the definition of "restraint" in §415.353, a commenter stated that the use of psychotropic medications to reduce or alter inappropriate behavior in an emergency situation constitutes restraint and recommended that the definition be revised accordingly. The department declines to make the recommended revision because a state MR facility's use of psychotropic medications in a behavioral emergency is addressed elsewhere in department rules and the relevant reference is provided in §415.356(s).

A commenter recommended that a definition of "serious injury" be added to §415.353 because the phrase is used repeatedly throughout the subchapter and state MR facility staff must understand when an injury that occurs during the use of restraint is considered "serious" and must be reported as required in §415.362. The department agrees and, to be consistent with usage in the department's rules concerning abuse, neglect, and exploitation in department facilities, has changed "serious injury" to "serious physical injury" throughout the subchapter and has added a definition of "serious physical injury" in §415.353.

A commenter recommended that the definition of "restraint monitor" in §415.353 be revised to include a reference to the training and experience requirements outlined in detail in §412.363(c). The department agrees and has made the recommended revision.

Concerning the definition of "restraint monitor" in §415.353, two commenters asked how many restraint monitors a state MR facility will be required to hire and what services will be cut to pay for the additional staff. The department responds that a state MR facility will not have to hire additional staff because existing staff who have the required training are functioning as restraint monitors. The department further responds that no services have been eliminated as a result of the use of restraint monitors.

A commenter recommended that §415.354(a)(2)(A), which addresses the department's commitment to "providing treatment that is the least restrictive and most effective alternative available for an individual," be revised to describe how the effectiveness of recommended alternative interventions will be evaluated, especially those interventions that have not be attempted for an individual. The department does not agree with the commenter's recommendation that the rule should articulate prescriptive requirements for the IDT process, which the department believes must remain highly individualized.

Two commenters recommended that §415.354 be revised to require a state MR facility's written policies and procedures to incorporate certain protections contained in rules that address the use of restraint and seclusion in public and private inpatient mental health settings. The department responds that §415.354(a)(1) requires that a state MR facility's written policies and procedures must not conflict with the subchapter or the federal regulations governing the ICF/MR program. The department notes also that many of the specific requirements listed by the commenters already are addressed in the subchapter. Further, the department notes that the new language recommended by the commenters addresses the use of seclusion in a behavioral emergency, and responds that state MR facilities must comply with the federal ICF/MR regulations that do not address the use of seclusion but do permit the use of time-out rooms as part of an approved behavior therapy program. The following five paragraphs describe the commenters' recommendations of specific language for inclusion in a state MR facility's written policies and procedures, and the department's responses.

The two commenters' were joined by a third commenter in recommending that §415.354 be revised to state that restraint must be used only as an intervention of last resort after less restrictive measures have been found to be ineffective or have been judged unlikely to protect the individual or others from harm. The department responds that §415.356(b) requires that staff must first attempt the verbal or other de-escalative interventions to address an individual's inappropriate behavior that appears to be escalating into a behavioral emergency. Only if those interventions fail to prevent the individual's behavior from escalating into a behavioral emergency are staff permitted to use restraint. The department further explains that the definition of "behavioral emergency" in §415.353 provides that "severely aggressive, destructive, violent, or self-injurious behavior" constitutes a behavioral emergency only if the behavior "has not abated in response to attempted preventive de-escalatory or redirection techniques".

The two commenters recommended that §415.354 be revised to state that restraint and seclusion, when determined by staff to be the appropriate intervention in an behavioral emergency, must be used for the shortest period necessary and be terminated as soon as the individual demonstrates the release behaviors specified by the physician. The department responds that §415.355(f)(1) requires staff to restrain an individual during a behavioral emergency only for the shortest period of time necessary to ensure protection of the individual and others. The department has added new §415.356(n) to clarify that an individual who is restrained during a behavioral emergency must be released as soon as the individual no longer poses a risk of imminent physical harm to self or others.

The two commenters recommended that §415.354 be revised to require staff to respect and preserve the rights of an individual during restraint. The department responds that §415.355(j)(4) requires staff to implement restraint without violating the individual's rights as described in department rules at 25 TAC Chapter 405, Subchapter Y.

The two commenters recommended that §415.354 be revised to state that an individual placed in restraint or seclusion must be provided with a protected, private, and observable environment that safeguards the individual's personal dignity and well-being. The department responds that §415.355(h)(5) requires staff to implement restraint in a manner that safeguards the individual's dignity, privacy, and well-being.

The two commenters recommended that §415.354 be revised to state that staff must avoid causing undue physical discomfort, harm, or pain to the individual when restraint or seclusion is used. The commenters also recommended that the section require that only the minimal amount of physical force that is reasonable and necessary for staff to implement restraint is to be used and that psychoactive medication may be used in an emergency only in accordance with department rules at Chapter 405, Subchapter B, which addresses the prescribing of psychotropic medications in a state MR facility. The department responds that §415.355 addresses most of the commenters concerns; subsection (h)(4) requires staff to implement restraint in a manner that reduces the risk of injury or undue physical discomfort to the individual; subsection (i)(1) requires that staff implement restraint using only the minimal amount of force or pressure that is reasonable and necessary to ensure the safety of the individual and others; subsection (i)(3) requires that staff to implement restraint without causing pain that restricts the individual's movement; subsection (k)(1) requires staff to provide immediate relief to an individual, which may include immediate release from restraint, and to notify a nurse to check the individual if the individual shows signs of symptoms of physical distress; and subsection (k)(4) requires staff to monitor the individual to the extent necessary to protect the individual from physical distress, self-injury, or injury by another individual. In addition, the department responds that §415.356(t) requires staff to follow the provisions of §405.31 in the subchapter cited by the commenters if the use of psychotropic medications in a behavioral emergency is deemed necessary by a physician.

A commenter recommended that §415.355(b)(1) and (h)(1) be revised to describe those conditions that are known risk factors in the use of restraint. The commenter stated that these factors include, but are not limited to obesity, heart disease, respiratory diseases, traumatic brain injury, prescription and illegal drug use and abuse, and other medical conditions. The department disagrees with the commenter's recommendation and responds that a state MR facility's IDT and physicians is afforded no practical guidance by a listing in the rules of all physical and medical conditions that might possibly be risk factors during restraint. The department believes that it has taken the most prudent and responsible approach by requiring the state MR facility's IDT and physician to assess an individual, review the medical documentation provided in the individual's admission application and to

identify the individual's known physical or medical conditions that might constitute a risk to the individual during the use of restraint. The department further believes that the subchapter provides an added level of assurance and protection by requiring the IDT and physician in §415.355(b)(1)(B) to also consider other factors including--but not limited to--an individual's cognitive functioning level, size, weight, emotional condition (including whether the individual has a history of having been physically or sexually abuse), and age.

Two commenters recommended that §415.355(d) be revised by adding "each" between "Before" and "restraint" to clarify that the requirement for staff to determine whether less restrictive, less intrusive interventions will be ineffective is "episode specific" and not just upon admission to the facility. The department responds that the provision is a general requirement and is not intended to be "episode specific" and, therefore, declines to make the recommended revision. The department notes that the commenters' concern appears to be related to the use of restraint in a behavioral emergency and explains that §415.356(b) requires staff to attempt verbal or other de-escalative interventions before using restraint to address a behavioral emergency.

Two commenters recommended that §415.355(f) be revised to specify that when restraint or seclusion is the determined to be the appropriate intervention, staff should use it for the shortest period necessary and should terminate it as soon as the individual demonstrates the release behaviors specified by the physician. The department declines to make the recommended revision and responds that §415.355(f)(1) provides that staff may restrain an individual during a behavioral emergency only for the shortest period of time necessary to ensure protection of the individual and others, and §415.355(f)(2) requires staff to restrain an individual for the shortest period of time necessary to ensure therapeutic effectiveness as part of a behavior therapy program, a medical or dental procedure, or in protecting against involuntary self-injury. The department has added new §415.356(n) to clarify that an individual who is restrained during a behavioral emergency must be released as soon as the individual no longer poses a risk of imminent physical harm to self or others.

Concerning §415.355(g), two commenters commended the department for incorporating this provision of Senate Bill 59, 78th Legislature, even though the bill was not approved by the legislature. A third commenter recommended that §415.355(g)(1) be revised to add "or restricts circulation" and §415.355(g)(2) be revised to substitute "respiratory or cardiovascular functions" for "breathing" and to prohibit staff from putting pressure on an individual's neck. The department acknowledges the two commenters' commendation. The department declines to make the revision recommended by the third commenter because the intent of the provision is to prohibit certain techniques that have been found to contribute to death by asphyxiation during the use of restraint.

A commenter recommended that §415.355(k)(3) be revised to allow an individual to be released from restraint during mealtime and to require that an individual's IDT to determine whether the individual should be provided with snacks while in restraint. The department responds that the commenter's concerns appear to be related to the use of restraint in a behavioral emergency, and that the suggested revision would not be appropriate if applied to all instances of restraint addressed by the rules. For instance, an individual who is in restraint to promote healing after a medical or dental procedure may be harmed if released prematurely, as might an individual who is in restraint to prevent involuntary self-injury or an individual who is in restraint in order to maintain postural support. The department notes that an individual's IDT addresses appropriate nutrition under all circumstances, including whether an individual should receive snack while in restraint. The department declines to make the recommended revisions.

Three commenters recommended that §415.355(k)(4) be revised to require that an individual who is restrained in a behavioral emergency must be monitored continually. Two of the three commenters also recommended adding language requiring staff to maintain "continuous face-to-face observation" of an individual who is in restraint with a mechanical device and that the staff person observing the individual be of the same gender as the individual unless contraindicated by the individual's history or other factors. The two commenters further requested the addition of language requiring that an individual in personal restraint must be under continuous face-to-face observation by a staff person who is not physically involved in the restraint. The department disagrees that with the commenters' recommendations and responds that §415.355(k)(4) requires an individual who is restrained to be "monitored to the extent necessary, with consideration given to the individual's position, level of agitation, and the identified conditions and factors documented in the individual's record". The department further explains that if an individual is restrained in response to a behavioral emergency, §415.356 (e)(2) requires a restraint monitor to be summoned who will observe and ensure that the restraint is properly used. Regarding the recommendation that the rules require an individual who is restrained using a mechanical device to be under "continuous face-to-face observation" by a staff of the same gender, the department declines to add the requirement because it is unnecessary, noting that §415.355(i)(5) requires restraint to be implemented in a manner that safeguards the individual's dignity, privacy, and well-being.

Two commenters recommended that §415.355(k)(5) be revised to require that an individual who falls asleep while in restraint using a mechanical device must be released immediately and that staff must maintain continuous face-to-face observation of the individual while asleep. One of the two commenters observed that the individual no longer meets the criteria for a behavioral emergency. The two commenters recommended that the provision be revised to require that the individual, upon awakening, be evaluated by an advanced practice nurse for evidence of behaviors requiring restraint and, if the nurse determines that the further restraint is necessary, the nurse will obtain a new physician's order for restraint. A third commenter recommended that an individual who falls asleep not be released if the individual's behavior therapy program specifies otherwise. The department responds that §415.355(k)(5) has been deleted and new subsection (n) has been added in §415.356, which addresses the use of restraint in a behavioral emergency, to require staff to release an individual from restrain when the individual no longer poses a risk of imminent physical harm to self or others and when the individual falls asleep while being restrained in a mechanical device. Concerning the recommendation for face-to-face observation of the individual, the department directs the commenters' attention to §415.355(l), which provides that an individual will be monitored to the extent necessary while in restraint. Concerning the commenters' recommendation that an advanced practice nurse evaluate an individual upon awakening, the department responds that the commenters' concern is addressed in §415.356(h)(3), which requires a nurse to conduct a face-to-face evaluation of the individual for injuries and overall well-being after an individual is released from restraint. The department further responds

that if the individual, upon awakening, exhibits behavior that staff believe is likely to escalate into a behavior emergency, staff will respond as described in §415.356(b) and (c). The department agrees with the third commenter that an individual who is restrained with a mechanical device as provided in the individual's behavior therapy program and falls asleep during the restraint should not be released if the behavior therapy program directs otherwise.

Two commenters recommended that §415.355(l), which addresses communication between staff at shift change, be revised to require that appropriate staff on the concluding shift must review the status of an individual in restraint with appropriate staff on the new shift. The commenters stated that the review must include the time restraint was initiated, the individual's current physical, emotional, and behavioral condition, medications administered, and type of care needed. The commenters also recommended that the review must be documented in the individual's record. The department agrees and has revised the provision to address the commenters' concerns.

Two commenters recommended that proposed §415.355(p), which addresses the response of staff if an individual experiences a medical emergency while in restraint, be replaced with language from department rules applicable to public and private inpatient mental health settings. The department responds that the only significant provision recommended by the commenters that is not present in the proposed language is a requirement to obtain a new order for restraint if the individual was in restraint in response to a behavioral emergency. The department has added such a requirement as new §415.355(p).

Two commenters recommended that §415.355(q), which requires staff to "respond as described in the state MR facility's policies and procedures to ensure the individual's safety" if an emergency evacuation or evacuation drill occurs while an individual is in restraint, be revised to require staff to implement "established procedures" under those circumstances. The department the language as proposed more than adequately addresses the commenters' concerns that the state MR facility must have procedures in place that address the appropriate response.

Two commenters objected to §415.356(c)(2), which permits staff to take such actions as are reasonably believed to be immediately necessary to avoid imminent harm to the individual or others, including the use of a mechanical device, as long as those actions do not include acts of unnecessary force, in the rare instance when an individual's behavior escalates into a behavioral emergency and staff are unable to safely apply the personal restraint techniques described in the department's Prevention and Management of Aggressive Behavior (PMAB) curriculum. The commenters characterized the provision as a "loop hole due to lack of accountability" and stated that it would permit staff to routinely indicate that they were forced to take actions not addressed in the PMAB curriculum. The commenters stated that, at a minimum, the rule must require staff to document in writing why PMAB personal restraint techniques could not be safely applied and to justify the actions that were taken. The department has revised the provision to require that if staff are unable to safely apply PMAB personal restraint techniques, a description of the actions taken and the reason why the PMAB techniques could not be safely applied must be added to the individual's record.

Two commenters recommended that §415.356(d) be revised to specify that a "prone or supine hold shall not be used except to transition an individual into another position and shall not exceed one minute in duration." A third commenter commended the department's effort through the provision to limit the restraint of an individual while in a prone or supine position. The commenter stated, however that the provision appears to support the use of restraint of an individual in a side position on the floor. The commenter suggested that the provision should ban all floor restraints because such restraints place an individual at a higher risk of restraint-related positional asphyxia and other injury or death. The department believes that the language as proposed provides appropriate protection for individuals and declines to make the recommended revisions.

Concerning §415.356(e)-(g), which addresses the responsibilities of a restraint monitor when an individual is in restraint in response to a behavioral emergency, a commenter recommended the addition of language requiring the state MR facility to have a restraint monitor on duty at all times. The commenter also recommended that the rules require that a staff person who is not physically involved in the restraint of an individual must observe the individual until a restraint monitor arrives and that all staff be trained to serve as observers. The department agrees and, noting that state MR facilities currently have at least one restraint monitor on duty at all times, has added the recommended language in new §415.355(r).

Two commenters recommended that §415.356(g) be revised to specify that a restraint monitor must report the use of restraint in a behavioral emergency to a nurse within an hour rather than "as soon as reasonably possible." The commenters also asked whether the "nurse" to whom the restraint monitor must make report is can be either a registered nurse or a licensed vocational nurse. The department responds that the nurse to whom the restraint monitor reports can be either a registered nurse or a licensed vocational nurse.

Two commenters submitted language from department rules applicable to public and private inpatient mental health settings that address the use of restraint in response to a behavioral emergency occurring off facility premises or during transportation. The commenters recommended that the language replace §415.356(p), which requires staff to contact a state MR facility nurse "as soon as reasonably possible" if staff use restraint with an individual during a behavioral emergency while absent from the state MR facility. The department has revised the subsection by adding language that requires staff accompanying an individual away from the state MR facility to follow the general principles and specific procedures described in the subchapter if restraint must be used in response to a behavioral emergency. The department further responds that some of the commenters' concerns are addressed in those general principles and specific procedures while other recommendations are outside the scope of the proposed rules. The following four paragraphs summarize the commenters' detailed recommendations for revisions and the department's responses.

The two commenters recommended revising §415.356(p) to require that, if staff believe an individual may require medical attention, medication, or use of restraint while being transported away from the state MR facility, then a registered nurse or physician assistant, as appropriate, must accompany the individual. The department does not believe that the recommended revision will result in the reasonable and appropriate use of limited professional staff resources. In addition, the department explains that if staff are able to anticipate inappropriate behavior that will necessitate the use of restraint while an individual is transported

from the state MR facility, a behavior therapy program should be approved to address that behavior. The department explains further that a behavioral emergency, as defined in §415.353, arises when an individual's inappropriate behavior "could not reasonably have been anticipated." The department further notes that medical attention and medication administration responsibilities are outside the scope of these rules. The department declines to revise the subsection as suggested.

The two commenters recommended revising §415.356(p) to require that staff not restrain an individual while away from a state MR facility campus unless the criteria for a behavioral emergency are met, a physician orders the restraint, and the transport is "medically necessary with documented clinical justification." The commenters further recommended the inclusion of requirements to contact a registered nurse for assistance in obtaining a physician's order and ensure that all implementation, monitoring, documentation, and reporting requirements described in the subchapter are observed. The department declines to require that each transport of an individual away from the state MR facility be documented as being "medically necessary." The department notes that individuals residing in state MR facilities frequently leave the campus in department-owned vehicles accompanied by staff to attend school, go to work, and participate in local community activities. The department believes that defining such trips as "medically necessary" is inappropriate, and that to restrict an individual's excursions to only those that are "medically necessary" is a significant limitation of an individual's rights. In addition, as described two paragraphs earlier, the department has revised the subsection to require that staff accompanying an individual off the campus must follow the general principles and specific procedures described in the subchapter for use of restraint in a behavioral emergency, which include requirements for staff to contact a nurse at the state MR facility as soon as is reasonably possible to obtain a physician's order and address the implementation, monitoring, documentation and reporting requirements in the subchapter.

The two commenters recommended revising §415.356(p) to require that staff must not implement restraint prior to an individual being transported to another state MR facility unless the situation meets the criteria for a behavioral emergency. If the individual is restrained, the commenters stated that a registered nurse must accompany the individual. The commenters also recommended requiring that a female staff member must accompany a female individual and including requirements that appear elsewhere in the rules. The commenters further stated that if the duration of the trip exceeds the maximum allowable time of restraint on the original order and a behavioral emergency continues to exist, the registered nurse who accompanies the individual must obtain a physician's order by phone to renew the restraint. The commenters also stated that staff at the originating state MR facility must fax required documentation about the restraint to the destination facility on the day of transport, and staff at the destination facility must to file the documentation in the individual's medical record. The department believes that provisions in the federal regulations governing the ICF/MR Program and the department's essential elements for state MR facilities require a state MR facility to ensure the health and welfare of an individual jointly weigh against the possibility that any state MR facility will attempt to move an individual to another state MR facility while the individual is in restraint as a result of a behavioral emergency. The department declines to make the recommended revision.

The two commenters recommended revising §415.356(r) require staff to provide an individual with reasonable opportunities for food and water and to use the bathroom if the individual must be restrained in a behavioral emergency while being transported from the state MR facility. The department responds that the commenters' concerns are addressed in §§415.355(l) and 415.356(j), but notes that the §415.356(r) has been revised to require staff accompanying an individual off campus to follow the general principles and specific procedures described in the subchapter for use of restraint in a behavioral emergency.

Concerning §415.356(s), which requires an individual's IDT to review alternative strategies for addressing an individual's inappropriate behavior if restraint must be used in a behavioral emergency of a specified frequency or duration, two commenters recommended that the provision be revised to require the review to occur "in conjunction with a consultant who is not part of the IDT and who may view the episode with a more objective eye." The department believes the members of an individual's IDT are best prepared and qualified to review alternative strategies for addressing inappropriate behavior under the circumstances described in this provision. The department explains that IDT members, which include an individual's physician, psychologist, and other appropriate professionals and paraprofessionals, are familiar with the individual, as well as other individuals and staff who may have been targets of or witnesses to the inappropriate behavior that resulted in restraint being used in a behavioral emergency. The professional and paraprofessional members of the individual's IDT are knowledgeable about environmental, physiological, and medical factors that may be critical in formulating a plan to address an individual's inappropriate behavior. The department, therefore, declines to require the involvement of a consultant in the IDT's review of alternative strategies under the circumstances described in this provision.

Two commenters stated that §415.356(u)(2), which prohibits the use of a restraint board during a behavioral emergency but permits use of a restraint board as part of an approved behavior therapy program, is not consistent with a policy negotiated by the department and Advocacy Inc. and described in a department memorandum dated April 11, 2001. The department disagrees that the provision conflicts with the policy memorandum, and explains that the policy, which remains in effect, permits the use of restraint boards under certain circumstances.

Two commenters recommended that §415.358(e), which requires an individual's IDT to consider what steps may be taken to reduce the need for restraint during medical or dental care, be revised to qualify that any steps considered by the IDT must be "possible or appropriate". The commenters stated that for some individuals no other steps are possible or appropriate. The department declines to make the recommended revision and explains that the provision clearly expects that an IDT will recommend only steps that it anticipates might be successful in reducing the need for restraint during medical or dental care.

A commenter recommended that the department include requirements for daily documentation and monitoring in §415.359, which addresses the use of restraint to prevent involuntary self-injury, and §415.360, which addresses the use of restraint to provide postural support. The commenter further recommended adding language to require that staff monitoring of an individual must not inappropriately restrict the individual's right to privacy. The department responds that the provisions in the two sections and in §415.355(h)(5) adequately address the issues of documentation and monitoring without inappropriately restricting the individual's right to privacy. The department declines to make the recommended revisions.

Two commenters requested that §415.361(f), which lists mechanical devices for use in restraint, be revised to specify that certain of the devices can be used to secure an individual to a stationary object while the individual is seated. The department believes the descriptions adequately describe the mechanical devices and their intended use and declines to make the recommended change. The department further notes that the §415.355(i)(2) prohibits staff from securing an individual to a stationary object while the individual is in a standing position.

Concerning §415.363, which addresses training requirements, one commenter recommended a minimum requirement of annual refresher training for everyone who may become involved in de-escalation of potentially violent situations or in the implementation of a restraint in any capacity. The commenter stated that even staff not involved in restraint should have a clear understanding of the philosophy and approach supported by the policy and training. The commenter also recommended that the rules require training to address more than simply recognizing signs of distress. The commenter stated that staff must be educated about the risks inherent in every restraint, particularly those leading to takedown procedures. The department responds that §415.363(e) requires an employee to demonstrate competency annually in the appropriate training components if the employee's work responsibilities require the employee to participate in restraint. The department further notes that all staff, including those employed in the Central Office, are required to complete courses that address the department's philosophy about the rights of individuals and the responsibility of staff to ensure that individuals are protected from abuse, neglect, and exploitation. The department also notes that state MR facility training in use of restraint addresses the risks inherent in the use of restraint for individual and for staff.

Two commenters recommended that §415.363(c)(2)(B) be revised to specify that a state MR facility's training module on rights must address not only the rights of individuals but of LARs. The commenters stated that "many of the rights of the individual are transferred to the LAR by the court and this must be acknowledged here and in all TDMHMR documents." The department disagrees with the commenters' recommendation and responds that the new subchapter is designed to protect certain rights of the individual that do not "transfer" to a court-appointed guardian. These rights include protection from exploitation and abuse, access to appropriate treatment and services, freedom from mistreatment, and freedom from unnecessary medication. The department declines to make the recommended revision.

The new subchapter is adopted under the Texas Health and Safety Code (THSC), §532.015(a), which provides the Texas Mental Health and Mental Retardation Board (board) with broad rulemaking authority; THSC, §591.004, which requires the board to ensure the implementation of the Persons with Mental Retardation Act (THSC, Title 7, Subtitle D); and THSC, §592.002, which requires the board to ensure the implementation of certain rights enumerated in THSC, Chapter 592.

§415.353. Definitions.

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

(1) Behavior therapy--Systematic efforts to increase adaptive behaviors and to modify maladaptive or problem behaviors and replace them with behaviors that are adaptive and socially acceptable.

(2) Behavioral emergency--A situation in which severely aggressive, destructive, violent, or self-injurious behavior exhibited by an individual:

(A) poses a substantial risk of imminent probable death of, or substantial bodily harm to, the individual or others;

(B) has not abated in response to attempted preventive de-escalatory or redirection techniques;

(C) could not reasonably have been anticipated;

(D) is not addressed in a behavior therapy program; and

(E) does not occur during a medical or dental procedure.

(3) CFR (Code of Federal Regulations)--The compilation of federal agency regulations.

(4) IDT (interdisciplinary team)--Mental retardation professionals and paraprofessionals and other concerned persons, as appropriate, who assess an individual's treatment, training, and habilitation needs and make recommendations for services.

(A) Team membership always includes:

(i) the individual;

(ii) the individual's LAR, if any; and

(iii) persons specified by a state MR facility who are professionally qualified and/or certified or licensed with special training and experience in the diagnosis, management, needs, and treatment of individuals with mental retardation.

(B) Other participants in IDT meetings may include:

(i) other concerned persons whose inclusion is requested by the individual or the LAR; and

(ii) at the discretion of the state MR facility, persons who are directly involved in the delivery of mental retardation services to the individual.

(5) Individual--A person with mental retardation who resides in a state MR facility.

(6) IPP (individual program plan)--A plan developed by an individual's IDT that identifies the individual's training, treatment, and habilitation needs and describes appropriate services and supports to meet those needs.

(7) LAR (legally authorized representative)--A person authorized by law to act on behalf of an individual with regard to a matter described in this subchapter, and may include a parent, guardian, managing conservator of a minor individual, or a guardian of an adult individual.

(8) Legally adequate consent--A term consistent with provisions of the Texas Health and Safety Code (THSC), Title 7, §591.006, which states, in essence, that consent obtained from an individual with mental retardation is legally adequate when each of the following conditions has been met:

(A) legal status: The individual giving the consent:

(i) is 18 years of age or older, or younger than 18 years of age and is or has been married or had the disabilities of minority removed for general purposes by court order as described in the Texas Family Code, Chapter 31; and

(ii) has not been determined by a court to lack capacity to make decisions with regard to the matter for which consent is being sought.

(B) comprehension of information: The individual giving the consent has been informed of and comprehends the nature, purpose, consequences, risks, and benefits of and alternatives to the procedure, and the fact that withholding or withdrawal of consent shall not prejudice the future provision of care and services to the individual with mental retardation; and

(C) voluntariness: The consent has been given voluntarily and free from coercion and undue influence.

(9) Mechanical device--A piece of equipment or an apparatus used in the safe and relatively comfortable restraint of individuals.

(10) Medical emergency--A situation in which acute, nonpsychiatric signs and symptoms, including severe pain, exhibited by an individual require immediate attention by a physician or nurse:

(A) to preclude serious impairment to normal functioning of one or more of the individual's body parts or organs; or

(B) if the individual is a pregnant woman, to prevent irreversible harm to the woman or the woman's unborn child.

(11) Medical intervention--Treatment by a licensed medical doctor, osteopath, podiatrist, dentist, physician's assistant, or advanced practice nurse (APN). For the purposes of this subchapter, the term does not include first aid, an examination, diagnostics (e.g., x-ray, blood test), or the prescribing of oral or topical medication.

(12) Non-serious physical injury--Any injury requiring minor first aid and determined not to be serious by a registered nurse, advanced practice nurse (APN), or physician.

(13) PMAB (Prevention and Management of Aggressive Behavior)--The department's proprietary risk management curriculum that is intended to reduce the likelihood of injuries caused by the aggressive behavior of individuals receiving department services. The curriculum presents a graduated system of interventions that rely on the least restrictive approaches possible to respond to a behavioral emergency.

(14) Qualified mental retardation professional (QMRP)--A state MR facility employee responsible for integrating, coordinating, and monitoring an individual's IPP who meets the requirements of 42 CFR §483.430.

(15) Restraint--The use of manual pressure, except for physical guidance or prompting of brief duration, or a mechanical device to restrict:

(A) the free movement or normal functioning of the whole or a portion of an individual's body; or

(B) normal access by the individual to a portion of the individual's body.

(16) Restraint monitor--An employee of the state MR facility who:

(A) has experience working directly with persons with mental retardation;

(B) is designated to:

(i) go to a site where restraint in a behavioral emergency is implemented; and

(ii) provide supervision and oversight; and

(C) meets the training requirements described in §415.363 of this title (relating to Staff Training in the Use of Restraint).

(17) Serious physical injury--Any injury requiring medical intervention or hospitalization or any injury determined to be serious by a physician or advanced practice nurse (APN).

(18) State MR facility--A state mental retardation facility, i.e., a state school or state center operated by the department that provides residential services to individuals with mental retardation.

§415.354. General Provisions.

(a) Each state MR facility must have and implement written policies and procedures that:

(1) do not conflict with this subchapter or those provisions of the Conditions of Participation for Intermediate Care Facilities for Persons with Mental Retardation (42 CFR §483.410-483.480, et. seq.) concerning the management of inappropriate behavior;

(2) emphasize the department's commitment to:

(A) providing treatment that is the least restrictive and most effective alternative available for an individual;

(B) staff training that emphasizes early recognition of situations and behaviors that, if not appropriately addressed, could necessitate the use of restraint in a behavioral emergency; and

(C) reducing the necessity for the use of restraint;

(3) detail requirements for documenting and reporting the use of restraint, including instances when an individual:

(A) receives a serious physical injury or dies while in restraint during a behavioral emergency or as part of a behavior therapy program; or

(B) dies within 24 hours after being released from a restraint used during a behavioral emergency or as part of a behavior therapy program; and

(4) detail the training and demonstration of competence requirements for state MR facility staff.

(b) The standards in this subchapter take precedence over other applicable standards, including the ICF/MR Conditions of Participation, whenever the other applicable standards are less restrictive.

§415.355. General Principles for the Use of Restraint.

(a) The general principles listed in this subsection apply to the use of restraint in each of the following circumstances, unless explicitly stated otherwise:

(1) in a behavioral emergency;

(2) as an intervention in a behavior therapy program that addresses inappropriate behavior exhibited voluntarily by an individual (e.g., prevention of gouging of the individual's own eyes through the use of elbow immobilizers);

(3) during a medical or dental procedure if necessary to protect the individual or others and as a follow-up after a medical or dental procedure or following an injury to promote the healing of wounds;

(4) to protect the individual from involuntary self-injury (e.g., helmet for an individual who, during seizures, looses consciousness, falls to the floor, and risks head injuries), although not all techniques used by a state MR facility to protect an individual from involuntary self-injury constitute the use of restraint; and

(5) to provide postural support to the individual or to assist the individual in obtaining and maintaining normative bodily functioning, although not all techniques used by a state MR facility to provide postural support or assist in obtaining and maintaining normative bodily functioning constitute the use of restraint (e.g., placement of wedges, bolsters, or cushions to position an individual in a bed or chair).

(b) Upon an individual's admission to a state MR facility, an IDT must:

(1) with the involvement of a physician, identify:

(A) the individual's known physical or medical conditions that might constitute a risk to the individual during the use of restraint; and

(B) other factors that must be taken into account if the use of restraint is considered including, but not limited to, the individual's cognitive functioning level, size, weight, emotional condition (including whether the individual has a history of having been physically or sexually abused), and age; and

(2) document the identified conditions and factors and, as applicable, limitations on specific techniques or mechanical devices for restraint, in the individual's record.

(c) At least annually, or when significant changes occur to the extent and nature of the identified conditions and factors documented in the individual's record, the IDT must ensure that a physician, advanced practice nurse, or physician assistant reviews and updates, as necessary, the identified conditions, factors, and limitations on specific techniques or mechanical devices for restraint documented in the individual's record.

(d) Before restraint is used with an individual, state MR facility staff must determine that less restrictive, less intrusive interventions will be ineffective.

(e) Staff are prohibited from using restraint:

(1) for disciplinary purposes;

(2) for the convenience of staff or other individuals; or

(3) as a substitute for effective treatment or habilitation.

(f) Staff may use restraint only for the shortest period of time necessary to ensure:

(1) protection for the individual or others in a behavioral emergency; and

(2) therapeutic effectiveness;

(A) as part of a behavior therapy program;

(B) as part of a medical or dental procedure; and

(C) in protecting against involuntary self-injury.

(g) Staff are prohibited from using restraint in a way that:

(1) obstructs the individual's airway;

(2) impairs the individual's breathing by putting pressure on the individual's torso; or

(3) interferes with the individual's ability to communicate.

(h) Staff may use restraint only in a manner that:

(1) takes into consideration the individual's known physical or medical conditions that might constitute a risk to the individual during restraint, as documented in the individual's record in accordance with subsections (b)(2) and (c) of this section;

(2) takes into consideration other factors, including the individual's cognitive functioning level, size, weight, known physical, medical, and emotional condition, and age, as documented in the individual's record in accordance with subsections (b)(2) and (c) of this section;

(3) is consistent with the limitations on specific techniques or mechanical devices for restraint documented in the individual's record in accordance with subsections (b)(2) and (c) of this section;

(4) reduces the risk of injury or undue physical discomfort to the individual; and

(5) safeguards the individual's dignity, privacy, and well-being.

(i) Staff must implement restraint:

(1) with only the minimal amount of force or pressure that is reasonable and necessary to ensure the safety of the individual and others.

(2) without securing the individual to a stationary object while the individual is in a standing position;

(3) without causing pain that restricts the individual's movement; and

(4) without violating the individual's rights as described in §405.625 of this title (relating to Rights of Clients Receiving Residential Mental Retardation Services).

(j) Staff may use restraint only if it is authorized as described in:

(1) §415.356 of this title (relating to Use of Restraint in a Behavioral Emergency);

(2) §415.357 of this title (relating to Use of Restraint in a Behavior Therapy Program);

(3) §415.358 of this title (relating to Use of Restraint During Medical or Dental Procedures and to Promote Healing);

(4) §415.359 of this title (relating to Use of Restraint with a Mechanical Device to Protect an Individual from Involuntary Self-Injury); or

(5) §415.360 of this title (relating to Use of Restraint with a Mechanical Device to Provide Postural Support).

(k) When an individual is restrained, staff must ensure that the individual is:

(1) provided immediate relief, which may include immediate release from restraint, and checked by a nurse if the individual shows signs or symptoms of physical distress;

(2) provided with medications as prescribed;

(3) offered regular meals and snacks or, as appropriate, a nutritionally equivalent substitute; and

(4) monitored to the extent necessary, with consideration given to the individual's position, level of agitation, and the identified conditions and factors documented in the individual's record as described in subsection (b)(2) and (c) of this section to:

(A) prevent the individual from choking or aspirating food or fluid; and

(B) protect the individual from physical distress, self-injury, or injury by another individual. (For example, an individual in four-point restraint should be monitored continuously by staff, while

an individual wearing a helmet or mittens may not require continuous monitoring.)

(l) At shift change, staff going off-duty must review the status of an individual who is in restraint as a result of a behavioral emergency or as part of a behavior therapy program with staff who are coming on-duty. The review must be documented in the individual's record and must address:

(1) time the restraint was initiated;

(2) individual's current physical, emotional, and behavioral condition;

(3) medications administered during the restraint; and

(4) type of care needed.

(m) All communication with an individual concerning the use of restraint must be:

(1) conducted in a language or method that is understandable by the individual;

(2) tailored to the individual's ability to comprehend; and

(3) responsive to any visual or hearing impairment the individual is known to have.

(n) If an individual in restraint experiences a medical emergency, staff must:

(1) release the individual from restraint as soon as possible as indicated by the medical emergency;

(2) ensure that the medical emergency is promptly addressed as described in the state MR facility's policies and procedures concerning management of a medical emergency; and

(3) obtain a new order for restraint, if the use of restraint at the time of the medical emergency had been in response to a behavioral emergency and the individual continues to exhibit behavior that constitutes a behavioral emergency.

(o) If an emergency evacuation or an evacuation drill occurs while an individual is in restraint, staff will respond as described in the state MR facility's policies and procedures to ensure the individual's safety.

(p) If an individual is involved in a program outside the state MR facility, e.g., attending public school or working, the state MR facility will:

(1) coordinate with staff from the outside program in the assessment and development of interventions with the goal of consistency in the use of restraint:

(A) in a behavioral emergency; and

(B) as an intervention in a behavior therapy program; and

(2) invite staff of the outside program to participate in IDT meetings at which interventions, including behavior therapy programs, are discussed.

(q) A state MR facility must ensure that at least one restraint monitor is on duty at all times to respond as described in §415.356(e)(2), (g), and (p) of this title (relating to Restraint in a Behavioral Emergency).

§415.356. Use of Restraint in a Behavioral Emergency.

(a) A physician must not issue a standing or "as needed" order for the use of restraint in a behavioral emergency.

(b) If an individual exhibits behavior that staff believe is likely to escalate into a behavioral emergency, staff first should attempt verbal or other de-escalative interventions in which they have been trained as described in §415.363(b) of this title (relating to Staff Training in the Use of Restraint).

(c) If the individual's behavior escalates into a behavioral emergency, one or more staff may initiate:

(1) personal restraint as instructed during Prevention and Management of Aggressive Behavior (PMAB) training provided by the state MR facility as described in §415.363(b) of this title (relating to Staff Training in the Use of Restraint); or

(2) in the rare situation when PMAB procedures cannot be safely applied, staff may take such actions as are reasonably believed to be immediately necessary to avoid imminent harm to the individual or others, including the use of a mechanical device:

(A) as long as those actions do not include acts of unnecessary force; and

(B) staff describe in the individual's record the actions that were taken and the reason why PMAB personal restraint techniques could not be safely applied.

(d) Unless a physician's order specifically directs otherwise as a result of the identified conditions and factors documented in the individual's record as described in §415.355(b)(2) and (c) of this title (relating to General Principles for the Use of Restraint), staff must:

(1) not place an individual in a prone or supine position during personal restraint; and

(2) if the individual in personal restraint rolls into a prone or supine position, restore the individual to a standing, sitting, or side position as soon as possible.

(e) Immediately after the individual is placed in restraint, staff must:

(1) explain to the individual that release from the restraint will occur as soon as the individual no longer poses a risk of imminent physical harm to self or to others; and

(2) notify a restraint monitor, who will:

(A) immediately go to the site of the restraint and ensure that the restraint is properly used;

(B) ensure that the individual is not at risk of serious physical injury or death and is receiving proper care;

(C) ensure that staff have explained to the individual that release from the restraint will occur as soon as the individual no longer poses a risk of imminent physical harm to self or others; and

(D) determine whether consultation by a professional is necessary (e.g., psychologist) and contact the appropriate professional, if deemed necessary.

(f) If notified by a restraint monitor that consultation is necessary, a professional (e.g., nurse or psychologist) will:

(1) determine the nature of the restraint monitor's concerns;

(2) go to the site of the restraint, if the professional determines this is warranted by the circumstances; and

(3) address the restraint monitor's concerns.

(g) As soon as reasonably possible, but in no case later than an hour after the individual was placed in restraint, the restraint monitor

must report the use of restraint to a nurse with the following information:

(1) time the restraint was initiated;

(2) description of the specific behaviors which necessitated the use of restraint;

(3) the type of restraint;

(4) the duration of the restraint, if applicable; and

(5) the physical and apparent emotional condition of the individual.

(h) Upon being informed of the use of restraint, the nurse will:

(1) inform a physician, either in person or by phone, of the information described in subsection (g) of this section;

(2) document the physician's verbal order in the individual's record to include the:

(A) type of restraint;

(B) behaviors that necessitated the use of restraint;

(C) duration of the order, not to exceed 12 hours from the time the restraint was initiated;

(D) special instructions for the individual's care, if any, while in restraint; and

(E) time and date of the order; and

(3) within 30 minutes or as soon as reasonably possible of the individual's release from restraint or of being told of the individual's release from restraint, conduct a face-to-face evaluation of the individual for injuries and overall well-being.

(i) A physician will sign and date the order no later than the end of the next working day.

(j) While an individual is being restrained, staff must ensure that the individual is provided with:

(1) privacy to the extent possible without compromising the individual's safety or the safety of other individuals and staff; and

(2) an opportunity for a period of not less than five minutes during each one hour period:

(A) for movement and exercise if the restraint restricts the individual's range of motion in a limb or joint; and

(B) to use toilet facilities and drink fluids.

(k) If staff remove personal items, including clothing, from an individual to ensure the safety of the individual or others during the use of restraint in a behavioral emergency, staff must:

(1) ensure that the personal items are secured from damage, loss, or theft;

(2) provide clothing as appropriate to ensure the individual's dignity and privacy, if the personal items that were removed include clothing; and

(3) ensure that the personal items are returned to the individual immediately upon release from restraint.

(l) As the circumstances warrant, when releasing an individual from restraint to provide an opportunity for movement and exercise as described in subsection (j)(2)(A)-(B) of this section, staff may release one limb at a time.

(m) If an individual released from restraint as described in subsection (j)(2)(A)-(B) of this section demonstrates behavior that would constitute a behavioral emergency, staff will return the individual to restraint.

(n) Staff must release an individual from restraint:

(1) as soon as the individual no longer poses a risk of imminent physical harm to self or others; and

(2) when the individual falls asleep while being restrained with a mechanical device.

(o) After the individual is released from restraint, staff will:

(1) provide transition activities to facilitate the individual's re-assimilation into the social milieu;

(2) observe the individual for at least 15 minutes to ensure a smooth assimilation with documentation in the individual's record;

(3) if the individual's record directs that the individual be provided with an opportunity to discuss the use of restraint, inform the appropriate staff person; and

(4) complete the state MR facility's restraint checklist documenting the care of the individual while in restraint.

(p) The restraint monitor:

(1) will ensure that:

(A) all necessary documentation is completed;

(B) the individual's QMRP is notified and the notification is documented in the individual's record; and

(C) the appropriate professional staff (e.g., psychologist) is notified if the restraint occurred within 24 hours of another restraint of the individual in a behavioral emergency; and

(2) must debrief staff who actively participated in the use of restraint.

(q) The state MR facility will ensure that, within 24 hours of the individual's release from restraint, the individual's LAR (or the person listed in the individual's record as primary correspondent) is notified that the individual was restrained in a behavioral emergency with information about the type of restraint and the individual's condition. The notification will be documented in the individual's record.

(r) If staff must use restraint to address an individual's inappropriate behavior that escalates into a behavioral emergency while the individual is away from the state MR facility, staff must comply with §415.355 of this title (relating to General Principles for the Use of Restraint) and follow the procedures described in this section, with the following exceptions:

(1) Instead of notifying a restraint monitor as described in subsection (e)(2) of this section, staff who initiated the restraint must:

(A) report the use of restraint to a nurse at the state MR facility as soon as is reasonably possible; and

(B) provide the nurse with the information described in subsection (g) of this section.

(2) Upon returning to the state MR facility, staff must notify the restraint monitor who will comply with the provisions of subsection (p) of this section.

(s) An individual's IDT will meet to review alternative strategies, which may include developing a behavior therapy program that targets for modification or replacement those behaviors that resulted in

behavioral emergencies, if the individual is restrained in a behavioral emergency:

(1) more often than twice within 30 calendar days;

(2) in two or more separate episodes of any duration within 12 hours; or

(3) for more than 12 continuous hours.

(t) Staff will follow the provisions of §405.31 of this title (relating to Emergency Use of Psychotropic Medications) if the use of psychotropic medications in a behavioral emergency is deemed necessary by a physician.

(u) The following procedures must not be used in a behavioral emergency, but may be used as part of an approved behavior therapy program, as described in Chapter 415, Subchapter I of this title (relating to Behavior Therapy in State Mental Retardation Facilities):

(1) use of a time out room; and

(2) restraint using a restraint board.

§415.357. Use of Restraint in a Behavior Therapy Program.

(a) The use of restraint as an intervention in a behavior therapy program must be approved and implemented as described in Chapter 415, Subchapter I of this title (relating to Behavior Therapy--State Mental Retardation Facilities).

(b) The provisions of this section must be followed by staff when implementing restraint as directed in an individual's behavior therapy program both on and off the state MR facility campus.

(c) Immediately after an individual is placed in restraint as directed in the individual's behavior therapy program, staff must explain to the individual the conditions under which the individual will be released from restraint, unless the behavior therapy program provides direction to the contrary.

(d) Unless a physician's instructions in the behavior therapy program specifically direct otherwise as a result of the identified conditions and factors documented in the individual's record as described in §415.355(b)(2) and (c) of this title (relating to General Principles for the Use of Restraint), staff must:

(1) not place an individual in a prone or supine position during personal restraint; and

(2) if the individual in personal restraint rolls into a prone or supine position, restore the individual to a standing, sitting, or side position as soon as possible.

(e) If staff determine that consultation by a professional (e.g., nurse or psychologist) is necessary, staff will contact the appropriate professional. The professional will:

(1) determine the nature of staff's concerns; and

(2) go to the site of the restraint, if the professional determines this is warranted by the circumstances.

(f) While an individual is being restrained, staff must ensure that the individual is provided with an opportunity for a period of not less than five minutes during each one hour period:

(1) for movement and exercise if the restraint restricts the individual's range of motion in a limb or joint; and

(2) to use toilet facilities and drink fluids.

(g) If an individual released from restraint as described in subsection (f) of this section demonstrates behavior that would constitute a behavioral emergency, staff will initiate restraint as described in §415.356 of this title (relating to Use of Restraint in a Behavioral Emergency.

(h) Unless the individual's behavior therapy program directs otherwise, a nurse must check the individual for injuries and overall well-being after the individual is released from restraint.

§415.359. Use of Restraint with a Mechanical Device to Prevent Involuntary Self-injury.

(a) Some techniques used by a state MR facility to protect an individual from an injury that might result from involuntary movements exhibited by the individual (e.g., falling and hitting head on floor as a result of a seizure) may constitute restraint with a mechanical device. An individual's IDT may authorize staff to use restraint with a mechanical device if:

(1) the IDT determines that less restrictive interventions are inappropriate;

(2) a physician concurs with the recommendation and signs an order for use of the mechanical device; and

(3) state MR facility staff obtains, for a period not to exceed one year:

(A) legally adequate consent from the individual who is able to provide legally adequate consent;

(B) consent from the individual's LAR; or

(C) authorization by the head of the state MR facility if:

(i) the individual is not able to provide legally adequate consent and does not have an LAR; or

(ii) the individual's LAR has:

(I) not responded to the state MR facility's attempts to obtain the LAR's consent; and

(II) been notified that the head of the state MR facility may authorize the use of restraint if the LAR does not respond.

(b) The IDT must document the following in the individual's record:

(1) a description of the involuntary movements which necessitate the use of restraint with a mechanical device;

(2) the less restrictive interventions and alternative strategies that have been attempted or considered;

(3) the specific mechanical device recommended; and

(4) instructions for safe use of the mechanical device.

(c) Mechanical devices used as described in this section may include:

(1) helmet for an individual with a seizure disorder;

(2) bedrails to prevent an individual from falling out of bed; and

(3) seat belt to prevent an individual from falling out of a wheelchairs.

(d) An individual's IDT must review the use of a mechanical device for restraint as described in this section at least annually and whenever changes in the extent and nature of the individual's involuntary movements occur.

(1) The IDT will consider whether less restrictive interventions might be appropriate to protect the individual from involuntary self-injury.

(2) The IDT may recommend continued use of the mechanical device only if it determines that less restrictive interventions continue to be inappropriate to protect the individual from involuntary self-injury.

(3) The IDT must document in the individual program plan any measures taken to alleviate the need for the mechanical device.

(4) If the IDT recommends a change in the type of mechanical device, the recommendation must be submitted to a physician for review.

(A) If the physician concurs with the recommendation, the physician will sign an order for use of the mechanical device.

(B) Staff must obtain consent or authorization as described in subsection (a)(3) of this section whenever the IDT recommends a change in the type of mechanical device for restraint.

§415.360. Use of Restraint with a Mechanical Device to Provide Postural Support.

(a) Some techniques used by a state MR facility if an individual requires assistance to maintain postural support may constitute restraint with a mechanical device. An individual's IDT may authorize staff to use restraint with a mechanical device if:

(1) the individual's IDT concurs with the recommendation of a licensed occupational therapist or physical therapist that less restrictive interventions are inappropriate and recommends the use of restraint with a mechanical device;

(2) a physician concurs with the IDT's recommendation and signs an order for use of the mechanical device; and

(3) state MR facility staff obtain, for a period not to exceed one year:

(A) legally adequate consent from the individual who is able to provide legally adequate consent;

(B) consent from the individual's LAR; or

(C) authorization by the head of the state MR facility if:

(i) the individual is not able to provide legally adequate consent and does not have an LAR; or

(ii) the individual's LAR has:

(I) not responded to the state MR facility's attempts to obtain the LAR's consent; and

(II) been notified that the head of the state MR facility may authorize the use of restraint if the LAR does not respond.

(b) The IDT must document the following in the individual's record:

(1) a description of the condition which necessitates the use of restraint with a mechanical device;

(2) the expected therapeutic outcome;

(3) the less restrictive interventions and alternative strategies that have been attempted or considered;

(4) the specific mechanical device recommended; and

(5) instructions for safe use of the mechanical device.

(c) Mechanical devices used as described in this section may include, but are not limited to, vests and seat belts. They are considered an adjunct to proper care of an individual and may not be used as a substitute for appropriate nursing care.

(d) An individual's IDT must review the use of a mechanical device for restraint as described in this section at least annually and whenever changes in the extent and nature of the individual's physical condition occur.

(1) The IDT will consider whether less restrictive interventions might be appropriate to assist the individual in maintaining postural support.

(2) The IDT may recommend continued use of the mechanical device only if it determines that less restrictive interventions continue to be inappropriate to assist the individual in maintaining postural support.

(3) The IDT must document in the IPP any measures taken to alleviate the need for the mechanical device.

(4) If the IDT recommends a change in the type of mechanical device, the recommendation must be submitted to a physician for review.

(A) If the physician concurs with the recommendation, the physician will sign an order for use of the mechanical device.

(B) Staff must obtain consent or authorization as described in subsection (a)(3) of this section whenever the IDT recommends a change in the type of mechanical device for restraint.

§415.361. Mechanical Devices for Use in Restraint.

(a) A state MR facility must use only those mechanical devices designed specifically for the safe and relatively comfortable restraint of humans, to include:

(1) commercially available devices; and

(2) devices developed independently by or on behalf of the state MR facility.

(b) A state MR facility may use a commercially available mechanical device that has been altered to accommodate an individual's specific physical needs (e.g., a physical impairment or obesity) or a mechanical device developed independently by or on behalf of the state MR facility only if its use has been approved by the director of State MR Facilities in the department's Central Office.

(1) Before the state MR facility requests approval from the director of State MR Facilities to use such a mechanical device, a written description of the mechanical device and its intended use (with pictures and sketches, as appropriate) must be reviewed and approved by a committee at the state MR facility that includes the following staff:

(A) medical director or designee;

(B) nursing director or designee;

(C) director of psychology;

(D) director of habilitation services;

(E) safety officer; and

(F) rights officer.

(2) If the committee approves the mechanical device, a written description of the mechanical device and its intended use (with pictures and sketches, as appropriate) will be submitted to the head of the state MR facility, who must decide within 10 working days whether to request approval from the director of State MR Facilities to use the mechanical device.

(3) Within 10 working days of receiving a request for approval to use a mechanical device, the director of State MR Facilities must review the request and notify the head of the state MR facility whether or not the request has been approved.

(c) Staff will inspect a mechanical device before and after each use to ensure the device is in good repair and without tears or protrusions that may cause injury. A damaged mechanical device must be repaired before it can be used in the restraint of an individual. If a damaged mechanical device cannot be repaired to make it safe for use in the restraint of an individual, it must be discarded.

(d) Staff must ensure that a mechanical device is not secured so tightly that the individual's circulation or breathing is impaired or so loosely that the individual's skin is chafed. Staff must exercise caution when using mechanical devices such as a camisole or straitjacket that may impair the individual's balance or interfere with the individual's ability to break a fall.

(e) Staff may use two or more mechanical devices simultaneously in the restraint of an individual in a behavioral emergency if a physician authorizes their use.

(f) The following mechanical devices may be used in the restraint of an individual.

(1) Anklets--Padded bands of cloth or leather that are secured around the individual's ankles or legs using hook-and-loop (e.g., Velcro brand) tape or buckle fasteners and attached to a stationery object (e.g., bed or chair frame).

(2) Arm splints or elbow immobilizers--Strips of any material with padding that extend from below to above the elbow and are secured around the arm with ties or hook-and-loop (e.g., Velcro brand) tape. If appropriate, they should be secured such that the individual has full use of the hands.

(3) Belts--A cloth or leather band that is fastened around the waist and secured to a stationery object (e.g., chair frame) or used for securing the arms to the sides of the body.

(4) Camisole--A sleeveless cloth jacket which covers the arms and upper trunk and is secured behind the individual's back.

(5) Chair restraint--A padded, stabilized chair which supports all body parts and is used with anklets or wristlets to prevent the individual from standing up without assistance.

(6) Helmets--A plastic, foam rubber, or leather head covering, such as sports helmets, that may include an attached face guard.

(7) Mittens--A cloth, plastic, foam rubber, or leather hand covering, such as boxing and other types of sport gloves, that are secured around the wrist or lower arm with elastic, hook-and-loop (e.g., Velcro brand) tape, ties, paper tape, pull strings, buttons, or snaps.

(8) Restraint board--A padded, rigid board to which an individual is secured face-up, unless that position is clinically contraindicated for that individual. This device will not be used in the restraint of an individual in a behavioral emergency.

(9) Restraining net--Mesh fabric that is placed over an individual's upper and lower trunk with the head, arms, and lower legs exposed; the net is secured over a mattress to a bed frame and is never placed over the individual's head.

(10) Straitjacket--A heavy canvas jacket that is open in the back and has sleeves that are stitched closed. The individual's arms are crossed in front and the sleeves secured with ties at the back.

(11) Ties--A length of cloth or leather used to secure approved mechanical restraints (i.e., mittens, wristlets, arm splints, belts, anklets, vests, etc.) to a stationary object (i.e., bed or wheelchair frame) or to other mechanical restraints.

(12) Transport jacket--A heavy canvas sleeveless jacket that encases the arms and upper trunk, fastens with hook-and-loop (e.g., Velcro brand) tape or roller buckles, and is held in place by a strap between the legs.

(13) Vest--A sleeveless cloth jacket which covers the upper trunk of the individual. The vest may be secured to a stationary object (e.g., bed or chair frame).

(14) Wristlets--Padded cloth or leather bands that are secured around the individual's wrists or arms using hook-and-loop (e.g., Velcro brand) tape or buckle fasteners and attached to a stationery object (e.g., bed or chair frame).

(g) The following mechanical devices must not be used in the restraint of an individual.

(1) metal wrist or ankle cuffs;

(2) rubber bands, ropes, and cords, unless part of an approved device;

(3) long ties and leashes, including halter leashes;

(4) restraining sheets attached to any stationary object other than a bed;

(5) padlocks; and

(6) barred enclosures with tops, including crib-style bed with mesh tops.

(h) A mechanical device that is not described in subsection (f) of this section but is not expressly forbidden in subsection (g) of this section may be used in the restraint of an individual if its use is approved as described in subsection (b) of this section.

§415.362. Additional Reporting and Documentation Requirements.

(a) Reports to head of the state MR facility.

(1) Staff will notify the head of the state MR facility or designee immediately, but in no case more than one hour after learning of a serious physical injury to or death of an individual that occurs while the individual is in restraint.

(2) Within one working day of receiving the notice described in paragraph (1) of this subsection, the head of the state MR facility or designee must:

(A) notify the State MR Facilities Division in Central Office of the serious physical injury or death; and

(B) name one or more staff to investigate the serious physical injury or death.

(3) The staff named to investigate the serious physical injury or death must submit a written report on the results of the investigation to the head of the state MR facility or designee no later than five working days after the notice of the serious physical injury or death required in paragraph (1)(A)-(B) of this subsection.

(A) The written report will be reviewed by the head of the facility, who will take prompt appropriate corrective action, if determined to be necessary.

(B) A copy of the report will be submitted to the State MR Facilities Division in Central Office.

(b) Reports to Texas Department of Family and Protective Services. If the serious physical injury or death is suspected to be the result of abuse or neglect, staff must make a verbal report immediately, but in no case more than one hour after suspicion or after learning of the incident, to the Texas Department of Family and Protective as described in §417.505 of this title (relating to Reporting Responsibilities of all TDMHMR Employees, Agents, and Contractors: Reports to the Texas Department of Protective and Regulatory Services (TDPRS)).

(c) Reports required by MOU. If the serious physical injury or death is a reportable incident as described in the memorandum of understanding titled "Reportable Incidents in State Schools, State Centers, State Operated Community-based MHMR Services, and Community Mental Health and Mental Retardation Centers with Intermediate Care Facilities for the Mentally Retarded (ICF/MR)" dated March 25, 1996, the head of the state MR facility will report the incident as described in the MOU.

(d) Reports to Central Office. Each state MR facility must prepare and submit to the State Mental Retardation Facilities division in Central Office a quarterly report on the state MR facility's use of restraint in behavioral emergencies, as part of behavior therapy programs, and to prevent involuntary self-injury. The report must include the following:

(1) number of incidents and types of restraint and the number of individuals restrained during each month of the fiscal year quarter, with designation of how many individuals were under 18 years of age;

(2) the number of serious physical injuries and non-serious physical injuries and the injury rate for each month of the fiscal quarter, with designation of how many individuals were under 18 years of age; and

(3) number of deaths that occur within 24 hours of the use of restraint for each month of the fiscal quarter, with designation of how many individuals were under 18 years of age.

(e) Analysis of data. The head of the state MR facility must ensure ongoing analysis of data collected as described in subsection (d) of this section to identify issues or emerging trends and to develop appropriate responses.

§415.363. Staff Training in the Use of Restraint.

(a) The state MR facility must inform each employee whose work responsibilities involve direct contact with individuals of the employee's roles and responsibilities under this subchapter and under written facility policy and procedures.

(b) Before an employee assumes work responsibilities that might require the employee to participate in restraint, the state MR facility will ensure that the employee receives training and demonstrates the competencies:

(1) in the department's approved restraint training program as outlined in the course descriptions in the TDMHMR Operating Instructions of Internal Facilities Management for Human Resources: Minimum Training Requirements (407. 12: §7);

(2) in sections of the PMAB training program as appropriate to the employee's position and responsibilities, and as required under the TDMHMR Operating Instructions of Internal Facilities Management for Human Resources: Minimum Training Requirements (407. 12. §7); and

(3) related to the state MR facility's written policies and procedures as appropriate to the employee's position and responsibilities.

(c) An employee who is a restraint monitor must:

(1) have successfully completed those sections of the department's PMAB curriculum that address the procedures used at the state MR facility and successfully complete subsequent refresher training annually; and

(2) have successfully completed the state MR facility's training in the following:

(A) cardiopulmonary resuscitation (CPR) and successfully complete subsequent refresher training every two years;

(B) rights of an individual and successfully complete subsequent refresher training annually;

(C) abuse and neglect and successfully complete subsequent refresher training annually;

(D) use of restraint, to include the mechanical devices utilized by the state MR facility and successfully complete subsequent refresher training annually; and

(E) conducting and documenting the debriefing of an employee who actively participated in the restraint of an individual during a behavioral emergency.

(d) Before a nurse or physician assumes work responsibilities that require participation in requesting, ordering, evaluating, or documenting restraint, the state MR facility will ensure that the nurse or physician receives training and demonstrates competence in:

(1) recognizing facility procedures for requesting, ordering, evaluating, or documenting restraint;

(2) recognizing facility-approved personal restraint procedures and mechanical devices;

(3) identifying contraindications specific to facility-approved personal restraint procedures and mechanical devices; and

(4) recalling reporting procedures for restraint-related injuries and deaths.

(e) The state MR facility will ensure that each employee whose work responsibilities require the employee to participate in restraint must demonstrate competence annually in the areas described in subsection (b)(1)-(3) of this section.

(f) Documentation of training and demonstrated competence for each employee will be kept by the state MR facility's human resource development office. Documentation shall include the name of the training, the date of training, the name of the instructor or person who assessed competence, a list of successfully demonstrated knowledge and skills and the date knowledge and skills were assessed.

§415.365. References.

Reference is made to the following statutes and rules of the department:

(1) 42 CFR §§483.410-483.480 et. seq., (Conditions of Participation for Intermediate Care Facilities for Persons with Mental Retardation);

(2) 42 CFR §483.430;

(3) Chapter 405, Subchapter B of this title (relating to Prescribing of Psychotropic Medication--Mental Retardation Facilities);

(4) §405.31 of this title (relating to Emergency Use of Psychotropic Medications);

(5) §405.625 of this title (relating to Rights of Clients Receiving Residential Mental Retardation Services);

(6) Chapter 415, Subchapter I of this title (relating to Behavior Therapy in State Mental Retardation Facilities);

(7) §417.505 of this title (relating to Reporting Responsibilities of all TDMHMR Employees, Agents, and Contractors: Reports to the Texas Department of Protective and Regulatory Services (TDPRS)); and

(8) "Reportable Incidents in State Schools, State Centers, State Operated Community-based MHMR Services, and Community

Mental Health and Mental Retardation Centers with Intermediate Care Facilities for the Mentally Retarded (ICF/MR)" dated March 25, 1996.

This agency 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 June 3, 2004.

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SUBCHAPTER I. BEHAVIOR THERAPY IN STATE MENTAL RETARDATION FACILITIES

25 TAC §§415.401 - 415.412

The Texas Department of Mental Health and Mental Retardation (department) adopts new §§415.401 - 415.412 of new Chapter 415, Subchapter I, governing behavior therapy in state mental retardation facilities. The department adopts §§415.401, 415.403, 415.404, 415.406 - 415.408, and 415.411 with changes to the text as proposed in the January 23, 2004, issue of the *Texas Register* (29 TexReg 597). The department adopts §§415.402, 415.405, 415.409, 415.410, and 415.412 without changes.

The new subchapter ensures that the health, safety, welfare, rights, and privileges of an individual residing in a state mental retardation facility (state MR facility) are protected when staff recommend utilizing highly restrictive procedures or restricting rights or privileges to address the individual's inappropriate behavior. Policies and procedures are outlined in the subchapter that must be followed by a state MR facility when initiating, monitoring, and reporting behavior therapy programs. In addition, the subchapter describes provisions and principles that support and enhance the practice of applied behavior analysis and behavior therapy.

The new subchapter replaces Chapter 405, Subchapter H, governing behavior management--facilities serving persons with mental retardation, the repeal of which is adopted contemporaneously in this issue of the *Texas Register*. The department developed the new subchapter and related new Chapter 415, Subchapter H, governing the use of restraint in state mental retardation facilities, which is adopted contemporaneously in this issue of the *Texas Register*, in response to recent and considerable interest at the federal and state levels by legislators and advocate/stakeholder groups, and by Texas and national media in the use of restraint in all institutional settings.

In §415.404, a state MR facility is required to develop and implement written policies and procedures that, among other things, emphasize the department's commitment to providing treatment and habilitation to an individual that is the least restrictive and most effective alternative available and that is supportive and positive. The state MR facility also is required to describe the processes to be followed for obtaining consent or authorization before implementing a functional analysis and a behavior therapy program and to detail the training and demonstration of competence requirements for state MR facility staff.

In §415.405, the department describes general principles for behavior therapy programs that state, among other things, that behavior therapy programs must use only the least intrusive or restrictive intervention that effectively modifies or replaces a targeted behavior. Another principle states that staff must ensure that an individual who exhibits inappropriate behavior is treated with compassion and respect, in addition to being provided with effective and appropriate services.

The development, implementation, and monitoring of effectiveness of behavior therapy programs are addressed in §415.406. Subsection (a) specifies the conditions under which a written behavior therapy program must be developed for an individual. Subsection (b) specifies the requirements for implementing a functional analysis. Criteria for the development of the behavior therapy program are described in subsection (c). Review and approval procedures are addressed in subsection (d), including approval by the IDT, the state MR facility's Human Rights Committee, and the behavior therapy committee. If the behavior therapy program will involve the use of a highly restrictive procedure, including restraint, subsection (e) provides additional criteria for developing the program. Subsection (f) addresses monitoring by the individual's qualified mental retardation professional (QMRP) to ensure that the behavioral objectives specified in the behavior therapy program are being met.

Requirements for obtaining and documenting consent or authorization for a functional analysis or a behavior therapy program are described in §415.407. Section 415.409 describes the reporting requirements for a state MR facility regarding behavior therapy programs that use highly restrictive procedures.

Minor language changes have been made throughout the subchapter to update or correct references, for grammatical and organizational purposes, and for consistency and clarification.

Language in §415.406(b)(3)(A) regarding when a written protocol must be developed for a functional analysis has been revised to require such a protocol when the functional analysis would involve systematic changes in environmental and biological factors that might adversely impact the individual. Language regarding obtaining legally adequate consent in §415.406(b) and (c) and §415.407 has been modified to clarify that the individual provides legally adequate consent and the LAR provides consent. Language has been added to §415.406(c) to clarify that if an individual is involved in a program outside the state MR facility (e.g., attending public school or working), then the individual's IDT must invite staff of the outside program to participate in the development of a behavior therapy program that will be implemented while the individual is on the state MR facility campus.

The title of §415.407 has been modified to more accurately reflect the rule's content and the definition of "legally adequate consent." In subsection (a)(2), the requirement for a state MR facility to attempt (i.e., singular) to obtain consent from the LAR has been changed to require the facility to make reasonable attempts (i.e., multiple). Subsection (b) has been expanded to allow the head of the state MR facility to authorize implementation of a functional analysis or behavior therapy program in situations in which the individual's LAR has not responded to the facility's attempts to obtain consent and the LAR has been notified that the head of the state MR facility may authorize implementation if the LAR does not respond.

A hearing to accept oral and written testimony from members of the public concerning the proposal was held on February 13, 2004, in Austin. No one provided testimony.

Written comments concerning the proposal were submitted by the parent/guardian of a state MR facility resident, Garland; Advocacy, Inc., Austin; Parent Association for the Retarded of Texas (PART), Austin; The Arc of Texas, Austin; and Texas Council for Developmental Disabilities, Austin.

One commenter stated that the proposed subchapter places heavy emphasis on the use of behavior analysis and behavior therapy to decrease specific behaviors and largely neglects the potential for behavior analysis to assist in building desired functional behaviors when not related to inappropriate behaviors. The commenter further remarked that a state MR facility, because it is certified as a Intermediate Care Facility for Persons with Mental Retardation (ICF/MR), must provide active treatment as described in the federal ICF/MR regulations and recommended that that the new subchapter emphasize the effectiveness of such techniques in acquiring, developing, and shaping new skills to increase an individual's level of independence. The department responds it agrees that behavior analysis and behavior therapy can indeed assist in acquiring, developing, and shaping new skills to increase an individual's level of independence. The department explains, however, that the subchapter is intended to address primarily those aspects of behavior therapy that have the potential to affect the health, safety, welfare, rights, and privileges of an individual residing in a state MR facility, which are the use highly restrictive procedures or the restriction of rights or privileges and responds that clarifying language has been added to the purpose section.

Two commenters questioned why the new subchapter applies only to state MR facilities. The commenters stated that a state agency's requirements for use of behavior therapy should be applied consistently in all ICFs/MR and reflect the less restrictive environments typical of smaller public and private ICFs/MR. The department responds that the new subchapter has been promulgated by the department in its role as a provider of residential services, not as a regulatory agency.

Two commenters recommended that §415.401(1) be revised to state that the subchapter's purpose includes protecting the rights of an individual's LAR as well as those of the individual. The commenters stated that when a full guardianship of an individual is granted, many of the rights of the individual are transferred to the guardian by the court and that the subchapter must acknowledge this. The department disagrees with the commenters' recommendation and responds that the rights of the individual protected by the rules do not "transfer" to a court-appointed guardian. These rights include protection from exploitation and abuse, access to appropriate treatment and services, and freedom from mistreatment.

Two commenters stated that the department's current rules concerning behavior management are much more specific in describing the behavior therapy committee and its functions, and recommended that the language in current §405.161 be incorporated into the new subchapter to provide a fuller picture of the qualifications of members, how they are appointed, the responsibilities of the committee, and the expectations of the members. The commenters explained that current rule language states, among other things, that members "shall be knowledgeable regarding individual rights" and "shall have the technical skills and knowledge of applied behavior analysis necessary to evaluate the adequacy of proposed behavior intervention programs." The department responds that it is unnecessary to articulate membership qualification and notes that absence of such a requirement by rule would not automatically result in behavior therapy committees having unqualified members.

Concerning the definition of "functional analysis" in §415.403, a commenter stated that biological factors are difficult to assess through a functional analysis performed by non-medical personnel. The commenter suggested that "inappropriate" not be used in the definition because a functional assessment may be used to evaluate the effect of environmental factors on appropriate behavior, as well as inappropriate behavior. The department responds that this subchapter is intended to address primarily those aspects of behavior therapy that have the potential to affect the health, safety, welfare, rights, and privileges of an individual residing in a state MR facility, which are the use of highly restrictive procedures or the restriction of rights or privileges. This intent is also reflected in the definition of "functional analysis." The department declines to revise the definition as suggested by the commenter.

Concerning the definition of "restraint" under "highly restrictive procedure" in §415.403, a commenter recommended that the word "normal" in the phrases "normal functioning of the whole or a portion of an individual's body" and "normal access by the individual to a portion of the individual's body" be replaced with a more descriptive word when referring to behavior. The commenter stated that "normal" is not well defined and carries negative connotations, and suggested using "typical," "average," or acceptable" instead. The department responds that use of "normal" in this definition refers to the individual's physical movement or access, not to the individual's behavior. The department declines to modify the language as recommended by the commenter.

Concerning the definition of "use of timeout room" under "highly restrictive procedure" in §415.403, two commenters recommended specifying whether the use of "time out" is voluntary. The commenters stated that if "time out" is involuntary, staff should document the frequency and duration of use not only for the individual, but "across units, facilities, and time." The department responds that "use of a timeout room" is a highly restrictive procedure that may be used only as part of a behavior therapy program for which consent (or authorization) has been obtained; therefore, time out is considered voluntary, and the department has not revised the rule language.

Two commenters recommended that the definition of "Human Rights Committee" in §415.403 be revised to specify that at least one member of a state MR facility's committee must be the LAR of an individual residing at that state MR facility. The department responds that, although the proposed language does not preclude an LAR from being a member of a state MR facility's HRC, the department declines to require such membership by rule as recommended by the commenters.

Two commenters recommended that the definition of "legally adequate consent" in §415.403 be revised to specify that an LAR who has the right to consent on behalf of an individual must be the person who is asked to provide legally adequate consent to a behavior therapy program. The department responds that it is unnecessary to revise the definition as recommended by the commenters because an individual who has the ability to provide legally adequate consent would not have an LAR with the right to consent on the individual's behalf. The department notes that §415.407(a) requires the state MR facility to make reasonable

attempts to obtain consent from the LAR of an individual who lacks the ability to provide legally adequate consent.

Two commenters recommended that §415.404(a)(2)(A)(i) be revised to add "least intrusive" as well as least restrictive and most effective. The department agrees and has revised the language as recommended by the commenters.

A commenter stated that §415.505(4), which states that "staff must attempt to understand an individual's motivation for engaging in inappropriate behavior...," is inconsistent with the principles of behavior analysis. The commenter suggested that the intention of this statement is to clarify that staff must be aware that all behavior serves a purpose, and recommended that the statement be reworded to place the emphasis on staff, as part of the IDT, "systemically developing an understanding of the likes/dislikes/behavioral triggers of that individual and using that knowledge appropriately to prevent inappropriate behavior." The department responds that it believes the proposed principle provides adequate guidance to staff and declines to revise the language as recommended by the commenter.

Two commenters suggested revising §415.406(b)(3)(D) and §415.406(d)(1) to state that the written protocol for a functional analysis and the behavior therapy program must be approved by the individual's LAR as well as the individual's IDT, the Human Rights Committee, and the behavior therapy committee. The commenters rejected a previous department explanation that the LAR is a member of the IDT as inappropriately equating the rights of the IDT with the rights of the LAR. The department responds that review and approval of the required written protocol for a functional analysis or the written behavior therapy program is the clinical responsibility of facility staff. Consent to a functional analysis that requires a written protocol and consent to a behavior therapy program is the responsibility of the individual or LAR. The department declines to add the requirements as suggested by the commenters.

Concerning §415.406(e)(1)(A), which requires that before a highly restrictive procedure is considered as part of a behavior therapy program the individual's record must have evidence that other less restrictive, less intrusive interventions have been employed and found to be ineffective in modifying or replacing the targeted behavior, two commenters stated that the state MR facility must search the individual's records "over many years or decades" if necessary to determine whether such evidence exists. The department responds that the revision suggested by the commenters is unnecessary. The department notes that "evidence present in an individual's record" is not limited to just a portion of the record or to recent evidence.

Two commenters recommended that §415.406(f)(2) be revised to require the QMRP to notify the individual's LAR, in addition to the treating psychologist, if the behavioral objectives specified in an individual's behavior therapy program are not being met, or if significant changes in the individual's behavior, functioning level, or physical or medical condition occur. The department declines to add language as suggested by the commenters because the purpose of the requirement is to monitor the behavior therapy program for effectiveness. The department notes that the LAR may request notification from the state MR facility if the behavioral objectives specified in an individual's behavior therapy program are not being met, or if significant changes in the individual's behavior, functioning level, or physical or medical condition occur.

Two commenters recommended that §415.407(a)(2) be revised to require a state MR facility to make more than one attempt to contact an individual's LAR for consent to implement a behavior therapy program. The department responds by adding language stating the state MR facility will make reasonable attempts to obtain consent from the LAR.

Two commenters recommended that §415.409 be revised to require the state MR facility to include in its quarterly report to the department's Central Office the date of the last review of each behavior therapy program that uses a highly restrictive procedure. The department responds that the purpose of the requirement recommended by the commenters is unclear and notes that review dates for a behavior therapy program is significant to the individual, LAR, and staff implementing the program. The department declines to add the requirement because it would not provide meaningful data to Central Office.

The new subchapter is adopted under the Texas Health and Safety Code (THSC), §532.015(a), which provides the Texas Mental Health and Mental Retardation Board (board) with broad rulemaking authority; THSC, §591.004, which requires the board to ensure the implementation of the Persons with Mental Retardation Act (THSC, Title 7, Subtitle D); and THSC, §592.002, which requires the board to ensure the implementation of certain rights enumerated in THSC, Chapter 592.

§415.401. Purpose.

The purpose of this subchapter is to:

(1) ensure that the health, safety, welfare, rights, and privileges of an individual residing in a state mental retardation facility (state MR facility) are protected when staff recommend utilizing highly restrictive procedures or restricting rights or privileges to address the individual's inappropriate behavior;

(2) outline policies and procedures for developing, implementing, monitoring, and reporting behavior therapy programs; and

(3) describe principles that support and enhance the practice of applied behavior analysis and behavior therapy.

§415.403. Definitions.

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

(1) Behavior services director--A person appointed by the head of the state MR facility to chair the facility's behavior therapy committee and consult with program directors and who:

(A) is knowledgeable in the specifics of behavior therapy principles and theory;

(B) is qualified to evaluate published behavior therapy research studies; and

(C) has applied experience with behavior therapy techniques.

(2) Behavior therapy--The application of applied behavior analysis principles, cognitive therapies, and skills acquisition to clinical problems with the intent of increasing adaptive behaviors and modifying or replacing targeted behaviors with behaviors that are adaptive and socially acceptable.

(3) Behavior therapy committee--Persons designated by a state MR facility who are knowledgeable about applied behavior analysis and who:

(A) review, approve, and monitor behavior therapy programs; and

(B) review, monitor, and make suggestions concerning the state MR facility's policies and procedures concerning behavior therapy.

(4) CFR (Code of Federal Regulations)--The compilation of federal agency regulations.

(5) Functional analysis--An assessment of environmental and biological factors that may influence inappropriate behavior exhibited by an individual.

(6) Head of the state MR facility--The superintendent of a state school or the executive director of a state center.

(7) Highly restrictive procedures--

(A) Restraint--The use of manual pressure, except for physical guidance or prompting of brief duration, or a mechanical device to restrict:

(i) the free movement or normal functioning of the whole or a portion of an individual's body; or

(ii) normal access by the individual to a portion of the individual's body.

(B) Use of timeout room--Placement of an individual alone and under constant, direct staff supervision in an enclosed area in which positive reinforcement is not available and from which egress is denied by a closed door in accordance with Code of Federal Regulations (CFR), Title 42, §483.450(c), concerning timeout rooms. The term does not include circumstances in which staff remain in close proximity to an individual who has been directed to an area that is removed from regular activities.

(C) Application of aversive stimuli--Application of any stimulus that may be unpleasant or noxious, startling, or painful such that its intended effect is the suppression of the targeted behavior upon which it is immediately contingent. Such stimuli include olfactory, auditory, gustatory, tactile, and other stimuli that may result in physical discomfort or pain.

(D) Effortful task--An activity requiring physical effort by an individual that is directed or manually guided by staff. Examples of effortful tasks include, but are not limited to:

(i) Required exercise--A procedure whereby an individual performs and may be guided by staff to perform a series of physical movements that are incompatible with the undesirable response they systematically follow. An example would be the guided movement of a self-injurious individual's arms through a series of positions away from the body.

(ii) Negative practice--A procedure whereby an individual is required to repeatedly engage in an effortful task that is topographically similar to the undesirable response the procedure systematically follows. An example is a program in which an individual who strikes others is required to repeatedly hit a punching bag following each occurrence of striking others.

(iii) Restitutional overcorrection--A procedure whereby an individual is required to correct the consequences of a disruptive response by performing a task that restores the environment to a state even more improved than existed before the disruptive behavior. An example would be the requirement that a disruptive individual polish all the tables in the residence as a consequence of knocking over one of them.

(iv) Positive practice overcorrection--A procedure whereby an individual is required to repeatedly engage in an appropriate behavior related to the function of the undesirable response the procedure systematically follows. An example is a program in which an individual is required to repeatedly practice an appropriate social behavior contingent upon exhibition of a targeted behavior.

(8) Human Rights Committee (HRC)--Persons designated by a state MR facility in accordance with 42 CFR §483.440(f)(3), concerning specially constituted committee, who review, approve and monitor behavior therapy programs and review, monitor, and make suggestions about the state MR facility's policies, procedures, and practices concerning behavior therapy programs.

(9) Interdisciplinary team (IDT)--Mental retardation professionals and paraprofessionals and other concerned persons, as appropriate, who assess an individual's treatment, training, and habilitation needs and make recommendations for services.

(A) Team membership always includes:

(i) the individual;

(ii) the individual's LAR, if any; and

(iii) persons specified by a state MR facility who are professionally qualified and/or certified or licensed with special training and experience in the diagnosis, management, needs, and treatment of individuals with mental retardation.

(B) Other participants in IDT meetings may include:

(i) other concerned persons whose inclusion is requested by the individual or the LAR; and

(ii) at the discretion of the state MR facility, persons who are directly involved in the delivery of mental retardation services to the individual.

(10) Individual--A person with mental retardation who resides in a state MR facility.

(11) LAR (legally authorized representative)--A person authorized by law to act on behalf of an individual with regard to a matter described in this subchapter, and may include a parent, guardian, or managing conservator of a minor individual, or a guardian of an adult individual.

(12) Legally adequate consent--A term consistent with provisions of the Texas Health and Safety Code (THSC), §591.006, which states, in essence, that consent obtained from an individual with mental retardation is legally adequate when each of the following conditions has been met:

(A) legal status: The individual giving the consent:

(i) is 18 years of age or older, or younger than 18 years of age and is or has been married or had the disabilities of minority removed for general purposes by court order as described in the Texas Family Code, Chapter 31; and

(ii) has not been determined by a court to lack capacity to make decisions with regard to the matter for which consent is being sought.

(B) comprehension of information: The individual giving the consent has been informed of and comprehends the nature, purpose, consequences, risks, and benefits of and alternatives to the procedure, and the fact that withholding or withdrawal of consent shall not prejudice the future provision of care and services to the individual with mental retardation; and

(C) voluntariness: The consent has been given voluntarily and free from coercion and undue influence.

(13) State MR (mental retardation) facility--A state school or state center operated by the department that provides residential services to individuals with mental retardation.

(14) Targeted behavior--An inappropriate behavior exhibited by an individual that the IDT has identified for modification or reduction.

§415.404. General Provisions.

(a) Each state MR facility must have and implement written policies and procedures concerning behavior therapy that:

(1) do not conflict with this subchapter or 42 CFR §483.450(b), concerning the management of inappropriate behavior;

(2) emphasize the department's commitment to:

(A) providing treatment and habilitation to an individual that is:

(i) the least restrictive, least intrusive, and most effective alternative available; and

(ii) supportive and positive; and

(B) reducing the necessity for the use of highly restrictive procedures or other restrictions of the rights and privileges of an individual in behavior therapy programs;

(3) describe the process to be followed for obtaining, as appropriate, legally adequate consent from an individual, consent from an individual's LAR, or authorization from the head of the state MR facility before implementing a behavior therapy program or a functional analysis that requires a written protocol; and

(4) detail the training and demonstration of competence requirements for state MR facility staff.

(b) The standards in this subchapter take precedence over other applicable standards, including the Conditions of Participation for Intermediate Care Facilities for Persons with Mental Retardation (42 CFR §§483.410-483.480 et. seq.), whenever the other applicable standards are less prescriptive.

§415.406. Development, Implementation, and Monitoring of Effectiveness of Behavior Therapy Programs.

(a) When a behavior therapy program must be developed. An individual's treating psychologist, with input from the individual's interdisciplinary team (IDT), must develop a written behavior therapy program for the individual if:

(1) the IDT recommends the use of a highly restrictive procedure or other restriction of the individual's rights or privileges to modify or replace a targeted behavior; or

(2) the individual is receiving medications intended primarily for the treatment of a psychiatric disorder.

(b) Functional analysis.

(1) The individual's treating psychologist must implement a functional analysis before developing a behavior therapy program.

(2) If an individual participates in a program outside the state MR facility (e.g., attending public school or working), the functional analysis must involve the outside program. The state MR facility must invite staff of the outside program to participate in the functional analysis.

(3) The individual's treating psychologist must develop a written protocol if the functional analysis will involve any of the following:

(A) systematic changes in environmental and biological factors that might adversely impact the individual;

(B) evaluation of a highly restrictive procedure; or

(C) a significant risk of injury to the individual or others (e.g., the targeted behavior involves severe self-injury or aggression towards others).

(4) A written protocol, as required in paragraph (3) of this subsection, must:

(A) be developed by the treating psychologist;

(B) describe the specific procedures or environmental variables to be manipulated;

(C) describe the length of time required for each phase; and

(D) be reviewed and approved by:

(i) the individual's IDT;

(ii) the state MR facility's behavior services director; and

(iii) the chair of the state MR facility's Human Rights Committee (HRC).

(5) Before implementing a functional analysis that requires a written protocol a state MR facility must ensure that staff:

(A) obtain legally adequate consent, consent, or authorization in accordance with §415.407(a) or (b) of this title (relating to Requirement to Obtain Legally Adequate Consent, Consent, or Authorization); and

(B) document the legally adequate consent, consent, or authorization in the individual's record.

(c) Development of behavior therapy program.

(1) If an individual participates in a program outside the state MR facility (e.g., attending public school or working), the individual's IDT must invite staff of the outside program to participate in the development of a behavior therapy program that will be implemented while the individual is on the state MR facility campus.

(2) If the individual's treating psychologist and IDT determine that an individual's behavior therapy program should include a highly restrictive procedure, then the determination of which procedure to use must be based on:

(A) evidence documented in professional and scientific literature of the probability that the specific technique or procedure:

(i) will be effective in modifying or replacing a targeted behavior; and

(ii) is appropriate for an individual's cognitive functioning level, size, weight, known physical, medical, and emotional condition, and age; and

(B) the results of the functional analysis.

(3) As required by 40 TAC §90.42(e)(4)(A) (relating to Standards for Facilities Serving Persons with Mental Retardation or Related Conditions), if restraint is the highly restrictive procedure being considered by the individual's IDT as an intervention in a behavior therapy program, a physician must participate on the IDT concur with the IDT's recommendation concerning the use of restraint.

(4) An individual's behavior therapy program must be developed and implemented as described in this subchapter and 42 CFR

§483.450 (Condition of Participation: Client Behavior and Facility Practices).

(5) The written behavior therapy program must:

(A) describe the targeted behavior;

(B) describe reliable and representative baseline data indicating the frequency and severity of the targeted behavior;

(C) summarize the results of the functional analysis;

(D) specify behavioral objectives;

(E) describe detailed procedures for implementation of the behavior therapy program to include:

(i) the chosen intervention;

(ii) the recommended replacement behavior and how it is to be introduced; and

(iii) the techniques to prevent the occurrence of the targeted behavior;

(F) provide instructions for an evaluation of the individual by a nurse for injuries and overall well-being after the individual is released from restraint, if restraint is the chosen intervention and the IDT determines that an evaluation by a nurse is necessary;

(G) describe methods for evaluating the program's effectiveness to include collection and analysis of data;

(H) describe procedures for making timely revisions to the program based on an analysis of data if the specified behavioral objectives are not met; and

(I) specify the timeframes for reviewing the program.

(d) Review and approval of and consent to a behavior therapy program. Prior to implementation of a behavior therapy program, the state MR facility must ensure that:

(1) the behavior therapy program is reviewed and approved by:

(A) the individual's IDT;

(B) the state MR facility's HRC; and

(C) the state MR facility's behavior therapy committee;

(2) staff obtain legally adequate consent, consent, or authorization in accordance with §415.407(a) or (b) of this title (relating to Requirement to Obtain Legally Adequate Consent, Consent, or Authorization); and

(3) staff document the legally adequate consent, consent, or authorization in the individual's record.

(e) Use of a highly restrictive procedure.

(1) Except as described in paragraph (2) of this subsection, a behavior therapy program utilizing a highly restrictive procedure will not be approved by an individual's IDT, the state MR facility's HRC, or the state MR facility's behavior therapy committee unless a behavior therapy program that utilizes less restrictive procedures has been systematically attempted and failed to modify or replace the targeted behavior. Procedures for teaching replacement behaviors must be implemented simultaneously.

(A) If a highly restrictive procedure is being considered, evidence must be present in the individual's record that describes other less restrictive and less intrusive interventions, including verbal or other de-escalative interventions, that have been utilized and found to be ineffective in modifying or replacing the targeted behavior.

(B) If the highly restrictive procedure being considered is restraint the individual's IDT must:

(i) obtain written authorization from a physician, advanced practice nurse, or physician assistant stating that the individual has no known physical or medical condition that would constitute a risk to the individual during the use of restraint;

(ii) consider other factors that might be contraindications to the use of restraint, including the individual's cognitive functioning level, size, weight, emotional condition, including whether the individual has a history of having been physically or sexually abused, and age; and

(iii) limitations on specific techniques or mechanical devices for restraint as documented in the individual's record in accordance with §415.355(b)(2) and (c) of this title (relating to General Principles for the Use of Restraint).

(C) If the individual's medical condition changes and becomes a contraindication to the use of restraint, the physician must review the authorization.

(D) The state MR facility's HRC must approve any significant increase in the intensity or duration of a highly restrictive procedure, unless the behavior therapy program specifies the conditions under which an increase may occur.

(2) If an individual's inappropriate behavior is so severe (i.e., life threatening) or of such duration that other therapeutic approaches are currently precluded, the individual's IDT, the HRC, and the behavior therapy committee may approve and the state MR facility may implement a behavior therapy program that utilizes a highly restrictive procedure without first attempting a behavior therapy program that utilizes less restrictive procedures.

(f) Monitoring by qualified mental retardation professional (QMRP).

(1) The individual's QMRP, as defined in 42 CFR §483.430(a), concerning qualified mental retardation professional, must review the behavior therapy program to assess whether the specified behavioral objectives are being met:

(A) during the quarterly review of the Individual Plan of Care; or

(B) more frequently, if the QMRP believes changes in the individual's behavior, functioning level, or physical, or medical condition warrant it.

(2) If the individual's QMRP determines that the behavioral objectives specified in the program are not being met, or that significant changes in the individual's behavior, functioning level, or physical or medical condition have occurred, the QMRP must notify the individual's treating psychologist.

§415.407. Requirement to Obtain Legally Adequate Consent, Consent, or Authorization.

(a) Except as provided in subsection (b) of this section, a state MR facility must obtain legally adequate consent or consent in accordance with this subsection before implementing a functional analysis that requires a written protocol or a behavior therapy program.

(1) If an individual has the ability to provide legally adequate consent, the state MR facility will attempt to obtain legally adequate consent from the individual.

(2) If an individual lacks the ability to provide legally adequate consent and has an LAR, the state MR facility will make reasonable attempts to obtain consent from the LAR.

(3) Efforts taken by the state MR facility to obtain legally adequate consent from an individual or consent from an LAR must be documented in the individual's record.

(b) The head of the state MR facility, in accordance with Texas Health and Safety Code, §592.054, may authorize implementation of a functional analysis that requires a written protocol or a behavior therapy program only if:

(1) the individual lacks the ability to provide legally adequate consent and does not have an LAR; or

(2) the individual lacks the ability to provide legally adequate consent and the individual's LAR:

(A) has not responded to the state MR facility's attempts to obtain the LAR's consent; and

(B) has been notified that the head of the state MR facility may authorize implementation of a behavior therapy program if the LAR does not respond.

(c) An individual with the ability to provide legally adequate consent or the LAR of an individual who lacks the ability to provide legally adequate consent may:

(1) withhold consent to the implementation of a functional analysis that requires a written protocol or a behavior therapy program; or

(2) withdraw consent at any time to the continued implementation of a functional analysis that requires a written protocol or a behavior therapy program.

(d) If legally adequate consent is withheld or withdrawn by an individual or if consent is withheld or withdrawn by an LAR as described in subsection (c) of this section:

(1) state MR facility staff must document in the individual's record the time, date, and circumstances under which the withholding or withdrawal of consent occurred; and

(2) the individual's IDT must convene to discuss alternative interventions to address the targeted behavior.

(e) The consent or authorization to implement a behavior therapy program must be reviewed by the individual's IDT and the state MR facility's HRC at least annually and upon any substantive modification of the program or significant change in the individual's medical condition.

§415.408. Use of Restraint.

If restraint is used as part of a behavior therapy program, it must be implemented as described in §415.355 of this title (relating to General Principles for the Use of Restraint) and §415.357 of this title (relating to Use of Restraint in a Behavior Therapy Program).

§415.411. References.

Reference is made to the following statutes and regulations:

(1) 42 CFR §§483.410-483.480 et. seq., (Conditions of Participation for Intermediate Care Facilities for Persons with Mental Retardation);

(2) 42 CFR §483.430(a), concerning qualified mental retardation professional;

(3) 42 CFR §483.440(f)(3), concerning specially constituted committee;

(4) 42 CFR §483.450 (Condition of Participation: Client Behavior and Facility Practices);

(5) 42 CFR §483.450(b), concerning the management of inappropriate behavior;

(6) 42 CFR §483.450(c), concerning timeout rooms;

(7) Texas Family Code, Chapter 31;

(8) Texas Health and Safety Code (THSC), §591.006;

(9) THSC, §592.054;

(10) §415.355 of this title (relating to General Principles for the Use of Restraint) and §415.357 of this title (relating to Use of Restraint in a Behavior Therapy Program); and

(11) 40 TAC §90.42(e)(4)(A) (relating to Standards for Facilities Serving Persons with Mental Retardation or Related Conditions).

This agency 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 June 3, 2004.

TRD-200403686
Rodolfo Arredondo
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: June 23, 2004
Proposal publication date: January 23, 2004
For further information, please call: (512) 206-5232

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 15. DRIVER LICENSE RULES

SUBCHAPTER D. DRIVER IMPROVEMENT

37 TAC §15.81, §15.89

The Texas Department of Public Safety adopts an amendment to §15.81 and new §15.89, concerning Driver Improvement, without changes to the proposed text as published in the April 16, 2004, issue of the *Texas Register* (29 TexReg 3776).

Amendment of §15.81 and new §15.89 are necessary due to the passage of Tex H.B. 3588, 78th Leg., R.S. (2003). This bill created the Driver Responsibility Program, Texas Transportation Code (TRC), Chapter 708 and requires the department to identify by rule a listing of moving violations applicable to this program and administrative actions.

Amendment to §15.81 deletes the definition of "moving violation" and renumbers the remaining paragraphs.

New §15.89 is created to address the "moving violation" definition, provides a table listing moving violations, and whether or not the violation would be assessed points under the Driver Responsibility Program.

No comments were received regarding adoption of the amendment and new section.

The amendment and new section are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's rules, and Texas Transportation Code, §708.052, which requires the department to designate offenses that constitute moving violations of the traffic law.

This agency 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 June 2, 2004.

TRD-200403663
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: June 22, 2004
Proposal publication date: April 16, 2004
For further information, please call: (512) 424-2135

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CHAPTER 25. SAFETY RESPONSIBILITY REGULATIONS

37 TAC §§25.1 - 25.18

The Texas Department of Public Safety adopts the repeal of §§25.1 - 25.18, concerning Safety Responsibility Regulations, without changes to the proposed text as published in the April 16, 2004, issue of the *Texas Register* (29 TexReg 3777).

Repeal of the sections is necessary due to substantial revisions having been made. The last amendment to this chapter occurred in 1999, and revisions are now needed to clearly outline and support the implementation of the Safety Responsibility Act, Texas Transportation Code, Chapter 601. Adoption of the repeals is filed simultaneously with the adoption of new §§25.1 - 25.8 which implement the provisions of the Safety Responsibility Act.

No comments were received regarding adoption of the repeals.

The repeals are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, Chapter 601.

This agency 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 June 2, 2004.

TRD-200403661
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: June 22, 2004
Proposal publication date: April 16, 2004
For further information, please call: (512) 424-2135

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37 TAC §§25.1 - 25.8

The Texas Department of Public Safety adopts new §§25.1 - 25.8, concerning Safety Responsibility Regulations, without changes to the proposed text as published in the April 16, 2004, issue of the *Texas Register* (29 TexReg 3777).

Adoption of the new sections is necessary in order to outline and support the implementation of the Safety Responsibility Act, Texas Transportation Code, Chapter 601. Adoption of the new sections is filed simultaneously with the adoption for repeal of current §§25.1 - 25.18.

New §25.1 establishes the criteria for determining whether action can be taken to suspend a driver license and/or vehicle registration in an accident case. The department will not initiate suspension action unless proper documentation is received for review and the suspension action can be completed within 20 months of the accident date. The documents received are subject to release under the Public Information Act.

New §25.2 provides the method by which the enforcement in §25.1 is processed and the types of compliance accepted for reinstatement of driver license; provides for an administrative hearing if a written request is received in a timely manner; indicates the types of compliance documents that are acceptable and the fee required for reinstatement of driver license; and provides for reinstatement of driver license after two years from the accident if no judgment has been filed.

New §25.3 establishes the method by which suspension action is initiated following an unsatisfied judgment and the types of compliance accepted for reinstatement. The section further provides for suspension following a default on a court approved installment agreement or agreed judgment and has a provision by which a debtor can have the license reinstated by proving liability coverage for the accident out of which the judgment arose.

New §25.4 defines the procedure for reciprocity suspension action resulting from an out-of-state accident and what documents are acceptable to initiate such suspensions. Also states what is acceptable as compliance and the fee required for reinstatement.

New §25.5 establishes the criteria for suspension action following a second or subsequent conviction for failure to maintain financial responsibility and the compliance acceptable for reinstatement. The section further provides for the department to waive the filing of evidence of financial responsibility for the future if the individual can show satisfactory evidence that he was covered by liability insurance at the time the offense occurred. Also allows the department to suspend a driver license if the insurance company notifies the department that the proof on file has been canceled.

New §25.6 defines the SR-22 insurance certificate; explains when it is required and the duration of the requirement. The section also defines the form SR-26 which must be filed by the insurance carrier to cancel the SR-22.

New §25.7 defines self insurance; the documents necessary to establish self insurance; and how the certificates are issued by the department.

New §25.8 outlines the cost of the reinstatement fee.

No comments were received regarding adoption of the new sections.

The new sections are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, Chapter 601.

This agency 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 June 2, 2004.

TRD-200403662

Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: June 22, 2004
Proposal publication date: April 16, 2004
For further information, please call: (512) 424-2135

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IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Department of Agriculture

Request for Proposals - Texas Yes! Matching Fund Program

The Marketing and Promotion Division of the Texas Department of Agriculture (the department) hereby requests proposals for the Texas Yes! matching fund program projects for the period of September 1, 2004, through August 31, 2005. The Texas Yes! Hometown STARS matching fund program is a matching funds reimbursement program designed to directly promote tourism in rural Texas by developing promotional campaigns based on project requests submitted by successful applicants. Program and project proposal application information can be obtained at: www.texasyes.org or by contacting the Funding Coordinator at (512) 463-7731 or (866) 4TEX-YES. This request for proposals supersedes the previous request for proposals published by the department in the November 28, 2003, issue of the *Texas Register* (28 TexReg 10805).

Eligibility. To be eligible for participation in the matching funds program, an applicant must be a Texas Yes! Community Member who is a city or county, and is in good standing with the Texas Department of Agriculture. A Texas Yes! Community Member who is a city or county can submit a proposal on behalf of an event, festival or fair. The community member will be responsible for providing the sales tax information, other economic impact information, and any additional documentation or information requested by the department to indicate the impact of the project on the community or region. The department has the sole discretion to determine whether a project meets program eligibility requirements.

Proposal Requirements. To apply for Texas Yes! Hometown STARS matching funds a community member who is a city or county must: (i) prepare and submit a project request in accordance with this RFP; (ii) submit a sworn affidavit disclosing any existing or potential conflict of interest related to the evaluation of the project plan by Texas Yes! Hometown STARS; and (iii) acknowledge that the applicant will notify the department of any change in the status of the project. The deadline for submission of project requests is July 12, 2004. The department will only consider the first fifteen applications that it receives.

Each project proposal must use the Texas Yes! Hometown STARS project proposal form. Each project request submitted by an eligible applicant must describe the advertising or other market- oriented promotional activities to be carried out using matching funds and must include a cover page including the name, title and address of applicant and agent; a detailed specific narrative that contains a brief description of the community or city, a brief description of the tourism event that will be promoted, dates and location of the tourism event, why the applicant wants to promote the event, how the matching funds will be used to promote the tourism event, how will Texas Yes! Hometown STARS matching funds improve the event, how will the Texas Yes! program be promoted as part of the promotional campaign, how will the applicant work with other entities to promote the event, what impact is expected from the event and how the applicant will collect the necessary data to measure the impact of the promotion; a detailed budget/activity request; a signed original Resolution Authorizing Application from the governing body of the applicant; a signed original Reimbursement Guidelines document and a signed original Acknowledgement. Please send one original for initial review by the Funding Coordinator and then follow up with 16 additional copies, when requested by the Funding Coordinator that will be distributed to the Review Committee.

All approved projects must be completed by August 31, 2005, or the date specified in the project contract, whichever is earlier. All approved projects will be subject to audit and periodic reporting requirements.

Proposals should be submitted to: Debbie Wall, Funding Coordinator, Texas Department of Agriculture, 1700 North Congress Avenue, 11th Floor, Austin, Texas 78701. Ms. Wall may be contacted by telephone at (512) 463-7731, by fax at (512) 936- 4469 or e-mail at debbie.wall@agr.state.tx.us for additional information about preparing the proposal.

All qualifying proposals will be evaluated by the Texas Yes! Hometown STARS Review Team who are appointed by the Commissioner of Agriculture. The Texas Yes! Hometown STARS Review Team are representatives from the following areas: media, print, travel industry, art, agricultural tourism, rural economic development, historical preservation, cultural diversity, entertainment industry, GO TEXAN Partner Program and awarded Texas Yes! communities. Proposals will be selected for reimbursement funding on a competitive basis. The proposals will be rated in ten general categories by the Texas Yes! Hometown STARS. The ten categories are as follows: (i) the proposal displays a well planned vision for the tourism event promotion; (ii) the proposal presents concrete goals for this project; (iii) the proposal is unique and innovative; (iv) the anticipated results indicate a good return on investment; (v) the proposal includes efforts to effectively utilize regional resources; (vi) the event offers good potential to draw new and returning visitors from outside the area; (vii) the promotion will further enhance the Texas Yes! program with a high level of visibility for Texas Yes!; (viii) the proposed budget is appropriate and well developed; (ix) the proposal includes a well conceived and tangible plan for impact measurement; and (x) based on the information in the proposal, the promoted event appears to have a high probability for success with room to expand and grow. The Texas Department of Agriculture's Texas Yes! Hometown STARS Review Committee will base its award decisions on the Texas Yes! Hometown STARS -Review Team's recommendations and each applicant's overall score. **The factors that the department will consider when evaluating each application are subject to change, without notice, at the discretion of the department.**

Only project requests that further or enhance the department's Texas Yes! Program and are submitted by applicants physically located in Texas will be funded. The department reserves the right to terminate any award if it determines, in its sole discretion, that a project does not further or enhance the goals of the Texas Yes! Program.

The announcement of the grant awards will be made by the Marketing Coordinator for Texas Yes! after the first fifteen applications received by the department have been fully considered.

TRD-200403775

Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: June 9, 2004

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Office of the Attorney General

Texas Clean Air Act, and Texas Water Code Enforcement Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Clean Air Act, and the Texas Water Code. Before the State may settle a judicial enforcement action under the Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code.

Case Title and Court: *Harris County, Texas and the State of Texas v. Aubrey S. Labuff and Associates Construction Co., Inc.*, Cause No. 2003-49426, 270th Judicial District Court of Harris County, Texas

Nature of Defendant's Operations: Defendants operate several land clearing businesses throughout Harris County. Defendants were cited numerous times for violations due to the improper use of a trench burners to dispose of solid waste.

Proposed Agreed Judgment: The Agreed Final Judgment and Permanent Injunction provides for civil penalties, attorney's fees and compliance with injunctive provisions against Aubrey S. Labuff and Associates Construction Co., Inc. Defendant Aubrey S. Labuff and Associates Construction Co., Inc., agreed to pay $17,125.00 in civil penalties, and $2,000.00 in attorney's fees, amounts to be split evenly between the State of Texas and Harris County, and all court costs.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement should be directed to Lisa Sanders Richardson, Assistant Attorney General, Office of the Texas Attorney General, P. O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

For information regarding this publication, you may contact A.G. Younger, Agency Liaison, at 512 463-2110.

TRD-200403752
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: June 8, 2004

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Texas Health and Safety Code, Texas Clean Air Act and Texas Water Code Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Health and Safety Code (Texas Solid Waste Disposal Act and Texas Clean Air Act) and the Texas Water Code. Before the State may settle a judicial enforcement action under the Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code.

Case Title and Court: *Harris County, Texas and the State of Texas v. Houston Chemical Services, Inc.*, Cause No. 2002-34902, in the 157th Judicial District Court of Harris County, Texas

Nature of Defendant's Operations: Defendant Houston Chemical Services, Inc., ("HCS") pre-treated (neutralized) industrial wastewater to be disposed at another company's facility. The waste and air violations occurred at its facility in Houston, Texas. Harris County determined that the HCS facility emitted nuisance odors on several dates. The odors apparently came from several of the tanks and the two storm water ponds at the HCS facility. Harris County and the State also determined that HCS had processed, stored, and disposed of waste without a permit and committed other industrial solid waste violations.

Proposed Agreed Judgment: The proposed Agreed Final Judgment and Permanent Injunction is in favor of Harris County, Texas and the State in the amount of One Million Three Hundred and Fifty Dollars ($1,350,000.00) in civil penalties to be equally divided between Harris County and the State of Texas. Defendant is also required to pay attorney fees in the amount of Seventy-Five Thousand Dollars ($75,000.00) to Harris County, Texas, and Seventy-Five Thousand Dollars ($75,000.00) to the State of Texas.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment and Permanent Injunction should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement should be directed to Anthony W. Benedict, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

For information regarding this publication, you may contact A.G. Younger, Agency Liaison, at (512) 463-2110.

TRD-200403760
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: June 8, 2004

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Texas Building and Procurement Commission

Invitation for Bid (IFB) Notice

TBPC Project No. 03-026-7021

Project Name: Laredo DPS pavement, accessibility, and drainage repairs, Department of Public Safety, 1901 Bob Bullock Loop, Laredo, TX 78043, for the Department of Public Safety.

Sealed Bids for this project will be received until **3:00 P.M., Friday, July 5, 2004, at the 4th Floor Reception, 1711 San Jacinto, Austin, TX 78701.** See the IFB for other delivery choices.

Plans and specifications may be obtained from A/E J. F. Thompson, Inc., 6110 Clarkson Lane, Houston, TX 77055 (P) 713.956.4100, (F) 713.956.4121, for a deposit of $25.00, refundable upon return of a complete, unmarked set(s).

A Pre-Bid Conference will be held at Department of Public Safety, 1901 Bob Bullock Loop, Laredo, TX 78043, at 10:00 a. m., Friday,

June 11, 2004. Only bids submitted on the official Contractor's Bid Form found in the project Manual will be accepted.

The IFB may be obtained by contacting TBPC Internal Procurement, Attn: Deborah Norwood (Fax: 512.463.3360), *deborah.norwood@tbpc.state.tx.us* or through the Electronic State Business Daily at:

http://esbd.tbpc.state.tx.us; then enter the Agency Req. No. "303-4-11259" in the blank provided and click FIND.

TRD-200403677
Cynthia de Roch
General Counsel
Texas Building and Procurement Commission
Filed: June 3, 2004

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. Requests for federal consistency review were deemed administratively complete for the following project during the period of May 27, 2004, through June 2, 2004. The public comment period for these projects will close at 5:00 p.m. on July 9, 2004.

FEDERAL AGENCY ACTIONS:

Applicant: Texas Department of Transportation; Location: The project is located in wetlands adjacent to the Gulf Intracoastal Waterway (GIWW), at FM 2031, south of the City of Matagorda, Matagorda County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Matagorda, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 210211; Northing: 3176898.

Project Description: The applicant proposes to replace the existing swing bridge with a fixed bridge structure. The project will require the placement of 1.49 acres of jurisdictional fill for the structural supports and approaches, including a new public access road from FM 2031 to the GIWW. The impacted wetlands are dominated by saltwort (Batis maritima), and at slightly higher elevations, bushy sea-ox-eye daisy (Borrichia frutescens), bigleaf sumpweed (Iva frutescens), seaside goldenrod (Solidago sempervirens), and Gulf cordgrass (Spartina spartinae). The project also includes potential temporary impacts to 2.74 acres of jurisdictional wetlands in areas designated for regrading/reshaping on the project plans. These areas will potentially be used as temporary work areas, construction laydown areas, and may or may not be impacted. All of these areas impacted, as by rutting from heavy equipment, will be restored to pre-construction contours upon project completion. In addition, board mats will be used to minimize impacts to the extent practicable. The proposed fixed bridge supports will include temporary dewatering within sheet pile walls at the north and south embankments followed by the construction of permanent sheet pile retaining walls at the same embankments. To offset unavoidable impacts, the applicant proposes to utilize the prior in-lieu-fee agreement made with The Nature Conservancy (TNC) and permitted under Permit 22935(01) for the construction of a breakwater for erosion control and the protection of habitat near the mouth of Mad Island Bayou, Matagorda County. The mitigation the applicant agreed to for Permit 22935(01) was generally agree to be in excess of that necessary to offset those impacts and language in that permit alludes to utilizing the TNC mitigation in consideration of future unspecified impacts. The applicant would like to utilize the remaining credit for the construction of the Mad Island Bayou breakwater to mitigate the impacts of the current project.

CCC Project No.: 04-0177-F1; Type of Application: U.S.A.C.E. permit application #23389 is being evaluated under §404 of the Clean Waters Act (33 U.S.C.A. §1251-1387).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the application listed above may be obtained from Diane P. Garcia, Council Secretary, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or diane.garcia@glo.state.tx.us. Comments should be sent to Ms. Garcia at the above address or by fax at (512) 475-0680.

TRD-200403772
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: June 9, 2004

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Notice of Revision of General Concurrence #1

The Texas Coastal Coordination Council (Council) has revised General Concurrence #1, a Council document concerning Council procedures for the review of U.S. Army Corps of Engineers, Galveston District (Corps) actions. The purpose of General Concurrence #1 is to minimize the scope and duration of Council review of certain Corps actions for consistency with the goals and policies of the Texas Coastal Management Program (CMP). As originally issued, General Concurrence #1 provided for a 15-day review period for the Council's consistency review of those activities permitted by the Corps under Letters of Permission (33 CFR §325.2(e)(1)). The revisions to General Concurrence #1 include the addition of 15-day coordination notices, which the Corps issues for Oil Field Development Specific Permits, Project Revisions, Minor Modifications, and extensions of time. These federal actions are now in the list of Corps actions that are subject to the 15-day review period under General Concurrence #1. The revisions also include changes to clarify the purpose and scope of General Concurrence #1 and its notification and review procedures.

The Council is authorized to amend General Concurrence #1 under 31 Texas Administrative Code (TAC) §506.28 and §506.35 and 15 Code of Federal Regulations (CFR) §930.53(b).

The revised General Concurrence #1, as well as information concerning the Council and its duties, may be found on the Texas General Land Office website at http://www.glo.state.tx.us/coastal/ccc.html.

Requests for copies of the revised General Concurrence #1 may be submitted to Diane P. Garcia, Council Secretary, Coastal Coordination Council, P.O. Box 12873, Austin, Texas, 78711-2873, diane.garcia@glo.state.tx.us, facsimile (512) 475-0680, phone (512) 463-5385.

TRD-200403771
Larry L. Laine
Chief Clerk/Deputy Commissioner, General Land Office
Coastal Coordination Council
Filed: June 9, 2004

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Sections 303.003 and 303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by Sections 303.003 and 303.009 for the period of 06/14/04 -- 06/20/04 is 18% for Consumer [1]/Agricultural/Commercial [2]/credit thru $250,000.

The weekly ceiling as prescribed by Sections 303.003 and 303.09 for the period of 06/14/04 -- 06/20/04 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200403765
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: June 9, 2004

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Texas Education Agency

Notice of Correction: Request for Applications (RFA) Concerning Even Start and Family Literacy Program, 2004 - 2005

The Texas Education Agency (TEA) published Request for Application (RFA) #701-04-011 concerning the Even Start Family Literacy Program in the April 23, 2004, issue of the *Texas Register* (29 TexReg 3995).

The TEA is amending the Deadline for Receipt of eGrant Applications paragraph in the *Texas Register* Notice to read, "Applications must be received by the Document Control Center of the TEA by 5:00 p.m. (Central Time), Thursday, July 1, 2004, to be considered for funding." This correction reflects a change from the original deadline date of Thursday, June 17, 2004.

Further Information. For clarifying information about the RFA, contact Carlos Garza, Division of Discretionary Grants, TEA, (512) 463-9269.

TRD-200403769
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: June 9, 2004

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Request for Applications Concerning Texas High School Completion and Success Grant, Cycle 2

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-04-036 to implement programs that target 9th through 12th grade students from school districts and open-enrollment charter schools. A shared services arrangement of school districts also may apply. A district must serve as the fiscal agent. A local educational agency that has the following is eligible to apply: (1) one or more high schools with an overall campus passing rate of 50 percent or lower for all tests taken on the 10th grade Texas Assessment of Knowledge and Skills (TAKS) during the spring 2004 administration **and/or** (2) one or more high schools with a 2003 (Class of 2002) Completion Rate (graduates, continuing students, and GED recipients as a percentage of total students in the class) for *All Students* that is less than 90 percent, **and** (3) the high schools identified above are not currently receiving funding under the Texas High School Completion and Success Grant Program.

Description. The purpose of this program is to support the establishment and implementation of comprehensive high school completion and success initiatives. The grant program will target under-performing high schools and high schools with low student completion rates through student-focused competitive intervention grants that will provide direct and indirect (support) services to students in Grades 9 through 12. Its goals are to (1) increase student achievement, as evidenced through improved TAKS scores and increased credit accrual; (2) increase the number of students who graduate in four years after entering 9th grade; and (3) increase the number of students who graduate college-ready, as demonstrated through credit accrual, Advanced Placement/International Baccalaureate participation, and enrollment in rigorous coursework in a college-preparatory curriculum.

Dates of Project. The Texas High School Completion and Success Grant, Cycle 2, will be implemented during the 2004-2005 and 2005-2006 school years. Applicants should plan for a starting date of no earlier than October 1, 2004, and an ending date of no later than August 31, 2006. The grant period will be 22 months.

Project Amount. Approximately $20 million is available for funding approximately 100 projects. The grant request may not be less than $15,000 or greater than $600,000 per district.

Applicant's Conference. Prospective applicants will be provided an opportunity to receive general and clarifying information from TEA about the scope of the Texas High School Completion and Success Grant, Cycle 2. This Applicant's Conference will be held on Monday, July 12, 2004, from 9:00 a.m. until 12:00 p.m. on the Texas Educational Telecommunications Network (TETN).

Selection Criteria. Applications will be selected based on the independent reviewers' assessment of each applicant's ability to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. The TEA will not award a grant to an applicant receiving an average score of below 70. The TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA and that are most advantageous to the project.

The TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. A complete copy of RFA #701-04-036 may be obtained by writing the Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701; by calling (512) 463-9304; by faxing (512) 463-9811; or by e-mailing dcc@tea.state.tx.us. Please refer to the RFA number and title in your request. Provide your name, complete mailing address, and phone number including area code.

The announcement letter and complete RFA will also be posted on the TEA website at http://www.tea.state.tx.us/opge/disc/index.html for viewing and downloading.

Further Information. For clarifying information about the RFA, contact Barbara Knaggs, Division of Education Initiatives, Texas Education Agency, (512) 936-6060.

Deadline for Receipt of Applications. Applications must be received in the Document Control Center of the TEA by 5:00 p.m. (Central Time), Tuesday, August 10, 2004, to be considered for funding.

TRD-200403768
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: June 9, 2004

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Texas Commission on Environmental Quality

Notice of Application for Hazardous Waste Permits

For the Period of May 26, 2004

APPLICATION. Huntsman Petrochemical Corporation-Jefferson County Operations, located at 2701 Spur 136 near the intersection of FM-366 and Spur 136 on approximately 344 acres near Port Neches, Jefferson County, Texas has applied to the Texas Commission on Environmental Quality (TCEQ) for a permit renewal for four existing boilers to be used for burning hazardous waste for energy recovery.

The TCEQ executive director has reviewed this action for consistency wit the goals and policies of the Texas Coastal Management Program (CMP) in accordance wit the regulation of the Coastal Coordination Council and has determined that the action is consistent with the applicable CMP goals and policies.

The Executive Director of TCEQ has prepared a draft permit which, if approved, would established conditions under which the facility must operate.

PUBLIC COMMENT / PUBLIC MEETING. Written public comments and request for a public meeting should b submitted to the Office of Chief clerk at the address provided in the information section below, within 45 day of the date of newspaper publication the notice. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application or if requested in writing by and affected person within 45 days of the date of newspaper publication of the notice.

CONTESTED CASE HEARING. The TCEQ may grant a contested case hearing on this application if a written hearing request is filed within 45 days from the date of newspaper publication of this notice. The Executive Director may approve the application unless a written request for a contested case hearing I filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, and official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the state " I/we" request a contested case hearing;' (4) a brief and specific description of how you would be affected by the granting of the application in a way not common to the general public; and (5) the location and distance of your property relative to the proposed activity. You may also submit your proposed adjustment to the application/permit which would satisfy your concerns. Request for a contested case hearing must be submitted in writing to the Office of Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the permit and forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

INFORMATION. Written hearing request, public comments, or request for a public meeting should be submitted to the Office of Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Office of Public Interest Counsel, MC 103, the same address as above. Individual members of the general public may contact the Office of Public assistance, c/o Office of the Chief Clerk, at the address above or by calling 1-800-687-4040 to: (1 review or obtain copies of available document (such as draft permit, technical summary, and application); (2) inquire about the information in this notice; or (3) inquire about other agency permit application or permitting processes. General information regarding the TCEQ can be found at our we site at www.tceq.state.tx.us.

TRD-200403753
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 8, 2004

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Notice of Application for Hazardous Waste Permits/Compliance Plan

For the Period of May 27, 2004

APPLICATION. ONYX ENVIRONMENTAL SERVICES, LLC, located on the south side of State Highway No. 73 (SH 73), approximately 11.5 miles west of the Port Arthur, Texas Post Office and 3.2 miles west of the intersection of SH 73 and Taylor Bayou in Port Arthur, Texas on approximately 156.5 acres in Jefferson County has applied to the Texas Commission on Environmental Quality (TCEQ) for a permit renewal for continued operation of 25 existing tanks; 6 existing container storage areas; 1 incinerator train, 12 proposed tanks, 3 proposed container storage areas, 1 landfill, and 7 miscellaneous units for the storage, processing, incineration, and landfilling of hazardous waste and Class 1 and 2 industrial solid waste. Additionally, the permit renewal application requests continued authorization of post-closure care activities at 1 closed surface impoundment. The applicant has also applied for a compliance plan renewal which authorizes and requires the applicant to monitor the concentration of hazardous constituents in ground water and remediate ground-water quality to specified standards. The permit and compliance plan renewal applications were submitted on December 8, 1997.

The TCEQ executive director has reviewed this action for consistency with the goals and policies of the Texas Coastal Management Program (CMP) in accordance with the regulation of the Coastal Coordination Council and has determined that the action is consistent with the applicable CMP goals and policies.

The Executive Director of TCEQ has prepared a draft permit and compliance plan which, if approved, would established conditions under which the facility must operate.

PUBLIC COMMENT / PUBLIC MEETING. Written public comments and request for a public meeting should b submitted to the Office of Chief clerk at the address provided in the information section below, within 45 day of the date of newspaper publication the notice. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application or

if requested in writing by and affected person within 45 days of the date of newspaper publication of the notice.

CONTESTED CASE HEARING. The TCEQ may grant a contested case hearing on this application if a written hearing request is filed within 45 days from the date of newspaper publication of this notice. The Executive Director may approve the application unless a written request for a contested case hearing I filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, and official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the state " I/we" request a contested case hearing;' (4) a brief and specific description of how you would be affected by the granting of the application in a way not common to the general public; and (5) the location and distance of your property relative to the proposed activity. You may also submit your proposed adjustment to the application/permit which would satisfy your concerns. Request for a contested case hearing must be submitted in writing to the Office of Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the permit and forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

INFORMATION. Written hearing request, public comments, or request for a public meeting should be submitted to the Office of Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Office of Public Interest Counsel, MC 103, the same address as above. Individual members of the general public may contact the Office of Public assistance, c/o Office of the Chief Clerk, at the address above or by calling 1-800-687-4040 to: (1 review or obtain copies of available document (such as draft permit, technical summary, and application); (2) inquire about the information in this notice; or (3) inquire about other agency permit application or permitting processes. General information regarding the TCEQ can be found at our we site at www.tceq.state.tx.us.

TRD-200403754
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 8, 2004

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Notice of Application for Hazardous Waste Permits/Compliance Plan

For the Period of June 4, 2004

APPLICATION. CLEAN HARBORS DEER PARK, LP, located at 2027 Battleground Road on approximately 86 acres of land in Deer Park, Harris County, Texas has applied to the Texas Commission on Environmental Quality (TCEQ) for a permit renewal for the construction and continued operation of 39 existing tanks; 15 existing and one proposed container storage areas; two existing incinerators; three existing and one proposed miscellaneous units; and two existing and one proposed landfills for the storage, processing, disposal, and post-closure care of hazardous, Class 1 and Class 2 industrial solid waste. The applicant has also applied for a compliance plan renewal which authorizes and requires the applicant to monitor the concentration of hazardous constituents in ground water and remediate ground-water quality to specified standards. The permit and compliance plan renewal applications were submitted on September 16, 1997.

The TCEQ executive director has reviewed this action for consistency with the goals and policies of the Texas Coastal Management Program (CMP) in accordance with the regulation of the Coastal Coordination Council and has determined that the action is consistent with the applicable CMP goals and policies.

The Executive Director of TCEQ has prepared a draft permit and compliance plan which, if approved, would established conditions under which the facility must operate.

PUBLIC COMMENT / PUBLIC MEETING. Written public comments and request for a public meeting should be submitted to the Office of Chief Clerk at the address provided in the information section below, within 45 days of the date of newspaper publication the notice. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application or if requested in writing by an affected person within 45 days of the date of newspaper publication of the notice.

CONTESTED CASE HEARING. The TCEQ may grant a contested case hearing on this application if a written hearing request is filed within 45 days from the date of newspaper publication of this notice. The Executive Director may approve the application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, and official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement " I/we" request a contested case hearing; (4) a brief and specific description of how you would be affected by the granting of the application in a way not common to the general public; and (5) the location and distance of your property relative to the proposed activity. You may also submit your proposed adjustment to the application/permit which would satisfy your concerns. Request for a contested case hearing must be submitted in writing to the Office of Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the permit and forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

INFORMATION. Written hearing request, public comments, or request for a public meeting should be submitted to the Office of Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Office of Public Interest Counsel, MC 103, the same address as above. Individual members of the general public may contact the Office of Public Assistance, c/o Office of the Chief Clerk, at the address above or by calling 1-800-687-4040 to: (1) review or obtain copies of available document (such as draft permit, technical summary, and application); (2) inquire about the information in this notice; or (3) inquire about other agency permit application or permitting processes. General information regarding the TCEQ can be found at our we site at www.tceq.state.tx.us.

TRD-200403758
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 8, 2004

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Notice of District Petition

Notice mailed June 4, 2004

TCEQ Internal Control No. 03312004-D03; Robert L. Moody, Transitional Learning Community at Galveston, and League City Investors, Ltd., (Petitioners) filed a petition for creation of Galveston County Municipal Utility District No. 45 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioners are the owner of a majority in value of the land to be included in the proposed District; (2) there are two lien holders, Texas State Bank and CIG International L.L.C., on the property to be included in the proposed District, and the before mentioned entities have consented to the petition; (3) the proposed District will contain approximately 593.48 acres located within Galveston County, Texas; and (4) the proposed District is within the corporate boundaries of the City of League City, Texas, and no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. The Petitioners have also provided the TCEQ with a certificate evidencing the consent of Texas State Bank and CIG International L.L.C. to the creation of the proposed District. By Resolution No. 2003-29, effective June 10, 2003, the City of League City, Texas gave its consent to the creation of the proposed District. The petition further states that the proposed District will: (1) purchase, construct, acquire, maintain and operate a waterworks and sanitary sewer system for residential and commercial purposes; (2) construct, acquire, improve, extend, maintain and operate works, improvements, facilities, plants, equipment and appliances helpful or necessary to provide more adequate drainage for the property in the proposed District; and (3) control, abate and amend local storm waters or other harmful excesses of water, as more particularly described in an engineer's report filed simultaneously with the filing of the petition. According to the petition, the Petitioners have conducted a preliminary investigation to determine the cost of the project, and from the information available at the time, the cost of the project is estimated to be approximately $28,200,000.

INFORMATION SECTION

The TCEQ may grant a contested case hearing on a petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed district's boundaries. You may also submit your proposed adjustments to the petition which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below.

The Executive Director may approve a petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of the notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, the same address. For additional information, individual members of the general public may contact the Office of Public Assistance, at 1-800-687- 4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200403756
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 8, 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 **July 19, 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 July 19, 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: Agro-Transfer, Inc.; DOCKET NUMBER: 2002-0458-AIR-E; TCEQ ID NUMBER: HN-0320-P; LOCATION: northwest corner of the intersection of Toluca Road and Gonzalez Road, Progreso, Hidalgo County, Texas; TYPE OF FACILITY: grain transfer and storage; RULES VIOLATED: 30 TAC §116.115(b), Texas Health and Safety Code (THSC), §382.085(b), TCEQ Permit Number 24286, General Provision Number 6, and Agreed Order Docket Number 1999-0663-AIR-E, Ordering Provision 2.f., by failing to ensure that the facilities covered by the permit are not operated unless all air pollution emission capture equipment and abatement equipment are maintained in good working order and operating properly during normal facility operations; and 30 TAC §116.115(c), THSC, §382.085(b), TCEQ Permit Number 24286, Special Provision Number 3, and Agreed Order Docket Number 1999-0663-AIR-E, Ordering Provision 2.h., by failing to equip truck receiving and load-out areas with flaps on all doorways while receiving and/or loading products; PENALTY: $5,000; STAFF ATTORNEY: David Speaker, Litigation Division, MC 175, (512) 239-2548; REGIONAL OFFICE:

Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(2) COMPANY: Alvy T. McQueen dba Buzzard Hill Service Station; DOCKET NUMBER: 2001-1028-PST-E; TCEQ ID NUMBERS: 0011518 and RN101790079; LOCATION: Highway 146 and Providence Road, Livingston, Polk County, Texas; TYPE OF FACILITY: underground storage tanks (USTs); RULES VIOLATED: 30 TAC §334.7(d)(3) and TWC, §26.346(a), by failing to amend, update, or change the facility's registration information within 30 days from the date the facility's USTs were taken out of service; 30 TAC §334.47(a)(2), by failing to permanently remove the existing UST system no later than 60 days after the prescribed implementation date; 30 TAC §334.48(a) and §334.50(b)(1)(A) and TWC, §26.351(b) and §26.3475, by failing to ensure that the UST system was operated, maintained, and managed in a manner to prevent releases of a regulated substance and failing to monitor the USTs in a manner which would detect a release at a frequency of at least once every month; 30 TAC §334.49(a) and TWC, §26.3475, by failing to have corrosion protection for the UST system; and 30 TAC §37.815(a) and (b), by failing to demonstrate the required financial responsibility 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: $23,100; STAFF ATTORNEY: Sarah Utley, Litigation Division, MC R-13, (210) 403-4017; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(3) COMPANY: ASN Enterprises, Inc. dba Jr Food Mart; DOCKET NUMBER: 2003-0806-PST-E; TCEQ ID NUMBER: 9067; LOCATION: 101 Highway 110 North, Whitehouse, Smith County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; PENALTY: $2,400; STAFF ATTORNEY: David Speaker, Litigation Division, MC 175, (512) 239-2548; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

TRD-200403750

Paul C. Sarahan

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: June 8, 2004

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

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **July 19, 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 July 19, 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: Century Industrial Coatings Incorporated; DOCKET NUMBER: 2003-1266-MLM-E; TCEQ ID NUMBERS: RN101933946, 87233, F1590, 47583, and CJ0159M; LOCATION: United States Highway 69, 0.5 miles south of Loop 456, near Jacksonville, Cherokee County, Texas; TYPE OF FACILITY: paint manufacturing plant; RULES VIOLATED: 30 TAC §335.62 and 40 Code of Federal Regulations (CFR) §262.11, by failing to conduct a proper waste determination; 30 TAC §116.115(c), §335.4, and Air Quality Permit Number 47583, Special Condition Number 9, by failing to prevent an unauthorized discharge; 30 TAC §335.69(d)(1) and (2), §335.262(c)(2)(A) and (F), and 40 CFR §262.34(c)(1)(ii), by failing to close and label hazardous waste containers; 30 TAC §335.2(b), by failing to dispose of an industrial hazardous waste at an authorized site; and 30 TAC §116.110(a) and Texas Health and Safety Code, §382.085(b), by failing to authorize air emissions; PENALTY: $14,400; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(2) COMPANY: Robert Schreier; DOCKET NUMBER: 2003-1468-MSW-E; TCEQ ID NUMBERS: 455060005 and RN102935509; LOCATION: Block G4, Section 2976, Brewster County, Texas; TYPE OF FACILITY: scrap tire storage site; RULES VIOLATED: 30 TAC §328.60(a), by failing to obtain a scrap tire storage site registration from the TCEQ while continuing to store more than 500 used or scrap tires on the ground; PENALTY: $3,000; STAFF ATTORNEY: Kelly W. Mego, Litigation Division, MC R-4, (817) 588-5922; REGIONAL OFFICE: El Paso Regional Office, 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

TRD-200403751

Paul C. Sarahan

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: June 8, 2004

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Notice of Water Quality Applications

The following notices were issued during the period of May 28, 2004 through June 9, 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.

ACME BRICK COMPANY has applied for a renewal of TPDES Permit No. WQ0013192001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 1,200 gallons per day. The facility is located approximately 3.8 miles east of the intersection of Farm-to-Market Road 331 and State Highway 36 in Austin County, Texas.

AQUA WATER SUPPLY CORPORATION has applied for a renewal of TPDES Permit No. 14224-001, which authorizes the discharge of treated water treatment plant filter backwash water at a daily average flow not to exceed 4,200 gallons per day. The facility is located on County Road 106, 1.2 miles west of the County Road 106 and Farm-to-Market Road 696 intersection in Bastrop County, Texas.

BRUNI RURAL WATER SUPPLY CORPORATION has applied for a renewal of TPDES Permit No. 13924-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 62,500 gallons per day. The facility is located at the east end of 16th Street, approximately one mile northeast of the intersection of State Highway 359 and Farm-to- Market Road 2050 in the community of Bruni in Webb County, Texas.

CHRISTIAN TABERNACLE OF HOUSTON, INC. has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014513001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 19,000 gallons per day. The facility is located on the north side of Garrett Road, approximately 0.262 mile west of the intersection of Beltway 8 and Garrett Road in Harris County, Texas.

CITY OF CROSBYTON has applied for a renewal of Permit No. 10097-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 264,000 gallons per day via surface irrigation of 518.3 acres of farmland. The facility and disposal site are located approximately 3.0 miles southeast of the intersection of U.S. Highway 82 and Farm-to-Market Road 651 in Crosby County, Texas.

DRIPPING SPRINGS INDEPENDENT SCHOOL DISTRICT has applied for a renewal of Permit No. WQ0013748001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 150,000 gallons per day via subsurface drip irrigation on 3.44 acres. The draft permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 15,000 gallons per day via subsurface drip irrigation on 3.44 acres. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located approximately 0.9 mile northwest of the intersection of Ranch Road 12 and U.S. Highway 290 in Hays County, Texas.

THE FORT BEND COUNTY MUNICIPAL UTILITY DISTRICT NO. 81 has applied for a renewal of TPDES Permit No. 13051-002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 325,000 gallons per day. The facility is located approximately 10 miles northwest of Rosenberg, Texas and 3 miles south southwest of Fulshear in Fort Bend County, Texas.

GRAND MISSION MUNICIPAL UTILITY DISTRICT NO. 1 has applied for a major amendment to TPDES Permit No. WQ0014231001 to authorize an increase in the discharge of treated domestic wastewater flow limitations in the interim phases and to authorize an increase in the final volume not to exceed an annual average flow of 1,000,000 gallons per day. The facility is located approximately 0.9 mile south and 0.5 mile west of the intersection of Farm-to-Market Road 1093 and Harlem Road in Fort Bend County, Texas.

GRAPE CREEK INDEPENDENT SCHOOL DISTRICT has applied for a renewal of Permit No. 14242-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 9,600 gallons per day via subsurface drip irrigation of 2.2 acres of school athletic field. The facility and disposal site are located 3,800 feet north of the intersection of Farm-to-Market Road 2288 and U. S. Highway 87 in Tom Green County, Texas

CITY OF GUNTER has applied for a renewal of TPDES Permit No. 10569-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 240,000 gallons per day. The facility is located adjacent to the St. Louis-San Francisco and Texas Railway, approximately 2,300 feet west of State Highway 289 and approximately 1,400 feet north of Farm-to-Market Road 121 in the City of Gunter in Grayson County, Texas.

LAMAR CONSOLIDATED INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. 13007-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 17,000 gallons per day. The facility is located at 5111 Farm-to-Market Road 762, approximately 4.5 miles east-southeast of the City of Rosenberg in Fort Bend County, Texas.

CITY OF MANOR has applied for a renewal of TPDES Permit No. 12900-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 840,000 gallons per day. The facility is located immediately west of New Sweden Road and approximately 0.25 mile south of U.S. Highway 290 in Travis County, Texas.

MONTGOMERY COUNTY UTILITY DISTRICT 3 has applied for a renewal of TPDES Permit No. 11203-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 950,000 gallons per day. The facility is located south of State Highway 105, approximately 8.5 miles west of the intersection of State Highway 105 and Interstate Highway 45 in Montgomery County, Texas.

NEEDVILLE INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. 12010-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 36,000 gallons per day. The facility is located between the intersections of Roesler Road and Danhouse Road with State Highway 36, approximately 2.25 miles southeast of the City of Needville on State Highway 36 in Fort Bend County, Texas.

NEW HORIZONS RANCH AND CENTER, INC. has applied for a major amendment to Permit No. 12759-001, to authorize an increase in the daily average flow from 10,000 gallons per day to 25,000 gallons per day and to increase the acreage irrigated from 6.8 acres to 15 acres. The draft permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 18,000 gallons per day via surface irrigation of 15 acres of nonpublic access pastureland. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located one mile west-northwest of the intersection of Farm-to-Market Road 574 (Mills County Road) and Pecan Bayou in Mills County, Texas.

NORTH TEXAS MUNICIPAL WATER DISTRICT has applied for a renewal of TPDES Permit No. 11259-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day. The facility is located south of the intersection of Yankee Creek Road and Yacht Club Road, approximately 1.5 miles southwest of the City of Heath in Rockwall County, Texas.

RIVERSIDE COUNTRY CLUB has applied for a renewal of TPDES Permit No. 11602-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 6,000 gallons per day. The facility is located approximately 1200 feet south of State Highway 332 and approximately 1.5 miles east of the intersection of

State Highway 332 and Farm-to-Market Road 521 in Brazoria County, Texas.

CITY OF SEYMOUR has applied for a renewal of Permit No. 10281-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 537,000 gallons per day. The facility is located approximately 0.5 mile southwest of the intersection of Farm-to-Market Road 1286 and State Highway 199 in Baylor County, Texas.

DR. JAMES DONALD SMITH JR. has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014498001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 35,000 gallons per day. The facility is located 2,211 feet south of State Highway 787 and approximately 4,800 feet east of the Community of Romayor in Liberty County, Texas.

CITY OF SOMERVILLE has applied for a renewal of TPDES Permit No. 10371-001, 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 adjacent to Farm-to-Market Road 1361, approximately 0.5 mile northeast of the intersection of Farm-to-Market Road 1361 and State Highway 36, east of the City of Somerville in Burleson County, Texas.

WILDWOOD PROPERTY OWNERS ASSOCIATION has applied for a renewal of TPDES Permit No. 11184-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 24,000 gallons per day. The facility is located at the corner of Balsawood and Chestnut Streets in the community of Wildwood, approximately 0.25 miles south of Lake Kimble and approximately 2.5 miles west of the intersection of U. S. Highways 69 and 287 and Farm-to-Market Road 3063 in Hardin County, Texas.

CITY OF YOAKUM has applied for a renewal of TPDES Permit No. WQ0010463001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 990,000 gallons per day. The facility is located on the west side of Dunn Street and approximately one mile southwest of its intersection with State Highway 111 in the City of Yoakum in Dewitt County, Texas.

TRD-200403755

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: June 8, 2004

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Notice of Water Rights Application

Notices mailed June 3, 2004 through June 8, 2004.

APPLICATION NO. 5832; Westerra Stonebridge, L.P., 1611 North Stonebridge Drive, McKinney, Texas, 75071, has applied to the Texas Commission on Environmental Quality (TCEQ) for a Water Use Permit pursuant to 11.143, Texas Water Code, and Texas Commission on Environmental Quality Rules 30 TAC 295.1, et seq. Applicant seeks a water use permit to improve and maintain three existing exempt on-channel dams and reservoirs to impound a combined total of 78 acre-feet of water with a combined surface area of 12 acres for in-place recreation purposes in Collin County, approximately 6.0 miles west of the town of McKinney, Texas. Applicant is proposing to maintain the reservoir full at all times with water from the City of McKinney's domestic water supply system. Water will be piped directly into the three reservoirs. Ownership of the land is evidenced by a Special Warranty Deed recorded as Document No. 96-0106740 and a Quitclaim Deed recorded as Document No. 96-0106741 on December 12, 1996 in the Collin County Clerk's Office. The Commission will review the application as submitted by the applicant and may or may not grant the application as requested. The application was received on January 29, 2004. Additional information and fees were received on February 1, February 5, March 1 and March 18, 2004. The application was declared administratively complete and filed with the Office of the Chief Clerk on April 12, 2004. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice. For a complete version of this notice, contact the Office of the Chief Clerk at the address given in the information section below.

APPLICATION NO. 5827; The City of Houston, applicant, 611 Walker, 21st Floor, Houston, Texas 77002 seeks a Water Use Permit pursuant to Texas Water Code (TWC) 11.121, 11.042, & 11.085 and Texas Commission on Environmental Quality (TCEQ) Rules 30 Texas Administrative Code (TAC) 295.1, et seq. Applicant seeks authorization to divert and reuse not to exceed 580,923 acre-feet of its return flows and any future return flows from its wastewater treatment plants located in the San Jacinto River Basin for municipal and industrial purposes. Applicant also seeks to use the bed and banks of Brays Bayou, Buffalo Bayou, Greens Bayou, Hunting Bayou, Lake Houston, Sims Bayou, and White Oak Bayou to convey the water downstream from its wastewater treatments plants to its diversion points. Applicant further seeks to use the water within the City's service area in Harris, Fort Bend, Brazoria, Chambers, and Galveston Counties within the San Jacinto River Basin, the Trinity River Basin, San Jacinto-Brazos Coastal Basin, and Trinity-San Jacinto Coastal Basin. Water is transferred from the San Jacinto River Basin to the other basins within the City's service area pursuant to TWC 11.085(v)(3) and (4). Water will be discharged from the Wastewater Treatment Plants in San Jacinto River Basin. Presently, the combined maximum permitted discharge rate for these plants is 545,191 MGD, or 611,498 acre-feet of water per annum. The applicant has only requested to divert and reuse 580,923 acre-feet of water out of the 611,498 acre- feet of water. The difference accounts for the estimated 5% carriage loss associated with conveyance of water down the bed and banks. This application is subject to the Texas Coastal Management Program (CMP) and must be consistent with the CMP goals and policies. The Commission will review the application as submitted by the applicant and may or may not grant the application as requested. The application was received on January 14, 2004. Additional information for the application were received on April 23, 2004. The application was accepted for filing and declared administratively complete on May 14, 2004. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below by July 9, 2004. For a complete version of this notice, contact the Office of the Chief Clerk at the address given in the information section below.

APPLICATION NO. 5576A; Lipar Group, Inc., 19221 I-45 South, Suite 320, Conroe, Texas, 77385, seeks an amendment to Water Use Permit No. 5576 pursuant to Texas Water Code (TWC) 11.122 and Texas Commission on Environmental Quality Rules 30 TAC 295.1, et seq. Water Use Permit No. 5576 authorizes the owner to maintain a dam and reservoir with a capacity of not to exceed 345 acre-feet on an unnamed tributary of Dry Creek, tributary of Spring Creek, tributary of the West Fork San Jacinto, tributary of the San Jacinto River, San Jacinto River Basin for in-place recreational purposes and no diversions other than domestic and/or livestock purposes in Montgomery County. The Permit contains a typographical error which states the time priority for this right is February 20, 1977. Applicant seeks to amend Water Use Permit No. 5576 to authorize an increase in the impoundment capacity from 345 to 707 acre-feet of water for in-place recreational use.

The applicant also seeks to correct the typographical error in the priority date of the impoundment of the 345 acre-feet of water to February 20 1997. The applicant currently utilizes an onsite well adjacent to the dam for the purpose of keeping the reservoir at an acceptable level. The well has a capacity of 300 gallons-per-minute. The Commission will review the application as submitted by the applicant and may or may not grant the application as requested. The application was received on February 9, 2004. Additional fees and information were received on April 29, 2004. The application was accepted for filing and declared administratively complete on May 10, 2004. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk at the address provided in the information section below within 30 days of the date of newspaper publication of the notice.

Information Section

A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in an application.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200403757
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 8, 2004

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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 **July 19, 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 July 19, 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: AAA Petroleum Distributors, Inc.; DOCKET NUMBER: 2004-0212-PST-E; IDENTIFIER: Regulated Entity (RN) Identification Number 103777223; LOCATION: Austin, Travis County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to observe a valid, current delivery certificate; PENALTY: $1,200; ENFORCEMENT COORDINATOR: Kensley Greuter, (512) 239-2520; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(2) COMPANY: Arnold Felts dba A & D General Store; DOCKET NUMBER: 2002-1146-PST- E; IDENTIFIER: Petroleum Storage Tank (PST) Facility Identification Number 71010, Public Water Supply (PWS) Number 2260059, RN102314770; LOCATION: San Angelo, Tom Green County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline and public water supply; RULE VIOLATED: 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to perform annual performance tests; 30 TAC §37.815(a) and (b), by failing to demonstrate financial assurance; 30 TAC §334.8(c)(4)(B), (C), and (5)(A)(i) and the Code, §26.346(a), by failing to fully and accurately complete and submit a new self-certification form and by failing to make available a valid, current delivery certificate; and 30 TAC §290.46(d)(2)(A), by failing to maintain the minimum chlorine residual of 0.20 milligrams per liter; PENALTY: $600; ENFORCEMENT COORDINATOR: Jill Reed, (915) 570-1359; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(3) COMPANY: Ashmal, Incorporated dba East 1st Grocery; DOCKET NUMBER: 2003-0666- PST-E; IDENTIFIER: PST Facility Identification Number 11315; LOCATION: Austin, Travis County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline and public water supply; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c), by failing to monitor an underground storage tank (UST) system for releases; 30 TAC §334.49(e)(2)(B)(i), by failing to maintain records of the results of tests and inspections of the impressed current cathodic protection system; and 30 TAC §334.48(c), by failing to conduct effective inventory control procedures; PENALTY: $9,900; ENFORCEMENT COORDINATOR: Larry King, (512) 339-2929; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(4) COMPANY: CMS Taurus Field Services, LP; DOCKET NUMBER: 2004-0233-AIR-E; IDENTIFIER: Air Account Number CC-0005-U; LOCATION: Putnam, Callahan County, Texas; TYPE

OF FACILITY: natural gas processing; RULE VIOLATED: 30 TAC §122.145(2)(C) and THSC, §382.085(b), by failing to submit a deviation report; 30 TAC §111.111(a)(4)(A) and THSC, §382.085(b), by allowing visible emissions; and THSC, §382.085(b), by failing to comply with a condition of a standard exemption; PENALTY: $8,075; ENFORCEMENT COORDINATOR: Larry King, (512) 339-2929; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(5) COMPANY: Centex Dairy, L.L.C.; DOCKET NUMBER: 2004-0339-AGR-E; IDENTIFIER: Texas Pollutant Discharge Elimination System (TPDES) Permit Number 03132; LOCATION: near Hico, Erath County, Texas; TYPE OF FACILITY: dairy; RULE VIOLATED: 30 TAC §321.39(f)(28)(G), by failing to file a detailed nutrient utilization plan; PENALTY: $648; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: City of Galena Park; DOCKET NUMBER: 2004-0554-MWD-E; IDENTIFIER: TPDES Permit Number 10831-001, RN101701324; LOCATION: Galena Park, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 10831-001, and the Code, §26.121(a), by failing to comply with ammonia-nitrogen permit limits; PENALTY: $4,620; ENFORCEMENT COORDINATOR: Pamela Campbell, (512) 239-4493; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(7) COMPANY: Hicks Oil & Butane Company; DOCKET NUMBER: 2004-0354-PST-E; IDENTIFIER: RN102974680; LOCATION: Harlingen, Cameron County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to observe a valid, current delivery certificate; PENALTY: $400; ENFORCEMENT COORDINATOR: Keith Fleming, (512) 239-0560; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(8) COMPANY: Kelsoe Tractor Company, Inc.; DOCKET NUMBER: 2004-0579-PST-E; IDENTIFIER: PST Facility Identification Number 7927, RN103052817; LOCATION: Pilot Point, Denton County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to observe a valid, current delivery certificate; PENALTY: $800; ENFORCEMENT COORDINATOR: Sunday Udoetok, (512) 239-0739; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(9) COMPANY: Kingsland Municipal Utility District; DOCKET NUMBER: 2003-0220-MWD- E; IDENTIFIER: TPDES Permit Number 11549-001; LOCATION: Kingsland, Llano County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 11549-001, and the Code, §26.121(a), by exceeding permit limits for total residual chlorine, five-day biochemical oxygen demand (BOD_5), total suspended solids, and dissolved oxygen; PENALTY: $4,070; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(10) COMPANY: City of Mart; DOCKET NUMBER: 2003-1437-PWS-E; IDENTIFIER: PWS Number 1550005; LOCATION: Mart, McLennan County, Texas; TYPE OF FACILITY: surface water treatment; RULE VIOLATED: 30 TAC §290.44(h), by failing to provide adequate back flow protection, 30 TAC §290.45(b)(2)(A) and (C), by failing to provide a raw water pump of 0.6 gallons per minute (gpm) and by failing to provide a transfer water pump capacity of 0.6 gpm per connection; 30 TAC §290.43(c) and (e), by failing to provide a proper ground storage tank roof and by failing to provide an intruder-resistant fence; 30 TAC §290.46(m) and (s)(2)(C)(ii), by failing to initiate maintenance and housekeeping practices and by failing to maintain a current and thorough plant operations manual; and 30 TAC §290.42(d)(5), by failing to provide a separate flow measuring device at the surface water treatment plant; PENALTY: $5,508; ENFORCEMENT COORDINATOR: Keith Fleming, (512) 239-0560; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(11) COMPANY: Morgan Trailer Manufacturing Company; DOCKET NUMBER: 2004-0278- AIR-E; IDENTIFIER: Air Account Number NB-0102-T, RN100741735; LOCATION: Corsicana, Navarro County, Texas; TYPE OF FACILITY: trailer manufacturing; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.085(b) and §382.0518(a), by failing to renew Air Permit Number 20386 before it expired and continuing to operate the plant; PENALTY: $4,320; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(12) COMPANY: Motiva Enterprises LLC; DOCKET NUMBER: 2004-0164-PST-E; IDENTIFIER: RN102862455; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to observe a valid, current delivery certificate; PENALTY: $24,800; ENFORCEMENT COORDINATOR: Ed Moderow, (512) 239-2680; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13) COMPANY: North American Trans Waste, Inc.; DOCKET NUMBER: 2003-1495-IHW- E; IDENTIFIER: Solid Waste Registration Number 85642; LOCATION: Brownsville, Cameron County, Texas; TYPE OF FACILITY: temporary storage of industrial and hazardous waste; RULE VIOLATED: 30 TAC §335.94(a)(1), (4), and (5) and 40 Code of Federal Regulations (CFR) §§262.51(a), 265.14(b)(2)(ii) and (c), 265.32, and 265.37(a)(1), (3), and (4), by failing to design a contingency plant, by failing to prevent the storage of hazardous waste for longer than ten days at an unpermitted storage facility, by failing to control entry, at all times, through the gates or other entrances, by failing to post signs in English and Spanish with the legend "Danger - Unauthorized Personnel Keep Out," by failing to equip the facility with a particular type of equipment sufficient to handle an emergency, by failing to make arrangements to familiarize police, fire departments, and emergency response teams with the layout of the entity, by failing to make agreements with state emergency response teams, contractors, and equipment suppliers, and by failing to familiarize local hospitals with the properies of the hazardous wastes handled; 30 TAC §335.6(e), by failing to notify the executive director of its operation as a transfer facility; 30 TAC §335.4, by failing to prevent the collection, handling, storage, processing, or disposal of industrial solid waste or municipal hazardous waste; 30 TAC §335.69(a)(3) and 40 CFR §262.34(a)(3), by failing to mark or label each container and tank containing hazardous waste; and 30 TAC §335.76(d)(1) and 40 CFR §262.60(b)(1), by failing to place the importer's United States Environmental Protection Agency identification number on the manifest; PENALTY: $11,340; ENFORCEMENT COORDINATOR: Mauricio Olaya, (915) 834-4949; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(14) COMPANY: PNI Distribution, Inc.; DOCKET NUMBER: 2003-1207-PST-E; IDENTIFIER: RN103081055; LOCATION: Garland and Dallas, Dallas County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that an owner or operator had a valid, current delivery certificate; PENALTY: $2,400; ENFORCEMENT COORDINATOR:

Catherine Sherman, (713) 767-3500; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(15) COMPANY: Parkview Metal Products, Inc.; DOCKET NUMBER: 2004-0143-AIR-E; IDENTIFIER: Air Account Number HK-0046-W, RN100211945; LOCATION: San Marcos, Hays County, Texas; TYPE OF FACILITY: metal stamping plant; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit the annual permit compliance certification; 30 TAC §122.145(2)(C) and THSC, §382.085(b), by failing to submit the deviation report; 30 TAC §116.115(c), Air New Source Review Permit Number 20090, and THSC, §382.085(b), by failing to submit inventory data; and 30 TAC §101.20(1), 40 CFR §63.468(h), and THSC, §382.085(b), by failing to submit a semiannual exceedence report; PENALTY: $6,500; ENFORCEMENT COORDINATOR: Jill Reed, (915) 570-1359; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(16) COMPANY: Polimeri Europa Americas, Inc.; DOCKET NUMBER: 2004-0551-AIR-E; IDENTIFIER: Air Account Number HG-3757-A, RN102325974; LOCATION: Baytown, Harris County, Texas; TYPE OF FACILITY: elastomer manufacturing; RULE VIOLATED: 30 TAC §101.359 and THSC, §382.085(b), by failing to submit Form ECT-1, Annual Compliance Report; PENALTY: $1,700; ENFORCEMENT COORDINATOR: Ronnie Kramer, (806) 353-9251; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(17) COMPANY: City of Richmond; DOCKET NUMBER: 2004-0177-PST-E; IDENTIFIER: PST Facility Identification Number 14112; LOCATION: Richmond, Fort Bend County, Texas; TYPE OF FACILITY: fueling station for local government vehicles; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and (5)(A)(iii) and the Code, §26.346(a), by failing to submit a UST registration and self-certification form and by failing to make available to a common carrier a valid, current delivery certificate; and 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor the USTs for releases; PENALTY: $10,400; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: City of Slaton; DOCKET NUMBER: 2003-1267-MWD-E; IDENTIFIER: Water Quality Permit Number 10284-001; LOCATION: Slaton, Lubbock County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and (5) and §319.11(c), Water Quality Permit Number 10284-001, and the Code, §26.121, by failing to meet permit limits for BOD_5, by failing to properly measure permitted flow, and by failing to prevent unauthorized discharges; PENALTY: $8,800; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(19) COMPANY: Ollie Sutton dba Sutton Septic Service; DOCKET NUMBER: 2004-0310- SLG-E; IDENTIFIER: Sludge Transporter Identification Number 21099, RN102798790; LOCATION: Abilene, Jones County, Texas; TYPE OF FACILITY: sludge transportation; RULE VIOLATED: 30 TAC §312.143 and the Code, §26.121(a)(1), by failing to properly dispose or deposit grease trap and septic tank waste; PENALTY: $1,050; ENFORCEMENT COORDINATOR: Leila Pezeshki, (210) 490-3096; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(20) COMPANY: Therma Foam, Inc.; DOCKET NUMBER: 2004-0356-AIR-E; IDENTIFIER: Air Account Number TA-0374-V, RN102297348; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: expandable polystyrene molding; RULE VIOLATED: 30 TAC §116.110(a)(1) and THSC, §382.085(b), by failing to obtain a permit or satisfy the conditions of a permit by rule; PENALTY: $6,300; ENFORCEMENT COORDINATOR: Lori Thompson, (903) 535-5100; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118- 6951, (817) 588-5800.

(21) COMPANY: Cody Lewis dba Water Works 1 Floyd Acres; DOCKET NUMBER: 2003- 1329-PWS-E; IDENTIFIER: PWS Number 1500018, RN102685633; LOCATION: Buchanan Dam, Llano County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.110(c)(1)(b), by failing to provide a disinfection contact time tracer study or a theoretical analysis; 30 TAC §290.46(s)(2)(B) and (v), by failing to properly calibrate the water system's turbidimeter and use current turbidity standards and by failing to place electrical wiring in a securely mounted conduit; and 30 TAC §290.42(k), by failing to compile and make accessible a plant operations manual; PENALTY: $1,520; ENFORCEMENT COORDINATOR: Lori Thompson, (903) 535-5100; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

TRD-200403721
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: June 8, 2004

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Texas Feed and Fertilizer Control Service/Office of the Texas State Chemist

Correction of Error

The Texas Feed and Fertilizer Control Service/Office of the Texas State Chemist proposed new 4 TAC §65.91, concerning Cost of Preparing Agency Record. The notice appeared in the May 21, 2004, *Texas Register* (29 TexReg 5013).

There is a typographical error in subsection (b). The reference to "Texas Rules of Civil Procedure" incorrectly reads, "Texas Rules *or* Civil Procedure."

The subsection should read as follows.

"(b) A charge imposed under subsection (a) is a court cost and shall be assessed by the court in accordance with the Texas Rules of Civil Procedure."

TRD-200403684

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General Land Office

Notice of Issuance of Temporary Orders

On June 7, 2004, the Commissioner of the Texas General Land Office (Land Office) issued 116 Temporary Orders, each suspending for a period of two years from the date the order is issued the submission of a request that the Office of the Attorney General of Texas file a suit under Texas Natural Resources Code (the Code) Section 61.018(a) to obtain a temporary or permanent court order or injunction, either prohibitory or mandatory, to remove a house from a public beach. While a Temporary Order is in effect, a county attorney, district attorney, or criminal district attorney may not file suit under Section 61.018(a) of the Code to obtain a temporary or permanent court order or injunction, either prohibitory or mandatory, to remove the house from the public beach. Also, while a Temporary Order is in effect, a local government may issue a certificate or permit authorizing repair of the house if the local government determines that the repair: is solely to make the house

habitable; complies with rules adopted by the Commissioner under the Code §61.011(d)(7); does not increase the footprint of the house or involve the use of concrete, Fibercrete, or other impervious materials seaward of the line of vegetation; does not include the construction of an enclosed space below the base flood elevation and seaward of the natural line of vegetation; does not include the repair, construction, or maintenance of an erosion response structure seaward of the natural line of vegetation; does not occur seaward of mean high water; and does not include construction underneath, outside or around the house other than for reasonable access to the house. The local government may also allow utilities to be reconnected to the house.

The Land Office is authorized to issue the Temporary Orders under Texas Natural Resources Code §61.0185 and 31 Texas Administrative Code §15.12.

Each of the Temporary Orders is filed in the real property records of either Brazoria County or Galveston County, Texas, as appropriate.

Requests for information regarding the Temporary Orders may be submitted to Ms. Deborah Cantu, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas, 78711-2873, deborah.cantu@glo.state.tx.us, facsimile (512) 463-6311.

Temporary Orders were issued for the following addresses:

Acapulco Village, City of Galveston, Texas

4425 Antigua, 4426 Tampico Way

Bermuda Beach, City of Galveston, Texas

12817 Bermuda Beach Dr., 12829 Bermuda Beach Dr., 12837 Bermuda Beach Dr., 12901 Bermuda Beach Dr., 12911 Bermuda Beach Dr., 12913 Bermuda Beach Dr., 12921 Bermuda Beach Dr., 12925 Bermuda Beach Dr., 13001 Bermuda Beach Dr., 13005 Bermuda Beach Dr., 13009 Bermuda Beach Dr., 13017 Bermuda Beach Dr., 13101 Bermuda Beach Dr., 13107 Bermuda Beach Dr., 13125 Bermuda Beach Dr., 13127 Bermuda Beach Dr., 13203 Bermuda Beach Dr., 13211 Bermuda Beach Dr., 13223 Bermuda Beach Dr.

Sea Isle, City of Galveston, Texas

22716 Kennedy Dr., 22708 Kennedy Dr., 22630 Kennedy Dr., 22620 Kennedy Dr., 22434 Kennedy Dr., 22430 Kennedy Dr., 22420 Kennedy Dr., 22410 Kennedy Dr., 22402 Kennedy Dr., 22330 Kennedy Dr., 21412 Gulf Drive, 21406 Gulf Drive, 21402 Gulf Drive, 21328 Gulf Drive, 21324 Gulf Drive, 21302 Gulf Drive, 21238 Gulf Drive, 21232 Gulf Drive, 21230 Gulf Drive, 21226 Gulf Drive, 21220 Gulf Drive, 21210 Gulf Drive, 21206 Gulf Drive

Spanish Grant, City of Galveston, Texas

12423 E. Ventura Drive, 12428 E. Buena Vista, 12519 E. Buena Vista, 12611 W. Buena Vista, 12615 W. Buena Vista, 12640 W Ventura Drive

Terramar Beach, City of Galveston, Texas

23170 Gulf Drive, 23156 Gulf Drive, 23144 Gulf Drive, 23138 Gulf Drive, 23134 Gulf Drive, 23130 Gulf Drive, 23126 Gulf Drive, 23120 Gulf Drive, 23114 Gulf Drive, 23108 Gulf Drive, 23102 Gulf Drive, 22803 Gulf Drive

Jamaica Beach, Texas

16501 Jamaica Beach Rd., 16505 Jamaica Beach Rd., 16509 Jamaica Beach Rd., 16702 West Beach Rd., 16706 West Beach Rd., 16730 Jamaica Beach Rd., 16734 West Beach Rd., 16905 Jamaica Beach Rd., 16913 Jamaica Beach Rd., 16921 Jamaica Beach Rd., 16925 Jamaica Beach Rd., 16929 Jamaica Beach Rd.

Village of Surfside Beach, Texas

211 Beach Drive, 215 Beach Drive, 223 Beach Drive, 303 Beach Drive, 307 Beach Drive, 311 Beach Drive, 315 Beach Drive, 319 Beach Drive, 403 Beach Drive, 405 Beach Drive, 407 Beach Drive, 411 Beach Drive, 415 Beach Drive, 419 Beach Drive, 503 Beach Drive, 507 Beach Drive, 511 Beach Drive, 515 Beach Drive, 519 Beach Drive, 523 Beach Drive, 603 Beach Drive, 611 Beach Drive, 619 Beach Drive, 701 Beach Drive, 705 Beach Drive, 709 Beach Drive, 801 Beach Drive, 809 Beach Drive, 819 Beach Drive, 907 Beach Drive, 915 Beach Drive, 919 Beach Drive, 1007 Beach Drive, 1009 Beach Drive, 1011 Beach Drive, 110 Coral Street, 503 Sargasso Circle, 507 Sargasso Circle, 523 Bluewater Highway, 322 Sea Shell Drive, 623 Fin Alley, 631 Fin Alley

The Temporary Orders, as issued, follow the format below.

To Be Filed In The Real Property Records Of (County Name) County

In Re: House at (Address) (Legal Description of Property) (County Name) County § Before the Commissioner of the Texas General Land Office State of Texas

TEMPORARY ORDER

The Commissioner of the Texas General Land Office (Commissioner) makes the following Findings of Fact and Conclusions of Law in support of this Temporary Order suspending the submission of requests that the Office of the Attorney General of Texas file suit under Section 61.018(a) of the Texas Natural Resources Code to obtain a temporary or permanent court order or injunction, either prohibitory or mandatory, to remove the above-referenced house from the public beach.

Findings of Fact

1. The above-referenced house (house) is a single or multi-family structure that serves as permanent, temporary or occasional living quarters for one or more persons or families.

2. On the date of this Temporary Order, the above-referenced house is located, either wholly or in part, seaward of the line of vegetation that establishes the public beach easement at the location of the house.

3. The line of vegetation establishing the boundary of the public beach has moved as a result of a meteorological event.

4. The house was located landward of the natural line of vegetation before the meteorological event referenced in Finding of Fact No. 3.

5. On the date of this Temporary Order, the house does not present an imminent threat to public health and safety.

Conclusions of Law

1. The Commissioner and the Texas General Land Office (Land Office) have jurisdiction over this matter pursuant to the Open Beaches Act. TEX. NAT. RES. CODE, Chapter 61 (Vernon 2001).

2. The Commissioner, by order, may suspend for a period of two years from the date the order is issued the submission of a request that the Attorney General file a suit under Section 61.018(a) to obtain a temporary or permanent court order or injunction, either prohibitory or mandatory, to remove the house from the public beach. TEX. NAT. RES. CODE §61.0185 (Vernon Supp. 2004).

3. The house falls under the definition of a "House" in Section 15.12(b)(4) of the Land Office's rules. 28 Tex. Reg. 6252 (August 8, 2003), adopted 28 Tex. Reg. 10234 (November 14, 2003) (codified at 31 TEX. ADMIN. CODE §15.12).

4. The Commissioner is authorized to issue this Temporary Order because he has determined that: (1) the line of vegetation establishing the boundary of the public beach has moved as a result of a meteorological event; (2) the house was located landward of the natural line

of vegetation before the meteorological event; and (3) the house does not present an imminent threat to public health and safety. TEX. NAT. RES. CODE §61.0185(a) (Vernon Supp. 2004).

5. The line of vegetation establishes the landward boundary of the public beach. TEX. NAT RES. CODE §§61.012, 61.016, & 61.017 (Vernon 2001).

6. While this Temporary Order is in effect, no county attorney, district attorney, or criminal district attorney may file suit under Section 61.018(a) to obtain a temporary or permanent court order or injunction, either prohibitory or mandatory, to remove the house from the public beach. TEX. NAT. RES. CODE §61.0185(g) (Vernon Supp. 2004).

7. While this Temporary Order is in effect, the local government with authority over construction at the location of the house (local government) may issue a certificate or permit authorizing repair of the house if the local government determines that the repair is solely to make the house habitable; complies with rules adopted by the Commissioner under Texas Natural Resources Code §61.011(d)(7); does not increase the footprint of the house or involve the use of concrete, Fibercrete, or other impervious materials seaward of the line of vegetation; does not include the construction of an enclosed space below the base flood elevation and seaward of the natural line of vegetation; does not include the repair, construction, or maintenance of an erosion response structure seaward of the natural line of vegetation; does not occur seaward of mean high water; and does not include construction underneath, outside or around the house other than for reasonable access to the house. The local government may also allow utilities to be reconnected to the house. TEX. NAT. RES. CODE §61.0185(h) (Vernon Supp. 2004); 28 Tex. Reg. 6252 (August 8, 2003), adopted 28 Tex. Reg. 10234 (November 14, 2003) (codified at 31 TEX. ADMIN. CODE §15.12(d)).

It is accordingly **ORDERED** that:

1. The submission of a request that the Attorney General file a suit under Section 61.018(a) to obtain a temporary or permanent court order or injunction, either prohibitory or mandatory, to remove a house from a public beach is hereby suspended for a period of two years from the date the order is issued.

2. While this Temporary Order is in effect, no county attorney, district attorney, or criminal district attorney may file suit under Section 61.018(a) of the Texas Natural Resources Code to obtain a temporary or permanent court order or injunction, either prohibitory or mandatory, to remove the house from the public beach.

3. While this Temporary Order is in effect, the local government may issue a certificate or permit authorizing repair of the house if the local government determines that the repair is solely to make the house habitable; complies with rules adopted by the Commissioner under Texas Natural Resources Code §61.011(d)(7); does not increase the footprint of the house or involve the use of concrete, Fibercrete, or other impervious materials seaward of the line of vegetation; does not include the construction of an enclosed space below the base flood elevation and seaward of the natural line of vegetation; does not include the repair, construction, or maintenance of an erosion response structure seaward of the natural line of vegetation; does not occur seaward of mean high water; and does not include construction underneath, outside or around the house other than for reasonable access to the house. The local government may also allow utilities to be reconnected to the house.

4. This Temporary Order expires two years from the date of issuance.

5. Should any part of this Temporary Order be determined by a court of competent jurisdiction to be invalid, the validity of the remaining parts of this Temporary Order shall remain unaffected.

TRD-200403770
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: June 9, 2004

♦ ♦ ♦

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
Austin	Cedra Clinical Research LLC	L05723	Austin	00	05/25/04
El Paso	Texas Oncology PA DBA El Paso Cancer Treatment Center	L05771	El Paso	00	05/19/04
Fort Worth	Multatech Engineering Incorporated	L05781	Fort Worth	00	05/21/04
Houston	Nuclear Imaging Services LLC	L05775	Houston	00	05/21/04
La Porte	J V Industrial Company LTD	L05785	La Porte	00	05/20/04
Orange	Invista Incorporated	L05777	Orange	00	05/21/04

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Alvin	Quantum Technical Services Incorporated	L03731	Alvin	17	05/20/04
Amarillo	Amarillo Heart Group PA	L04697	Amarillo	17	05/25/04
Andrews	Waste Control Specialists LLC	L04971	Andrews	26	05/18/04
Andrews	Waste Control Specialists LLC	L04971	Andrews	27	05/20/04
Arlington	Metroplex Hematology Oncology Associates DBA Arlington Cancer Center	L03211	Arlington	71	05/19/04
Austin	Ambion Incorporated	L04307	Austin	12	05/19/04
Austin	Columbia/Saint David's Healthcare System LP DBA Saint David's Medical Center	L00740	Austin	86	05/21/04
Baytown	ExxonMobil Chemical Company	L01135	Baytown	63	05/25/04
Baytown	ExxonMobil Refining and Supply Company	L01134	Baytown	56	05/24/04
Corpus Christi	Spohn Hospital	L02495	Corpus Christi	80	04/13/04
Dallas	COR Specialty Associates of North Texas PA	L04694	Dallas	21	05/27/04
Dallas	Dallas Cardiology Associates DBA Heartplace Methodist	L05541	Dallas	03	05/24/04
Dallas	Raytheon Company	L00946	Dallas	87	05/17/04
El Paso	Guillermo A Pinzon MD PA	L04277	El Paso	10	05/26/04
El Paso	Guillermo A Pinzon MD PA	L04277	El Paso	11	05/26/04
Flower Mound	Imaging Specialists Group LTD DBA Imaging Specialists	L05407	Flower Mound	08	05/27/04
Fort Worth	Harris Methodist Fort Worth	L01837	Fort Worth	91	05/26/04
Fort Worth	TIDC Incorporated	L05247	Fort Worth	12	05/18/04
Fort Worth	University of North Texas Health Science Center Fort Worth	L02518	Fort Worth	31	05/30/04
Glen Rose	Glen Rose Medical Foundation Incorporated DBA Glen Rose Medical Center	L03225	Glen Rose	18	05/26/04
Houston	American Diagnostic Tech LLC	L05514	Houston	11	05/25/04
Houston	Cooperheat-MQS Incorporated	L00087	Houston	117	05/20/04
Houston	Mandes Inspection & Testing Services Inc.	L05220	Houston	42	05/20/04
Houston	Memorial Hermann Healthcare System	L04655	Houston	20	05/27/04
Humble	Cardiovascular Association PLLC	L05421	Humble	04	05/21/04

CONTINUED AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Humble	Northeast Hospital Authority DBA Northeast Medical Center Hospital	L02412	Humble	53	05/25/04
Katy	Memorial Hermann Hospital System DBA Memorial Hermann Katy Hospital	L03052	Katy	38	05/24/04
La Porte	Clean Harbors Deer Park LP	L02870	La Porte	22	05/26/04
Longview	Longview Regional Hospital Incorporated DBA Longview Regional Medical Center	L02882	Longview	34	05/20/04
Lufkin	Piney Woods Healthcare System DBA Woodland Heights Medical Center	L01842	Lufkin	46	05/25/04
New Braunfels	Cancer Care Network of South Texas PA	L05717	New Braunfels	01	05/26/04
Orange	Cardinal Health 414 Incorporated DBA Cardinal Health Nuclear Pharmacy Services	L04785	Orange	28	05/19/04
Paris	Advanced Heart Care PA	L05290	Paris	07	05/20/04
Pasadena	PET Scans of America Corporation DBA Bayshore Medical Center	L05406	Pasadena	03	05/17/04
San Antonio	CTRC Clinical Foundation	L01922	San Antonio	75	05/19/04
San Antonio	US Diagnostic Incorporated DBA San Antonio Diagnostic Imaging Inc.	L04968	San Antonio	19	05/20/04
Throughout Tx	Gulf Coast Weld Spec	L05426	Beaumont	29	05/26/04
Throughout Tx	Professional Service Industries Incorporated	L04940	Dallas	06	05/14/04
Throughout Tx	University of North Texas Radiation Safety Office	L00101	Denton	74	05/18/04
Throughout Tx	Professional Services Industries Incorporated	L02476	El Paso	17	05/18/04
Throughout Tx	Terra-Mar Incorporated	L03157	Fort Worth	41	05/26/04
Throughout Tx	B J Services Company USA	L02684	Houston	44	05/26/04
Throughout Tx	Baker Hughes Oilfield Operations Incorporated	L00446	Houston	151	05/25/04
Throughout Tx	D-Arrow Inspection	L03816	Houston	74	05/21/04
Throughout Tx	Material Inspection Technology	L05672	Houston	07	05/17/04
Throughout Tx	Metco	L03018	Houston	145	05/26/04
Throughout Tx	Petrochem Inspection Services Incorporated	L04460	Houston	59	05/19/04
Throughout Tx	Professional Service Industries Incorporated	L04942	Houston	17	05/18/04
Throughout Tx	Varco LP FKA Tuboscope Vetco International Inc.	L00287	Houston	115	05/26/04
Throughout Tx	Perf-O-Log Incorporated	L05478	Iowa City	05	05/25/04
Throughout Tx	Austin Bridge & Road	L04629	Irving	14	05/26/04
Throughout Tx	Longview Inspection Incorporated	L01774	La Porte	203	05/14/04
Throughout Tx	Texas Tech University Environmental Health and Safety	L01536	Lubbock	74	05/21/04
Throughout Tx	Eagle X-Ray	L03246	Mont Belvieu	79	05/25/04
Throughout Tx	Jones Brothers Dirt & Paving Contractors	L04783	Odessa	06	05/25/04
Throughout Tx	Conam Inspection & Engineering Incorporated	L05010	Pasadena	71	05/20/04
Throughout Tx	Conam Inspection & Engineering Incorporated	L05010	Pasadena	72	05/26/04
Throughout Tx	Texas Gamma Ray LLC	L05561	Pasadena	38	05/27/04
Throughout Tx	X-R-I Non-Destructive Testing A Team Industrial Services Company	L05275	Pearland	37	05/26/04
Throughout Tx	Texas A & M University System Health Science Center	L05494	Temple	03	05/17/04
Fairfax, VA	Exxon Mobil Corporation C/O ExxonMobil Refining and Supply	L01431	Fairfax, VA	08	05/17/04

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Austin	Texas Department of Health Bureau of Laboratories	L01594	Austin	30	05/25/04
Sweetwater	Rolling Plains Memorial Hospital	L02550	Sweetwater	18	05/25/04
Taylor	Johns Community Hospital	L03657	Taylor	27	05/25/04
Throughout Tx	Site Concrete Incorporated	L05025	Grand Prairie	05	05/26/04
Throughout Tx	Coastal Wireline Services Incorporated	L04239	Pearland	08	05/26/04

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Denton	Isostar Texas Incorporated DBA Imagyn Medical Technologies California Incorporated	L05430	Denton	03	05/27/04
Throughout Tx	Rice University Department of Earth Science	L04744	Houston	08	05/25/04

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-200403724
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: June 8, 2004

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Notice of Amendment Number 26 to the Radioactive Material License of Waste Control Specialists, LLC

Notice is hereby given by the Texas Department of Health (department), Bureau of Radiation Control that it has amended Radioactive Material License Number L04971 issued to Waste Control Specialists, LLC (WCS) located in Andrews County, Texas, one mile North of State Highway 176; 250 feet East of the Texas/New Mexico State Line; 30 miles West of Andrews, Texas.

The issuance of amendment number 26 allows for a revised protocol that substitutes an alternative mixing container during an authorized In-Container Vitrification procedure, originally authorized in amendment number 21.

The department has determined that the amendment of the license and the documentation submitted by the licensee provide reasonable assurance that the licensee's radioactive waste facility is operated in accordance with the requirements of 25 Texas Administrative Code (TAC), Chapter 289; the amendment of the license will not be inimical to the health and safety of the public or the environment; and the activity represented by the amendment of the license will not have a significant effect on the human environment.

This notice affords the opportunity for a public hearing upon written request within 30 days of the date of publication of this notice by a person affected as required by Texas Health and Safety Code §401.116 and as set out in 25 TAC, §289.205(f). 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 a county, in which the 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 Mr. Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control, 1100 West 49th Street, Austin, Texas, 78756-3189. Any request for a hearing must contain the name and address of the person who considers himself affected by this action, identify the subject license, specify the reasons why the person considers himself affected, and state the relief sought. If the person is represented by an agent, the name and address of the agent must be stated. Should no request for a public hearing be timely filed, the agency action will be final.

A public hearing, if requested, shall be conducted in accordance with the provisions of Texas Health and Safety Code, Chapter 401, the Administrative Procedure Act (Chapter 2001, Texas Government Code), the formal hearing procedures of the department (25 TAC, §1.21 et seq.) and the procedures of the State Office of Administrative Hearings (1 TAC, Chapter 155).

A copy of the license amendment and supporting materials are available, by appointment, for public inspection and copying at the office of the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, 8:00 a.m. to 5:00 p.m. Monday-Friday (except holidays). Information relative to inspection and copying the documents may be obtained by contacting Chrissie Toungate, Custodian of Records, Bureau of Radiation Control.

TRD-200403735
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: June 8, 2004

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Notice of Amendment Number 27 to the Radioactive Material License of Waste Control Specialists, LLC

Notice is hereby given by the Texas Department of Health (department), Bureau of Radiation Control that it has amended Radioactive Material License Number L04971 issued to Waste Control Specialists, LLC (WCS) located in Andrews County, Texas, one mile North of State Highway 176; 250 feet East of the Texas/New Mexico State Line; 30 miles West of Andrews, Texas.

The issuance of amendment number 27 allows for an additional mixer/blender to be utilized during routine waste processing procedures.

The department has determined that the amendment of the license and the documentation submitted by the licensee provide reasonable assurance that the licensee's radioactive waste facility is operated in accordance with the requirements of 25 Texas Administrative Code (TAC), Chapter 289; the amendment of the license will not be inimical to the health and safety of the public or the environment; and the activity represented by the amendment of the license will not have a significant effect on the human environment.

This notice affords the opportunity for a public hearing upon written request within 30 days of the date of publication of this notice by a person affected as required by Texas Health and Safety Code §401.116 and as set out in 25 TAC, §289.205(f). 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 a county, in which the 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 Mr. Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control, 1100 West 49th Street, Austin, Texas, 78756-3189. Any request for a hearing must contain the name and address of the person who considers himself affected by this action, identify the subject license, specify the reasons why the person considers himself affected, and state the relief sought. If the person is represented by an agent, the name and address of the agent must be stated. Should no request for a public hearing be timely filed, the agency action will be final.

A public hearing, if requested, shall be conducted in accordance with the provisions of Texas Health and Safety Code, Chapter 401, the Administrative Procedure Act (Chapter 2001, Texas Government Code), the formal hearing procedures of the department (25 TAC, §1.21 et seq.) and the procedures of the State Office of Administrative Hearings (1 TAC, Chapter 155).

A copy of the license amendment and supporting materials are available, by appointment, for public inspection and copying at the office of the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, 8:00 a.m. to 5:00 p.m. Monday-Friday (except holidays). Information relative to inspection and copying the documents may be obtained by contacting Chrissie Toungate, Custodian of Records, Bureau of Radiation Control.

TRD-200403736
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: June 8, 2004

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on East Texas Medical Center

Notice is hereby given that the Bureau of Radiation Control (bureau), Texas Department of Health (department), issued a notice of violation and proposal to assess an administrative penalty to East Texas Medical Center - Pittsburgh (registrant-M00171) of Pittsburgh. A total penalty of $24,000 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-200403725
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: June 8, 2004

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Healthsouth Diagnostic Centers of Texas, Limited Partnership, dba Healthsouth Diagnostic Center of Hurst

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 Healthsouth Diagnostic Centers of Texas, Limited Partnership, doing business as Healthsouth Diagnostic Center of Hurst (registrant-M00643) of Hurst. A total penalty of $8,000 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-200403732
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: June 8, 2004

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Heart Institute for C.A.R.E., P.A.

Notice is hereby given that the Bureau of Radiation Control (bureau), Texas Department of Health (department), issued a notice of violation and proposal to assess an administrative penalty to Heart Institute for C.A.R.E., P.A. (registrant-R04712) of Amarillo. A total penalty of $9,000 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-200403726
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: June 8, 2004

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Onys Burke Henley, dba Henley Enterprises

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 Onys Burke Henley, doing business as Henley Enterprises (licensee-L05372) of Waco. A total penalty of $4,000 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-200403734
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: June 8, 2004

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Providence Chiropractic Center, Inc., dba Addicks Chiropractic Center

Notice is hereby given that the Bureau of Radiation Control (bureau), Texas Department of Health (department), issued a notice of violation and proposal to assess an administrative penalty to Providence Chiropractic Center, Inc., doing business as Addicks Chiropractic Center (registrant-R11061) of Houston. A total penalty of $10,000 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-200403729
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: June 8, 2004

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Terry O. Riley, R.T., dba Independent X-Ray

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 Terry O. Riley, R.T., doing business as Independent X-Ray (registrant-Unregistered) of Dallas. A total penalty of $8,000 is proposed to be assessed the individual 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-200403731
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: June 8, 2004

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Texas NDT Company

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 Texas NDT Company (licensee-L05089) of Pasadena. A total penalty of $4,000 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-200403733
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: June 8, 2004

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Tomball Hospital Authority, dba Tomball Regional 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 Tomball Hospital Authority, doing business as Tomball Regional Hospital (registrant-M00451) of Tomball. 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-200403737
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: June 8, 2004

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on UT Physicians, dba University Care Plus

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 UT Physicians, doing business as University Care Plus (registrant-R26367) of Houston. A total penalty of $12,000 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-200403730
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: June 8, 2004

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Notice of Revocation of Certificates of Registration

The Texas Department of Health, having duly filed complaints pursuant to 25 Texas Administrative Code, §289.205, has revoked the following certificates of registration: Leonard S. Tibbetts, D.D.S., M.S.D., Arlington, R11029, May 20, 2004; Bridgeport Clinic, Bridgeport, R20261, May 20, 2004; Triptesh Chaudhury, M.D., Pasadena, R23219, May 20, 2004; McAllen Heart Hospital, McAllen, Z01377, May 20, 2004.

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-200403728
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: June 8, 2004

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Notice of Revocation of the Radioactive Material License of Midland Clinic, PLLC

The Texas Department of Health, having duly filed complaints pursuant to 25 Texas Administrative Code, §289.205, has revoked the following radioactive material license: The Midland Clinic, PLLC, Midland, L05239, May 20, 2004.

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-200403727
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: June 8, 2004

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Texas Health and Human Services Commission

Public Notice Statement

The Texas Health and Human Services Commission announces its intent to submit Transmittal Number 04-15, Amendment Number 679, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. This purpose of this amendment is to provide for residential rehabilitative behavioral health services for children. Residential Rehabilitative Behavioral Health Services are those services determined to be necessary for the treatment of a condition identified through an EPSDT screen and recommended by a licensed practitioner of the healing arts as medically necessary to reduce a child's disability resulting from serious emotional/behavioral disorders and to restore or maintain the child at his/her best possible functioning level in the community. These behavioral health services are provided in residential child care facilities licensed by the State of Texas and certified under requirements adopted by the single state agency.

The proposed amendment is to be effective June 1, 2004 and is expected to increase the amount of federal matching funds to the state. The proposed amendment is estimated to result in increased annual aggregate expenditures of $5,527,612 with increased federal matching funds of $3,350,962 for state fiscal year 2004, and $33,198,873 with increased federal matching funds of $20,208,154 for state fiscal year 2005.

To obtain copies of the proposed amendment, interested parties may contact Carolyn Pratt by mail at Rate Analysis Department, Texas Health and Human Services Commission, 1100 W. 49th Street, H-400, Austin, Texas 78756-3199 or by telephone at (512) 491-1359. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Human Services.

TRD-200403700
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Filed: June 4, 2004

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University of Houston System

Consultant Contract Award Notice

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, The University of Houston System furnishes this notice of consultant contract award. The consultant will provide services in the evaluation of Treasury business practices with the goal of implementing best practices. Requests for proposals were filed in the March 5, 2004, issue of the *Texas Register* (29 TexReg 2455).

The contract was awarded to McConnell Jones & Murphy LLP, 11 Greenway Plaza, Suite 2902, Houston, Texas 77046, for a total amount of $88,478.

The beginning date of the contract is June 1, 2004 and the ending date is September 30, 2004.

For further information, please call (713) 743-8781.

TRD-200403719
Dona G. Hamilton
VC/VP for Legal Affairs and General Counsel
University of Houston System
Filed: June 8, 2004

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Texas Department of Insurance

Notice of Application by a Small Employer Carrier to be a Risk-Assuming Carrier

Notice is given to the public of the application of the listed small employer carrier to be a risk-assuming carrier under Texas Insurance Code Article 26.52. A small employer carrier is defined by Chapter 26 of the Texas Insurance Code as a health insurance carrier that offers, delivers or issues for delivery, or renews small employer health benefit plans subject to the chapter. A risk-assuming carrier is defined by Chapter 26 of the Texas Insurance Code as a small employer carrier that elects not to participate in the Texas Health Reinsurance System. The following small employer carrier has applied to be a risk-assuming carrier:

Unicare Health Plans of Texas, Inc.

The application is subject to public inspection at the offices of the Texas Department of Insurance, Legal & Compliance Division- Archie Clayton, 333 Guadalupe, Tower I, 8th Floor, Austin, Texas.

If you wish to comment on the application to be a risk-assuming carrier, you must submit your written comments within 60 days after publication of this notice in the Texas Register to Gene C. Jarmon, Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-91204. Upon consideration of the application, if the Commissioner is satisfied that all requirements of law have been met, the Commissioner or his designee may take action to approve the application to be a risk-assuming carrier.

TRD-200403761
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: June 8, 2004

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for admission to Texas of NPD Dental Services, Inc., a foreign third party administrator. The home office is Wilmington, Delaware.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200403767
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: June 9, 2004

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Texas Department of Licensing and Regulation

Public Notice--Public Hearing on Proposed Rules

The Texas Department of Licensing and Regulation will conduct a public hearing on proposed rules regarding the licensing of electricians. The public hearing will be held at the Texas State Capitol Extension, Room E2.012, in Austin, Texas. It will begin at 9 a.m. on Tuesday, June 15, 2004, and will conclude after the last registered speaker has had an opportunity to provide comments.

The rules were published in the April 30, 2004, issue of the *Texas Register* (29 TexReg 4049) and the last day for providing written comment on the rules was June 1, 2004. The department also received a request for a public hearing pursuant to Government Code §2001.029(b)(3). The proposed rules can be found on the Department's website at http://www.license.state.tx.us/electricians/elecprop.htm.

Persons wishing to attend the public hearing who require auxiliary aids, services or materials in an alternate format, please contact the Texas Department of Licensing and Regulation at least five working days prior to the meeting date. Phone: (512) 463-3306, Fax: (512) 475-3032, E-mail: caroline.jackson@license.state.tx.us, TDD Relay Texas: 1-800-relay-VV (for voice), 1-800-TX (for TDD).

Questions concerning this notice should be referred to Chris Kadas, General Counsel at (512) 463-3306 or chris.kadas@license.state.tx.us.

TRD-200403762
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: June 8, 2004

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Texas State Board of Public Accountancy

Notice of Public Forum

Notice is hereby given that the Texas State Board of Public Accountancy will conduct a public forum regarding the desirability of making all or a part of the provisions of the Sarbanes-Oxley Act of 2002 applicable to non-publicly traded public interest entities within the state.

The Texas State Board of Public Accountancy was given a charge in Section 29 HB1218 passed by the 78th Legislature to study the rules imposed on publicly traded companies by the Sarbanes-Oxley Act of 2002 to determine which, if any of those rules and regulations should apply to non-publicly traded public interest entities in Texas that have financial statement audits; and to report its conclusions to the Governor, Lieutenant Governor, and Speaker of the House of Representatives no

later than December 31, 2004. The Board appointed a task force consisting of some members of the Texas State Board of Public Accountancy and certified public accountants in the client practice of public accountancy and in industry practice.

The task force has solicited input from various agencies responsible for oversight of some public interest entities such as Texas Department of Insurance, Texas Bankers Association, Texas Education Agency, Texas State Auditor, and Texas Association of County Auditors. The task force has received and reviewed their responses. Accordingly, the task force is conducting this public forum to receive input from interested parties on the following issues related to public interest entities:

1. Which provisions of the Sarbanes-Oxley Act of 2002 should be made applicable to public interest entities within the state?

2. What additional rules and regulations should be considered to accomplish this task?

3. What are the benefits of those rules and regulations?

4. What are the costs of those rules and regulations?

5. What other impacts should be considered?

A public forum on this matter will be held in Austin, Texas, on Monday, July 12, 2004 beginning at 9:00 A.M. in the Hobby Building, 333 Guadalupe, Room 100 (First Floor) Austin, Texas, 78701. The forum will be structured for the receipt of oral and/or written comments from interested persons. Individuals who wish to present oral comments are not required to submit their comments in writing prior to the public forum, but are encouraged to do so to ensure accuracy of the record. Individuals who attend the forum and request an opportunity to address the task force will be called upon to present their oral comments in order of registration on the speaker's list. There is no set time limitation on the oral remarks; however, the forum chair may request a speaker to relinquish the floor if the remarks are too lengthy or repetitive or would prevent others present from having an opportunity to address the task force.

Written comments may be submitted to Rande K. Herrell, General Counsel via United States mail or other delivery service at the Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701, (512) 305-7848, via facsimile at (512) 305-7854, or via e-mail to gencounsel@tsbpa.state.tx.us. Please indicate on the comments submitted if you wish to make an oral presentation during the hearing. Comments should be submitted by July 7, 2004, but will be accepted through the close of the forum on July 12, 2004.

For further information, please contact Rande K. Herrell, General Counsel at (512) 305-7842.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact Ms. Kym Rusch at (512) 305-7842. Requests for special accommodations should be made as far in advance as possible.

TRD-200403759
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Filed: June 8, 2004

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Public Utility Commission of Texas

Notice of Application for Amendment to Certificated Service Area Boundary

Notice is given to the public of an application filed on June 7, 2004, with the Public Utility Commission of Texas, for an amendment to a certificated service area boundary.

Docket Style and Number: Application of Southwestern Bell Telephone, L.P., doing business as SBC Texas, for Amendment to a Certificate of Convenience and Necessity for Elm Creek Zone (SA) and Bulverde Exchanges. Docket Number 29827.

The Application: Southwestern Bell Telephone, L.P., doing business as SBC Texas, seeks to amend the certificated service area boundary of its Elm Creek Zone (San Antonio Metropolitan Exchange) and the Bulverde Exchange of Guadalupe Valley Telephone Cooperative, Incorporated (GVTC). There are no customers currently located in the affected area. GVTC has filed a letter of concurrence with the application. SBC Texas stated that the proposed realignment of service area boundaries is to accommodate service to a new development and allow for a more efficient facilities design for both SBC Texas and GVTC.

Persons wishing to intervene or 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 29827.

TRD-200403764
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 8, 2004

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On June 1, 2004, Sure-Tel, 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 60180. Applicant intends to reflect the termination of the approved, but unconsummated transaction between Metro Teleconnect Companies, Inc., and Sure-Tel, Inc.

The Application: Application of Sure-Tel, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 29681.

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 23, 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 29681.

TRD-200403697
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 4, 2004

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Notice of Application for Certificate of Convenience and Necessity for a Proposed Transmission Line in San Jacinto County, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on June 8, 2004, for a certificate of convenience and necessity for a proposed transmission line in San Jacinto County, Texas.

Docket Style and Number: Application of Sam Houston Electric Cooperative, Incorporated for a Certificate of Convenience and Necessity (CCN) for a Proposed Transmission Line in San Jacinto County, Texas. Docket Number 29705.

The Application: The project is designated the Staley - Point Blank 138 kV Transmission Line Project. The proposed transmission line will be located in northern San Jacinto Country partly within the city limits of Point Blank, Texas, to the east of Lake Livingston. The total estimated cost of this transmission project is $3,116,360. The total estimated cost of substation projects associated with this application is approximately $4,955,000. The estimated date of completion is June 2006.

Persons wishing to intervene or 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. The deadline for intervention in this proceeding is July 23, 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 29705.

TRD-200403766
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 9, 2004

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Notice of Application for Certificate of Convenience and Necessity in Wichita County, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on June 4, 2004, for a certificate of convenience and necessity for a proposed transmission line in Wichita County, Texas

Docket Style and Number: Application of TXU Electric Delivery Company for a Certificate of Convenience and Necessity (CCN) for a Proposed Transmission Line in Wichita County, Texas. Docket Number 29768.

The Application: The proposed project is designated as the Pleasant Valley - Iowa Park Tap 69 kV Transmission Line Project. The amount of existing load that is connected in the Iowa Park/Pleasant Valley area and the expectation of continued annual load growth are the driving factors for this project. The estimated cost for the project is $2,857,000. The estimated completion date is December 2005.

Persons wishing to intervene or 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. The deadline for intervention in this proceeding is July 19, 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 29768.

TRD-200403718
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 7, 2004

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Notice of Intent to File LRIC Study Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing on June 1, 2004, with the Public Utility Commission of Texas (commission), a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214. The Applicant will file the LRIC study on or around June 12, 2004.

Docket Title and Number: Central Telephone Company of Texas, Inc., d/b/a Sprint Application for Approval of LRIC Study Pursuant to P.U.C. Substantive Rule §26.214, Docket Number 29811.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 29811. Written comments or recommendations should be filed no later than forty-five (45) days after the date of a sufficient study and should be filed at 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 telephones (TTY) may contact the commission at (512) 936-7136 or toll free 1-800-735-2989. All comments should reference Docket Number 29811.

TRD-200403698
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 4, 2004

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Notice of Intent to File LRIC Study Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing on June 1, 2004, with the Public Utility Commission of Texas (commission), a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214. The Applicant will file the LRIC study on or around June 12, 2004.

Docket Title and Number: United Telephone Company of Texas, Inc., d/b/a Sprint Application for Approval of LRIC Study Pursuant to P.U.C. Substantive Rule §26.214, Docket Number 29812.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 29812. Written comments or recommendations should be filed no later than forty-five (45) days after the date of a sufficient study and should be filed at 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 telephones (TTY) may contact the commission at (512) 936-7136 or toll free 1-800-735-2989. All comments should reference Docket Number 29812.

TRD-200403699
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 4, 2004

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Public Notice of Workshop and Request for Comments - Project to Address Modification of the Definition of "Access Line" Pursuant to Local Government Code §283.003

The staff of the Public Utility Commission of Texas (commission) will hold a workshop regarding modifying the definition of the term "access line," pursuant to Local Government Code §283.003, on August 10, 2004, from 1:00 p.m. to 4:00 p.m. in the Commissioners' Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Due to the fact that this workshop will be held in conjunction with the workshop for Project Number 29719, *Municipal Authorized Review of Access Line Reporting*, the starting time for this workshop may vary. If necessary, this workshop will be continued on August 11, 2004 at 9:30 a.m. Project Number 29347, *Project to Address Modification of the Definition of "Access Line" Pursuant to Local Government Code §283.003*, was established for this proceeding on February 17, 2004 but was abated on March 29, 2004. At the time this project was abated, the workshop was cancelled and interested parties were asked to hold off on filing their comments until further notice. This project has now been unabated and a new deadline for filing comments to the original questions is July 19, 2004. The original questions are listed below. The commission requests that interested persons file comments to the following questions:

1. Since September 2002, have there been any changes in technology or facilities that would justify a modification to the categories of access lines as developed by the commission? If so, what are these changes? How frequently have they been deployed?

2. Since September 2002, have there been any changes in the competitive or market conditions that would justify a modification to the categories of access lines as developed by the commission? If so, what are these changes? How frequently have they been deployed?

3. Are there any other issues regarding the redefinition of "access line" pursuant to Local Government Code §283.003 that should be addressed by the commission?

Responses to the questions 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 by **July 19, 2004**. In addition to the printed copies, an electronic copy of all responses shall be submitted on diskette or by email to lizkayser@puc.state.tx.us. All responses should reference Project Number 29347. This notice is not a formal notice of proposed rulemaking; however, the parties' responses to the questions and comments at the workshop will assist the commission in developing a commission policy or determining the necessity for a related rulemaking.

Questions concerning the workshop or this notice should be referred to Liz Kayser, Policy Analyst, Telecommunications Division, (512) 936-7390, lizkayser@puc.state.tx.us. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. Parties are strongly encouraged to arrange for a court reporter.

TRD-200403776
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 9, 2004

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Public Notice of Workshop and Request for Comments - Rulemaking to Address Municipal Authorized Review of Access Line Reporting

The staff of the Public Utility Commission of Texas (commission) will hold a workshop regarding municipal authorized review of access line reporting on August 10, 2004, from 9:30 a.m. to 12:00 p.m. in the Commissioners' Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 29719, *Rulemaking to Address Municipal Authorized Review of Access Line Reporting* has been established for this proceeding. This rulemaking is pursuant to Texas Local Government Code, §283.056 (c)(3), which references a municipality's right "… to conduct an authorized review of the provider to ensure compliance with the access line reporting requirements of this chapter if commenced within 90 days after the filing of a certificated telecommunications provider's report of access lines."

Prior to the workshop, the commission staff requests that interested persons file comments to the proposed Strawman Rule and responses to the questions in Project Number 29719. These items will be available on June 18, 2004 and may be obtained from either the commission's Central Records or from the PUC web site. To access this information from the PUC web site, go to www.puc.state.tx.us/rules/rulemake/29719/29719.cfm. Responses to the questions 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 by **July 19, 2004**. In addition to the printed copies, an electronic copy of all responses shall be submitted on diskette or by email. The electronic copy should be submitted to lizkayser@puc.state.tx.us . All responses should reference Project Number 29719.

Questions concerning the workshop or this notice should be referred to Liz Kayser, Telecommunications Policy Analyst, Telecommunications Division, 512-936-7390 or liz.kayser@puc.state.tx.us. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. Parties are strongly encouraged to arrange for a court reporter.

TRD-200403777
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 9, 2004

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Texas Department of Transportation

Request for Proposal for Professional Services - Aviation Division

Cameron County through its agent, the Texas Department of Transportation (TxDOT), intends to engage an aviation professional services firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT, Aviation Division will solicit and receive proposals for professional services as described in this notice.

Airport Sponsor: Cameron County, Port Isabel/Cameron County Airport, TxDOT CSJ No.0421PTISB, Scope: Prepare an Airport Development Plan which includes, but is not limited to, information regarding existing and future conditions, proposed facility development to meet existing and future demand, constraints to development, anticipated capital needs, financial considerations, management structure and options, as well as an updated Airport Layout Plan. The Airport Development Plan should be tailored to the individual needs of the airport.

The HUB goal is set at 0%. TxDOT Project Manager is Daniel Benson.

Interested firms shall utilize the Form AVN-551, titled "Aviation Planning Services Proposal." The form may be requested from TxDOT, Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site, URL address:

http://www.dot.state.tx.us/avn/avn551.doc

The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

(Attention: To ensure utilization of the latest version of Form 551, firms are encouraged to download Form 551 from the TxDOT website as addressed previously. Utilization of Form 551 from a previous download may not be the exact same format. Form 551 is an MS Word Template).

Six unfolded copies of Form AVN- 551 must be postmarked by U. S. Mail by midnight **Friday, July 9, 2004 (CDST)**. Mailing address: TxDOT, Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483. Overnight delivery must be received by 4:00 p.m. (CDST) on **Monday, July 12, 2004**; overnight address: TxDOT, Aviation Division, 200 E. Riverside Drive, Austin, Texas, 78704. Please mark the envelope of the forms to the attention of Amy Deason. Hand delivery must be received by 4:00 p.m. **Monday, July 12, 2004 (CDST)**; hand delivery address: 150 E. Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704. Electronic facsimiles or forms sent by email will not be accepted.

The consultant selection committee will be composed of local government members.

The final selection by the sponsor's committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating planning proposals can be found at:

www.dot.state.tx.us/business/avnconsultinfo.htm

All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. In such case, selection will be made following interviews.

If there are any procedural questions, please contact Amy Deason, Grant Manager, or Daniel Benson, Project Manager, for technical questions at 1-800-68-PILOT (74568).

TRD-200403774
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: June 9, 2004

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The University of Texas System

Consulting Services Contract Notification

In accordance with the provisions of *Texas Government Code*, Chapter 2254, The University of Texas at San Antonio has entered into a contract for consulting services more particularly described in the Request for Proposal for Consulting Services, published in the *Texas Register* on May 7, 2004 (29 TexReg 4615). The consultant will design and implement a new compensation program for classified personnel and provide compensation advisory services.

The name and address of the consultant is as follows:

Ernst & Young, LLP

1401 McKinney Street, Suite 1200

Houston, TX 77010

The University will pay a not to exceed amount of $28,435. The initial term of the contract shall be for a period of one year from May 28, 2004. The due date of the initial report is June 15, 2004.

Any questions regarding this posting should be directed to:

Mr. Bernard Leiter

Senior Buyer

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TRD-200403773
Francie A Frederick
Counsel and Secretary to the Board
The University of Texas System
Filed: June 9, 2004

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Texas Water Development Board

Applications Received

Pursuant to the Texas Water Code, Section 6.195, the Texas Water Development Board provides notice of the following applications received by the Board:

City of Ballinger, 700 Railroad Avenue, Ballinger, Texas, 76821, received April 30, 2004, application for financial assistance in the amount of $3,780,000 from the Drinking Water State Revolving Fund - Disadvantaged Community Program.

Baytown Area Water Authority, 2401 Market Street, Baytown, Texas, 77520, received May 5, 2004, application for financial assistance in the amount of $13,250,000 from the Drinking Water State Revolving Fund.

Bell County Water Control and Improvement District No. 1, P.O. Box 43, Killeen, Texas, 76540-0043, received May 3, 2004, application for an increase in financial assistance in the amount of $2,725,000 from the Texas Water Development Funds.

Harris County Fresh Water Supply District No. 27, P.O. Box 508, Baytown, Texas, 77522-0508, received May 3, 2004, application for financial assistance in the amount of $1,575,000 from the Texas Water Development Funds.

Lower Rio Grande Valley Development Council, 311 North 15th Street, McAllen, Texas, 78501-4705, received April 2, 2004, application for an increase in financial assistance in an amount not to exceed $790,100 from the Research and Planning Fund.

Texas A&M University - Texas Agricultural Experiment Station (High Plains Evapotransportation Network), 2147 Texas, A&M University,

College Station, Texas, 77843-2147, received April 19, 2004, application for financial assistance in the amount of $162,519 from the Agricultural Water Conservation Fund.

Texas A&M University - Texas Agricultural Experiment Station (Development of True Rate Irrigation Concept), 2147 Texas A&M University, College Station, Texas, 77843-2147, received April 19, 2004, application for financial assistance in the amount of $173,384 from the Agricultural Water Conservation Fund.

Texas A&M University - Texas Agricultural Experiment Station (Subsurface Drip Irrigation Edwards Aquifer), 2147 Texas A&M University, College Station, Texas, 77843-2147, received April 19, 2004, application for financial assistance in the amount of $40,601 from the Agricultural Water Conservation Fund.

Texas A&M University - Texas Agricultural Experiment Station (LRGV), 2147 Texas A&M University, College Station, Texas, 77843-2147, received April 19, 2004, application for financial assistance in the amount of $114,120 from the Agricultural Water Conservation Fund.

Texas A&M University - Texas Agricultural Experiment Station (Water Conservation Research), 2147 Texas A&M University, College Station, Texas, 77843-2147, received April 16, 2004, application for financial assistance in the amount of $100,000 from the Agricultural Water Conservation Fund.

Texas A&M University - Texas Cooperative Extension, 2147 Texas A&M University, College Station, Texas, 77843-2147, received April 16, 2004, application for financial assistance in the amount of $58,970 from the Agricultural Water Conservation Fund.

Texas Tech University - High Plans Groundwater Conservation District, 203 Holden Hall, P.O. Box 41035, Lubbock Texas, 79409-1035, received April 16, 2004, application for financial assistance in the amount of $299,633 from the Agricultural Water Conservation Fund.

Texas State Soil & Conservation, P. O. box 658, Temple, Texas, 76503, received April 15, 2004, application for financial assistance in the amount of $115,000 from the Agricultural Water Conservation Fund.

Hickory Underground Water Conservation District No. 1, 111 East Main Street, Brady, Texas, 76825, received April 16, 2004, application for financial assistance in the amount of $1,745 from the Agricultural Water Conservation Fund.

Lower Colorado River Authority, P. O. Box 220, Austin, Texas, 78767, received April 19, 2004, application for financial assistance in the amount of $200,000 from the Agricultural Water Conservation Fund.

Llano Estacdo Underground Water Conservation District, 101 S. Main, Room, Semiole, Texas, 79360, received April 19, 2004, application for financial assistance in the amount of $32,000 from the Agricultural Water Conservation Fund.

North Plains Groundwater Water Conservation District, 603 East First Street, Dumas, Texas, 79029, received April 16, 2004, application for financial assistance in the amount of $44,000 from the Agricultural Water Conservation Fund.

North Plains Groundwater Water Conservation District, 603 East First Street, Dumas, Texas, 79029, received April 16, 2004, application for financial assistance in the amount of $23,500 from the Agricultural Water Conservation Fund.

Pecos County Water Improvement District No. 03, 201 First Street, Imperial, Texas, 79743, received April 16, 2004, application for financial assistance in the amount of $200,000 from the Agricultural Water Conservation Fund.

Sandy Land Underground Water Conservation District, 1012 Avenue F, Plains, Texas, 79355, received April 12, 2004, application for financial assistance in the amount of $45,000 from the Agricultural Water Conservation Fund.

Sandy Land Underground Water Conservation District - Drip Irrigation, 1012 Avenue F, Plains, Texas, 79355, received April 12, 2004, application for financial assistance in the amount of $51,804 from the Agricultural Water Conservation Fund.

Sandy Land Underground Water Conservation District, 1012 Avenue F, Plains, Texas, 79355, received April 12, 2004, application for financial assistance in the amount of $44,000 from the Agricultural Water Conservation Fund.

Southmost Soil & Water Conservation District No. 319, 2315 West Expressway 83, Room 103, San Benito, Texas, 78586, received April 19, 2004, application for financial assistance in the amount of $73,320 from the Agricultural Water Conservation Fund.

Upper Pecos Soil & Water Conservation District No. 213, 1415 West 3rd Street, Pecos, Texas, 79972, received April 19, 2004, application for financial assistance in the amount of $40,053 from the Agricultural Water Conservation Fund.

Upper Pecos Soil & Water Conservation District No. 213, 1415 West 3rd Street, Pecos, Texas, 79972, received April 19, 2004, application for financial assistance in the amount of $24,742 from the Agricultural Water Conservation Fund.

Uvalde County Underground Water Conservation District, P. O. Box 1419, Uvalde, Texas, 78801, received April 16, 2004, application for financial assistance in the amount of $20,000 from the Agricultural Water Conservation Fund.

Cameron County Irrigation District No. 02, 216 S. Sam Houston, San Benito, Texas, 78586, received April 19, 2004, application for financial assistance in the amount of $50,000 from the Agricultural Water Conservation Fund.

High Plains Underground Water Conservation District No. 01, 2930 Avenue Q, Lubbock, Texas, 79411, received April 19, 2004, application for financial assistance in the amount of $20,000 from the Agricultural Water Conservation Fund.

Delta Lake Irrigation District, Rt. 1, Box 225, Edcouch, Texas, 78538, received April 19, 2004, application for financial assistance in the amount of $25,000 from the Agricultural Water Conservation Fund.

Mesa Underground Water Conservation District, P. O. Box 497, Lamesa, Texas, 79331-0497, received April 19, 2004, application for financial assistance in the amount of $64,980 from the Agricultural Water Conservation Fund.

El Paso Water Irrigation District No. 1, 294 Candelaria, El Paso, Texas, 79907-5599, received April 19, 2004, application for financial assistance in the amount of $25,000 from the Agricultural Water Conservation Fund.

Harlingen Irrigation District Cameron County No. 01, P. O. Box 148, Harlingen, Texas, 78551, received April 19, 2004, application for financial assistance in the amount of $25,000 from the Agricultural Water Conservation Fund.

Hidalgo County Irrigation District No. 01, P. O. Box 870, Edinburg, Texas, 78640, received April 19, 2004, application for financial assistance in the amount of $25,000 from the Agricultural Water Conservation Fund.

Hidalgo County Irrigation District No. 06, P. O. Box 786, Mission, Texas, 78538, received April 19, 2004, application for financial assistance in the amount of $25,000 from the Agricultural Water Conservation Fund.

Hudspeth County Conservation & Reclamation No. 01, P. O. Box 125, Fort Hancock, Texas, 79839, received April 19, 2004, application for financial assistance in the amount of $25,000 from the Agricultural Water Conservation Fund.

Hudspeth County Underground Water Conservation District No. 01, P. O. Box 212, Dell City, Texas, 79837, received April 19, 2004, application for financial assistance in the amount of $25,000 from the Agricultural Water Conservation Fund.

La Feria Irrigation District Cameron County No. 03, P. O. Box 158, La Feria, Texas, 78559, received April 19, 2004, application for financial assistance in the amount of $25,000 from the Agricultural Water Conservation Fund.

Maverick County Water Control and Improvement District No. 01, Rt. 2, Box 4700, Eagle Pass, Texas, 78852, received April 19, 2004, application for financial assistance in the amount of $25,000 from the Agricultural Water Conservation Fund.

Uvalde County Underground Water Conservation District, P. O. Box 1419, Uvalde, Texas, 78801, received April 16, 2004, application for financial assistance in the amount of $45,000 from the Agricultural Water Conservation Fund.

TRD-200403690
Jonathan Steinberg
Deputy Counsel
Texas Water Development Board
Filed: June 4, 2004

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Notice of Public Hearing

An attorney with the Texas Water Development Board will conduct a public hearing beginning at 8:30 a.m., July 14, 2004, Room 1100, William Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, on the proposed Fiscal Year 2005 Intended Use Plan for the Drinking Water State Revolving Fund (DWSRF).

The Intended Use Plan contains a combined list of projects for large and small communities, including projects for privately owned water systems and projects for entities which have qualified as disadvantaged communities. Projects are listed in priority order. The Intended Use Plan describes the sources and uses of funds for projects as well as for set-aside activities. The proposed Intended Use Plan has been prepared pursuant to rules for the DWSRF as adopted by the Texas Water Development Board in 31 T.A.C. Chapter 371.

Interested persons are encouraged to attend the hearing and to present relevant and material comments concerning the proposed Intended Use Plan. In addition, persons may participate in the hearing by mailing written comments before July 14, 2004 to Patricia Loving, Grant Administration to Contract Administration, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711. Written comments will also be accepted for thirty (30) days following the July 14, 2004 hearing. Copies of the proposed 2005 Intended Use Plan will be available in Room 537-A of the Stephen F. Austin Building or may be obtained from the Grant Administration to Contract Administration, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711.

The hearing is being conducted pursuant to 31 Texas Administrative Code, §371.11 and 40 Code of Federal Regulations Part 25.

TRD-200403779
Jonathan Steinberg
Deputy Counsel
Texas Water Development Board
Filed: June 9, 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-200403739
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: June 8, 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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