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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Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the Texas Register's Internet site: http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.state.tx.us

For items not available here, contact the agency directly. Items not found here:
- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the Open Meetings Act Handbook, and Open Meetings Opinions.
http://www.oag.state.tx.us/opinopen/opengovt.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.state.tx.us/

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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.
Appointments

**Appointments for March 10, 2010**

Appointed as the Texas Youth Commission Independent Ombudsman for a term to expire February 1, 2011, John L. Moore of Denison (replacing Catherine Evans of Dallas who resigned).

Appointed to the Texas Youth Commission for a term to expire September 1, 2011, Toni Sykora of San Antonio.

**Appointments for March 12, 2010**

Appointed to the Commission on Law Enforcement Officer Standards and Education for a term to expire August 30, 2011, James Oakley of Spicewood (replacing Allan Cain of Carthage who resigned).

Appointed to the Texas Board of Professional Geoscientists for a term to expire February 1, 2015, Justin McNamee of Rowlett (replacing Ben Harris of Plano who resigned).

Appointed to the Texas Department of Rural Affairs for a term to expire February 1, 2011, Bryan Tucker of Childress (replacing Joaquin Rodriguez of Eagle Pass who resigned).

Appointed to the Texas Physician Assistant Board for a term to expire February 1, 2015, Margaret Bentley of DeSoto. Ms. Bentley is being reappointed.

Appointed to the State Soil and Water Conservation Board for a term to expire February 1, 2012, Larry D. Jacobs of Montgomery. Mr. Jacobs is being reappointed.

**Appointments for March 15, 2010**

Appointed to the Cancer Prevention and Research Institute of Texas Oversight Committee for a term to expire January 31, 2015, Phil Wilson of Austin (replacing Malcolm Gillis of Houston who resigned).

Appointed to the Texas Ethics Commission for a term to expire November 19, 2013, James Clancy, Jr. of Portland (replacing Ross Fischer of Kendalia whose term expired).

Appointed to the Texas Ethics Commission for a term to expire November 19, 2013, Thomas Ramsay of Mount Vernon (replacing David Montagne of Beaumont whose term expired).

Appointed to the Alamo Area Regional Review Committee for a term at the pleasure of the Governor, Doug King of Vanderpool (replacing Denise Griffin of Bandera).

Appointed to the Alamo Area Regional Review Committee for a term at the pleasure of the Governor, Santiago G. Montemayor of Pearsall (replacing Adeline Pierdolla of La Vernia).

Appointed to the Nortex Regional Review Committee for a term at the pleasure of the Governor, Max P. McCuistion of Vernon (replacing Harlan T. Cardwell of Vernon).

Appointed to the Nortex Regional Review Committee for a term at the pleasure of the Governor, Thomas H. Sessions of Jacksboro (replacing Jerry Craft of Jacksboro).

Appointed to the East Texas Regional Review Committee for a term at the pleasure of the Governor, Stephen Ashley of Grand Saline (replacing Terry Tolar of Grand Saline).

Appointed to the East Texas Regional Review Committee for a term at the pleasure of the Governor, Walter Derrick of Gladewater (replacing John Paul Tallent of Gladewater).

Appointed to the East Texas Regional Review Committee for a term at the pleasure of the Governor, Jim W. Moffit of Chandler (replacing Don Copeland of Chandler).

Appointed to the West Central Texas Regional Review Committee for a term at the pleasure of the Governor, Rex Fields of Cisco (replacing Brad Stephenson of Eastland).

**Appointments for March 16, 2010**

Appointed to the State Board for Educator Certification for a term to expire February 1, 2011, L. Curtis Culwell of Garland (replacing Chris Barbic of Houston who resigned).

Appointed to the Chronic Kidney Disease Task Force for a term at the pleasure of the Governor, Jennie Lang House of Midland (replacing Louise Clement of Lubbock who resigned).

Appointed to the State Advisory Council on Early Childhood Education and Care for a term at the pleasure of the Governor, Nicole R. Verver of Austin.

Appointed to the OneStar Foundation for a term to expire March 15, 2013, Scott Sanders of Austin (replacing Joshua Carden of Weatherford whose term expired).

Appointed to the Health Disparities Task Force for a term to expire February 1, 2012, Eva M. Moya of El Paso (Ms. Moya is being reappointed).

Appointed to the Health Disparities Task Force for a term to expire February 1, 2012, Verna Kathleen Shipp of Lubbock (replacing Elizabeth Noser of Sugar Land whose term expired).

Designating Patty Bryant as presiding officer of the Texas Commission on the Arts for a term at the pleasure of the Governor. Ms. Bryant is replacing Lee William McNutt, III of Dallas as presiding officer.

Appointed to the Texas Commission on the Arts for a term to expire August 31, 2013, Dale W. Brock of Wichita Falls (replacing Lee William McNutt of Dallas who resigned).

Appointed to the Teacher Retirement System of Texas Board of Trustees for a term to expire August 31, 2015, Christopher S. Moss of Luflin (replacing Seth Crone, Jr. of Beaumont who resigned).

Rick Perry, Governor

TRD-201001368
Requests for Opinion

RQ-0868-GA

Requestor:
Ms. Anne Heiligenstein, Commissioner
Texas Department of Family and Protective Services
Post Office Box 149030
Austin, Texas 78714-9030

Re: Whether, under chapter 42, Human Resources Code, the Texas Department of Family and Protective Services has rulemaking authority to increase the number of training hours required for an employee of a day-care center or group day-care home (RQ-0868-GA)

Briefs requested by April 13, 2010

RQ-0869-GA

Requestor:
The Honorable Joe Deshotel
Chair, Committee on Business & Industry
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768

Re: Whether a civilian advisory committee to the police chief may review information maintained in a police department personnel file under Local Government Code, section 143.089(g) (RQ-0869-GA)

Briefs requested by April 13, 2010

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

TRD-201001365
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: March 17, 2010

Opinions

Opinion No. GA-0761
Mr. Victor T. Vandergriff, Chair

Texas Department of Motor Vehicles
4000 Jackson Avenue, Building I
Austin, Texas 78731

Re: Authority of a magistrate to award ownership or title of a motor vehicle under chapter 47, Code of Criminal Procedure, or other law (RQ-0811-GA)

SUMMARY

Because of the differing statements intermediate appellate courts have made regarding a court’s jurisdiction under article 47.01a(a), we cannot predict with any certainty whether a court would conclude Code of Criminal Procedure articles 47.01a(a) and 47.02(b) authorize a justice of the peace or a municipal judge to award title or ownership of a motor vehicle. However, depending upon the foreclosure proceeding at issue, we conclude that a justice court could award title or ownership of a motor vehicle in enforcing a lien under Government Code section 27.031.

The Texas Department of Motor Vehicles may, under section 501.074(a)(4) of the Transportation Code, accept a court order from a justice or municipal court in carrying out its duty to issue a new certificate of title for a motor vehicle, the ownership of which has been transferred by operation of law.

Opinion No. GA-0762
The Honorable Patrick M. Rose
Chair, Committee on Human Services
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Re: Whether a Type A general-law municipality may impose and enforce a nonpoint source pollution ordinance in its extraterritorial jurisdiction pursuant to section 26.177 of the Water Code (RQ-0822-GA)

SUMMARY

Pursuant to Water Code subsection 26.177(b)(5), if a Type A general-law municipality determines that implementing a water pollution control program in its extraterritorial jurisdiction is necessary to achieve pollution control objectives in its territorial jurisdiction, the Legislature has authorized the municipality to regulate, in its extraterritorial jurisdiction, pollution resulting from generalized discharges of waste which are not traceable to a specific source.
For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-201001366
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: March 17, 2010
TITLE 10. COMMUNITY DEVELOPMENT
PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS
CHAPTER 5. COMMUNITY AFFAIRS PROGRAMS
SUBCHAPTER I. WEATHERIZATION ASSISTANCE PROGRAM DEPARTMENT OF ENERGY AMERICAN RECOVERY AND REINVESTMENT ACT (WAP ARRA)
10 TAC §§5.900 - 5.905
The Texas Department of Housing and Community Affairs (the "Department") adopts on an emergency basis new 10 TAC Chapter 5, Subchapter I, §§5.900 - 5.905, concerning the Weatherization Assistance Program Department of Energy American Recovery and Reinvestment Act (WAP ARRA).

Under the American Recovery and Reinvestment Act of 2009, the Department received an allocation of funding from the Department of Energy for additional funding for the Weatherization Assistance Program. ARRA programs generally require short time lines for committing and expending funds. Under the Department's WAP ARRA Program, if the Department's Subrecipients are unable to meet expenditure deadline criteria set by the Department, the State of Texas risks losing a significant portion of the WAP ARRA funding. Therefore, the Department is adopting these procedures, as required by federal law (24 CFR §440.15(e)), for deobligating and reobligating WAP ARRA funds in the event a Subrecipient is unable to meet expenditure deadlines. The emergency rule provides for appropriate notice to the affected Subrecipients and an opportunity to be heard concerning the Deobligation of any funds. Given that the Board will be unable to complete the rulemaking process before commitment deadlines arise, the Board finds that it is not practical to provide the usual thirty (30) days' prior notice and hearing.

The Department has found that these rules need to be adopted on an emergency basis for the following reasons: First, 10 CFR Part 440 provides for states to impose requirements on the administration of Department of Energy funds, provided they are not inconsistent with federal requirements, and, therefore, these rules are necessary to comply with federal requirements under those regulations. Second, the American Recovery and Reinvestment Act of 2009, PL Pub. L. 111-5 ("ARRA"), provided for an appropriation of funding for the weatherization assistance program ("WAP") and the Department of Energy allocated $327 million in WAP funds to the State of Texas. This additional new funding, a fifty-fivefold increase over historic Department of Energy funding levels, comes with very significant time limitations, requiring the funds to be obligated within two years and expended within three years. If these timeframes are not complied with, the State and the Texans served are at risk of losing this funding. Therefore, the Department finds that there is an imminent peril to the public welfare, placing Texans at risk of loss of this vital assistance if these rules are not immediately adopted to provide the Department with the essential tools to assure timely expenditure and utilization of these funds through the creation of processes for the de-obligation and re-obligation of WAP funds.

In order to provide as much notice as possible to the public of this emergency rule, the Department released a copy of this emergency rule on its website and notified the public through an e-mail distribution list on or before February 24, 2010. The public was provided the opportunity to make comment to the Department’s Board at the March 11, 2010 Board meeting prior to the Board’s adoption of the emergency rule.

The new sections are adopted on an emergency basis under Chapter 2306 of the Texas Government Code, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs, and §2001.034 of the Texas Government Code, which provides for the adoption of administrative rules on an emergency basis, without notice and comment.


Under the American Recovery and Reinvestment Act of 2009 (ARRA), the Texas Department of Housing and Community Affairs (the "Department") is receiving funding from the United States Department of Energy for the Weatherization Assistance Program (WAP). The Department is adopting rules to establish the processes and criteria to be used for the Deobligation of WAP ARRA funds committed to a Subrecipient pursuant to the Department’s approved plan with the U.S. Department of Energy and the subsequent Reobligation of those funds. These sections will also apply to any New Providers of WAP ARRA Funds. The Department is adopting these sections in order to assure the timely and appropriate use of WAP ARRA funds; compliance with federal accountability, transparency, and programmatic requirements; and that WAP ARRA funds are expended by required deadlines. Unless otherwise specified herein, all definitions and requirements under 10 TAC Chapter 5, Subchapters E, F and G of this chapter apply to WAP ARRA.

§5.901. Definitions.

(a) Awarded Funds—The amount of WAP ARRA funds awarded through the Department plan, as amended, submitted to the United States Department of Energy to each Subrecipient or the amount of funds awarded by the Department to New Providers of WAP ARRA funds. The amount of funds awarded reflects the full
multi-year amount of WAP ARRA funds awarded to the Subrecipient or New Provider and not only the amount reflected in a contract.

(b) WAP ARRA—The allocation of funds provided to the Department from the American Recovery Reinvestment Act of 2009 for the Department of Energy Weatherization Assistance Program.

(c) Deobligation—The partial or full removal of Awarded Funds from a Subrecipient or New Provider. Partial Deobligation is the removal of some portion of the full Awarded Funds from a Subrecipient or New Provider, leaving some remaining balance of Awarded Funds to be administered by the Subrecipient or New Provider. Full Deobligation is the removal of the full amount of Awarded Funds from a Subrecipient or New Provider.

(d) Department—The Texas Department of Housing and Community Affairs.

(e) Executive Director—The Executive Director of the Texas Department of Housing and Community Affairs.

(f) Expenditure—Funds having been drawn from the Department through the Contract System. For purposes of this rule, expenditure will include draws requested through the system.

(g) New Provider—An entity to which the Department has contractually obligated WAP ARRA funds subsequent to March 12, 2010.

(h) Production Schedule—A production schedule signed by the applicable Executive Director/Chief Executive Officer of the Subrecipient or New Provider, and approved by the Department meeting the requirements of this definition. The Production Schedule shall include a total estimated number of units to be completed with all Awarded Funds, based on the average per unit cost for the Subrecipient or New Provider; the estimated monthly and quarterly unit production; and the estimated monthly and quarterly expenditure targets for all Awarded Funds reflecting achievement of the criteria identified in §5.902 of this chapter (relating to Criteria for Deobligation of Fund Award). The Production Schedule should reflect anticipated delays, and unit production estimates may vary significantly from month to month. The Production Schedule shall reflect by month estimated numbers that include for each month: total units to be produced; households that need to be income qualified; units to be assessed; audits to be performed; work orders to be issued; units for which weatherization is to be completed; units to have final inspections; and units to be invoiced. The Production Schedule is a requirement applicable to all WAP ARRA contracts administered by the Subrecipient or New Provider. The Production Schedule must demonstrate how all Awarded Funds will be expended by required ARRA deadlines. The Production Schedule as defined herein may differ significantly from the WAP ARRA plan production schedule submitted by the Department to the United States Department of Energy. In the case of any such conflict, the applicable Subrecipient or New Provider is required to comply with the Production Schedule.

(i) Subrecipient—An entity to which the Department contractually obligated WAP ARRA funds prior to March 12, 2010. Subrecipients may have one or more contracts for WAP ARRA funds and reference to Subrecipient herein may include only one, some, or all of those contracts.

(j) Reobligation—The reallocation of deobligated WAP ARRA funds to current Subrecipients and/or New Providers.

(k) Unit Production—A unit is considered "produced" for purposes of this rule when the unit is considered a final unit and the post-weatherization inspection and all other requirements have been satisfied.

§5.902. Criteria for Deobligation of Fund Award.

(a) The criteria noted in this section will prompt the Deobligation process under this rule. If the criteria are met, then notification and ensuing processes will apply as further described in this rule.

(b) The criteria for Deobligation for a Subrecipient are as follows:

(1) Subrecipient fails to provide the Department with a Production Schedule by April 1, 2010. The Production Schedule must be signed by the Subrecipient Executive Director/Chief Executive Officer and approved by the Department.

(2) By April 15, 2010, no unit production has occurred.

(3) By June 30, 2010, less than 20% of total expected unit production has occurred based on the Production Schedule, or less than 15% of total Awarded Funds have been expended.

(4) By August 31, 2010, less than 35% of total expected unit production has occurred based on the Production Schedule, or less than 25% of total Awarded Funds have been expended.

(5) By October 31, 2010, less than 40% of total expected unit production has occurred based on the Production Schedule, or less than 40% of total Awarded Funds have been expended.

(6) By December 31, 2010, less than 50% of total expected unit production has occurred based on the Production Schedule, or less than 50% of total Awarded Funds have been expended.

(7) The Subrecipient fails to submit a required monthly report explaining any variances between the Production Schedule and actual results on Production Schedule criteria.

(8) The Subrecipient’s monthly report, as required under the contract between the Department and the Subrecipient, for Subrecipients whose monthly production target is 50 units or greater reflects unit production that is 5% or more below the unit production amount to be completed, or for Subrecipients whose monthly production target is less than 50 units the monthly report reflects unit production that is 10% or more below the unit production amount to be completed, as of the end of the month according to the Production Schedule, or expenditure of funds is 5% or more below the amount of Awarded Funds to be expended as of the end of the month according to the Production Schedule; and

(9) The Subrecipient’s quarterly report, as required under the contract between the Department and the Subrecipient, for Subrecipients whose monthly production target is 50 units or greater reflects that unit production is 5% or more below the unit production amount to be completed, or for Subrecipients whose monthly production target is less than 50 units the monthly report reflects unit production that is 10% or more below the unit production amount to be completed, as of the end of the quarter according to the Production Schedule, or expenditure of funds is 5% or more below the amount of Awarded Funds to be expended as of the end of the quarter according to the Production Schedule.

(c) The criteria for Deobligation for a New Provider are as follows:

(1) The New Provider fails to provide a Production Schedule as described in this rule and required under the contract between the Department and the New Provider within fifteen (15) days of contract execution. The Production Schedule must be approved by the New Provider Executive Director/Chief Executive Officer;

(2) The New Provider fails to submit a required monthly report explaining any variances between the Production Schedule and actual results on Production Schedule criteria;
(3) The New Provider’s monthly report, as required under the contract between the Department and the New Provider, reflects unit production that is 5% or more below the unit production amount to be completed as of the end of the month according to the Production Schedule, or expenditure of funds is 5% or more below the amount of Awarded Funds to be expended as of the end of the month according to the Production Schedule;

(4) The New Provider’s quarterly report, as required under the contract between the Department and the New Provider, reflects that unit production is 5% or more below the unit production amount to be completed as of the end of the quarter according to the Production Schedule, or expenditure of funds is 5% or more below the amount of Awarded Funds to be expended as of the end of the quarter according to the Production Schedule; and

(5) The New Provider fails to meet any other production or expenditure targets based on the Production Schedule as required under the contract between the Department and the New Provider.

(d) At any time, a Subrecipient or New Provider fails to notify the Department of any adverse audit, inspection or internal control finding.

(e) At any time a Subrecipient or New Provider has recurrent findings or inspections reflecting work quality that do not conform fully to program requirements, lack of adequate and satisfactory inspections, inadequate assessments or that insufficient quality control efforts are in place.

(f) At any time a Subrecipient or New Provider has unresolved WAP ARRA monitoring findings, violates their contract, and fails to implement timely all necessary changes identified during a monitoring visit.

(g) At any time the Department believes a Subrecipient or New Provider is at significant risk of not expending WAP ARRA Awarded Funds in accordance with the Production Schedule or is at significant risk of not providing appropriate and thorough controls on the expenditure of WAP ARRA funds.

§5.903 Notification and Action Plan.

(a) At any time that a Subrecipient or New Provider believes they may be at risk of meeting one of the criteria noted in §5.902 of this chapter (relating to Criteria for Deobligation of Fund Award), or of not achieving their Production Schedule goals, notification must be provided to the Department.

(b) A written "Notification of Possible Deobligation" will be sent to the Executive Director of the Subrecipient or New Provider as soon as a criterion included in §5.902 of this chapter is at risk of being met. Written notice will be sent electronically and by mail. The notice will include an explanation of the criteria met.

(c) Within fifteen (15) days of the date of the "Notification of Possible Deobligation" referenced in subsection (b) of this section, a Mitigation Action Plan must be submitted to the Department by the Subrecipient or New Provider in the format prescribed by the Department.

(d) A Mitigation Action Plan is not limited to but must include:

(1) Explanation of why one or more of the criteria under §5.902 of this chapter occurred setting out all fully relevant facts.

(2) Explanation of how the criteria under §5.902 of this chapter will be immediately, permanently, and adequately mitigated. For example, if production or expenditures are insufficient, the explanation would need to address how production or expenditures will be increased in the short- and long-term to restore projected full and timely execution of the contract with respect to all Awarded Funds.

(3) If applicable because of failure to produce Unit Production or Expenditure targets under the existing Production Schedule, a revised Production Schedule reflecting how Unit Production and Expenditure targets will be achieved for each remaining month, including compensation for prior months of missed production, for all Awarded Funds.

(4) An explanation of how remaining criteria under §5.902 of this chapter will be avoided. For example, if Unit Production criteria for June 30, reflected under §5.902(b) of this chapter were not met, then explanation will need to include how the ensuing criteria will be met and the criteria under §5.902(c) of this chapter, avoided.

(5) If relating to a Unit Production or expenditure criteria, a description of activities currently being undertaken including an accurate description of the number of units in progress, broken down by number of units that have been qualified, audited, assessed, contracted, inspected, and invoiced and as reflected in an updated Production Schedule.

(6) Provide any request for a reduction in Awarded Funds, reasons for the request, desired Awarded Fund and revised Production Schedule reflecting the reduced Awarded Fund.

(e) At any time after sending a Notification of Deobligation, the Department or a third-party assigned by the Department may monitor, conduct onsite-visits or other assessment or engage in any other oversight of the Subrecipient or New Provider that is believed appropriate by the Department under the facts and circumstances.

(f) The Department or a third-party assigned by the Department will review the Mitigation Action Plan, and where applicable, assess the Subrecipient’s or New Provider’s ability to meet the revised Production Schedule or remedy other concern.

(g) After the Department’s receipt of the Mitigation Action Plan, the Department will provide the Subrecipient or New Provider a written Corrective Action Notice indicating the Department’s determination, which may include one or more of the criteria identified in §5.904 of this chapter (relating to Deobligation and Other Mitigating Actions) or other acceptable solutions or remedies.

(h) The Subrecipient or New Provider has seven (7) calendar days from the date of the Corrective Action Notice to appeal the Corrective Action Notice to the Executive Director. Appeals may include:

(1) Request for the full Fund Award;

(2) Request for only partial Deobligation of the full Awarded Fund if full Deobligation was indicated in the Corrective Action Notice;

(3) Request for other lawful action consistent with the timely and full completion of the contract and Production Schedule for all Awarded Funds.

(i) In the event that an appeal is submitted to the Executive Director, the Executive Director may grant extensions or forbearance of targets included in the Production Schedule, continued operation of a contract, authorize Deobligation, or take other lawful action that is designed to ensure the timely and full completion of the contract for all Awarded Funds.

(j) In the event the Executive Director denies an appeal, the Subrecipient will have the opportunity to have their appeal presented at the next Department Board meeting for which the matter may be posted in accordance with law and submitted for final determination by the Board.
(k) In the event an appeal is not submitted within seven (7) calendar days from the date of the Corrective Action Notice, the Corrective Action Notice will automatically become final without need of any further action or notice by the Department, and the Department will amend/terminate the contract with the Subrecipient or New Provider to effectuate the Corrective Action Notice.

§5.904. Deobligation and Other Mitigating Actions.

(a) When one or more of the criteria in §5.902 of this chapter (relating to Criteria for Deobligation of Fund Award) have been met, the Department will issue a Corrective Action Notice, as described in §5.903 of this chapter (relating to Notification and Action Plan), recommending one or more of the actions in subsections (b) - (d) of this section.

(b) Partial or Full Deobligation of Awarded Funds. Deobligation may be made dependent upon identification of a temporary or permanent replacement provider as described in §5.905 of this chapter (relating to Reobligation).

(c) Month-to-month monitoring, site visits, assessments and/or oversight by the Department or a third-party assigned by the Department.

(d) Other mitigating action that may improve the performance of the Subrecipient or New Provider and ensure the delivery of services to the service area, consistent with the timely and full completion of contract and expenditure of Awarded Funds.

(e) In the event of Deobligation, the Subrecipient will place no further orders, or enter into further subcontracts for services, materials, or equipment. However, to the extent possible, the Department will allow continued delivery of eligible services to those customers whose unit has been assessed prior to the delivery of notice of Deobligation. In the event of Deobligation, the Subrecipient will identify any such customers and negotiate with the Department regarding the delivery of services to those customers.

§5.905. Reobligation.

(a) While it may not be possible in all circumstances, it is the Department’s primary goal to ensure that Deobligated Awarded Funds be expended in the existing geographic service area of the Deobligated Subrecipient or New Provider. So that Awarded Funds released through Deobligation can be recommitted to the geographic service area, the Department may immediately take the actions in paragraphs (1) and (2) of this subsection:

(1) Identify and reach agreements for increasing funding with Subrecipients who are capable of achieving unit production and expenditures in adjacent or non-adjacent geographic regions on a temporary or permanent basis; and/or

(2) Identify, initiate and complete the procurement process with one or more New Providers of weatherization services that can service one or more geographic service areas.

(b) In the event that no qualified provider can be identified to serve a geographic service area where a Subrecipient or New Provider has been Deobligated, the Department will consider the geographic re-allocation of Awarded Funds for only the remainder of the WAP ARRA contract, to other existing Subrecipients or New Providers.

(c) Unless otherwise determined by the Executive Director, Subrecipients or a New Provider will only qualify for Reobligation of Awarded Funds if they meet the criteria in paragraphs (1) - (5) of this subsection:

(1) If applicable, they have achieved 95% or more of monthly unit and expenditure Production Schedule targets for the previous three months;

(2) Subrecipients must have achieved 30% of total Production Schedule goals by August 31, 2010;

(3) have no significant outstanding unresolved monitoring findings;

(4) have had no significant unit quality or other concerns; and

(5) can demonstrate available capacity or expedited capacity building to administer additional Awarded Funds in a timely and appropriate manner.

(d) Awards of Reobligation. Awarded Funds to existing Subrecipients or New Providers will be based upon ability to meet Unit Production and Expenditures requirements as assessed by Department staff and other criteria consistent with ARRA, Department or state weatherization policy objectives. Priority will be given to serving priority populations as required by the Department of Energy.

(e) Subrecipients and New Providers may request an increase in their Awarded Funds with the Department or may be approached by the Department.

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

Filed with the Office of the Secretary of State on March 15, 2010.

TRD-201001305
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective Date: March 15, 2010
Expiration Date: July 12, 2010
For further information, please call: (512) 475-4595

♦ ♦ ♦ ♦
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 97. BUSINESS OPPORTUNITY
SUBCHAPTER B. FEES AND GENERAL INFORMATION

1 TAC §97.22, §97.23
The Office of the Secretary of State proposes amendments to §97.22 and §97.23, concerning business opportunity. The amendments are proposed to remove a requirement that notices of exemption and notices of voluntary termination of business opportunities include a statement that the person executing the document is authorized to do so. Such a statement is not required by the Business Opportunity Act, Business and Commerce Code, Chapter 51, and, upon further consideration of the requirement, the Office of the Secretary of State has determined that it would not be appropriate to reject notices of exemption or notices of voluntary termination for lack of such a statement.

FISCAL NOTE
Leigh A. Joseph, Attorney in 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 rules are in effect there will be no fiscal implications to state or local governments as a result of enforcing or administering the amendments as proposed.

PUBLIC BENEFIT AND SMALL BUSINESS COST NOTE
Ms. Joseph has determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing or administering the amendments as proposed will be to view the rules as corrected. 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
Comments on the proposed amendments may be submitted in writing to: Leigh A. Joseph, Office of the Secretary of State, Corporations Section, P.O. Box 13697, Austin, Texas 78711-3697. Comments must be received not later than 12:00 noon, April 26, 2010.

STATUTORY AUTHORITY
The amendments are proposed under the authority of the Business Opportunity Act, Business and Commerce Code, Chapter 51, which provides for the secretary of state to prescribe forms, set fees, and adopt rules to administer and enforce Chapter 51. No other code or statute is affected by the proposed amendments.

§97.22. Notice of Exemption.
(a) In addition to the information required by §51.003(b)(8) of the Business Opportunity Act, notice filed with the secretary of state pursuant to §51.003(b)(8) must contain:
(1) a statement that the franchisor claims an exemption under §51.003(b)(8), Business Opportunity Act;
(2) the date the notice is signed; and
(3) [(4)] the signature of the person executing the notice.
(b) The notice of exemption will be effective as of the date of receipt by the secretary of state of both the complete notice of exemption and the filing fee provided in §97.21 of this title (relating to Fees).

§97.23. Voluntary Termination.
(a) A voluntary termination of business opportunity filed with the secretary of state pursuant to §51.251, Business Opportunity Act, must contain:
(1) the name of the business opportunity;
(2) the date of registration of the business opportunity with the secretary of state;
(3) the registration number issued by the secretary of state;
(4) a statement of voluntary termination specifying the applicable subsection of §51.251, Business Opportunity Act;
(5) the date the statement is signed; and
(6) [(7)] the signature of the person executing the statement.
(b) The voluntary termination will be effective as of the date of receipt by the secretary of state of both the complete voluntary termination statement and the filing fee provided in §97.21 of this title (relating to Fees).

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

Filed with the Office of the Secretary of State on March 11, 2010.
TRD-201001245
PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 15. HEARING AID SERVICES

1 TAC §354.1231

The Texas Health and Human Services Commission (HHSC) proposes to amend §354.1231, concerning Benefits and Limitations, in Title 1, Part 15, Chapter 354, Subchapter A, Division 15, related to Medicaid hearing aid services.

Background and Justification

Section 354.1231 currently applies to Medicaid clients 21 years of age and older for whom hearing aid services are payable by the Texas Medicaid program. Hearing aid services for Medicaid clients younger than 21 years of age have been reimbursed using Medicaid funding through the Program for Amplification for Children of Texas (PACT) at the Department of State Health Services (DSHS). The PACT rules are currently located in the DSHS rule base.

The claims processing and administration of hearing aid services for Medicaid clients younger than 21 are being transferred from DSHS to HHSC. HHSC proposes to amend §354.1231 to add language related to hearing services for Medicaid clients younger than 21 years of age to the HHSC rule base and to remove extraneous language. DSHS is concurrently repealing the PACT rules.

Section-by-Section Summary

Language relating to home visit hearing evaluation is deleted in both subsections (a)(2) and (b)(6) because other Medicaid benefits rules do not specify place of service. Due to the deletion of subsection (b)(6), the remaining paragraphs are renumbered.

Subsection (b)(1) is amended to add hearing aid services for Medicaid clients younger than 21 as an HHSC-administered Medicaid benefit.

Subsection (b)(10) is added to clarify that Medicaid clients younger than 21 that do not meet the criteria of this amended rule, may submit a request for authorization through the Texas Health Steps Comprehensive Care Program.

Financial Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five years the amended rule is in effect there will be a fiscal impact to state government of $77,578 in 2010, $96,350 in 2011, $106,637 in 2012, $108,770 in 2013, $110,945 in 2014, and $113,164 in 2015. The proposed rule will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small and Micro-Business Impact Analysis

Ms. Rymal has also determined that there will not be an effect on small businesses or micro businesses to comply with the proposed amendment, as they will not be required to alter their business practices as a result of the rule. There are no anticipated economic costs to persons who are required to comply with the proposed rules. There is no anticipated negative impact on local employment.

Public Benefit

Billy Millwee, Associate Commissioner for Medicaid and CHIP, has determined that for each of the first five years the proposed rule is in effect, the public will benefit from the adoption of the rule. The anticipated public benefit, as a result of enforcing the proposed amendment, is increased availability of hearing aid services for Medicaid eligible children.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Clarice Cefai, Senior Policy Analyst, Medicaid/CHIP Division, Texas Health and Human Services Commission, P.O. Box 85200, Austin, TX 78798-5200, Mail Code H-390 91X, by fax to (512) 249-3707; or by e-mail to Clarice.Cefai@hhsc.state.tx.us within 30 days of the publication of this proposal in the Texas Register.

Public Hearing

A public hearing is scheduled for April 22, 2010, at 1:00 p.m. at the Health and Human Services Building H, Lone Star Conference Room, located at 11209 Metric Boulevard, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Leigh Van Kirk at (512) 491-2813.

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021(a); which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed amendment affects the Human Resources Code, Chapter 32, and the Texas Government Code, Chapters 531 and 533. No other statutes, articles, or codes are affected by this proposal.
§354.1231. Benefits and Limitations.

(a) Benefits. Reimbursement for hearing aid services available through the Texas Medical Assistance (Medicaid) Program shall be provided in accordance with federal regulations found at 42 CFR Subchapter C, Medical Assistance Programs, and the provisions and procedures found elsewhere in this chapter. The following hearing aid services shall be reimbursed through the Texas Medicaid Program:

(1) (No change.)

(2) Hearing aid evaluations, including home visit hearing evaluations;

(3) (No change.)

(b) Limitations and exclusions. All authorized hearing aid providers, as described in §354.1233 of this Division (relating to Requirements for Hearing Aid Services), must comply with the following conditions and limitations established by the Health and Human Services Commission (Commission) or its designee.

(1) Hearing aid services are available to persons who are 21 years of age and older and eligible for Medicaid services.

(2) (No change.)

(6) Recipients may receive home visit hearing evaluations and hearing aid fittings only on the written recommendation of a physician.

(6) (23) Hearing aids may be replaced once every five years.

(7) (23) Hearing aid services do not include auditory training, speechreading, or other types of rehabilitative services.

(8) (29) Hearing aids are limited to eligible recipients whose air conduction puretone average (500 Hz, 1000 Hz, 2000 Hz) in the better ear is 35 dB hearing loss (HL) or greater.

(9) (40) Recipients meet the criteria for binaural aids if they meet the conditions for a monaural hearing aid and have at least a 35 dB hearing loss in both ears.

(10) Recipients under the age of 21 that do not meet the criteria listed in this section may submit a request for authorization through the Texas Health Steps Comprehensive Care Program (THSteps-CCP).

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

Filed with the Office of the Secretary of State on March 15, 2010.
TRD-201001322
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 424-6900

DIVISION 28. TUBERCULOSIS

1 TAC §354.1371

The Texas Health and Human Services Commission (HHSC) proposes to amend §354.1371, concerning Benefits and Limitations, in Title 1, Part 15, Chapter 354, Subchapter A, Division 28, related to Medicaid tuberculosis services.

Background and Justification

The Centers for Medicare and Medicaid Services (CMS) requested that the Texas Medicaid tuberculosis (TB) billing system be revised to require providers to bill separately for each type of TB service, rather than bundling payment for services. In order to bring HHSC rules in line with this Medicaid policy, HHSC proposes to amend §354.1371 by deleting "contact investigations" (investigation of persons who had contact with a client with infectious TB) as a benefit. When all TB services were paid with one bundled rate, contact investigations were included as a benefit. Contact investigations are not a Medicaid benefit because they are not performed on or for Medicaid-eligible clients with infectious TB, but for those individuals who come in contact with Medicaid clients with infectious TB. The Department of State Health Services (DSHS) and TB clinics will still continue to conduct contact investigations for public health purposes.

In addition, HHSC is adding the requirement that a Medicaid client diagnosed with TB must receive physician services (provided by a physician, advanced practice nurse, or physician assistant) at least every 90 days. This requirement ensures that patients initially diagnosed and treated by TB staff follow-up care every 90 days.

Section-by-Section Summary

Subsection (a)(4) deletes language relating to "contact investigations" to align the rule with current policy. The subsequent paragraph is renumbered.

Subsection (b)(4) changes include:

deletion of "a physician must see the patient" and replacement with "physician services must be provided to the clinic’s patients" to clarify the service provided can be performed by a physician, advanced practice nurse, or a physician’s assistant;

addition of "every 90 days" to align the rule with current policy; and

additional changes for grammatical accuracy.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five years the amended rule is in effect there will be no fiscal impact to state government. The proposed rule will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small and Micro-Business Impact Analysis

Ms. Rymal has also determined that there will not be an effect on small businesses or micro businesses to comply with the proposed amendment, as they will not be required to alter their business practices as a result of the rule. There are no anticipated economic costs to persons who are required to comply with the proposed rule. There is no anticipated negative impact on local employment.

Public Benefit

Billy Millwee, Associate Commissioner for Medicaid and CHIP, has determined that for each of the first five years the proposed rule is in effect, the public will benefit from the adoption of the rule. The anticipated public benefit, as a result of enforcing the proposed amendment, is availability of TB services that are consistent with current Medicaid policy.

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

Take Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Clarice Cefai, Senior Policy Analyst, Medicaid/CHIP Division, Texas Health and Human Services Commission, P.O. Box 85200, Austin, TX 78708-5200, Mail Code H-390 91X; by fax to (512) 249-3707; or by e-mail to Clarice.Cefai@hhsc.state.tx.us within 30 days of the publication of this proposal in the Texas Register.

Public Hearing

A public hearing is scheduled for April 22, 2010, at 2:00 p.m. at the Health and Human Services Building H, Lone Star Conference Room, located at 11209 Metric Boulevard, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Leigh Van Kirk at (512) 491-2813.

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed amendment affects the Human Resources Code, Chapter 32, and the Texas Government Code, Chapters 531 and 533. No other statutes, articles, or codes are affected by this proposal.

§354.1371. Benefits and Limitations.

(a) Covered tuberculosis (TB)-related clinic benefits shall include:

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

(3) prescription drugs; and

(4) [contact investigations to investigate all persons who have had close contact with a known case or suspected case, and case coordination of the recipient’s medical care; and]

(4) [monitoring recipient compliance and completion of regimes of prescribed drugs including direct observation of recipient intake of prescribed drugs.

(b) TB clinics shall:

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

(4) employ or have a contract or formal arrangement with a licensed physician (Medical Doctor or Doctor of Osteopathy) who is responsible for providing medical direction and supervision over all services provided to the clinic’s patients. To meet this requirement, physician services must be provided to the clinic’s patients [a physician must see the patient] at least once every 90 days to [prescribe the type of care provided, and, if the services are not limited by the prescription, to periodically review the need for continued care;

(5) - (10) (No change.)

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

Filed with the Office of the Secretary of State on March 15, 2010.

TRD-201001323

Steve Aragon

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: April 25, 2010

For further information, please call: (512) 424-6900

SUBCHAPTER F. PHARMACY SERVICES

The Texas Health and Human Services Commission (HHSC) proposes to amend §354.1867, concerning Refills; §354.1924, concerning Preferred Drug List; and §354.1928, concerning Pharmaceutical and Therapeutics Committee, relating to Medicaid pharmacy services.

Background and Justification

The proposed changes are made in accordance with the direction of the Texas Legislature in H.B. 2030, 81st Legislature, Regular Session, 2009, which relates to the Medicaid Drug Utilization Review Program and prescription drug use under the Medicaid program.

Section 1 of H.B. 2030 adds §531.0694 to the Government Code, which requires HHSC to ensure that a prescription written by an authorized health care provider under the Medicaid program is valid for the lesser of the period for which the prescription is written or one year. Section 3 of the bill amends Government Code §534.072 to allow the Medicaid preferred drug list (PDL) to include a drug provided by a manufacturer or labeler that has not reached a supplemental rebate agreement with HHSC if the inclusion will have no negative cost impact to the state. Section 5 of the bill amends Government Code §534.074 to require that the Pharmaceutical & Therapeutics Committee (P&T Committee), or its designee, present on the HHSC internet website a summary of any clinical efficacy and safety information or analyses regarding a drug under consideration for the preferred drug list before the public hearing is held. HHSC proposes to amend its rules to reflect these statutory changes.

Section-by-Section Summary

Section 354.1867 states the limitations placed on Medicaid prescription refills. The rule amendment will increase the number of allowable refills from five to eleven and will extend the allowable refill period from within six months to within one year of the original prescription.

Section 354.1924 describes the requirements of the Medicaid PDL. New subsection (h) adds language to allow the PDL to include a drug provided by a manufacturer or labeler that has not reached a supplemental rebate agreement with HHSC if the inclusion will have no negative cost impact to the state.
Section 354.1928 describes the requirements of the P&T Committee, which provides recommendations to HHSC for the Medicaid PDL. New subsection (g) adds language requiring that the committee present to the public a summary of any clinical efficacy and safety information or analyses regarding a drug under consideration for the PDL that is provided by a private entity that has contracted with HHSC to provide the information. The information shall be provided before the public meeting in electronic form on HHSC’s internet website.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five-year period the amended rule is in effect there will be no fiscal impact to state government. The proposed rule will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small and Micro-Business Impact Analysis

Ms. Rymal also has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendment. The implementation of these proposed rule amendments does not require any changes in practice or any additional cost to the contracted provider.

HHSC does not anticipate that there will be any economic cost to persons who are required to comply with this amendment. The amendment will not affect local employment.

Public Benefit

Billy Millwee, Associate Commissioner for Medicaid and CHIP, has determined that for each year of the first five years the proposed amendment is in effect, the public benefit of enforcing the proposed amendment will be improved access to and quality of health care services and information.

Regulatory Analysis

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

Takings Impact Assessment

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

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

Public Comment

Written comments on the proposed amendments to the rules may be submitted to Leslie Weems, Medicaid/CHIP Division, Texas Health and Human Services Commission, P.O. Box 13247, H600, Austin, Texas 78711; by fax to (512) 491-1453; or by e-mail to leslie.weems@hhsc.state.tx.us within 30 days of publication of this proposal in the Texas Register.

Public Hearing

A public hearing is scheduled for April 14, 2010, at 10:00 a.m. at the Health and Human Services Building H, Lone Star Conference Room, located at 11209 Metric Boulevard, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Leigh Van Kirk at (512) 491-2813.

DIVISION 4. LIMITATIONS

I TAC §354.1867

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

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

§354.1867. Refills.

As many as [five] refills may be authorized by the prescriber, but the total amount authorized must be dispensed within one year [six months] of the original prescription. Refills for controlled substances must conform to Drug Enforcement Administration and Texas State Board of Pharmacy rules. All refills are counted when determining compliance with the authorized refill limitation. In the absence of specific refill instructions, the prescription must be interpreted as not refillable. If a prescription notes specific refill instructions, any future dispensings must be considered refills of the original prescription, unless the prescriber has been contacted for authorization to dispense a new supply of medication. If authorization is granted, a new and separate prescription is prepared.

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

Filed with the Office of the Secretary on March 15, 2010.

TRD-201001324
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission

Earliest possible date of adoption: April 25, 2010

For further information, please call: (512) 424-6900

DIVISION 7. TEXAS DRUG CODE INDEX--ADDITIONS, RETENTIONS, AND DELETIONS

I TAC §354.1924, §354.1928

The amendments are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021(a), which pro-
vide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

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

§354.1924. Preferred Drug List.

(a) (No change.)

(b) Applicability. This section applies to drugs included in the Texas Drug Code Index (TDCI) established under §354.1921 of this title (relating to Addition of Drugs to the Texas Drug Code Index).

(c) Selection of drugs for the PDL. HHSC will include a drug listed on the TDCI in the PDL on the basis of:

1. The recommendations of the Pharmaceutical and Therapeutics Committee (P&T committee) established under §354.1928 of this title (relating to Pharmaceutical and Therapeutics Committee);

2. (No change.)

3. Comparison of the price of the drug and the price of competing drugs. For purposes of this section, the price of a drug is determined by reference to the reimbursement for the drug established under [4 TAC] §355.8541 of this title (relating to Legend and Nonlegend Medications) and after deducting Texas and federal rebates;

4. - (No change.)

5. - (No change.)

(f) Exclusion of a drug from the PDL. A drug that is not included in the PDL will be subject to prior authorization by HHSC or its designee in accordance with §354.1832 of this title (relating to Prior Authorization Procedures).

(g) (No change.)

(h) Notwithstanding subsection (g) of this section, the preferred drug list may contain a drug provided by a manufacturer or labeler that has not reached a supplemental rebate agreement with HHSC if HHSC determines that inclusion of the drug on the preferred drug list will have no negative cost impact to the state, in accordance with §531.072 of the Government Code.

§354.1928. Pharmaceutical and Therapeutics Committee.

(a) - (f) (No change.)

(g) The P&T committee or its designee shall present a summary of any clinical efficacy and safety information or analyses regarding a drug under consideration for a preferred drug list that is provided to the committee by a private entity that has contracted with HHSC to provide the information. The committee or the committee’s designee shall provide the summary in electronic form before the public meeting at which consideration of the drug occurs. Confidential information described by §531.071 of the Government Code must be omitted from the summary. The summary must be posted on HHSC’s Internet website.

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

Filed with the Office of the Secretary of State on March 15, 2010.

TRD-201001325

Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 424-6900

CHAPTER 355. REIMBURSEMENT RATES
SUBCHAPTER A. COST DETERMINATION PROCESS

1 TAC §355.112

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.112, concerning Attendant Compensation Rate Enhancement, under Title 1, Part 15, Chapter 355, Subchapter A.

Background and Justification

Currently, providers of Intermediate Care Facility for Persons with Mental Retardation (ICF/MR) and Home and Community-Based Services (HCS) waiver services are subject to the fiscal accountability system described under Title 1, Part 15, Chapter 355, Subchapter D, §355.457, Fiscal Accountability, for ICF/MR, and Title 1, Part 15, Chapter 355, Subchapter F, §355.722, Reporting Costs by Home and Community-based Services (HCS) Providers, for HCS. Providers of Texas Home Living (TxHmL) waiver services are not currently subject to fiscal accountability.

Fiscal accountability requires all ICF/MR and HCS providers to meet certain spending requirements for a broad range of staff including direct care staff, first line supervisors, licensed professionals, Qualified Mental Retardation Professionals (QMRPs) and case managers and is complex and prescriptive. Providers and the Health and Human Services Commission (HHSC) have both expressed concerns that the system is not sustainable over the long term. In response to these concerns, the Legislature, through the 2010-11 General Appropriations Act (S.B. 1, Article II, Health and Human Services Commission, Rider 67), authorized HHSC to discontinue fiscal accountability spending requirements contingent upon the implementation of a rate enhancement system or other appropriate financial performance standards.

In response to Rider 67, HHSC is amending §355.457 and §355.722 to limit the current fiscal accountability system for services delivered on or before August 31, 2009, amending Title 1, Part 15, Chapter 355, Subchapter D, §355.456, Reimbursement Methodology and Title 1, Part 15, Chapter 355, Subchapter F, §355.723, Reimbursement Methodology for Home and Community-Based Services (HCS), to enable reimbursement rates for direct service workers, direct care trainers and job coaches in the ICF/MR, TxHmL and HCS programs to be determined as per §355.112 and proposes to incorporate the ICF/MR, HCS and TxHmL programs under §355.112, which describes the Attendant Compensation Rate Enhancement program, effective September 1, 2010. HHSC is also amending Title 1, Part 15, Chapter 355, Subchapter F, §355.791, Reporting Costs and Reimbursement Methodology for the Texas Home Living (TxHmL) Program, to delete stand-alone cost reporting requirements for TxHmL and §355.722 to incorporate TxHmL under the cost reporting requirements for HCS. The proposed amendments
Section 355.112, relating to Attendant Compensation Rate Enhancement, currently outlines the requirements providers must meet to receive and retain enhanced funding for attendant compensation in the Primary Home Care (PHC); Day Activity and Health Services (DAHS); Residential Care (RC); Community Living Assistance and Support Services (CLASS)--Direct Service Agency (DSA); Community-Based Alternatives (CBA)--Home and Community Support Services (HCSS); Integrated Care Management (ICM)-HCSS; Deaf-Blind Multiple Disabilities Waiver (DBMD); CBA--Assisted Living/Residential Care (AL/RC); and ICM AL/RC programs.

The Attendant Compensation Rate Enhancement is a voluntary program; only those providers who participate and receive enhanced rates are required to meet spending requirements. Enrollment is conducted annually and each provider submits a contract amendment indicating their desire to enroll in the enhancement and their agreement to comply with enhancement reporting and spending requirements. Participating providers are paid an enhanced rate, which is intended to be passed through to their attendants in the form of increased compensation. Participating providers who spend at least 90 percent of the part of their payment rate intended for attendants on attendants are not subject to a recoupment of funds. Participating providers who spend less than 90 percent of the part of their payment rate intended for attendants on attendants are subject to a recoupment of the difference between their attendant payment rate and their attendant compensation expenses. At no time will a participating provider’s payment rate be reduced below the level of a non-participating provider’s payment rate.

The Attendant Compensation Rate Enhancement has been in place since September 1, 2000. It is a popular program that gives incentives to providers to increase compensation for those employees most likely to work directly with consumers. The program is simple to administer and is not subject to the complexities and contention that have made ICF/MR and HCS fiscal accountability difficult to administer and maintain.

HHSC, under its authority and responsibility to administer and implement rates, proposes to update §355.112 to add the non-state-operated ICF/MR program and the HCS and TxHmL waiver programs to the Attendant Compensation Rate Enhancement. Eligible programs will be divided into two populations: 1) programs currently incorporated into the Attendant Compensation Rate Enhancement (e.g., the PHC; DAHS; RC; CLASS--DSA; CBA--HCSS; ICM-HCSS; DBMD; CBA--AL/RC; and ICM AL/RC programs); and 2) programs being added to the enhancement (e.g., the ICF/MR; HCS; and TxHmL programs). Enhancements for the two populations will be funded separately; funds intended for enhancements for the first population of programs will never be used for enhancements for the second population and funds intended for enhancements for the second population of programs will never be used for enhancements for the first population.

Section-by-Section Summary
HHSC proposes to make the following amendments to §355.112:

Revise subsection (a) to add the ICF/MR, HCS and TxHmL programs to the list of programs eligible for the Attendant Compensation Rate Enhancement and to specify that CLASS-DASA is the acronym for Community Living Assistance and Support Services - Direct Service Agency.

Revise subsection (b)(1) to add the ICF/MR program and HCS Supervised Living (SL) and Residential Support Services (RSS) services to the list of programs and services where an attendant may perform some nonattendant functions and still be considered an attendant.

Revise subsection (b)(2) to add QMRPs, assistant QMRPs, direct care worker supervisors, direct care trainer supervisors, job coach supervisors and foster care providers to the list of positions that may not be considered to be attendants.

Revise subsection (b)(3) to indicate that, in the ICF/MR program and for HCS SL/RSS services, an attendant can be a driver.

Add a new subsection (b)(5) which indicates that an attendant also includes direct care workers, direct care trainers and job coaches in the ICF/MR, HCS and TxHmL programs.

Revise subsection (c)(1) to indicate that allowable ICF/MR attendant compensation is subject to the requirements detailed in §355.457 and allowable HCS and TxHmL attendant compensation is subject to the requirements detailed in §355.722.

Modify subsection (f) to divide its content into various paragraphs and subparagraphs for clarity.

Modify re-designated subsection (f)(1) to limit its application to the CBA-HCSS and AL/RC, CLASS-DASA, DBMD, DAHS, ICM-HCSS and AL/RC, RC and PHC programs.

Modify re-designated subsection (f)(1)(A) to change the word "participating" to "participate".

Add a new subsection (f)(2) and subsection (f)(2)(A) and (B) to describe enrollment contract amendment requirements for the ICF/MR, HCS and TxHmL programs.

Modify re-designated subsection (f)(3) to include participating component codes for ICF/MR, HCS and TxHmL.

Modify subsection (g) to: 1) add a component code delivering its first day of service to a Department of Aging and Disability Services (DADS) client on or after the first day of the open enrollment period to the definition of a new contract; 2) to indicate that contracts that underwent a change of ownership and new contracts that are part of an existing component code are not considered new contracts for purposes of this section; and 3) change the word contractors to contracts.

Modify subsection (h)(2)(B) to apply to providers changing ownership through a change of ownership. Currently, the subparagraph only applies to providers changing ownership through a contract assignment.

Modify subsection (h)(2)(C) and (D) to clarify their meaning.

Modify subsection (h)(2)(E) to add the word "the" for clarity.

Modify subsection (h)(4) to replace the term "contractor" with the term "provider".

Modify subsection (h)(4)(A) to include component codes.

Modify subsection (h)(4)(B) to include component codes and ownership changes and to change the word "that" to "and" for clarity.

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Modify subsection (j) to indicate that, for the ICF/MR program, cost reports must also be completed in accordance with §355.457 and, for the HCS and TxHmL programs, cost reports must also be completed in accordance with §355.722.

Modify subsection (k) to include references to component codes as well as contracts and to indicate that: 1) for providers delivering services to both HCS and TxHmL clients, participation in the Attendant Compensation Rate enhancement includes both programs; 2) for the ICF/MR program, participation in the Attendant Compensation Rate enhancement is determined separately for residential services and day habilitation services; and 3) for the HCS and TxHmL programs, participation in the Attendant Compensation Rate enhancement is determined separately for non-day habilitation services and day habilitation services.

Modify subsection (l) to create a new subsection (l)(1), to limit the applicability of (l)(1) to the PHC, DAHS, RC, CLASS-DSA, CBA-HCSS, ICM-HCSS, DBMD, CBA-AL/RC and ICM-AL/RC programs and to re-designate subsection (l)(1) as subsection (l)(1)(A), subsection (l)(2) as subsection (l)(1)(B), subsection (l)(3) as subsection (l)(1)(C), and subsection (l)(4) as subsection (l)(1)(D).

Modify re-designated subsection (l)(1)(C) to clarify that the attendant compensation rate component for nonparticipating contracts for PHC, DAHS, CLASS-DSA, CBA-HCSS, ICM-HCSS and DBMD includes a 4.4 percent mark-up while the attendant compensation rate component for nonparticipating contracts for RC, CBA-AL/RC and ICM-AL/RC includes a 7.0 percent mark-up.

Modify re-designated subsection (l)(1)(D) to indicate that the attendant compensation rate component for nonparticipating contracts will remain constant over time, except in the case of increases to the attendant compensation rate component for nonparticipating contracts explicitly mandated by the Texas legislature and for adjustments necessitated by increases in the minimum wage.

Add a new subsection (l)(2) and subsection (l)(2)(A) - (C) which describe the calculation of the attendant compensation rate component for nonparticipating contracts for ICF/MR day habilitation, ICF/MR residential services, and the various HCS and TxHmL services incorporated in the Attendant Compensation Rate Enhancement.

Modify subsection (o) to include component codes and to divide its content into various paragraphs.

Modify re-designated subsection (o)(1) to limit its application to the CBA-HCSS and AL/RC, CLASS-DSA, DBMD, DAHS, ICM-HCSS and AL/RC, and RC programs.

Add a new subsection (o)(3) which indicates that ICF/MR providers must select a single attendant compensation level for all contracts within a component code for the day habilitation and/or residential services they have selected for participation. This new paragraph also indicates that ICF/MR providers who select to have their component codes participate as a group must select a single attendant compensation level for their entire group of contracts for the day habilitation and/or residential services they have selected for participation.

Add a new subsection (o)(4) which indicates that HCS and TxHmL providers must select a single attendant compensation level for all contracts within a component code for the non-day habilitation and/or day habilitation services they have selected for participation. This new paragraph also indicates that HCS and TxHmL providers who select to have their component codes participate as a group must select a single attendant compensation level for their entire group of contracts for the non-day habilitation services and/or day habilitation services they have selected for participation.

Modify subsection (p) to indicate that eligible programs are divided into two populations for purposes of granting attendant compensation rate enhancements. The first population includes the PHC; DAHS; RC; CLASS--DSA; CBA--HCSS; ICM-HCSS; DBMD; CBA--AL/RC; and ICM AL/RC programs and the second population includes the ICF/MR; HCS; and TxHmL programs. Enhancements for the two populations are funded separately; funds intended for enhancements for the first population of programs will never be used for enhancements for the second population and funds intended for enhancements for the second population of programs will never be used for enhancements for the first population. As a result, the process described in subsection (p) for granting attendant compensation rate enhancements is applied separately for each population of programs.

Modify subsection (p)(1) to add a reference to component codes.

Modify subsection (q) to add a reference to component codes.

Modify subsection (s) to add a reference to component codes and to indicate that compliance with the spending requirement for providers delivering services in both the HCS and TxHmL programs is determined by combining both programs rather than by evaluating each program individually.

Modify subsection (s)(3) to add a reference to component codes.

Modify subsection (u)(3) to apply to providers changing ownership through a change of ownership. Currently, the paragraph only applies to providers changing ownership through a contract assignment.

Modify subclauses under subsection (w) to add missing words and to change the words “as provided” to “as described in” for clarity.

Modify subsection (x) to add references to component codes and to indicate that providers whose contracts are participating as part of a component code must request withdrawal of all the contracts in the component code if they request to withdraw from the Attendant Compensation Rate Enhancement.

Modify subsection (y) to add references to component codes and to indicate that providers whose contracts are participating as part of a component code must request the same reduction for all the contracts in the component code if they request a reduction in the attendant compensation requirements and associated enhancement payments.

Modify subsection (ee) to add a reference to component codes.

Add a new subsection (ff) which details conditions for participation for ICF/MR, HCS and TxHmL providers specifying their wish to have day habilitation services participate in the Attendant Compensation Rate Enhancement. These conditions include: 1) reporting job trainer and job coach compensation and hours on the required cost report items; and 2) ensuring access to any and all records necessary to verify information pertaining to job trainers and job coaches, including ensuring access to records held by a non-related-party day habilitation provider. Failure to comply with these conditions will result in recoupment of all attendant compensation rate enhancement funds associated with the day habilitation service. Providers specifying their wish to have day habilitation services participate in the attendant com-
pensation rate enhancement will be required to certify during the enrollment process that they will comply with these conditions.

Add a new subsection (gg) which indicates that for ICF/MR, HCS and TxHmL, new contracts within existing component codes will be assigned a level of participation equal to the existing component code’s level of participation effective on the start date of the contract as recognized by HHSC or its designee.

Renumber subsection (ff) as (hh).

Fiscal Note

Gordon E. Taylor, Chief Financial Officer for the Department of Aging and Disability Services, has determined that during the first five-year period the amended rule is in effect there will be a fiscal impact to state government as a result of funding attendant compensation rate enhancement payments for the ICF/MR, HCS and TxHmL programs of $2,998,159 for state fiscal year (FY) 2011; $3,253,918 for FY 2012; $3,253,918 for FY 2013; $3,253,918 for FY 2014; and $3,253,918 for FY 2015. The amended rule will not result in any fiscal implications for local health and human services agencies. There are no fiscal implications for local governments as a result of enforcing or administering the section.

Small Business and Micro-business Impact Analysis

HHSC has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendment. The implementation of the proposed rule amendment does not require any changes in practice or any additional cost to the contracted provider.

HHSC does not anticipate that there will be any economic cost to persons who are required to comply with this amendment. The amendment will not affect local employment.

Public Benefit

Kevin Nolting, Acting Director of Rate Analysis, has determined that for each of the first five years the amendment is in effect, the expected public benefit is that ICF/MR, HCS and TxHmL providers will be able to access funds to increase compensation for their attendant-type staff and that these providers will be held accountable for the expenditure of these funds on attendant compensation as intended.

Takings Impact Assessment

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

Regulatory Analysis

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

Public Comment

Questions about the content of this proposal may be directed to Pam McDonald in the HHSC Rate Analysis Department by telephone at (512) 491-1373. Written comments on the proposal may be submitted to Ms. McDonald by facsimile at (512) 491-1998, by e-mail to pam.mcdonald@hhsc.state.tx.us, or by mail to HHSC Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas, 78708-5200, within 30 days of publication of this proposal in the Texas Register.

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission’s duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

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

§355.112. Attendee Compensation Rate Enhancement.

(a) Eligible programs. Providers contracted in the Intermediate Care Facilities for Persons with Mental Retardation (ICF/MR), Home and Community-based Services (HCS), Texas Home Living (TxHmL), Primary Home Care (PHIC); Day Activity and Health Services (DAHS); Residential Care (RC); Community Living Assistance and Support Services (CLASS) – Direct Service Agency (DSA); Community Based Alternatives (CBA) – Home and Community Support Services (HCSS); Integrated Care Management (ICM) – HCSS; Deaf-Blind Multiple Disabilities Waiver (DBMD); CBA-Assisted Living/Residential Care (AL/RC) programs; and ICM AL/RC are eligible to participate in the attendant compensation rate enhancement. References in this section to CBA program services also apply to the parallel services offered under the ICM program.

(b) Definition of attendant. An attendant is an unlicensed caregiver providing direct assistance to the clients with Activities of Daily Living (ADL) and Instrumental Activities of Daily Living (IADL).

(1) In the case of the ICF/MR, DAHS, RC, and CBA AL/RC programs and HCS Supervised Living (SL) and Residential Support Services (RSS) services, the attendant may perform some nonattendant functions. In such cases, the attendant must perform attendant functions at least 80% of his or her total time worked. Staff in these settings not providing attendant services at least 80% of their total time worked are not considered attendants. Time studies must be performed in accordance with §355.105(b)(2)(B)(i) of this title (relating to General Reporting and Documentation Requirements, Methods and Procedures) for staff in the ICF/MR, DAHS, RC, and CBA AL/RC programs and HCS SL/RSS services that are not full-time attendants but perform attendant functions to determine if a staff member meets this 80% requirement. Failure to perform the time studies for these staff will result in the staff not being considered to be attendants.

(2) Attendants do not include the director, administrator, assistant director, assistant administrator, clerical and secretarial staff, professional staff, other administrative staff, licensed staff, attendants, cooks and kitchen staff, maintenance and groundskeeping staff, activity director, Qualified Mental Retardation Professionals (QMRPs), assistant QMRPs, direct care worker supervisors, direct care worker supervisors, job coach supervisors, foster care providers, and laundry and housekeeping staff. In the case of HCS Supported Home
An attendant also includes a driver in the ICF/MR, DAHS, RC, and CBA AL/RC programs and HCS SL/RSS services.

An attendant also includes medication aides in the RC and CBA AL/RC programs.

An attendant also includes direct care workers, direct care trainers and job coaches in the ICF/MR, HCS and TxHmL programs.

Attendant compensation cost center. This cost center will include employee compensation, contract labor costs, and personal vehicle mileage reimbursement for attendants as defined in subsection (b) of this section.

Attendant compensation is the allowable compensation for attendants defined in §355.103(b)(1) of this title (relating to Specifications for Allowable and Unallowable Costs) and required to be reported as either salaries and/or wages, including payroll taxes and workers’ compensation, or employee benefits. Benefits required by §355.103(b)(1)(A)(iii) of this title to be reported as costs applicable to specific cost report line items, except as noted in paragraph (3) of this subsection, are not to be included in this cost center. For ICF/MR, attendant compensation is also subject to the requirements detailed in §355.457 of this title (relating to Cost Finding Methodology). For HCS and TxHmL, attendant compensation is also subject to the requirements detailed in §355.722 of this title (relating to Reporting Costs by Home and Community-based Services (HCS) Providers) and Texas Home Living (TxHmL) Providers.

Contract labor refers to personnel for whom the contracted provider is not responsible for the payment of payroll taxes, such as FICA, Medicare, and federal and state unemployment insurance, and who perform tasks routinely performed by employees where allowed by program rules. Allowable contract labor costs are defined in §355.103(b)(2)(C) of this title.

Mileage reimbursement paid to the attendant for the use of his or her personal vehicle and which is not subject to payroll taxes is considered compensation for this cost center.

Rate year. The rate year begins on the first day of September and ends on the last day of August of the following year.

Open enrollment. Open enrollment begins on the first day of July and ends on the last day of that same July preceding the rate year for which payments are being determined, unless the Texas Health and Human Services Commission (HHSC) notified providers before the first day of July that open enrollment has been postponed or cancelled. Should conditions warrant, HHSC may conduct additional enrollment periods during a rate year.

Enrollment contract amendment.

For CBA--HCSS and AL/RC, CLASS--DSA, DBMD, DAHS, ICM--HCSS and AL/RC, RC and PHC, an initial enrollment contract amendment is required from each provider choosing to participate in the attendant compensation rate enhancement. The initial enrollment contract amendment, the provider must specify for each contract a desire to participate or not to participate. The participating provider must specify for each program the desire to have all participating contracts be considered as a group as defined in subsection (ee) of this section or as individuals for purposes related to the attendant compensation rate enhancement.

For the PHC program, the participating provider must also specify if he wishes to have priority, nonpriority, or both priority and nonpriority services participate (participating) in the attendant compensation rate enhancement. If the PHC provider selects to have their contracts participating as a group as defined in subsection (ee) of this section, then the provider must select to have priority, nonpriority, or both priority and nonpriority services participate for the entire group of contracts.

For providers delivering services to both RC and CBA AL/RC clients in the same facility, participation includes both the RC and CBA AL/RC programs.

For ICF/MR, HCS and TxHmL, an initial enrollment contract amendment is required from each provider choosing to participate in the attendant compensation rate enhancement. On the initial enrollment contract amendment, the provider must specify for each component code a desire to participate or not to participate. All contracts of a component code within a specific program must either participate or not participate. The participating provider must specify for each program the desire to have all participating component codes be considered as a group as defined in subsection (ee) of this section or as individuals for purposes related to the attendant compensation rate enhancement.

For the ICF/MR program, the participating provider must also specify the services he wishes to have participate in the attendant compensation rate enhancement. Eligible services are residential services and day habilitation services. The participating provider must specify whether he wishes to participate for residential services only, day habilitation services only or both residential services and day habilitation services. If the ICF/MR provider selects to have their component codes participate as a group as defined in subsection (ee) of this section, then the provider must have all participating services participate as a group.

For the HCS and TxHmL programs, eligible services are divided into two categories: non-day habilitation services and day habilitation services. The non-day habilitation services category includes SL/RSS, supported home living/community supports, respite, supported employment and employment assistance. The day habilitation services category includes day habilitation. The participating provider must specify whether he wishes to participate for non-day habilitation services only, day habilitation services only or both non-day habilitation services and day habilitation services. If the HCS/TxHmL provider selects to have their component codes participating as a group as defined in subsection (ee) of this section, then the provider must have all participating categories participate as a group. For providers delivering services in both the HCS and TxHmL programs, the categories selected for participation must be the same for their HCS and TxHmL programs.

After initial enrollment, participating and nonparticipating providers may request to modify their enrollment status during any open enrollment period. A nonparticipant can request to become a participant; a participant can request to become a nonparticipant; a participant can request to change its participation level; a provider whose participating contracts (for ICF/MR, HCS and TxHmL, participating component codes), are being considered as a group can request to have them considered as individuals; and a provider whose participating contracts (for ICF/MR, HCS and TxHmL, participating component codes), are being considered as individuals can request to have them considered as a group.

Providers whose prior year enrollment was limited by subsection (i) of this section who request to increase their enrollment...
levels will be limited to increases of three or fewer enhancement levels during any single open enrollment period.

(5) Requests to modify a provider’s enrollment status during an open enrollment period must be received by HHSC Rate Analysis by the last day of the open enrollment period as per subsection (e) of this section. If the last day of open enrollment is on a weekend day, state holiday, or national holiday, the next business day will be considered the last day requests will be accepted. Providers from which HHSC Rate Analysis has not received an acceptable request to modify their enrollment by the last day of the open enrollment period will continue at the level of participation and group or individual status in effect during the open enrollment period within available funds until the provider notifies HHSC in accordance with subsection (x) of this section that it no longer wishes to participate or until the provider’s enrollment is limited in accordance with subsection (u) of this section.

(6) To be acceptable, an enrollment contract amendment must be completed according to instructions, signed by an authorized representative as per the Texas Department of Aging and Disability Services’ (DADS’) signature authority designation form applicable to the provider’s contract or ownership type, and legible.

(g) New contracts. For the purposes of this section, for each rate year a new contract is defined as a contract or component code delivering its first day of service to a DADS client on or after the first day of the open enrollment period, as defined in subsection (e) of this section, for that rate year. Contracts that underwent a contract assignment or change of ownership and new contracts that are part of an existing component code are not considered new contracts. For purposes of this subsection, an acceptable contract amendment is defined as a legible enrollment contract amendment that has been completed according to instructions, signed by an authorized representative as per the DADS’ signature authority designation form applicable to the provider’s contract or ownership type, and received by HHSC Rate Analysis within 30 days of the mailing of notification to the provider that such an enrollment contract amendment must be submitted. If the 30th day is on a weekend day, state holiday, or national holiday, the next business day will be considered the last day requests will be accepted. New contracts will receive the nonparticipant attendant compensation rate as specified in subsection (l) of this section with no enhancements. For new contracts [contractor[s]] specifying their desire to participate in the attendant compensation rate enhancement on an acceptable enrollment contract amendment, the attendant compensation rate is adjusted as specified in subsection (r) of this section, effective on the first day of the month following receipt by HHSC of an acceptable enrollment contract amendment. If the granting of newly requested enhancements was limited by subsection (p)(2)(B) of this section during the most recent enrollment, enrollment for new contracts will be subject to that same limitation. If the most recent enrollment was cancelled by subsection (e) of this section, new contracts will not be permitted to be enrolled.

(h) Attendant Compensation Report submittal requirements.

(1) Annual Attendant Compensation Report. For services delivered on or before August 31, 2009, providers must file Attendant Compensation Reports as follows. All participating contracted providers will provide HHSC Rate Analysis, in a method specified by HHSC Rate Analysis, an annual Attendant Compensation Report reflecting the activities of the provider while delivering contracted services from the first day of the rate year through the last day of the rate year. This report must be submitted for each participating contract if the provider requested participation individually for each contract; or, if the provider requested participation as a group, the report must be submitted as a single aggregate report covering all contracts participating at the end of the rate year within one program of the provider. A participating contract that has been terminated in accordance with subsection (v) of this section or that has undergone a contract assignment in accordance with subsection (w) of this section will be considered to have participated on an individual basis for compliance with reporting requirements for the owner prior to the termination or contract assignment. This report will be used as the basis for determining compliance with the spending requirements and recoupment amounts as described in subsection (s) of this section. Contracted providers failing to submit an acceptable annual Attendant Compensation Report within 60 days of the end of the rate year will be placed on vendor hold until such time as an acceptable report is received and processed by HHSC Rate Analysis.

(A) When a participating provider changes ownership through a contract assignment, the prior owner must submit an Attendant Compensation Report covering the period from the beginning of the rate year to the effective date of the contract assignment as determined by HHSC, or its designee. This report will be used as the basis for determining any recoupment amounts as described in subsection (s) of this section. The new owner will be required to submit an Attendant Compensation Report covering the period from the day after the date recognized by HHSC, or its designee, as the contract-assignment effective date to the end of the rate year.

(B) Participating providers whose contracts are terminated voluntarily or involuntarily must submit an Attendant Compensation Report covering the period from the beginning of the rate year to the date recognized by HHSC or its designee as the contract termination date. This report will be used as the basis for determining recoupment as described in subsection (s) of this section.

(C) Participating providers who voluntarily withdraw from participation, as described in subsection (x) of this section, must submit an Attendant Compensation Report within 60 days from the date of withdrawal as determined by HHSC. This report must cover the period from the beginning of the rate year through the date of withdrawal as determined by HHSC and will be used as the basis for determining any recoupment amounts as described in subsection (s) of this section.

(D) Participating providers whose cost report year, as defined in §355.105(b)(5) of this title, coincides with the state of Texas fiscal year, are exempt from the requirement to submit a separate annual Attendant Compensation Report. For these contracts, their cost report will be considered their annual Attendant Compensation Report.

(2) For services delivered on September 1, 2009, and thereafter, cost reports as described in §355.105(b) of this title will replace the Attendant Compensation Report with the following exceptions:

(A) For services delivered from September 1, 2009, to August 31, 2010, participating providers may be required to submit Transition Attendant Compensation Reports in addition to required cost reports. The Transition Attendant Compensation Report reporting period will include those days in calendar years 2009 and 2010 not included in either the 2009 Transition Attendant Compensation report or the provider’s 2010 cost report. This report must be submitted for each participating contract if the provider requested participation individually for each contract; or, if the provider requested participation as a group, the report must be submitted as a single aggregate report covering all contracts participating at the end of the transition reporting period within one program of the provider. A participating contract that has been terminated in accordance with subsection (v) of this section or that has undergone a contract assignment in accordance with subsection (w) of this section will be considered to have participated on an individual basis for compliance with transition reporting requirements for the owner prior to the termination or contract assignment. This report will be used as the basis for determining any recoupment amounts as described in subsection (s) of this section for the transition
reporting period. Participating providers failing to submit an acceptable Transition Attendant Compensation Report within 60 days of the date of the HHSC request for the report will be placed on vendor hold until such time as an acceptable report is received and processed by HHSC Rate Analysis.

(B) When a participating provider changes ownership through a contract assignment or change of ownership, the previous owner must submit an Attendant Compensation Report covering the period from the beginning of the provider’s cost reporting period to the date recognized by HHSC, or its designee, as the contract-assignment or ownership-change effective date. This report will be used as the basis for determining any recoupment amounts as described in subsection (s) of this section. The new owner will be required to submit a cost report covering the period from the day after the date recognized by HHSC or its designee as the contract-assignment or ownership-change effective date to the end of the provider’s fiscal year.

(C) When one or more contracts of a participating provider [Participating providers whose contracts] are terminated, either voluntarily or involuntarily, the provider must submit an Attendant Compensation Report for the terminated contract(s) covering the period from the beginning of the provider’s cost reporting period to the date recognized by HHSC, or its designee, as the contract termination date. This report will be used as the basis for determining any recoupment amounts as described in subsection (s) of this section.

(D) When one or more contracts of a participating provider is [Participating providers who] voluntarily withdrawn [withdrawn] from participation as per subsection (x) of this section, the provider must submit an Attendant Compensation Report within 60 days of the date of withdrawal as determined by HHSC, covering the period from the beginning of the provider’s cost reporting period to the date of withdrawal as determined by HHSC. This report will be used as the basis for determining any recoupment amounts as described in subsection (s) of this section. These providers must still submit a cost report covering the entire cost reporting period. The cost report will not be used for determining any recoupment amounts.

(E) For new contracts as defined in subsection (g) of this section, the cost reporting period will begin with the effective date of participation in the enhancement.

(F) Existing providers who become participants in the enhancement as a result of the open enrollment process described in subsection (e) of this section on any day other than the first day of their fiscal year are required to submit an Attendant Compensation Report with a reporting period that begins on their first day of participation in the enhancement and ends on the last day of the provider’s fiscal year. This report will be used as the basis for determining any recoupment amounts as described in subsection (s) of this section. These providers must still submit a cost report covering the entire cost reporting period. The cost report will not be used for determining any recoupment amounts.

(3) Other reports. HHSC may require other reports from all contracts as needed.

(4) Vendor hold. HHSC, or its designee, will place on hold the vendor payments for any participating provider [contractor] who does not submit a timely report as described in paragraph (1) of this subsection, or for services delivered on or after September 1, 2009, a timely report as described in paragraph (2) of this subsection completed in accordance with all applicable rules and instructions. This vendor hold will remain in effect until HHSC Rate Analysis receives an acceptable report.

(A) Participating contracts or component codes that do not submit an acceptable report completed in accordance with all applicable rules and instructions within 60 days of the due dates described in this subsection or, for cost reports, the due dates described in §355.105(b) of this title will become nonparticipants retroactive to the first day of the reporting period in question and will be subject to an immediate recoupment of funds related to participation paid to the contractor for services provided during the reporting period in question. These contracts or component codes will remain nonparticipants and recouped funds will not be restored until they submit an acceptable report and repay to HHSC, or its designee, funds identified for recoupment from subsection (s) of this section. If an acceptable report is not received within 365 days of the due date, the recoupment will become permanent and, if all funds associated with participation during the reporting period in question have been recouped by HHSC, or its designee, the vendor hold associated with the report will be released.

(B) Participating contracts or component codes that have terminated or undergone a contract assignment or ownership change from one legal entity to a different legal entity and [that] do not submit an acceptable report completed in accordance with all applicable rules and instructions within 60 days of the contract assignment, ownership change or contract termination effective date will become nonparticipants retroactive to the first day of the reporting period in question. These contracts or component codes will remain nonparticipants and recouped funds will not be restored until they submit an acceptable report and repay to HHSC, or its designee, funds identified for recoupment under subsection (s) of this section. If an acceptable report is not received within 365 days of the contract assignment, ownership change or contract termination effective date, the recoupment will become permanent and, if all funds associated with participation during the reporting period in question have been recouped by HHSC, or its designee, the vendor hold associated with the report will be released.

(5) Provider-initiated amended Attendant Compensation Reports and cost reports functioning as Attendant Compensation Reports. Reports must be received prior to the date the provider is notified of compliance with spending requirements for the report in question in accordance with subsection (s) of this section.

(i) Report contents. Each Attendant Compensation Report and cost report functioning as an Attendant Compensation Report will include any information required by HHSC to implement this attendant compensation rate enhancement.

(j) Completion of compensation reports. All Attendant Compensation Reports and cost reports functioning as Attendant Compensation Reports must be completed in accordance with the provisions of §§355.102 - 355.105 of this title (relating to General Principles of Allowable and Unallowable Costs, Specifications for Allowable and Unallowable Costs, Revenues, and General Reporting and Documentation Requirements, Methods, and Procedures) and may be reviewed or audited in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports). Beginning with the rate year that starts September 1, 2002, all Attendant Compensation Reports and cost reports functioning as Attendant Compensation Reports must be completed by preparers who have attended the required cost report training for the applicable program under §355.102(d) of this title. For services delivered on or before August 31, 2009, for Attendant Compensation Reports for even numbered state fiscal years, preparers must have attended the cost report training for that same even numbered year. For Attendant Compensation Reports for odd numbered state fiscal years, preparers must have attended the most recent cost report training sessions provided prior to the due date of the Attendant Compensation Report. For services delivered on or af-
ter September 1, 2009, preparers must have attended cost report training as described in §355.102(d) of this title. For the ICF/MR program, cost reports functioning as Attendant Compensation Reports must also be completed in accordance with the provisions of §355.457 of this title. For the HCS and TxHmL programs, cost reports functioning as Attendant Compensation Reports must also be completed in accordance with the provisions of §355.722 of this title (relating to Reporting Costs by Home and Community-based Services (HCS) Providers) and Texas Home Living (TxHmL Providers).

(k) Enrollment. Providers choosing to participate in the attendant compensation rate enhancement must submit to HHSC a signed enrollment contract amendment as described in subsection (f) of this section. Participation is determined separately for each program specified in subsection (a) of this section, except that for providers delivering services to both RC and CBA AL/RC clients in the same facility, participation includes both the RC and CBA AL/RC programs and for providers delivering services to both HCS and TxHmL clients, participation includes both the HCS and TxHmL programs. For PHC, participation is also determined separately for priority and nonpriority services. For ICF/MR, participation is also determined separately for residential services and day habilitation services. For HCS and TxHmL, participation is also determined separately for the non-day habilitation services category and the day habilitation services category as defined in subsection (f)(2)(B). Participation will remain in effect, subject to availability of funds, until the provider notifies HHSC, in accordance with subsection (x) of this section, that it no longer wishes to participate or until HHSC excludes the contract from participation for reasons outlined in subsection (u) of this section. Contracts or component codes voluntarily withdrawing from participation will have their participation end effective with the date of withdrawal as determined by HHSC. Contracts or component codes excluded from participation will have their participation end effective on the date determined by HHSC.

(l) Determination of attendant compensation rate component for nonparticipating contracts.

(1) For the PHC, DAHS, RC, CLASS--DSA; CBA--HCS; ICM--HCSS; DBMD; CBA--AL/RC; and ICM AL/RC programs [each of the programs identified in subsection (a) of this section], HHSC will calculate an attendant compensation rate component for nonparticipating contracts as follows.

(A) [44] Determine for each contract included in the cost report data base used in determination of rates in effect on September 1, 1999, the attendant compensation cost center from subsection (c) of this section.

(B) [42] Adjust the cost center data from subparagraph (A) of this paragraph in order to account for inflation utilizing the inflation factors used in the determination of the September 1, 1999 rates.

(C) [42] For each contract included in the cost report data base used to determine rates in effect on September 1, 1999, divide the result from subparagraph (B) of this paragraph by the corresponding units of service. Provider projected costs per unit of service are rounded from low to high, along with the provider’s corresponding units of service. For DAHS, the median cost per unit of service is selected. For all other programs, the units of service are summed until the median unit of service is reached. The corresponding projected cost per unit of service is the weighted median cost component. The result is multiplied by 1.044 for PHC; DAHS; CLASS--DSA; CBA--HCS; ICM--HCSS; DBMD and [all programs in subsection (a) of this section except for RC and CBA AL/RC, which is multiplied] by 1.07 for RC; CBA--AL/RC; and ICM AL/RC. The result is the attendant compensation rate component for nonparticipating contracts.

(D) [44] The attendant compensation rate component for nonparticipating contracts will remain constant over time, except in the case of increases to the attendant compensation rate component for nonparticipating contracts explicitly mandated by the Texas legislature and for adjustments necessitated by increases in the minimum wage. Adjustments necessitated by increases in the minimum wage [in such cases, adjustments to the nonparticipating rates] are limited to ensuring that these rates are adequate to cover mandated minimum wage levels.

(2) For ICF/MR day habilitation, ICF/MR residential services, HCS SL/RSS, HCS day habilitation, HCS supported home living, HCS respite, HCS supported employment, TxHmL day habilitation, TxHmL community supports, TxHmL respite, TxHmL supported employment, and TxHmL employment assistance, for each level of need, HHSC will calculate an attendant compensation rate component for nonparticipating contracts for each service as follows:

(A) For each service, for each level of need, determine the percent of the fully-funded model rate in effect on August 31, 2010 for that service accruing from attendants. For ICF/MR, the fully-funded model is the model as calculated under §355.456(d) of this title (relating to Reimbursement Methodology) prior to any adjustments made in accordance with §355.101 of this title (relating to Introduction) and §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations or Economic Factors Affect Costs). For HCS and TxHmL, the fully-funded model is the model as calculated under §355.723(d) of this title (relating to Reimbursement Methodology for Home and Community-based Services) prior to any adjustments made in accordance with §355.101 of this title and §355.109 of this title for the rate period.

(B) For each service, for each level of need, multiply the percent of the fully-funded model rate in effect on August 31, 2010 for that service accruing from attendants from subparagraph (A) of this paragraph by the total adopted reimbursement rate for that service in effect on August 31, 2010. The result is the attendant compensation rate component for that service for nonparticipating contracts.

(C) The attendant compensation rate component for nonparticipating contracts will remain constant over time, except in the case of increases to the attendant compensation rate component for nonparticipating contracts explicitly mandated by the Texas legislature and for adjustments necessitated by increases in the minimum wage. Adjustments necessitated by increases in the minimum wage are limited to ensuring that these rates are adequate to cover mandated minimum wage levels.

(m) Determination of attendant compensation base rate for participating contracts.

(1) For each of the programs identified in subsection (a) of this section except for CBA AL/RC, the attendant compensation base rate is equal to the attendant compensation rate component for nonparticipating contracts from subsection (l) of this section.

(2) For CBA AL/RC, the attendant compensation base rate will be determined by taking into consideration quality of care, labor market conditions, economic factors, and budget constraints.

(n) Determination of attendant compensation rate enhancements. HHSC will determine a per diem add-on payment for each enhanced attendant compensation level using data from sources such as cost reports, surveys, and/or other relevant sources and taking into consideration quality of care, labor market conditions, economic factors, and budget constraints. The attendant compensation rate enhancement add-ons will be determined on a per-unit-of-service
basis applicable to each program or service. Add-on payments may vary by enhancement level.

(o) Enhanced attendant compensation. Contracts or component codes desiring to participate in the enhanced attendant compensation rate may request attendant compensation levels from an array of enhanced attendant compensation options and associated add-on payments determined in subsection (n) of this section during open enrollment.

(1) For CBA--HCSS and AL/RC, CLASS, DBMD, DAHS, ICM--HCSS and AL/RC, and HC, participating [Participating] providers who select to have all of their contracts participate in a program as a group must request a single attendant compensation level for the entire group of contracts.

(2) PHC providers participating as a group must select a single attendant compensation level for their entire group of contracts for the priority and/or nonpriority services they have selected for participation.

(3) ICF/MR providers must select a single attendant compensation level for all contracts within a component code for the day habilitation and/or residential services they have selected for participation. ICF/MR providers who select to have all their component codes participate as a group must select a single attendant compensation level for their entire group of contracts for the day habilitation and/or residential services they have selected for participation.

(4) HCS and TxHmL must select a single attendant compensation level for all contracts within a component code for the non-day habilitation and/or day habilitation services they have selected for participation. HCS and TxHmL providers who select to have all their component codes participate as a group must select a single attendant compensation level for their entire group of contracts for the non-day habilitation services and/or day habilitation services they have selected for participation.

(p) Granting attendant compensation rate enhancements. Eligible programs are divided into two populations for purposes of granting attendant compensation rate enhancements. The first population includes the PHC; DAHS; RC; CLASS--DSA; CBA--HCSS; ICM--HCSS; DBMD; CBA--AL/RC; and ICM AL/RC programs and the second population includes the ICF/MR; HCS; and TxHmL programs. Enhancements for the two populations are funded separately; funds intended for enhancements for the first population of programs will never be used for enhancements for the second population and funds intended for enhancements for the second population of programs will never be used for enhancements for the first population. For each population of programs, HHSC divides all requested enhancements, after applying any enrollment limitations from subsection (u) of this section, into two groups: pre-existing enhancements, which providers request to carry over from the prior year, and newly-requested enhancements. Newly-requested enhancements may be enhancements requested by providers who were nonparticipants in the prior year or by providers who were participants in the prior year who seek additional enhancements. Using the process described herein separately for each population of programs, HHSC first determines the distribution of carry-over enhancements. If funds are available after the distribution of carry-over enhancements, HHSC determines the distribution of newly-requested enhancements. HHSC may not distribute newly-requested enhancements to providers owing funds identified for recoupment under subsection (s) of this section.

(1) For all programs and levels except for CBA AL/RC Level 1, HHSC determines projected units of service for contracts and/or component codes requesting each enhancement level and multiplies this number by the enhancement rate add-on amount associated with that enhancement level as determined in subsection (n) of this section. For CBA AL/RC Level 1, HHSC determines projected units of service for CBA AL/RC contracts requesting Level 1 and multiplies this number by the sum of the difference between the base rate and the nonparticipant rate and the enhancement add-on amount associated with enhancement Level 1 as follows: (Base Rate - Nonparticipant Rate) + Level 1 add-on amount.

(2) HHSC compares the sum of the products from paragraph (1) of this subsection to available funds.

(A) If the sum of the products is less than or equal to available funds, all requested enhancements are granted.

(B) If the sum of the products is greater than available funds, enhancements are granted beginning with the lowest level of enhancement and granting each successive level of enhancement until requested enhancements are granted within available funds. Based upon an examination of existing compensation levels and compensation needs, HHSC may grant certain enhancement options priority for distribution.

(q) Notification of granting of enhancements. Participating contracts and component codes are notified, in a manner determined by HHSC, as to the disposition of their request for attendant compensation rate enhancements.

(r) Total attendant compensation rate for participating providers. Each participating provider’s total attendant compensation rate will be equal to the attendant compensation base rate from subsection (m) of this section plus any add-on payments associated with enhanced attendant compensation levels selected by and awarded to the provider during open enrollment.

(s) Spending requirements for participating contracts and component codes. HHSC will determine from the Attendant Compensation Report or cost report functioning as an Attendant Compensation Report, as specified in subsection (h) of this section and other appropriate data sources, the amount of attendant compensation spending per unit of service delivered. The provider’s compliance with the spending requirement is determined based on the total attendant compensation spending as reported on the Attendant Compensation Report or cost report functioning as an Attendant Compensation Report for each participating contract or component code if the provider requested participation individually for each contract or component code. A participating contract or component code that has been terminated in accordance with subsection (v) of this section or that has undergone a contract assignment in accordance with subsection (w) of this section will be considered to have participated on an individual basis for compliance with the spending requirement for the owner prior to the termination or contract assignment. In all other cases, if the provider specified that he wished to have all participating contracts or component codes be considered as a group for purposes related to the attendant compensation rate enhancement (as specified in subsection (f) of this section) compliance with the spending requirement is based on the total attendant compensation as reported on the single aggregate Attendant Compensation Report described in subsection (h) of this section or, for cost reports functioning as Attendant Compensation Reports, the total attendant compensation as reported on the aggregated cost reports for the group. Compliance with the spending requirement is determined separately for each program specified in subsection (a) of this section, except for providers delivering services to both RC and CBA AL/RC clients in the same facility whose compliance is determined by combining both programs and providers delivering services in both the HCS and TxHmL programs whose compliance is determined by combining both programs. HHSC will calculate recoupment, if any, as follows.
(1) For the rate years beginning September 1, 2003 and September 1, 2004, the attendant compensation spending per unit of service is multiplied by 1.10 to determine the adjusted attendant compensation per unit of service. The adjusted attendant compensation per unit of service will be subtracted from the accrued attendant compensation revenue to determine the amount to be recouped. If the adjusted attendant compensation per unit of service is greater than or equal to the accrued attendant compensation revenue per unit of service, there is no recoupment.

(2) For the rate year beginning September 1, 2005, and thereafter, the accrued attendant compensation revenue per unit of service is multiplied by 0.90 to determine the spending requirement per unit of service. The unadjusted accrued attendant compensation spending per unit of service will be subtracted from the spending requirement per unit of service to determine the amount to be recouped. If the unadjusted accrued attendant compensation spending per unit of service is greater than or equal to the spending requirement per unit of service, there is no recoupment.

(3) The amount paid for attendant compensation per unit of service after adjustments for recoupment must not be less than the amount determined for nonparticipating contracts or component codes in subsection (l) of this section.

(4) In cases where more then one enhancement level is in effect during the reporting period, the spending requirement will be based on the weighted average enhancement level in effect during the reporting period calculated as follows:

(A) Multiply the first enhancement level in effect during the reporting period by the most recently available, reliable Medicaid units of service utilization data for the time period the first enhancement level was in effect.

(B) Multiply the second enhancement level in effect during the reporting period by the most recently available, reliable Medicaid units of service utilization data for the time period the second enhancement level was in effect.

(C) Sum the products from subparagraphs (A) and (B) of this paragraph.

(D) Divide the sum from subparagraph (C) of this paragraph by the sum of the most recently available, reliable Medicaid units of service utilization data for the entire reporting period used in subparagraphs (A) and (B) of this paragraph.

(i) Notification of recoupment. Providers will be notified in a manner specified by HHSC of the amount to be repaid to HHSC, or its designee. If a subsequent review by HHSC or audit results in adjustments to the annual Attendant Compensation Report or cost reporting, as described in subsection (h) of this section, that change the amount to be repaid, the provider will be notified in writing of the adjustments and the adjusted amount to be repaid. HHSC, or its designee, will recoup any amount owed from a provider’s vendor payment(s) following the date of the notification letter.

(u) Enrollment limitations. A provider will not be enrolled in the attendant compensation rate enhancement at a level higher than the level it achieved on its most recently available, audited Attendant Compensation Report or cost report functioning as an Attendant Compensation Report. HHSC will issue a notification letter that informs a provider in writing of its enrollment limitations (if any) prior to the first day of the open enrollment period.

(1) Requests for revision. A provider may request a revision of its enrollment limitation if the provider’s most recently available audited Attendant Compensation Report or cost report functioning as an Attendant Compensation Report does not represent its current attendant compensation levels.

(A) A request for revision of enrollment limitation must include the documentation specified in subparagraph (B) of this paragraph and must be received by HHSC Rate Analysis by hand delivery, United States mail, or special delivery mail no later than 30 calendar days from the date on the notification letter. If the 30th calendar day is a weekend day, national holiday, or state holiday, the first business day following the 30th calendar day is the final day the receipt of the written request will be accepted. A request for revision that is not received by the stated deadline and that is not submitted on the form specified by HHSC will not be accepted, and the enrollment limitation specified in the notification letter will apply.

(B) A provider that requests a revision of its enrollment limitation must submit documentation, in the form specified by HHSC in the notification letter, which shows that, for the period beginning September 1 of the current rate year and ending April 30 of the current rate year, the provider met a higher attendant compensation level than the notification letter indicates. In such cases, the provider’s enrollment limitation will be established at the level supported by its request for revision documentation. It is the responsibility of the provider to render all required documentation at the time of its request for revision. Requests not in the form specified by HHSC in the notification letter and requests that fail to support an attendant compensation level different from what is indicated in the notification letter will result in a rejection of the request, and the enrollment limitation specified in the notification letter will apply.

(C) A request for revision must be signed by an individual legally responsible for the conduct of the provider or legally authorized to bind the provider, such as the sole proprietor, a partner, a corporate officer, an association officer, a governmental official, a limited liability company member, a person authorized by the applicable DADS Form 2031 for the interested party on file at the time of the request, or a legal representative for the interested party. A request for revision that is not signed by an individual legally responsible for the conduct of the interested party will not be accepted, and the enrollment limitation specified in the notification letter will apply.

(D) If the provider’s Attendant Compensation Report or cost report functioning as an Attendant Compensation Report for the rate year that included the open enrollment period described in subsection (e) of this section shows the provider compensated attendants below the level it presented in its request for revision, HHSC will immediately recoup all enhancement payments associated with the request for revision documents, and the provider will be limited to the level supported by the report for the remainder of the rate year.

(2) Informal reviews and formal appeals. The filing of a request for an informal review or formal appeal relating to a provider’s most recently available, audited Attendant Compensation Report or cost report functioning as an Attendant Compensation Report under §355.110 of this title (relating to Informal Reviews and Formal Appeals) does not stay or delay implementation of an enrollment limitation applied in accordance with the requirements of this subsection. If an informal review or formal appeal relating to a provider’s most recently available, audited Attendant Compensation Report or cost report functioning as an Attendant Compensation Report is pending at the time the enrollment limitation is applied, the result of the informal review or formal appeal shall be applied to the provider’s enrollment retroactively to the beginning of the rate year to which the enrollment limitation was originally applied.

(3) New owners after a contract assignment or change of ownership that is an ownership change from one legal entity to a dif-
different legal entity. Enhancement levels for a new owner after a contract assignment or change of ownership that is an ownership change from one legal entity to a different legal entity will be determined in accordance with subsection (w) of this section. A new owner after a contract assignment or change of ownership that is an ownership change from one legal entity to a different legal entity will not be subject to enrollment limitations based upon the prior owner’s performance.

(4) New providers. A new provider’s enrollment will be determined in accordance with subsection (g) of this section.

(v) Contract terminations. For contracted providers required to submit an Attendant Compensation Report due to a contract termination as described in subsection (h) of this section, HHSC, or its designee, will place a vendor hold on the payments of the contracted provider until HHSC receives an acceptable Attendant Compensation Report, as specified in subsection (h) of this section, and funds identified for recoupment from subsection (s) of this section are repaid to HHSC, or its designee. Informal reviews and formal appeals relating to these reports are governed by §355.110 of this title. HHSC, or its designee, will recoup any amount owed from the provider’s vendor payments that are being held. In cases where funds identified for recoupment cannot be repaid from the held vendor payments, the responsible entity from subsection (cc) of this section will be jointly and severally liable for any additional payment due to HHSC, or its designee. Failure to repay the amount due or submit an acceptable payment plan within 60 days of notification will result in the recoupment of the owed funds from other HHSC and/or DADS contracts controlled by the responsible entity, placement of a vendor hold on all HHSC and/or DADS contracts controlled by the responsible entity, and will bar the responsible entity from enacting new contracts with HHSC and/or DADS until repayment is made in full. The responsible entity for these contracts will be notified as described in subsection (t) of this section prior to the recoupment of owed funds, placement of vendor hold on additional contracts, and barring of new contracts.

(w) Contract assignments. The following applies to contract assignments.

(1) Definitions. The following words and terms have the following meanings when used in this subsection.

(A) Assignee—A legal entity that assumes a Community Care contract through a legal assignment of the contract from the contracting entity as provided in 40 TAC §49.15 (relating to Contract Assignment).

(B) Assignor—A legal entity that assigns its Community Care contract to another legal entity as provided in 40 TAC §49.15.

(C) Contract assignment—The transfer of a contract by one legal entity to another legal entity as provided in 40 TAC §49.15.

(i) Type One Contract Assignment—A contract assignment by which the assignee is an existing Community Care contract.

(ii) Type Two Contract Assignment—A contract assignment by which the assignee is a new Community Care contract.

(2) Participation and group status after a contract assignment. Participation and group status after a contract assignment are determined as follows:

(A) Type One Contract Assignments. For Type One contract assignments, the assignee’s level of participation and group status remains the same while the assignor’s level of participation and grouping status changes to the assignee’s.

(B) Type Two Contract Assignments. For Type Two contract assignments the following applies:

(i) In cases where the assignee is controlled by a legal entity that controls other contracts participating in the attendant compensation rate enhancement, the following applies:

(I) If the assignee’s participating contracts are participating as a group as described in subsection (f) of this section, then the following applies:

(a) If the assignor was a participating contract, the new contract becomes part of the assignee’s group at the level of participation of the assignee’s group.

(b) If the assignor was not a participating contract, the new contract remains a nonparticipating contract.

(II) If the assignee’s participating contracts are participating as individuals as described in subsection (f) of this section, the following applies:

(a) If the assignor was a participating contract, the new contract continues participation at the assignor’s level as an individual contract whether or not the assignor contract was part of a group.

(b) If the assignor was not a participating contract, the new contract remains a nonparticipating contract.

(ii) In cases where the assignee is controlled by a legal entity that does not control any contracts participating in the attendant compensation rate enhancement, the level of participation and individual or group status of the assignor contract(s) will continue unchanged under the assignee contract(s).

(3) The assignee is responsible for the reporting requirements in subsection (h) of this section for any reporting period days occurring after the contract assignment effective date. If the contract assignment occurs during an open enrollment period as defined in subsection (e) of this section, the owner recognized by HHSC, or its designee, on the last day of the enrollment period may request to modify the enrollment status of the contract in accordance with subsection (f) of this section.

(4) For contracted providers required to submit an Attendant Compensation Report due to contract assignment, as described in subsection (h) of this section, HHSC, or its designee, will place a vendor hold on the payments of the existing contracted provider until HHSC receives an acceptable Attendant Compensation Report, as specified in subsection (h) of this section, and until funds identified for recoupment from subsection (s) of this section are repaid to HHSC, or its designee. HHSC, or its designee, will recoup any amount owed from the provider’s vendor payments that are being held. In cases where funds identified for recoupment cannot be repaid from the held vendor payments, the responsible entity from subsection (cc) of this section will be jointly and severally liable for any additional payment due to HHSC, or its designee. Failure to repay the amount due within 60 days of notification will result in the recoupment of the owed funds from other HHSC and/or DADS contracts controlled by the responsible entity, placement of a vendor hold on all HHSC and/or DADS contracts controlled by the responsible entity, and will bar the responsible entity from enacting new contracts with HHSC and/or DADS until repayment is made in full. The responsible entity for these contracts will be notified, as described in subsection (t) of this section, prior to the recoupment of owed funds, placement of vendor hold on additional contracts, and barring of new contract.

(x) Voluntary withdrawal. Participating contracts or component codes wishing to withdraw from the attendant compensation rate enhancement must notify HHSC Rate Analysis in writing by certified mail and the request must be signed by an authorized representative.
as designated per the DADS Form 2031 applicable to the provider’s contract or ownership type. The requests will be effective the first of the month following the receipt of the request. Contracts or component codes voluntarily withdrawing must remain nonparticipants for the remainder of the rate year. Providers whose contracts or component codes are participating as a group must request withdrawal of all the contracts or component codes in the group. Providers whose contracts are participating as part of a component code must request withdrawal of all the contracts in the component code.

(y) Adjusting attendant compensation requirements. Providers that determine that they will not be able to meet their attendant compensation requirements may request to reduce their attendant compensation requirements and associated enhancement payment to a lower participation level by submitting a written request to HHSC Rate Analysis by certified mail and the request must be signed by an authorized representative as designated per the DADS Form 2031 applicable to the provider’s contract or ownership type. These requests will be effective the first of the month following the receipt of the request. Providers whose contracts or component codes are participating as a group must request the same reduction for all of the contracts or component codes in the group. Providers whose contracts are participating as part of a component code must request the same reduction for all of the contracts in the component code.

(z) All other rate components. All other rate components will continue to be calculated as specified in the program-specific reimbursement methodology and will be uniform for all providers.

(aa) Failure to document spending. Undocumented attendant compensation expenses will be disallowed and will not be used in the determination of the attendant compensation spending per unit of service in subsection (s) of this section.

(bb) Appeals. Subject matter of informal reviews and formal appeals is limited as per §355.110 of this title.

(cc) Responsible entities. The contracted provider, owner, or legal entity which received the attendant compensation rate enhancement is responsible for the repayment of the recoupment amount.

(dd) Reinvestment. For services delivered on or before August 31, 2009, HHSC will reinvest recouped funds in the attendant compensation rate enhancement to the extent there are qualifying contracts. For services delivered beginning September 1, 2009, and thereafter, HHSC will not reinvest recouped enhanced attendant compensation rate funds.

1) Identify qualifying contracts. Contracts that meet the following criteria during the most recently completed reporting period are qualifying contracts for reinvestment purposes.

(A) The contract was a participant in the attendant compensation rate enhancement.

(B) The contract’s attendant compensation spending per unit of service was greater than the total attendant compensation rate per unit of service granted to the contract.

(C) An acceptable Attendant Compensation Report for the reporting period completed in accordance with all applicable rules and instructions was received by HHSC Rate Analysis at least 30 days prior to the date on which HHSC determined how available reinvestment funds would be distributed.

(D) The DADS contract that was in effect during the reinvestment reporting period is still in effect as an active contract when reinvestment is determined and there has been no ownership change from one legal entity to a different legal entity.

2) Distribution of available reinvestment funds. Available funds are distributed as follows:

(A) For each qualifying report, HHSC subtracts the attendant compensation revenue per unit of service from the attendant compensation spending per unit of service and determines the number of full levels by which attendant compensation costs exceeded attendant compensation revenues. This number is multiplied by the add-on value of a level during the reporting period and the product is multiplied by the units of service provided during the reporting period as determined by HHSC.

(B) HHSC compares the sum of the products from subparagraph (A) of this paragraph to funds available for reinvestment.

(i) If the product is less than or equal to available funds, all enhancements for qualifying contracts are retroactively awarded for the reporting period.

(ii) If the product is greater than available funds, retroactive enhancements are granted beginning with the lowest level of enhancement and granting each successive level of enhancement until enhancements are granted within available funds.

3) Non-qualification as pre-existing enhancements. Retroactively awarded enhancements do not qualify as pre-existing enhancements for enrollment purposes.

4) Notification of reinvested enhancements. Qualifying facilities are notified of the award of reinvested enhancements in a manner determined by HHSC.

(ee) Determination of compliance with spending requirements in the aggregate for a group.

1) Definitions. The following words and terms have the following meanings when used in this subsection.

(A) Commonly owned corporations--two or more corporations where five or fewer identical persons who are individuals, estates, or trusts own greater than 50 percent of the total voting power in each corporation.

(B) Entity--a parent company, sole member, individual, limited partnership, or group of limited partnerships controlled by the same general partner.

(C) Combined entity—one or more commonly owned corporations and one or more limited partnerships where the general partner is controlled by the same identical persons as the commonly owned corporation(s).

(D) Control—greater than 50 percent ownership by the entity.

(E) Group—an entity, commonly owned corporation, or combined entity that controls more than one participating contract or component code within a single program.

2) Aggregation. For a group, compliance with the spending requirements detailed in subsection (s) of this section can be determined in the aggregate for all participating contracts or component codes controlled by the group at the end of the rate year, the effective date of the change of ownership of the group’s last participating contract or component code, or the effective date of the termination of the group’s last participating contract or component code rather than requiring each contract or component code to meet its spending requirement individually. Corporations that do not meet the definitions under paragraph (1)(A) - (C) of this subsection are not eligible for aggregation to meet spending requirements.
(A) Aggregation Request. To exercise aggregation, the entity, combined entity, or commonly owned corporations must request to participate as a group, in a manner prescribed by HHSC, upon submission of each Enrollment Contract Amendment. In limited partnerships in which the same single general partner controls all the limited partnerships, the single general partner must make this request. Other such aggregation requests will be reviewed on a case-by-case basis.

(B) Ownership changes or terminations. Contracts or component codes that change ownership or terminate effective after the end of the applicable reporting period, but prior to the determination of compliance with spending requirements as per subsection (s) of this section, are excluded from all aggregate spending calculations. These contracts’ or component codes’ compliance with spending requirements will be determined on an individual basis and the costs and revenues will not be included in the aggregate spending calculation.

(ff) Conditions of participation for day habilitation. The following conditions of participation apply to each ICF/MR, HCS and TxHmL provider specifying its wish to have day habilitation services participate in the attendant compensation rate enhancement.

1. Job trainer and job coach compensation and hours must be reported on the required report items (e.g., hours, salaries and wages, payroll taxes, employee benefits/insurance/workers’ compensation, contract labor costs, and personal vehicle mileage reimbursement). This requirement applies to providers who directly provide day habilitation “in-house”, providers who contract with a related party to provide day habilitation and providers who contract with a non-related party to provide day habilitation. Day habilitation costs cannot be combined and reported in one cost report item.

2. The provider must ensure access to any and all records necessary to verify information submitted to HHSC on Attendant Compensation Reports and cost reports functioning as an Attendant Compensation Report. This requirement includes ensuring access to records held by the provider, a related-party day habilitation provider and a non-related-party day habilitation provider.

3. Failure to comply with the requirements of paragraphs (1) and (2) of this subsection will result in recoupment of all attendant compensation rate enhancement funds associated with the day habilitation service for the provider for the reporting period in question.

4. HHSC will require each ICF/MR, HCS and TxHmL provider specifying their wish to have day habilitation services participate in the attendant compensation rate enhancement to certify during the enrollment process that it will comply with the requirements of paragraphs (1) - (3) of this subsection.

(gg) New contracts within existing component codes. For ICF/MR, HCS and TxHmL, new contracts within existing component codes will be assigned a level of participation equal to the existing component code’s level of participation effective on the start date of the contract as recognized by HHSC or its designee.

(hh) [44h] Disclaimer. Nothing in these rules should be construed as preventing providers from compensating attendants at a level above that funded by the enhanced attendant compensation rate.

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

Filed with the Office of the Secretary of State on March 12, 2010. TRD-201001291

Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 424-6900

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

1 TAC §355.456, §355.457

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.456, concerning Reimbursement Methodology, and §355.457, concerning Fiscal Accountability, under Title 1, Part 15, Chapter 355, Subchapter D.

Background and Justification

Currently, providers of Intermediate Care Facility for Persons with Mental Retardation (ICF/MR) services are subject to the fiscal accountability system described under §355.457. Fiscal accountability requires all ICF/MR providers to meet certain spending requirements for a broad range of staff including direct care staff, first line supervisors, licensed professionals, and Qualified Mental Retardation Professionals (QMRPs) and is complex, contentious and prescriptive. Providers and the Health and Human Services Commission (HHSC) have both expressed concerns that the system is not sustainable over the long term. In response to these concerns, the 2010-11 General Appropriations Act (Article II, Health and Human Services Commission, Rider 67) authorized HHSC to discontinue fiscal accountability spending requirements contingent upon the implementation of a rate enhancement system or other appropriate financial performance standards.

In response to Rider 67, HHSC is amending §355.112, Attendant Compensation Rate Enhancement, under Title 1, Part 15, Chapter 355, Subchapter A, to incorporate the ICF/MR, program into the enhancement program effective September 1, 2010, and proposes to amend §355.456 to enable reimbursement rates for direct service workers, direct care trainers and job coaches in the ICF/MR program to be determined as per §355.112, and §355.457 to limit the current fiscal accountability system to services delivered on or before August 31, 2009. The proposed amendments to §355.112 appear elsewhere in this issue of the Texas Register.

Section-by-Section Summary

HHSC proposes to make the following amendments to §355.456:

Add a new subsection (d)(4) which defines the direct service workers cost area and indicates that the reimbursement rate for this cost area is calculated as specified in §355.112.

Add a new subsection (d)(5) which defines the direct care trainers and job coaches cost area and indicates that the reimbursement rate for this cost area is calculated as specified in §355.112.

HHSC proposes to make the following amendments to §355.457:
Change the name of the section from Fiscal Accountability to Cost Finding Methodology.

Revise subsection (a) to delete a reference to fiscal accountability.

Revise subsection (b) to delete references to annual reporting for fiscal accountability purposes and replace them with requirements that costs for the ICF/MR program be reported in conformity with the requirements of subsection (b)(1) - (8) and Title 1, Part 15, Chapter 355, Subchapter A, §355.102, relating to General Principles of Allowable and Unallowable Costs and §355.103, relating to Specifications for Allowable and Unallowable Costs.

Revise subsection (b)(2) to delete a reference to the fiscal accountability cost report and to add a statement that the provider is responsible for payment of amounts owed in accordance with subsection (c) for services delivered on or before August 31, 2009, and payment amounts owed in accordance with §355.112 for services delivered on or after September 1, 2010.

Revise subsection (b)(3) to limit the applicability of the paragraph’s vendor hold requirements to services delivered on or before August 31, 2009 and to indicate that, for services delivered on or after September 1, 2010, placement of vendor hold for a change of ownership and contract termination will be governed by §355.112.

Revise subsection (b)(4) to limit the applicability of the paragraph’s recoupment due to failure to submit a cost report required due to an ownership change or contract termination to services delivered on or before August 31, 2009 and to indicate that, for services delivered on or after September 1, 2010, recoupment of funds due to nonsubmittal of required reports will be governed by §355.112.

Revise subsection (b)(5) to limit the applicability of the paragraph’s recoupment due to failure to submit a cost report within 60 days of the placement of a vendor hold to services delivered on or before August 31, 2009 and to indicate that, for services delivered on or after September 1, 2010, recoupment of funds due to nonsubmittal of a cost report within 60 days of the placement of a vendor hold will be governed by §355.112.

Revise subsection (c) to limit fiscal accountability to services delivered on or before August 31, 2009.

Fiscal Note

Gordon E. Taylor, Chief Financial Officer for the Department of Aging and Disability Services, has determined that during the first five-year period the amended rule is in effect there will be a fiscal impact to state government as a result of halting recoupment of funds identified for recoupment under existing fiscal accountability requirements for the ICF/MR program of $174,955 for state fiscal year (FY) 2010; $216,770 for FY 2011; $235,262 for FY 2012; $235,262 for FY 2013; and $235,262 for FY 2014. The amended rule will not result in any fiscal implications for local health and human services agencies. There are no fiscal implications for local governments as a result of enforcing or administering the section.

Small Business and Micro-business Impact Analysis

HHSC has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendment. The implementation of the proposed rule amendment does not require any changes in practice or any additional cost to the contracted provider.

HHSC does not anticipate that there will be any economic cost to persons who are required to comply with this amendment. The amendment will not affect local employment.

Public Benefit

Kevin Nolting, Acting Director of Rate Analysis, has determined that for each of the first five years the amendment is in effect, the expected public benefit is that ICF/MR providers will no longer be subject to the complex and prescriptive requirements of the existing ICF/MR fiscal accountability system.

Takings Impact Assessment

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

Regulatory Analysis

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

Public Comment

Questions about the content of this proposal may be directed to Pam McDonald in the HHSC Rate Analysis Department by telephone at (512) 491-1373. Written comments on the proposal may be submitted to Ms. McDonald by facsimile at (512) 491-1998, by e-mail to pam.mcdonald@hhsc.state.tx.us, or by mail to HHSC Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas, 78708-5200, within 30 days of publication of this proposal in the Texas Register.

Statutory Authority

The amendments are proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission’s duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

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

§355.456. Reimbursement Methodology.

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

(b) Classes of non-state operated facilities. There is a separate set of reimbursement rates for each class of non-state operated facilities, which are as follows.
(1) Large facility--A facility with a Medicaid certified capacity of 14 or more as of the first day of the full month immediately preceding a rate’s effective date or, if certified for the first time after a rate’s effective date, as of the date of initial certification.

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

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

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

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

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

(d) Reimbursement rate determination for non-state operated facilities. HHSC will adopt the reimbursement rates for non-state operated facilities in accordance with §355.101 of this title (relating to Introduction) and this subchapter.

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

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

(3) The recommended modeled rates are based on cost components deemed appropriate for economically and efficiently operated services. The determination of these components is based on cost reports submitted by ICF/MR providers.

(4) Direct service workers cost area. This cost area includes direct service workers’ salaries and wages, benefits, and mileage reimbursement expenses. The reimbursement rate for this cost area is calculated as specified in §355.112 of this title (relating to Attendant Compensation Rate Enhancement).

(5) Direct care trainers and job coaches cost area. This cost area includes direct care trainers’ and job coaches’ salaries and wages, benefits, and mileage reimbursement expenses. The reimbursement rate for this cost area is calculated as specified in §355.112 of this title.

(e) Reimbursement determination for state-operated facilities. Except as provided in paragraph (2) of this subsection and subsection (f) of this section, state-operated facilities are reimbursed an interim rate with a settlement conducted in accordance with paragraph (1)(B) of this subchapter. HHSC will adopt the interim reimbursement rates for state-operated facilities in accordance with §355.101 of this title and this subchapter.

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

(A) Interim reimbursement rates for state-operated facilities are based on the most recent cost report accepted by HHSC.

(B) Settlement is conducted each state fiscal year by class of facility. If there is a difference between allowable costs and the reimbursement paid under the interim rate, including applied income, for a state fiscal year, federal funds to the state will be adjusted based on that difference.

(2) A state-operated facility certified on or after January 1, 2001, will be reimbursed using a pro forma rate determined in accordance with §355.101(c)(2)(B) and §355.105(h) of this title (relating to General Reporting and Documentation Requirements). A facility will be reimbursed under the pro forma rate methodology until HHSC receives an acceptable cost report which includes at least 12 months of the facility’s cost data and is available to be included in the annual interim rate determination process.

(f) HHSC may define experimental classes of service to be used in research and demonstration projects on new reimbursement methods. Demonstration or pilot projects based on experimental classes may be implemented on a statewide basis or may be limited to a specific region of the state or to a selected group of providers. Reimbursement for an experimental class is not implemented, however, unless HHSC and the Health Care Financing Administration (HCFA) approve the experimental methodology.

(g) Cost Reporting. For cost reports pertaining to providers’ fiscal years ending in calendar year 2004 and subsequent years the following applies:

(1) Providers must follow the cost-reporting guidelines as specified in §355.105 of this title.

(2) Providers must follow the guidelines in determining whether a cost is allowable or unallowable as specified in §355.102 and §355.103 of this title (relating to General Principles of Allowable and Unallowable Costs, and Specifications for Allowable and Unallowable Costs).

(3) Revenues must be reported on the cost report in accordance with §355.104 of this title (relating to Revenues).

(h) Adjusting costs. Each provider’s total reported allowable costs, excluding depreciation and mortgage interest, are projected from the historical cost-reporting period to the prospective reimbursement period as described in §355.108 of this title (relating to Determination of Inflation Indices). HHSC may adjust reimbursement if new legislation, regulations, or economic factors affect costs, according to §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs).

(i) Field Audit and Desk Review. Desk reviews or field audits are performed on cost reports for all contracted providers. The frequency and nature of the field audits are determined by HHSC to ensure the fiscal integrity of the program. Desk reviews and field audits will be conducted in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), and providers will be notified of the results of a desk review or a field audit in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments). Providers may request an informal review and, if necessary, an administrative hearing to dispute an action taken under §355.110 of this title (relating to Informal Reviews and Formal Appeals).


(a) General principles. The Texas Health and Human Services Commission (HHSC) applies the general principles of cost determination as specified in §355.101 of this title (relating to Introduction). [Fiscal accountability is a process used to gauge the ongoing financial performance under the non-state operated facility reimbursement rates.]
(b) Additional requirements. In addition to the requirements of §355.102 and §355.103 of this title (relating to General Principles of Allowable and Unallowable Costs, and Specifications for Allowable and Unallowable Costs), the following apply to costs for the intermediate care facilities for persons with mental retardation (ICF/MR) program. [Annual reporting. Fiscal accountability will consist of the annual reporting of direct service costs from all non-state operated providers. The data will be collected on a cost report designed by HHSC in accordance with §355.105(b) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).]

(1) Direct-service costs. Direct service costs include costs associated with personnel who provide direct hands-on support for consumers and include personnel such as direct care workers, first-level supervisors of direct care staff, Qualified Mental Retardation Professionals (QMRPs), as defined in 42 Code of Federal Regulations, Part 483, Subpart I, §483.430, registered nurses, and licensed vocational nurses. Direct service costs include: costs related to wages, benefits, payroll taxes, and contracts for direct services. Accrued leave (sick or annual) can only be considered a direct service cost if the employee has a right to the cash value of that leave upon termination.

(2) Provider responsibilities. The provider is responsible for submission of the [fiscal accountability] cost report to HHSC, and payment of amounts owed in accordance with subsection (c) of this section for services delivered on or before August 31, 2009, and payment of amounts owed in accordance with §355.112 of this title (relating to Attendant Compensation Rate Enhancement) for services delivered on or after September 1, 2010, regardless of whether the provider contracts with another entity for the management or operation of the ICF/MR.

(A) If the provider contracts with another entity for the management or operation of the ICF/MR, the provider must report the specific direct services costs of that entity as required in the cost report instructions and not the amount for which the provider is contracting for the entity’s services.

(B) For staff whose duties include work other than the provision of direct services for the provider, time spent providing direct services and associated expenses may be reported as direct service costs if properly documented in accordance with §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(C) Allowable compensation for owners and related parties and definitions of owners and related parties are specified in §355.102(i) and §355.103(b)(2) of this title.

(i) Time sheet requirement. Owners and related-parties who provide multiple types of direct service, both direct care and indirect services and/or both direct hands-on support and first-level supervision of direct care workers must maintain daily time sheets that record the time spent on activities in each area. The provider must maintain documentation relating to the compensation, bonuses, and benefits of each owner or related party in accordance with §355.105(b)(2)(B)(xi) of this title.

(ii) Calculation of allowable hourly wage rate and benefits. Allowable hourly wage rate and benefits for direct service work must be the lesser of the actual hourly wage rate paid and benefits paid or the hourly wage rate and benefits for a comparable direct care staff person assumed in the fully-funded model. The fully-funded model is the model as calculated under §355.456(d) of this title (relating to Reimbursement Methodology) prior to any adjustments made in accordance with §355.101 of this title and §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations or Economic Factors Affect Costs) for the rate period.

(iii) Calculation of allowable hours for direct staff except for direct-care trainer supervisors. Allowable hours per unit of service for a direct-care service staff-type when the reported hours for the staff-type includes related-party hours, are determined as follows:

(I) Step 1. Determine the hours per unit of service for a comparable direct-service staff-type assumed in the fully-funded model as defined in clause (ii) of this subparagraph, adjusted for the provider’s average Level of Need (LON) during the reporting period.

(II) Step 2. Determine the hours per unit of service encompassed by the 90th percentile in the array of hours per unit of service for comparable direct service staff-types as reported by those contracted providers not reporting any related-party hours for that staff-type, adjusted for the provider’s average LON during the reporting period.

(III) Step 3. Determine the greater of Step 1 and Step 2.

(iv) Calculation of allowable hours for direct-care trainer supervisors. Allowable direct-care trainer supervisor hours when the reported direct-care trainer supervisor hours include related-party hours, are determined as follows:

(I) Step 1. Determine the ratio of direct-care trainer supervisor hours to direct-care trainer hours assumed in the fully-funded model as defined in clause (ii) of this subparagraph.

(II) Step 2. Determine the ratio of direct-care trainer supervisor hours to direct-care trainer hours encompassed by the 90th percentile in the array of ratios of direct-care trainer supervisor hours to direct-care trainer hours for those contracted providers not reporting any related-party direct-care trainer supervisor hours.

(III) Step 3. Determine the greater of Step 1 and Step 2.

(v) Step 4. Determine the actual ratio of direct-care trainer supervisor hours to direct-care trainer hours.

(vi) Step 5. Determine the lesser of Step 4 and Step 3. This value is the allowable ratio of direct-care trainer supervisor hours to allowable direct-care trainer hours reported. To determine the actual allowable direct-care trainer supervisor hours, multiply the allowable direct-care trainer hours by the allowable ratio of direct-care trainer supervisor hours to allowable direct-care trainer hours.

(vii) Exception to related-party adjustment. If at least 40 percent of total labor hours in a specific related-party’s direct service type were provided by non-related-parties, the related-party’s hourly wage rate may be the higher of the model assumption for that direct service type described in clause (ii) of this subparagraph or the non-related party average for that direct service type, so long as the non-related party average does not exceed the related-party’s actual hourly wage.

(viii) Maximum direct-care hours. During any single fiscal year, the sum of all direct care hours reported on ICF/MR cost report(s) for any individual owner or related party cannot exceed 2,600.

(vii) Classification of hours over the limit. Hours, hourly wages and benefits above the limits described in clauses (ii) -
(vi) of this subparagraph are to be reported as administrative hours, hourly wages and benefits.

(3) Placement of vendor hold for change of ownership and contract termination. For services delivered on or before August 31, 2009, the [The] Department of Aging and Disability Services (DADS) will place a vendor hold on a prior owner at a change of ownership which results in the execution of a new provider agreement or a contract termination. The prior owner must submit a cost report to HHSC for the current reporting period. Upon receipt of an acceptable cost report and resolution of any outstanding balances, the vendor hold will be released. For services delivered on or after September 1, 2010, placement of vendor hold for change of ownership and contract termination will be governed by the information in §355.112 of this title.

(4) Ownership change or contract termination and failure to submit a cost report. For services delivered on or before August 31, 2009, providers [Providers] with an ownership change from one legal entity to a different legal entity or a contract termination that do not submit a cost report for the fiscal year of the ownership change or contract termination within 60 days of the change of ownership or contract termination are subject to recoupment of funds related to fiscal accountability as described in subsection (c)(1)(D) of this section. The recouped funds will not be restored until the provider submits an acceptable cost report and has paid the actual amount due as specified in subsection (c)(1)(A) - (C) of this section. If an acceptable cost report is not received within 365 days of the change of ownership or contract termination date, the recoupment will become permanent. For services delivered on or after September 1, 2010, recoupment of funds related to failure to submit a cost report after an ownership change from one legal entity to a different legal entity or a contract termination will be governed by the information in §355.112 of this title.

(5) Failure to submit a cost report. For services delivered on or before August 31, 2009, providers [Providers] that do not submit a cost report completed in accordance with all applicable rules and instructions within 60 days of the placement of a vendor hold due to the failure to submit the cost report are subject to an immediate recoupment of funds related to fiscal accountability as described in subsection (c)(1)(D) of this section. The recouped funds will not be restored until the provider submits an acceptable cost report and has paid the actual amount due as specified in subsection (c)(1)(A) - (C) of this section. If an acceptable cost report is not received within 365 days of the due date, the recoupment will become permanent. For services delivered on or after September 1, 2010, recoupment of funds related to failure to submit a cost report within 60 days of the placement of a vendor hold due to failure to submit the cost report will be governed by the information in §355.112 of this title.

(6) Other applicable rules. For cost reports pertaining to providers’ fiscal years ending in calendar year 2004 and subsequent years the following applies:

(A) Providers must follow the cost-reporting guidelines as specified in §355.105 of this title.

(B) Providers must follow the guidelines in determining whether a cost is allowable or unallowable as specified in §355.102 and §355.103 of this title.

(C) Revenues must be reported on the cost report in accordance with §355.104 of this title (relating to Revenues).

(7) Field Audit and Desk Review. Desk reviews or field audits are performed on cost reports for all contracted providers. The frequency and nature of the field audits are determined by HHSC to ensure the fiscal integrity of the program. Desk reviews and field audits will be conducted in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), and providers will be notified of the results of a desk review or a field audit in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments).

(8) Reviews of exclusions or adjustments. An ICF/MR provider who disagrees with HHSC’s exclusion or adjustment of items in cost reports may request an informal review and, when appropriate, an administrative hearing as specified in §355.110 of this title (relating to Informal Reviews and Formal Appeals).

(c) Fiscal accountability. For services delivered on or before August 31, 2009, HHSC will require providers to report all direct costs incurred in their annual fiscal year. HHSC will compare the reported direct service costs to the direct service cost component of the modeled rates.

(1) Fiscal accountability calculation. The total direct service revenue of the modeled rates is the direct service portion of the rate multiplied by the number of allowable units paid for services provided during the reporting period.

(A) Providers whose direct service costs are 90% or more of the direct service revenues will not be subject to repayment under this section.

(B) Providers whose direct service costs are less than 85% of the direct service revenues will be required to pay to HHSC or its designee the difference between the direct service costs and 95% of the direct service revenues.

(C) Providers whose direct service costs are less than 90% but greater than or equal to 85% of the direct service revenues will be required to pay to HHSC or its designee 75% of the difference between the direct service costs and 90% of the direct service revenues.

(D) Providers who do not submit an acceptable cost report as described in subsection (b)(4) or (5) of this section will be assumed to have direct service costs equal to 65% of the direct services revenues and HHSC or its designee will recoup the difference between 65% of the direct services revenues and 95% of the direct service revenues, subject to the provisions of subsection (b)(4) or (5) of this section.

(2) Notification of recoupment. Providers will be notified, by certified mail, within 90 days of the determination of their recoupment amount by HHSC of the amount to be repaid to HHSC or its designee. If a subsequent review by HHSC or audit results in adjustments to the Cost Report as described in subsection (b)(7) of this section that changes the amount to be repaid to HHSC or its designee, the provider will be notified in writing of the adjustments and the adjusted amount to be repaid. HHSC or its designee will recoup any amount owed from a provider’s vendor payment(s) following the date of the notification letter.

(3) Repayment. Repayment will be collected from the following:

(A) the provider or legal entity submitting the report;

(B) any other legal entity responsible for the debts or liabilities of the submitting entity; or

(C) the legal entity on behalf of which a report is submitted.

(4) Repayment when ownership change or contract termination occurs. For providers undergoing an ownership change or contract termination, HHSC or its designee will recoup any amount owed from the provider’s vendor payments that are being held. In cases where funds identified for recoupment cannot be repaid from the held
vendor payments, the responsible entity from paragraph (3) of this subsection will be jointly and severally liable for any additional payment due to HHSC or its designee. Failure to repay the amount due or submit an acceptable payment plan within 60 days of notification will result in the recoupment of the owed funds from all Medicaid contracts controlled by the responsible entity, placement of a vendor hold on all Medicaid contracts controlled by the responsible entity and will bar the responsible entity from receiving any new contracts with HHSC or its designee until repayment is made in full. The responsible entity for these contracts will be notified as described in paragraph (2) of this subsection prior to the recoupment of owed funds, placement of vendor hold and barring of new contracts.

(5) Aggregation.

(A) Definitions. The following words and terms have the following meanings when used in this paragraph.

(i) Aggregation--For an entity defined in clause (iii) of this subparagraph that controls, as defined in clause (iv) of this subparagraph, more than one ICF/MR component code, the process of determining compliance with the spending requirements detailed in paragraph (1) of this subsection for all component codes controlled by the entity in the aggregate rather than requiring each component code to meet its spending requirement individually. For commonly owned corporations defined in clause (ii) of this subparagraph, the process of determining compliance with the spending requirements detailed in paragraph (1) of this subsection for all component codes in the controlled small group in the aggregate rather than requiring each component code to meet its spending requirement individually. Corporations that do not meet the definitions under clauses (ii) - (iii) of this subparagraph are not eligible for aggregation.

(ii) Commonly owned corporations--two or more corporations where five or fewer identical persons who are individuals, estates, or trusts own greater than 50 percent of the total voting power in each corporation.

(iii) Entity--a parent company, sole member, individual, limited partnership, or group of limited partnerships controlled by the same general partner.

(iv) Control--greater than 50% ownership by the entity.

(B) Component Codes Included in Aggregation. If an entity controlling more than one ICF/MR component code or commonly owned corporations requests aggregation, compliance with the spending requirements will be evaluated in the aggregate for all ICF/MR component codes that the entity or commonly owned corporations controlled at the end of its fiscal year or at the effective date of the change of ownership or termination of its last ICF/MR contract.

(C) Aggregation Request. To exercise the aggregation option, the entity or commonly owned corporations must submit an aggregation request, in a manner prescribed by HHSC, at the time each cost report is submitted. In limited partnerships in which the same single general partner controls all the limited partnerships, that single general partner must make this request. Other such aggregation requests will be reviewed on a case-by-case basis.

(D) Frequency of Aggregation Requests. The entity or commonly owned corporations must submit a separate request for aggregation for each reporting period.

(E) Ownership Changes and Contract Terminations. ICF/MR contracts that change ownership or terminate effective after the end of the applicable reporting period, but prior to the determination of compliance with spending requirements as per paragraph (1) of this subsection, are excluded from all aggregate spending calculations. These contracts’ compliance with spending requirements will be determined on an individual basis and the costs and revenues will not be included in the aggregate spending calculation.

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

Filed with the Office of the Secretary of State on March 12, 2010.

TRD-201001292

Steve Aragon

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: April 25, 2010

For further information, please call: (512) 424-6900

SUBCHAPTER F. REIMBURSEMENT

METHODOLOGY FOR PROGRAMS SERVING PERSONS WITH MENTAL ILLNESS AND MENTAL RETARDATION

1 TAC §§355.722, 355.723, 355.791

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.722, concerning Reporting Costs by Home and Community-based Services (HCS) Providers, §355.723, concerning Reimbursement Methodology for Home and Community-Based Services (HCS), and §355.791, concerning Reporting Costs and Reimbursement Methodology for the Texas Home Living (TxHmL) Program, under Title 1, Part 15, Chapter 355, Subchapter F.

Background and Justification

Currently, providers of HCS services are subject to the fiscal accountability system described under §355.722. Providers of Texas Home Living (TxHmL) waiver services are not currently subject to fiscal accountability.

Fiscal accountability requires all HCS providers to meet certain spending requirements for a broad range of staff including direct care staff, first line supervisors, licensed professionals, Qualified Mental Retardation Professionals (QMRPs) and case managers, and is complex, contentious and prescriptive. Providers and the Health and Human Services Commission (HHSC) have both expressed concerns that the system is not sustainable over the long term. In response to these concerns, the 2010-11 General Appropriations Act (S.B. 1, Article II, Health and Human Services Commission, Rider 67) authorized HHSC to discontinue fiscal accountability spending requirements contingent upon the implementation of a rate enhancement system or other appropriate financial performance standards.

In response to Rider 67, HHSC is amending Title 1, Part 15, Chapter 355, Subchapter A, §355.112, Attendant Compensation Rate Enhancement to incorporate the HCS and TxHmL programs into the enhancement program effective September 1, 2010, and proposes to amend §355.722 to limit the current fiscal accountability system to services delivered on or before August 31, 2009 and to incorporate TxHmL under the cost reporting requirements for HCS, §355.723 to enable reimbursement rates for direct service workers, direct care trainers and
job coaches in the HCS and TxHmL programs to be determined as per §355.112, and §355.791 to delete stand-alone cost reporting requirements for TxHmL. The proposed amendments to §355.112 appear in this issue of the Texas Register.

Section-by-Section Summary

HHSC proposes to make the following amendments to §355.722:

- Change the name of the section from "Reporting Costs by Home and Community-based Services (HCS) Providers" to "Reporting Costs by Home and Community-based Services (HCS) and Texas Home Living (TxHmL) Providers."

- Revise subsection (h)(3)(A) to indicate that until such time as LONs are established for TxHmL consumers, when adjusting hours per unit of service for the provider’s average Level of Need (LON), the provider’s average LON is assumed to be LON 5.

- Revise subsection (h)(3)(B) to indicate that when adjusting the hours per unit of service for the provider’s average LON, until such time as LONs are established for TxHmL consumers, for TxHmL, the provider’s average LON is assumed to be LON 5.

- Revise subsection (h)(7) to add TxHmL cost reports in the calculation of maximum direct care hours.

- Revise subsection (j) to limit fiscal accountability to HCS services delivered on or before August 31, 2009.

- HHSC proposes to make the following amendments to §355.723:

- Revise subsection (c) to indicate that direct care worker staffing costs include wages, benefits, and modeled staffing ratios for direct care workers, direct care trainers and job coaches and that the determination of the direct service worker staffing costs rate component is calculated as specified in §355.112.

- HHSC proposes to make the following amendments to §355.791:

- Change the name of the section from "Reporting Costs and Reimbursement Methodology for the Texas Home Living (TxHmL) Program" to "Reimbursement Methodology for the Texas Home Living (TxHmL) Program."

- Delete subsections (a) - (r).

- Re-designate subsection (s) as subsection (a).

- Re-designate subsection (t) as subsection (b).

- Add new subsection (c) to indicate that, effective September 1, 2010, the determination of the direct care worker staffing costs component of the payment rates for community supports, day habilitation, respite, supported employment and employment assistance is governed by §355.112.

Fiscal Note

Gordon E. Taylor, Chief Financial Officer for the Department of Aging and Disability Services, has determined that during the first five-year period the amended rule is in effect there will be a fiscal impact to state government as a result of halting recoupment of funds identified for recoupment under existing fiscal accountability requirements for the HCS program of $1,137,767 for state fiscal year (FY) 2010; $1,409,698 for FY 2011, $1,529,953 for FY 2012; $1,529,953 for FY 2013; and $1,529,953 for FY 2014. The amended rule will not result in any fiscal implications for local health and human services agencies. There are no fiscal implications for local governments as a result of enforcing or administering the section.

Small Business and Micro-business Impact Analysis

HHSC has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendment. The implementation of the proposed rule amendment does not require any changes in practice or any additional cost to the contracted provider.

HHSC does not anticipate that there will be any economic cost to persons who are required to comply with this amendment. The amendment will not affect local employment.

Public Benefit

Kevin Nolting, Acting Director of Rate Analysis, has determined that for each of the first five years the amendment is in effect, the expected public benefit is that HCS providers will no longer be subject to the complex, contentious and prescriptive requirements of the existing HCS fiscal accountability system.

Takings Impact Assessment

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

Regulatory Analysis

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

Public Comment

Questions about the content of this proposal may be directed to Pam McDonald in the HHSC Rate Analysis Department by telephone at (512) 491-1373. Written comments on the proposal may be submitted to Ms. McDonald by facsimile at (512) 491-1998, by e-mail to pam.mcdonald@hhsc.state.tx.us, or by mail to HHSC Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200, within 30 days of publication of this proposal in the Texas Register.

Statutory Authority

The amendments are proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission’s duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The amendments affect Texas Government Code Chapter 531 and Texas Human Resources Code Chapter 32. No other statutes, articles, or codes are affected by this proposal.
§355.722. Reporting Costs by Home and Community-based Services (HCS) and Texas Home Living (TxHmL) Providers.

(a) Submittal of cost reports. On an annual basis, all providers must submit cost reports as directed by HHSC or its designee and in accordance with this subchapter. The Texas Health and Human Services Commission (HHSC) applies the general principles of cost determination as specified in §355.101 of this title (relating to Introduction).

(1) Direct service costs. Direct service costs are defined to include costs associated with personnel who provide direct hands-on support for consumers and include personnel such as direct care workers, first-level supervisors of direct care workers, registered nurses, licensed vocational nurses, and other personnel who provide activities of daily living training and clinical program services. Direct service costs include: costs related to wages, benefits, payroll taxes, and contracts for direct services. Accrued leave (sick or vacation) can only be considered a direct service cost if the employee has a right to a cash value of that leave upon termination.

(2) Staff who provide both direct and other than direct services. For staff whose duties include work other than the provision of direct services for the provider, time spent providing direct services and associated expenses may be reported as direct service costs if properly documented in accordance with §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(3) Providers must report the following costs:

(A) Staff wages related to the delivery of direct services including residential assistance, day habilitation services, and the direct supervision of the delivery of these services.

(B) These costs may be either the provider’s actual expense or contracted expenditures.

(b) Reviews of exclusions or adjustments. A provider who disagrees with HHSC’s exclusion or adjustment of items in cost reports may request an informal review and, when appropriate, an administrative hearing as specified in §355.110 of this title (relating to Informal Reviews and Formal Appeals).

(c) Field audit and desk review. Desk reviews or field audits are performed on cost reports for all contracted providers. The frequency and nature of the field audits are determined by HHSC to ensure the fiscal integrity of the program. Desk reviews and field audits will be conducted in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports).

(d) Notification of exclusions and adjustments. HHSC will notify a provider of the results of a desk review or field audit in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments).

(e) Cost reporting guidelines. Providers must follow the cost-reporting guidelines as specified in §355.105 of this title.

(f) Allowable and unallowable costs. Providers must follow the guidelines in determining whether a cost is allowable or unallowable as specified in §355.102 and §355.103 of this title (relating to General Principles of Allowable and Unallowable Costs, and Specifications for Allowable and Unallowable Costs).

(g) Revenues. Revenues must be reported on the cost report in accordance with §355.104 of this title (relating to Revenues).

(h) Related parties. Allowable compensation for owners and related parties and definitions of owners and related parties are specified in §355.102(i) and §355.103(b)(2) of this title (relating to General Principles of Allowable and Unallowable Costs and Specifications for Allowable and Unallowable Costs).

(1) Time sheet requirement. Owners and related parties who provide multiple types of direct service, both direct care and indirect services and/or both direct hands-on support and first-level supervision of direct care workers must maintain daily time sheets that record the time spent on activities in each area. The provider must maintain documentation related to the compensation, bonuses, and benefits of each owner or related party in accordance with §355.105(b)(2)(B)(xi) of this title.

(2) Calculation of allowable hourly wage rate and benefits. Allowable hourly wage rate and benefits for direct service work must be the lesser of the actual hourly wage rate paid and benefits paid or the hourly wage rate and benefits for a comparable direct care staff person assumed in the fully-funded model. The fully-funded model is the model as calculated under §355.723(d) of this title (relating to Reimbursement Methodology for Home and Community-based Services) prior to any adjustments made in accordance with §355.101 of this title and §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations or Economic Factors Affect Costs) for the rate period.

(3) Calculation of allowable hours for direct staff except for direct-care trainer supervisors and direct-care worker supervisors. Allowable hours per unit of service for a direct service staff-type when the reported hours for the staff-type include related-party hours, are determined as follows:

(A) Step 1. Determine the hours per unit of service for a comparable direct service staff-type assumed in the fully-funded model as defined in paragraph (2) of this subsection, adjusted for the provider’s average Level of Need (LON) during the reporting period. For TxHmL, until such time as LONs are established, the provider’s average LON is assumed to be LON 5.

(B) Step 2. Determine the hours per unit of service encompassed by the 90th percentile in the array of hours per unit of service for comparable direct service staff-types as reported by those contracted providers not reporting any related-party hours for that staff-type, adjusted for the provider’s average LON during the reporting period. For TxHmL, until such time as LONs are established, the provider’s average LON is assumed to be LON 5.

(C) Step 3. Determine the greater of Step 1 and Step 2.

(D) Step 4. Determine the actual hours worked by the staff-type per unit of service.

(E) Step 5. Determine the lesser of Step 4 and Step 3. This value is the allowable hours per unit of service for the direct service staff-type in question.

(4) Calculation of allowable hours for direct-care trainer supervisors or direct-care worker supervisors. Allowable direct-care trainer supervisor or direct-care worker supervisor hours when the reported direct-care trainer supervisor or direct-care worker supervisor hours include related-party hours, are determined separately as follows:

(A) Step 1. Determine the ratio of direct-care trainer supervisor or direct-care worker supervisor hours to direct-care trainer or direct-care worker supervisor hours assumed in the fully-funded model as defined in paragraph (2) of this subsection.

(B) Step 2. Determine the ratio of direct-care trainer or direct-care worker supervisor hours to direct-care trainer or direct-care worker supervisor hours to direct-care trainer or direct-care worker hours for those contracted providers
not reporting any related-party direct-care trainee or direct-care worker supervisor hours.

(C) Step 3. Determine the greater of Step 1 and Step 2.

(D) Step 4. Determine the actual ratio of direct-care trainee or direct-care worker supervisor hours to direct-care trainee or direct-care worker hours.

(E) Step 5. Determine the lesser of Step 4 and Step 3. This value is the allowable ratio of direct-care trainee or direct-care worker supervisor hours to allowable direct-care trainee or direct-care worker hours reported. To determine the actual allowable direct-care trainee supervisor or direct-care worker supervisor hours, multiply the allowable direct-care trainee or direct-care worker supervisor hours by the allowable ratio of direct-care trainee supervisor or direct-care worker supervisor hours to allowable direct-care trainee or direct-care worker hours.

(5) Calculation of allowable hours for other staff types. For staff types where representative hours and units of service data are not available, allowable related-party hours are determined using a pro forma approach in which factors such as hours assumed in the fully-funded model, median non-related party hours reported, and non-related party hours or staff ratios for similar staff types are considered.

(6) Exception to related-party adjustment. If at least 40 percent of total labor hours in a specific related-party’s direct service type were provided by non-related-parties, the related-party’s hourly wage rate may be the higher of the model assumption for that direct service type described in paragraph (2) of this subsection or the non-related party average for that direct service type, so long as the non-related party average does not exceed the related-party’s actual hourly wage.

(7) Maximum direct-care hours. During any single fiscal year, the sum of all direct care hours reported on HCS and TxHmL cost report(s) for any individual owner or related party cannot exceed 2,600.

(8) Classification of hours over the limit. Hours, hourly wages and benefits above the limits described in paragraphs (2) - (7) of this subsection are to be reported as administrative hours, hourly wages and benefits.

(i) Adjusting reported cost. Each provider’s total reported allowable costs, excluding depreciation and mortgage interest, are projected from the historical cost-reporting period to the prospective reimbursement period as described in §355.108 of this title (relating to Determination of Inflation Indices). HHSC may adjust reimbursement if new legislation, regulations, or economic factors affect costs, according to §355.109 of this title.

(j) Fiscal Accountability for HCS. This subsection applies to services delivered on or before August 31, 2009 and only for HCS program services.

(1) General principles. Fiscal accountability is a process used to gauge the ongoing financial performance under the reimbursement rates.

(2) Annual reporting. Fiscal accountability will consist of the annual reporting of the direct service costs including wages, and benefits, from all providers. The data will be collected on a cost report designed by HHSC in accordance with §355.105(b) of this title.

(A) The Department of Aging and Disability Services (DADS) will place a vendor hold on payments to a provider whose provider agreement is being assigned or terminated. The provider will submit a cost report for the current reporting period to HHSC. Upon receipt of an acceptable cost report and repayment of any amounts due in accordance with this section, the vendor hold will be released.

(B) Providers that do not submit a cost report completed in accordance with all applicable rules and instructions within 60 days of the placement of a vendor hold due to the failure to submit the cost report are subject to an immediate recoupment of funds related to fiscal accountability as described in paragraph (4)(E) of this subsection. The recouped funds will not be restored until the provider submits an acceptable cost report and has paid the actual amount due as specified in paragraphs (5) - (7) of this subsection. If an acceptable cost report is not received within 365 days of the due date, the recoupment will become permanent.

(C) Providers with an ownership change from one legal entity to a different legal entity or a contract termination that do not submit a cost report for the fiscal year of the ownership change or contract termination within 60 days of the change of ownership or contract termination are subject to recoupment of funds related to fiscal accountability as described in paragraph (4)(E) of this subsection. The recouped funds will not be restored until the provider submits an acceptable cost report and has paid the actual amount due as specified in paragraphs (5) - (7) of this subsection. If an acceptable cost report is not received within 365 days of the change of ownership or contract termination date, the recoupment will become permanent.

(3) Comparison of direct-service costs to total direct-service revenue. HHSC will require providers to report all direct costs incurred on an annual fiscal year basis. HHSC will compare the reported direct service costs to the total direct service revenue.

(4) Calculation of direct-service revenues and fiscal accountability repayment. Direct Service Revenues are calculated by multiplying the number of units eligible for payment that have been paid for services delivered during the reporting period times the appropriate direct service portion of the rate for the service billed.

(A) Providers whose direct service costs are 90% or more of the direct service revenues will not be subject to repayment under this section.

(B) Providers whose direct service costs are less than 90% but greater than or equal to 85% of the direct service revenues will be required to pay to DADS 50% of the difference between the direct service costs and 90% of the direct service revenues.

(C) Providers whose direct service costs are less than 85% but greater than or equal to 80% of the direct service revenues will be required to pay to DADS 100% of the difference between the direct service costs and 85% of the direct service revenues plus 50% of the difference between 85% and 90% of the direct service revenues.

(D) Providers whose direct service costs are less than 80% of the direct service revenues will be required to pay to DADS the difference between the direct service costs and 95% of the direct service revenues.

(E) Providers who do not submit a cost report as described in paragraph (2)(B) or (C) of this subsection will be assumed to have direct service costs equal to 65% of the direct services revenues and will be required to pay to DADS the difference between 65% of the direct services revenues and 95% of the direct service revenues, subject to the provisions of paragraph (2)(B) or (C) of this subsection.

(5) Notification of recoupment. Providers will be notified, by certified mail, within 90 days of the determination of their recoupment amount by HHSC of the amount to be repaid to HHSC or its designee. If a subsequent review by HHSC or audit results in adjustments to the cost report as described in subsection (a) of this section that

35 TexReg 2416  March 26, 2010  Texas Register
change the amount to be repaid to HHSC or its designee, the provider will be notified in writing of the adjustments and the adjusted amount to be repaid. Providers will submit the repayment amount within 60 days of notification.

(6) Repayment. Repayment will be made by the following:

(A) the provider or legal entity submitting the report;

(B) any other legal entity responsible for the debts or liabilities of the submitting entity; or

(C) the legal entity on behalf of which a report is submitted.

(7) Providers required to repay revenues to DADS will be jointly and severally liable for any repayment. DADS will apply a vendor hold on Medicaid payments to a provider for not making the payment to DADS within 60 days of receiving notice.

(8) Aggregation.

(A) Definitions. The following words and terms have the following meanings when used in this paragraph.

(i) Aggregation--For an entity defined in clause (iii) of this subparagraph that controls, as defined in clause (iv) of this subparagraph, more than one HCS component code, the process of determining compliance with the spending requirements detailed in paragraph (4) of this subsection for all component codes controlled by the entity in the aggregate rather than requiring each component code to meet its spending requirement individually. For commonly owned corporations defined in clause (ii) of this subparagraph, the process of determining compliance with the spending requirements detailed in paragraph (4) of this subsection for all component codes in the controlled small group in the aggregate rather than requiring each component code to meet its spending requirement individually. Corporations that do not meet the definitions under clauses (ii) - (iii) of this subparagraph are not eligible for aggregation.

(ii) Commonly owned corporations--two or more corporations where five or fewer identical persons who are individuals, estates, or trusts own greater than 50 percent of the total voting power in each corporation.

(iii) Entity--a parent company, sole member, individual, limited partnership, or group of limited partnerships controlled by the same general partner.

(iv) Control--greater than 50% ownership by the entity.

(B) Component Codes Included in Aggregation. If an entity controlling more than one HCS component code or commonly owned corporations requests aggregation, compliance with the spending requirements will be evaluated in the aggregate for all HCS component codes that the entity or commonly owned corporations controlled at the end of its fiscal year or at the effective date of the change of ownership or termination of its last HCS contract.

(C) Aggregation Request. To exercise the aggregation option, the entity or commonly owned corporations must submit an aggregation request, in a manner prescribed by HHSC, at the time each cost report is submitted. In limited partnerships in which the same single general partner controls all the limited partnerships, that single general partner must make this request. Other such aggregation requests will be reviewed on a case-by-case basis.

(D) Frequency of Aggregation Requests. The entity or commonly owned corporations must submit a separate request for aggregation for each reporting period.

(E) Ownership Changes and Contract Terminations. HCS contracts that change ownership or terminate effective after the end of the applicable reporting period, but prior to the determination of compliance with spending requirements as per paragraph (4) of this subsection, are excluded from all aggregate spending calculations. These contracts’ compliance with spending requirements will be determined on an individual basis and the costs and revenues will not be included in the aggregate spending calculation.

§355.723. Reimbursement Methodology for Home and Community-Based Services (HCS).

(a) Prospective payment rates. HHSC sets payment rates to be paid prospectively to HCS providers.

(b) Levels of need. Rates vary by level of need for residential support, supervised living, HCS foster/companion care, and day habilitation. Rates do not vary by level of need for any other HCS service.

(c) Recommended rates. The recommended modeled rates for each HCS service type and level of need include the following cost components: direct care worker staffing costs (wages, benefits, modeled staffing ratios for direct care workers, direct care trainers and job coaches), other direct service staffing costs (wages for [direct care], direct care supervisors, benefits, modeled staffing ratios); facility costs (for respite care only); room and board costs for overnight, out-of-home respite care; administration and operation costs; and professional consultation and program support costs. The determination of all [these] components except for the direct care worker staffing costs component is based on cost reports submitted by HCS providers in accordance with §355.722 of this subchapter (relating to Reporting Costs by Home and Community-based Services (HCS) Providers). The determination of the direct care worker staffing costs component is calculated as specified in §355.112 of this title (relating to Attendant Compensation Rate Enhancement).

(d) Administration and operation cost component. The administration and operation cost component included in the recommended rate described in subsection (c) of this section for each HCS service type is determined as follows.

(1) Step 1. Determine total projected administration and operation costs and projected units of service by service type using cost reports submitted by HCS providers in accordance with §355.722 of this subchapter.

(2) Step 2. Determine the foster/companion care coordinator component of the foster/companion care rate as follows. For fiscal years 2010 through 2013, this component will be modeled using the weighted average foster/companion care coordinator wage as reported on the most recently available, reliable audited HCS cost report database plus 10.25 percent for payroll taxes and benefits inflated to the rate period and a consumer to foster/companion care coordinator ratio of 1:15. For fiscal year 2014 and thereafter, this component will be determined by summing total reported foster/companion care coordinator wages and allocated payroll taxes and benefits from the most recently available audited cost report, inflating those costs to the rate period and dividing the resulting product by the total number of foster care units of service reported on that cost report.

(3) Step 3. Determine total foster/companion care coordinator dollars as follows. Multiply the foster/companion care coordinator component of the foster/companion care rate from paragraph (2) of this subsection by the total number of foster care units of service reported on the most recently available, reliable audited HCS cost report database.

(4) Step 4. Determine total projected administration and operation costs after offsetting total foster/companion care coordinator
dollars as follows. Subtract the total foster/companion care coordinator dollars from paragraph (3) of this subsection from the total projected administration and operation costs from paragraph (1) of this subsection.

(5) Step 5. Determine projected weighted units of service for each HCS service type as follows:

(A) Supervised Living and Residential Support Services. Projected weighted units of service for Supervised Living and Residential Support Services equal projected Supervised Living and Residential Support units of service times a weight of 1.00;

(B) Day Habilitation. Projected weighted units of service for Day Habilitation equal projected Day Habilitation units of service times a weight of 0.25;

(C) Foster/Companion Care. Projected weighted units of service for Foster/Companion Care equal projected Foster/Companion Care units of service times a weight of 0.50;

(D) Supported Home Living. Projected weighted units of service for Supported Home Living equal projected Supported Home Living units of service times a weight of 0.50;

(E) Respite. Projected weighted units of service for Respite equal projected Respite units of service times a weight of 0.20;

(F) Supported Employment. Projected weighted units of service for Supported Employment equal projected Supported Employment units of service times a weight of 0.25;

(G) Behavioral Support. Projected weighted units of service for Behavioral Support equal projected Behavioral Support units of service times a weight of 0.18;

(H) Physical Therapy, Occupational Therapy, Speech Therapy and Audiology. Projected weighted units of service for Physical Therapy, Occupational Therapy, Speech Therapy and Audiology equal projected Physical Therapy, Occupational Therapy, Speech Therapy and Audiology units of service times a weight of 0.18;

(I) Social Work. Projected weighted units of service for Social Work equal projected Social Work units of service times a weight of 0.18;

(J) Nursing. Projected weighted units of service for Nursing equal projected Nursing units of service times a weight of 0.18.

(6) Step 6. Calculate total projected weighted units of service by summing the projected weighted units of service from paragraph (5)(A) - (J) of this subsection.

(7) Step 7. Calculate the percent of total administration and operation costs to be allocated to the service type by dividing the projected weighted units for the service type from paragraph (5) of this subsection by the total projected weighted units of service from paragraph (6) of this subsection.

(8) Step 8. Calculate the total administration and operation cost to be allocated to that service type by multiplying the percent of total administration and operation costs allocated to the service type from paragraph (7) of this subsection by the total administration and operation costs after offsetting total foster/companion care coordinator dollars from paragraph (4) of this subsection.

(9) Step 9. Calculate the administration and operation cost component per unit of service for each HCS service type by dividing the total administration and operation cost to be allocated to that service type from paragraph (8) of this subsection by the projected units of service for that service type from paragraph (1) of this subsection.

(e) Refinement and adjustment. Refinement/adjustment of the cost components and model assumptions will be considered, as appropriate, by HHSC.

§355.791. [Reporting Costs and] Reimbursement Methodology for the Texas Home Living (TxHmL) Program.

(44) Submission of cost reports. On an annual basis, Texas Home Living (TxHmL) Program providers must submit cost reports as directed by the Health and Human Services Commission (HHSC) or its designee in accordance with §355.103 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(41) “Direct service costs” are defined in §355.102(b)(3) of this title (relating to General Principles of Allowable and Unallowable Costs). For purposes of this section, direct service costs include:

[(A) costs associated with personnel who provide direct hands-on support for consumers and include personnel such as:

[(i) direct care workers;

[(ii) first-level supervisors of direct care workers;

[(iii) registered nurses;

[(iv) licensed vocational nurses; and

[(v) other personnel who provide activities of daily living training and clinical program services; and

[(B) costs related to:

[(i) wage rates;

[(ii) benefits;

[(iii) payroll taxes;

[(iv) contracts for direct services; and

[(v) direct service supervision information; and

[(C) leave (sick or vacation) in accordance with §355.103(b)(1)(A)(iii)(III)-(c) of this title (relating to Specifications for Allowable and Unallowable Costs) including accrued leave if the TxHmL Program provider has implemented a written policy that entitles an employee to the cash value of accrued leave upon termination.

(2) For staff whose duties include work other than the provision of direct services, the proportion of work that is spent on direct services may be included in the direct service costs.

[(A) The proportion of their salary and benefits that is compensation for direct services work can be included in the direct service cost report only to the extent that the salary and benefits for this direct service work must be the lesser of the actual wages and benefits or the wages and benefits for a comparable direct care worker assumed in the model.

[(B) The TxHmL Program provider must have a procedure in place that specifies how direct service work time is allocated.

(3) TxHmL Program providers must report the following information in the Full Cost Report:

[(A) direct service costs related to the delivery of direct services including, but not limited to community support services; supported employment, and the direct supervision of the delivery of those services; and

[(B) indirect costs including but not limited to facility operating and administrative costs.]}
[(b) Record keeping requirements.]

[(1) A TxHmL Program provider must:]

[(A) retain records according to HHSC’s requirements;]

[(B) ensure that records are accurate and sufficiently detailed to provide the legal, financial, and statistical information requested by HHSC; and]

[(C) maintain all work papers and any other records that support the information submitted on the Full Cost Reports relating to all allocations, cost centers, cost or statistical line items, surveys, and schedules.]

[(2) HHSC may require supporting documentation other than that contained in the cost report to substantiate reported information.]

[(3) A TxHmL Program provider must maintain documentation relating to compensation, bonuses, and benefits of each owner or related party in accordance with §355.105(b)(2)(D)(xi) of this title.]

[(4) A TxHmL Program provider must maintain clearly defined bonus policies in its written agreements with employees or in its overall employment policy in accordance with §355.103(b)(1)(A)(i) of this title and for owners and related parties §355.105(b)(2)(D)(xi)(1) of this title.]

[(5) A TxHmL Program provider must maintain clearly defined benefit policies in its written agreements with employees or in its overall employment policy in accordance with §355.103(b)(1)(A)(iii) of this title and for owners and related parties §355.105(b)(2)(D)(xi)(H) of this title.]

[(6) A TxHmL Program provider must maintain documentation for each employee that clearly identifies each compensation component, including regular pay, overtime pay, incentive pay, mileage reimbursements, bonuses, sick leave, vacation, other paid leave, deferred compensation, retirement contributions, TxHmL Program provider-paid instructional courses, health insurance, disability insurance, life insurance, and any other form of compensation.]

[(A) Types of documentation would include insurance policies, TxHmL Program provider benefit policies, records showing paid leave accrued and taken, documentation to support hours (regular and overtime) worked and wages paid, and mileage logs or other documentation to support mileage reimbursements and travel allowances.]

[(B) For accrued benefits, the documentation must clearly identify the period of the accrual. For example, if an employee accrues two weeks of vacation during 20X1 and receives the corresponding vacation pay during 20X2, that employee’s compensation documentation for 20X3 should clearly indicate that the vacation pay received had been accrued during 20X1.]

[(c) Noncompliance with record keeping requirements. Failure to maintain accurate records is a violation of the TxHmL Program provider contract, and will result in HHSC notifying DADS to place the TxHmL Program provider on vendor hold.]

[(d) Cost reporting. A TxHmL Program provider must complete Full Cost Reports in accordance with HHSC’s rules, regulations, and instructions.]

[[(1) Providers must follow the cost-reporting guidelines as specified in §355.105 of this title.]

[(2) Providers must follow the guidelines in determining whether a cost is allowable or unallowable as specified in §355.102 and §355.103 of this title (relating to General Principles of Allowable and Unallowable Costs, and Specifications for Allowable and Unallowable Costs), in addition to the following.]

[(3) Revenues must be reported on the cost report in accordance with §355.104 of this title (relating to Revenues).]

[(4) Allowable compensation for owners and related parties and definitions of owners and related parties are specified in §355.102(h) and §355.103(b)(2) of this title. Owner and related party employees who provide both direct care and indirect services must maintain daily time sheets that record the time spent on activities in each area. The provider must maintain documentation relating to compensation, bonuses, and benefits of each owner or related party in accordance with §355.105(b)(2)(B)(xi) of this title. The maximum hours per fiscal year that an owner and related party employee may report on the cost report is 2000 hours per fiscal year.]

[(e) Cost certification. ATxHmL Program provider must certify the accuracy of cost reports submitted to HHSC. A TxHmL Program provider may be liable for civil and/or criminal penalties if the cost report is not completed according to HHSC requirements.]

[(f) Due date. A TxHmL Program provider must submit Full Cost Reports in accordance with §355.105(c) of this title.]

[(g) Extension of due date. HHSC may grant extensions of due dates for good cause in accordance with §355.105(c)(2) of this title.]

[(h) Cost data. HHSC may at times require additional financial and statistical information to assess the fiscal integrity of the TxHmL Program in accordance with §355.105(c)(3) of this title.]

[(i) Failure to submit requested data. Failure to submit acceptable cost data by the due date constitutes a violation of the TxHmL Program provider contract and may result in vendor hold.]

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

[(k) Desk reviews or field audits are performed on cost reports for all contracted providers. The frequency and nature of the field audits are determined by HHSC to ensure the fiscal integrity of the program. Desk reviews and field audits will be conducted in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), and providers will be notified of the results of a desk review or a field audit in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments).]

[(l) Access to records. Each TxHmL Program provider must allow access by HHSC or its authorized representatives to any and all records necessary to verify cost data submitted to HHSC.]

[(1) This requirement includes records pertaining to related-party transactions and other business activities engaged in by the TxHmL Program provider that are directly or indirectly related to the provision of contracted services.]

[(2) Failure to allow inspection of pertinent records within 10 working days following written notice from HHSC constitutes a violation of the TxHmL Program provider contract.]

[(3) If the administrative office or other entity pertaining to a multi-contract operation refuses access to records, then the penalties]
are extended to all of the TexHmL Program provider’s entities having Medicaid contracts with DADS.)

(4) Additional rules regarding access to records that are out-of-state may be found in §355.105 of this title.

(m) Reviews of exclusions or adjustments. An TexHmL Program provider who disagrees with HHSC’s exclusion or adjustment of items in cost reports may request an informal review and, when appropriate, an administrative hearing as specified in §355.110 of this title (relating to Informal Reviews and Formal Appeals).

(a) Notification of exclusions and adjustments. HHSC will notify a TexHmL Program provider of exclusions and any adjustments, including caps applied, to reported costs in accordance with §355.107 of this title.

(cc) General requirements. HHSC determines reimbursement rates according to §355.101 of this title (relating to Introduction).

(pp) Payment rate determination. For the initial reimbursement period, beginning the effective date of the Center for Medicare and Medicaid Services (CMS) approval of the waiver, payment rates are those rates determined for other Medicaid programs with similar services. When payment rates are not available from other Medicaid programs with similar services, payment rates are determined on a pro forma approach in accordance with §355.101(c)(2)(B) and §355.105(h) of this title.

(qq) Payment rates for TexHmL services in effect for the initial reimbursement period will remain in effect until HHSC obtains sufficient reliable cost data to determine new payment rates.

(4) Each TexHmL Program provider’s total reported allowable costs, excluding depreciation and mortgage interest, are projected from the historical cost reporting period to the prospective reimbursement period as described in §355.108 of this title (relating to Determination of Inflation Indices). HHSC may adjust reimbursement if new legislation, regulations, or economic factors affect costs, according to §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs).

(4) [42] Effective September 1, 2009 and thereafter, the payment rate for day habilitation services will be equal to the Home and Community-based Services (HCS) waiver program approved rate for day habilitation services for Level of Need 5; the payment rate for community supports will be equal to the HCS waiver program approved rate for supported home living; the payment rate for respite will be equal to the HCS waiver program approved rate for respite; and the payment rates for supported employment and employment assistance will be equal to the HCS waiver program approved rate for supported employment. The referenced HCS waiver program approved rates are calculated in accordance with §355.723 of this title (relating to Reimbursement Methodology for Home and Community-based Services (HCS)).

(4) [44] Effective September 1, 2009 and thereafter, the payment rates for professional services, including physical therapy, occupational therapy, speech/hearing/language, nursing services provided by an RN, nursing services provided by an LVN, auditory services, dietary services, behavioral support services, and requisition fees will be equal to the HCS waiver program approved rates for these services as calculated in accordance with §355.725 of this title (relating to Reimbursement Methodology for Professional Services and Requisition Fees for Home and Community-based Services (HCS)).

(4) Effective September 1, 2010, for payment rates for community supports, day habilitation, respite, supported employment and employment assistance services, the determination of the direct care worker staffing costs component of the payment rate (wages, benefits, modeled staffing ratios for direct care workers, direct care trainers and job coaches), is calculated as specified in §355.112 of this title (relating to Attendant Compensation Rate Enhancement).

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

Filed with the Office of the Secretary of State on March 12, 2010.

TRD-201001293
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission

Earliest possible date of adoption: April 25, 2010

For further information, please call: (512) 424-6900

SUBCHAPTER J. PURCHASED HEALTH SERVICES

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.8081, concerning Medicaid reimbursement for certain purchased health services, and repeal §355.8201, concerning reimbursement for maternity clinic services, and §355.8341, concerning reimbursement for tuberculosis clinic services.

Background and Justification

The proposed amendment to §355.8081 reflects the current Medicaid reimbursement methodology for maternity clinic services and tuberculosis clinic services, and clarifies existing rule language. HHSC also proposes to repeal the outdated Medicaid reimbursement rules for maternity clinic services in §355.8201 and tuberculosis clinic services in §355.8341.

Maternity clinic services were paid according to the updated reimbursement methodology effective January 1, 2009, based on a periodic rate review.

Tuberculosis clinic services were paid according to the updated methodology effective September 1, 2009. The Centers for Medicare and Medicaid Services (CMS) requested that the Texas Medicaid tuberculosis billing system be revised to have providers bill separately for each type of tuberculosis clinic service, rather than billing for bundled services. The revised reimbursement methodology includes the addition of payable procedure codes that will increase reimbursement for tuberculosis clinic services.

Section-by-Section Summary

The proposed amendment to §355.8081 adds Maternity Clinic Services and Tuberculosis Clinic Services to the rule, and clarifies all of the types of providers covered by subsection (a) of the rule. Based on the changes, maternity clinic services and tuberculosis clinic services will be reimbursed in accordance with §355.8081(a), which states that subject to qualifications, limitations, and exclusions as provided in this chapter, payment to eligible providers must not exceed the lesser of the provider’s billed amount or the amount derived from the methodology described in §355.8085 of this title (relating to Texas Medicaid Reimbursement Methodology (TMRM) for Physicians and Certain Other Practitioners). The language in §355.8085 describes that HHSC
uses access-based reimbursement fees and resource-based reimbursement fees for physician and other professional services. The proposed repeal of §355.8201 relating to maternity clinic services reimbursement and §355.8341 relating to tuberculosis clinic services reimbursement deletes reimbursement information that is no longer applicable.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five-year period the amended rule is in effect there will be a fiscal impact to state government of $57,669 for state fiscal year 2010; $74,590 (SFY2011); $84,695 (SFY2012); $87,234 (SFY2013); and $89,943 (SFY2014) due to increased reimbursement for tuberculosis clinic services. The proposed rules will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small and Micro-business Impact Analysis

Ms. Rymal has also determined that there will not be an effect on small businesses or micro-businesses to comply with the amended requirements, as they will not be required to alter their business practices as a result of the rule.

There are not anticipated economic costs to persons who are required to comply with the proposed rule. There is no anticipated negative impact on local employment.

Public Benefit

Carolyn Pratt, Director of Rate Analysis, has determined that for each year of the first five years the proposed rule is in effect, the public will benefit from adoption of the rule by continued access to Medicaid tuberculosis clinic services and maternity clinic services.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Dan Huggins, Director of Acute Care Services, Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, MC-H400, Austin, Texas 78708-5200; by fax to (512) 491-1998; or by e-mail to Dan.Huggins@hhsc.state.tx.us within 30 days of publication of this proposal in the Texas Register.

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

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

§355.8081. Payments for Laboratory and X-ray Services, Radiation Therapy, Physical Therapists’ Services, Physician Services, Podiatry Services, Chiropractic Services, Optometric Services, Ambulance Services, Dentists’ Services, Psychologists’ Services, [and] Licensed Psychological Associates’ Services, Maternity Clinic Services, and Tuberculosis Clinic Services.

(a) Subject to qualifications, limitations, and exclusions as provided in this chapter, payment to eligible providers must not exceed the lesser of the provider’s billed amount or the amount derived from the methodology described in §355.8085 of this title (relating to Texas Medicaid Reimbursement Methodology (TMRM) for Physicians and Certain Other Practitioners). Eligible providers include:

1. Providers of Laboratory and X-ray Services;
2. Providers of Radiation Therapy;
3. Physical therapists;
4. Physicians;
5. Podiatrists;
6. Chiropractors;
7. Optometrists;
8. Dentists;
9. Maternity clinics; and
10. Tuberculosis clinics.

(b) - (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 March 15, 2010.
TRD-201001326
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 424-6900

DIVISION 11. MATERNITY SERVICES

1 TAC §355.8201

(Editors’ note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Health and Human Services Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)
The repeal is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

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

§355.8201. Reimbursement.

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

Filed with the Office of the Secretary of State on March 15, 2010.
TRD-201001327
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission

Texas Health and Human Services Commission

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.8546, concerning Brand-Name Drugs, relating to Medicaid pharmacy services reimbursement.

Background and Justification

The proposed changes are made in accordance with H.B. 2030, 81st Legislature, Regular Session, 2009, which relates to the Medicaid Drug Utilization Review Program and prescription drug use under the Medicaid program.

Section 1 of the bill adds §531.0694 to the Government Code, which requires HHSC to ensure that a prescription written under the Medicaid program is valid for the lesser of the period for which the prescription is written or one year. In compliance with this statutory amendment, HHSC proposes to amend §355.8546 related to Brand-Name Drugs.

Section-by-Section Summary

Section 355.8546(b) describes the procedure for physicians to override a multisource drug to dispense a brand name and defines the life of a Medicaid prescription as up to five refills or a six-month supply. Amended §355.8546(b) will change this definition to up to eleven refills or a twelve-month supply.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five-year period the amended rule is in effect there will be no fiscal impact to state government. The proposed rule will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small and Micro-Business Impact Analysis

Ms. Rymal also has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendment. The implementation of these proposed rule amendments does not require any changes in practice or any additional cost to the contracted provider.

HHSC does not anticipate that there will be any economic cost to persons who are required to comply with this amendment. The amendment will not affect local employment.

Public Benefit

Billy Millwee, Associate Commissioner for Medicaid and CHIP, has determined that for each year of the first five years the proposed amendment is in effect, the public benefit of enforcing the proposed amendment will be improved access to and quality of health care services.

Regulatory Analysis

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

Taking Impact Assessment
HHSC has determined that this proposal does not restrict or limit an owner’s right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code. Under §2007.003(b) of the Government Code, HHSC has determined that Chapter 2007 of the Government Code does not apply to these rules. The changes these rules make do not implicate a recognized interest in private real property. Accordingly, HHSC is not required to complete a takings impact assessment regarding these rules.

Public Comment

Written comments on the proposed amendments to the rules may be submitted to Leslie Weems, Medicaid/CHIP Division, Texas Health and Human Services Commission, P.O. Box 13247, H600, Austin, Texas 78711; by fax to (512) 491-1453; or by e-mail to leslie.weems@hhsc.state.tx.us within 30 days of publication of this proposal in the Texas Register.

Public Hearing

A public hearing is scheduled for April 14, 2010, at 10:00 a.m. at the Health and Human Services Building H, Lone Star Conference Room, located at 11209 Metric Boulevard, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Leigh Van Kirk at (512) 491-2813.

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

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

§355.8546. Brand-Name Drugs.

(a) Physicians, who want to dispense a brand name on a prescription for a multsource drug with a maximum allowable cost, handwritten write the phrase "Brand necessary" on the face of the prescription. This procedure enables payment for the drug at the more expensive brand name estimated acquisition cost. To indicate this certification (override) on the pharmacy claim form, the provider must enter "6" in the field for "Dispense as Written." For telephone orders involving physician overrides, a written prescription must be obtained from the prescribing physician within 30 days from the time the order was placed.

(b) A physician override for a prescription is valid only for the life of the prescription. The life of the prescription is defined as the original dispensing and any authorized refills, not to exceed eleven [eleven] refills or a twelve-month [thirteen半月] supply. The physician override cannot be forwarded or transferred to any other prescription for the same drug.

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

Filed with the Office of the Secretary of State on March 15, 2010.

TRD-201001329

Steve Aragon
Chief Counsel
Texas Health and Human Services Commission

Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 424-6900

CHAPTER 357. HEARINGS

The Health and Human Services Commission (HHSC) proposes revisions to Chapter 357, Subchapter A, §357.3, concerning Authority and Right to Appeal, and §357.19, concerning Other Procedures. HHSC also proposes revisions to Subchapter R, §§357.701 - 357.703, concerning Purpose and Application, Definitions and Process and Timeframes.

Background and Justification

Section 10 of Senate Bill 408 (S.B.408), 81st Legislature, Regular Session, 2009, amends Government Code §531.019 which directs the Health and Human Services Commission (HHSC) to provide an opportunity for administrative and judicial review of a hearings officer’s decision regarding public assistance provided under Chapters 32 (Medicaid) and 33 (Nutrition Assistance Programs) of the Human Resources Code. The amendment expands the opportunity for an administrative and judicial review for recipients of, and applicants for, services provided under Chapter 31 (TANF) of the Human Resources Code.

The proposed change to §357.3 expands the timeframe for submitting a request for an appeal to include the effective date of the agency action. Thus, the appeal must be requested within 90 days from the date on the notice of agency action, or the effective date of the agency action, whichever is later.

Section-by-Section Summary

Proposed §357.3 expands the timeframe for the client to request an appeal. The current rule allows an appeal within 90 days from the date on the notice of agency action. The amendment extends this period by adding the effective date of the agency action, thus allowing an appeal within 90 days of whichever date is later.

Proposed §357.19 allows for an administrative and judicial review for applicants for and recipients of TANF services.

Proposed §357.701 adds Chapter 31 (TANF) to the list of chapters for requesting an administrative and judicial review.

Proposed §357.702 adds Chapter 31 (TANF) to the definition of Administrative Review.

Proposed §357.703 adds Chapter 31 (TANF) to the process and timeframes for requesting an administrative review.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for the first five years the proposed sections are in effect, there will be no fiscal implications for state government or local governments as a result of enforcing or administering the sections.

Public Benefit

Paul Leche, Special Counsel for Appeals, has determined that, for each year of the first five years the sections are in effect, the public benefit anticipated as a result of promulgating the amendments to the agency’s hearing rules will be that all parties and their attorneys, as well as all other members of the public in-
volved in the fair hearing process at HHSC, will have a clear statement of the expanded right to a fair hearing, as well as administrative and judicial review, to follow.

Small and Micro-business Impact and Effect on Local Employment

Ms. Rymal has also determined that there is no adverse economic effect on small or micro businesses as a result of enforcing or administering the rules, because the proposal increases flexibility for appellants and does not add any new requirements for businesses. There is no anticipated economic cost to persons who are required to comply with the proposed sections. There is no anticipated effect on local employment in geographic areas affected by these sections.

Regulatory Analysis

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

Takings Impact Statement

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

Public Comment

Questions about the content of this proposal may be directed to Fairy Davenport Rutland, Appeals Director, at (512) 231-5717. Written comments on the proposal may be submitted to Fairy Davenport Rutland, Texas Health and Human Services Commission, HHSC Appeals Division, P.O. Box 149030 (MC W-613), Austin, Texas 78714-9030, or by email to fairy.rutland@hhsc.state.tx.us, within 30 days of publication of this proposal in the Texas Register.

For comments submitted electronically, please include "Rule Comments" in the subject line. Comments submitted electronically that are sent to a different address or that do not have "Rule Comments" in the subject line may not be considered. Comments should be organized in a manner consistent with the organization of the proposed rule.

The Commission will hold a public hearing to consider comments on this rule package in a public hearing scheduled for April 6, 2010 from 9:30 a.m. until 11:30 a.m., in Room S329 of the Exchange Office Building, 8407 Wall Street, Austin, Texas. Written and oral comments presented at the hearing will be considered.

SUBCHAPTER A. UNIFORM FAIR HEARING RULES

1 TAC §357.3, §357.19

Statutory Authority

The amendments are proposed under §531.033 of the Government Code, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties.

The amendments affect Title 1, Part 15, Chapter 357, Subchapters A and R. No other statutes, articles or codes are affected by these proposed new rules.

§357.3. Authority and Right to Appeal.

(a) (No change.)

(b) Right to Fair Hearing.

(1) (No change.)

(2) Time for Fair Hearing. The client has the right to appeal:

(A) the current level of SNAP benefits anytime within SNAP certification period; and

(B) in all other actions, within 90 days from the date on the notice of agency action, or the effective date of the agency action, whichever is later.

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

§357.19. Other Procedures.

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

(e) Administrative Review. An [Except for TANF decisions, an] administrative review of a hearings decision is provided as set forth in §§357.701 - 357.703 of this chapter (relating to Purpose and Application, Definitions and Process and Timeframes).

(f) Procedural Review. A procedural review is available to clients and applicants for hearings decisions relating to programs not covered under Chapter 31 (TANF), Chapter 32 (Medicaid), or Chapter 33 (Nutrition Assistance Programs) Human Resources Code.

(1) An appellant or his or her authorized representative may make a timely request for a review of the decision.

(2) A request for a review of the decision must be postmarked within 30 days of the date of notice of the hearings officer’s decision, and must be addressed to the hearings administrator.

(3) The scope of the review is limited to determining whether the hearings officer followed laws, procedures, and program rules introduced in the hearing.


[44] An appellant or his or her authorized representative may make a timely request for a review of the decision.

[42] A request for a review of the decision must be postmarked within 30 days of the date of notice of the hearings officer’s decision, and must be addressed to the hearings administrator.

[43] The scope of the review is limited to determining whether the hearings officer followed laws, procedures, and program rules introduced in the hearing.

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

Filed with the Office of the Secretary of State on March 15, 2010.

TRD-201001303
Steve Aragon  
Chief Counsel  
Texas Health and Human Services Commission  
Earliest possible date of adoption: April 25, 2010  
For further information, please call: (512) 424-6900

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SUBCHAPTER R. JUDICIAL AND ADMINISTRATIVE REVIEW OF HEARINGS
1 TAC §§357.701 - 357.703

Statutory Authority
The amendments are proposed under §531.033 of the Government Code, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission’s duties.

The amendments affect Title 1, Part 15, Chapter 357, Subchapters A and R. No other statutes, articles or codes are affected by these proposed new rules.

§357.701. Purpose and Application.
The purpose of this subchapter is to address the process for requesting administrative and judicial review of hearings. This subchapter applies to those hearings provided in this chapter that are related to benefits provided under the public assistance programs of Chapters 31, 32, 33, Human Resources Code and is limited to the hearing record that was considered by the hearings officer.

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

(1) Administrative Review--A desk review performed by an HHS System attorney of a hearing decision related to benefits provided under the public assistance programs of Chapters 31, 32, and 33, Human Resources Code and is limited to the hearing record that was considered by the hearings officer.

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

§357.703. Process and Timeframes.
(a) The hearing officer makes the final administrative decision in a hearing for the HHS System agency and its designees, unless, in those instances related to benefits provided under the public assistance programs of Chapters 31, 32, and 33, Human Resources Code, the appellant or the appellant’s representative files a request for an administrative review of the hearing decision.

(b) - (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.

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TRD-201001304
Steve Aragon  
Chief Counsel  
Texas Health and Human Services Commission  
Earliest possible date of adoption: April 25, 2010  
For further information, please call: (512) 424-6900

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TITLE 4. AGRICULTURE
PART 1. TEXAS DEPARTMENT OF AGRICULTURE
CHAPTER 17. MARKETING AND PROMOTION
SUBCHAPTER I. TEXAS EQUINE INCENTIVE PROGRAM
4 TAC §17.508, §17.510

The Texas Department of Agriculture (the department) proposes new Chapter 17, Subchapter I, §17.508 and §17.510, concerning the Texas Equine Incentive Program. These rules are proposed to fulfill the mandate of the 81st Legislature of the State of Texas in accordance with House Bill 1881, 81st Legislature, 2009 (HB 1881), now codified at Texas Agriculture Code, §12.044, which creates the Texas Equine Incentive Program and requires the department to adopt rules to establish and administer the program. Section 17.508 establishes standards for foals eligible for awards under the program. Section 17.510 establishes an additional fee of $30.00 per mare bred for stallion owners who fail to file required breeding reports and pay applicable program fees on or before November 30th of the applicable breeding year. This proposal is filed in conjunction with the adoption of §§17.500 - 17.507 and 17.509, which is published in this issue of the Texas Register. Section 17.508 was included in the original proposal and has been withdrawn in order to allow the department to file this new proposal including that section.

Kerry Neely, Deputy Assistant Commissioner for Marketing and Promotion, has determined that for the first five years the proposed sections are in effect, there will be fiscal implications for state government as a result of enforcing or administering the proposed sections. There will be an increase in state revenue due to the collection of incentive fees from owners of stallions used for breeding. It is not possible to determine the amount of fees that will be collected, but that amount will be based upon the number of breeders of Appaloosas, Paint and Quarter horses whose stallions have bred more than five mares during the 12-month period preceding the filing of a breeders report with the appropriate breed association, as well as the numbers of breeders who opt in and opt out of the program. Breeders may opt out of the program by providing notice to the department in accordance with program rules. Chapter 17, at §17.504, states that the owner of these stallions, as well as the owners of other eligible stallions who elect to opt-in, will initially be paying a $30 fee to the program per mare bred. In addition to the increase in revenue due to fees collected from breeders who wish to participate in the program, commencing January 1, 2010, to ensure administrative compliance and to offset the department’s increased administrative costs associated with stallion owners who are delinquent in filing required breeding reports or paying required program fees, the department will assess an increased fee of $30 per mare bred to stallion owners who fail to file required breeding reports and pay applicable program fees on or before November 30th of the applicable breeding year. It is also not possible to determine the amount of increased fees to be collected from those not filing timely reports or paying timely fees. In addition, it is intended that fees collected will be awarded to eligible horse owners in the form of incentive grants, with the exception of up
to 5% of fees collected, which may be used for administrative costs. There will be no fiscal implications for local government as a result of enforcing or administering the proposed rules.

Ms. Neely also has determined that for each year of the first five years the proposed sections are in effect the public benefit anticipated as a result of enforcing the proposed sections will be to provide an incentive for the owners of certain Texas-bred horses to enter foals in Texas horse events, in order to encourage the further development of the Texas horse industry and to enhance the quality of certain breeds of Texas-bred horses. For the first five-year period the proposed sections are in effect, there will be an economic cost for micro-businesses, small businesses or individuals who are required to comply with the sections, as proposed. An incentive fee in the amount of $30 per mare bred will be paid by the owner of an eligible stallion who had bred more than five mares, or by the owner of a stallion who has elected to opt-in to the program. The department will assess an increased fee of $30 per mare bred to stallion owners who fail to fail required breeding reports and pay applicable program fees on or before November 30th of the applicable breeding year. The total amount paid by the owner of the stallion owner will be dependent on the number of Texas mares bred during the applicable period and whether the stallion owner timely pays program fees and files required breeding reports. In addition, the owner of a stallion who has bred less than six mares may elect to participate in the program and pay a fee for each mare bred by the stallion. The payment of an incentive fee is required by law, and therefore, no regulatory flexibility analysis is required.

Comments on the proposed rules may be submitted to Kerry Neely, Deputy Assistant Commissioner for Marketing and Promotion, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the Texas Register.

The new sections are proposed under the Texas Agriculture Code §12.044, as established by HB 1881, which requires the department to establish rules to establish an equine incentive program, and authorizes the department to set and collect a program fee in an amount of not less than $30 per mare bred.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§17.508. Foals Eligible for Awards. In order for the owner of a foal to be eligible for an incentive award under the Program, the following requirements must be met:

1. the foal must be a Texas-bred horse;
2. a program fee must be paid on behalf of the foal;
3. the foal must participate in Texas horse events;
4. the foal must be at least one year old to accrue points for sanctioned events other than racing; and
5. the foal must be at least two years old to accrue points for race events.

§17.510. Failure to Timely File Breeding Report and Pay Fees. (a) If a stallion owner fails to file required breeding reports and pay applicable program fees on or before November 30th of the applicable breeding year, as required by §17.504(a), (b), and (c) of this subchapter (relating to Breeding Report; Program Fee), the department will assess a fee of $30.00 per mare bred, plus the fee required by §17.504(b) of this subchapter.

(b) If an owner of a stallion fails to file breeding reports and pay program fees on or before December 31st of the applicable calendar year, no foal sired by that stallion during that breeding year will be eligible to participate in the program.

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

Filed with the Office of the Secretary of State on March 15, 2010.
TRD-201001331
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 463-4075

TITLE 7. BANKING AND SECURITIES

CHAPTER 115. SECURITIES DEALERS AND AGENTS

7 TAC §§115.1, 115.3, 115.10

The Texas State Securities Board (Board) proposes amendments to §115.1, concerning general provisions; §115.3, concerning examinations; and §115.10, concerning supervisory requirements.

The proposed amendment to §115.1 would create a restricted registration category to correspond to the new Series 79 examination for investment banking registration. A person seeking this type of restricted registration could pass the Series 79 registration in lieu of the examination on general securities principles. The applicant would still be required to pass a separate examination on securities law. Prior to the creation of the Series 79, agents who worked as investment bankers took the Series 7 exam—the General Securities Principles Exam—which is more comprehensive and is focused toward retail sales. The content of the Series 79 is exclusively on investment banking activities. Investment bankers do not participate in retail dealer activities, so much of the Series 7 exam content was not applicable to their business and clientele.

The proposed amendment to §115.3 would amend the reference to the passing score for dealer agent examinations. By rendering the provision neutral as to the passing percentage, it would permit passing scores to adhere to nationwide standards recommended by the North American Securities Administrators Association after detailed and ongoing analyses. Additionally, the proposed amendment would identify the new Series 79 examination as the qualification exam for applicants seeking restricted registration for investment banking activities.

The proposed amendment to §115.10 adds a requirement to the supervisory system maintained by dealers. It would require a dealer to maintain a system designed to achieve compliance with all applicable securities laws and rules, not just those of this state. In addition to the Texas Securities Act and the Board’s rules, most dealers and agents are subject to federal, self-regulatory organization and other states’ securities laws and rules. In its current form, the Board’s rule would not provide a basis for

35 TexReg 2426  March 26, 2010  Texas Register
taking action against a dealer who fails to maintain a supervisory system designed to achieve compliance with all applicable securities laws and rules. A similar amendment is being concurrently proposed to §116.10, concerning supervisory requirements for investment advisers.

Patty Loutherback, Director, Registration Division; Joe Rotunda, Director, Enforcement Division; and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the rules are in effect there will be no foreseeable fiscal implications for state or local government as a result of enacting or amending the rules.

Ms. Loutherback, Mr. Rotunda, and Mr. Zivley also have determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enacting the rules will be to recognize a uniform examination, utilize national standards for passage of examinations, and notify dealers of required content for their supervisory systems. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rules as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed sections in the Texas Register. Comments should be sent to David Weaver, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The amendments are proposed under Texas Civil Statutes, Articles 581-13.D and 581-28-1. Article 13.D provides the Board with authority to waive examination requirements for any applicant or class of applicants. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposals affect Texas Civil Statutes, Articles 581-13 and 581-14.

(a) - (b) (No change.)
(c) Types of registrations.
(1) (No change.)
(2) Restricted registration. The restricted registrations are as follows:
(A) - (L) (No change.)
(M) registration to act exclusively as a finder; and
(N) registration to deal exclusively in investment banking; and
(O) registration with other restrictions which the Securities Commissioner may impose based upon the facts.
(3) (No change.)
(d) (No change.)

§115.3. Examination.
(a) Requirement. To determine the applicant’s qualifications and competency to engage in the business of dealing in and selling securities, the State Securities Board requires a written examination on general securities principles and on state securities law. Applicants must make a [The] passing score, as determined by the North American Securities Administrators Association, FINRA, or the Securities Commissioner, as appropriate, for all applicants on any required examination, as 70%.

(b) Examinations accepted.
(1) - (2) (No change.)
(3) In lieu of an examination on general securities principles, the Securities Commissioner recognizes the following limited examinations, administered by FINRA, for the corresponding restricted registrations:
(A) - (E) (No change.)
(F) for persons seeking a restricted registration to deal in all general securities except municipal securities, either the Series 17--General Securities Representative Examination, the Series 37--General Securities Representative Examination, the Series 38--General Securities Representative Examination, or the Series 47--General Securities Representative Examination; and
(G) for persons seeking a restricted registration to deal exclusively in investment banking, the Series 79--Investment Banking Qualification Examination; and
(H) for persons seeking a restricted registration to deal exclusively in government securities, the Series 72--Government Securities Representative Examination. A person registered on or before September 1, 1998, for the purpose of dealing exclusively in government securities, is not required to pass the Series 72 examination.
(4) (No change.)
(c) - (d) (No change.)

§115.10. Supervisory Requirements.
(a) Supervisory system. Each dealer shall establish, maintain, and enforce a system to supervise the activities of its agents that is reasonably designed to achieve compliance with the Texas Securities Act, Board rules, and all applicable securities laws and regulations. A dealer’s supervisory system shall provide, at a minimum, for the following:
(1) the establishment and maintenance of written procedures; and
(2) the appointment of one or more registered agents to carry out the supervisory responsibilities of the dealer.
(b) Written procedures.
(1) Each dealer shall establish, maintain, and enforce written procedures to supervise the activities of its agents that are reasonably designed to achieve compliance with the Texas Securities Act, Board rules, and all applicable securities laws and regulations.
(2) - (4) (No change.)
(c) - (d) (No change.)

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

Filed with the Office of the Secretary of State on March 10, 2010.
TRD-201001213

PROPOSED RULES    March 26, 2010    35 TexReg 2427
CHAPTER 116. INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES
7 TAC §116.10
The Texas State Securities Board (Board) proposes an amendment to §116.10, concerning supervisory requirements. The proposed amendment would add a requirement to the supervisory system maintained by investment advisers. It would require an investment adviser to maintain a system designed to achieve compliance with all applicable securities laws and rules, not just those of this state. In addition to the Texas Securities Act and the Board’s rules, most investment advisers and investment adviser representatives are subject to federal and other states’ securities laws and rules. In its current form, the Board’s rule would not provide a basis for taking action against an investment adviser who fails to maintain a supervisory system designed to achieve compliance with all applicable securities laws and rules. A similar amendment is being concurrently proposed to §115.10, concerning supervisory requirements for dealers.

Patty Loutherback, Director, Registration Division; Joe Rotunda, Director, Enforcement Division; and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Loutherback, Mr. Rotunda, and Mr. Zivley also have determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to notify investment advisers of required content for their supervisory systems. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rules as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed sections in the Texas Register. Comments should be sent to David Weaver, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The amendments are proposed under Texas Civil Statutes, Articles 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposals affect Texas Civil Statutes, Article 581-14.

§116.10. Supervisory Requirements.
Each registered investment adviser shall establish, maintain, and enforce a system to supervise the activities of its investment adviser representatives that is reasonably designed to achieve compliance with the Texas Securities Act, Board rules, and all applicable securities laws and regulations. Supervisory systems must be written and available for inspection in either print or electronic format.

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

Filed with the Office of the Secretary of State on March 10, 2010.
TRD-201001215
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 305-8303

CHAPTER 133. FORMS
7 TAC §§133.5, 133.6, 133.9, 133.11, 133.29, 133.30, 133.34
(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 State Securities Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas State Securities Board proposes the repeal of seven rules concerning forms adopted by reference. Specifically, §133.5, concerning the Secondary Trading Exemption Notice form; §133.6, concerning the Secondary Trading Exemption Renewal Notice form; §133.9, concerning the Notice Filing for Third Party Brokerage Arrangements on Financial Entity Premises form; §133.11, concerning the Sales Report Form for Noncontinuous Offerings form; §133.29, concerning the Intrastate Exemption Notice for Sales under Regulation 109.13(f) form; §133.30, concerning Information Concerning Projected Market Prices and Related Market Information--Section 5.O(3) form; and §133.34, concerning the Undertaking Regarding Non-Issuer Sales Pursuant to §139.14 form. New replacement forms for each are being concurrently proposed.

Patty Loutherback, Director, Registration Division; Joe Rotunda, Director, Enforcement Division; and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the repeals are in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the repeals. Ms. Loutherback, Mr. Rotunda, and Mr. Zivley also have determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be that outdated forms would be replaced. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed. There is no anticipated impact on local employment.

Comments on the proposals to be considered by the Board should be submitted in writing within 30 days after publication of the proposed repeals in the Texas Register. Comments should be sent to David Weaver, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The repeals are proposed under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority
to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.


§133.6. Secondary Trading Exemption Notice.


§133.11. Sales Report Form for Noncontinuous Offerings.

§133.29. Intrastate Exemption Notice for Sales under Regulation 109.13(l).

§133.30. Information Concerning Projected Market Prices and Related Market Information--Section 5.O(3).

§133.34. Undertaking Regarding Non-Issuer Sales Pursuant to §139.14.

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

Filed with the Office of the Secretary of State on March 10, 2010.

TRD-201001216

Denise Voight Crawford

Securities Commissioner

State Securities Board

Earliest possible date of adoption: April 25, 2010

For further information, please call: (512) 305-8303

7 TAC §§133.5, 133.6, 133.9, 133.11, 133.29, 133.30, 133.34

The Texas State Securities Board proposes seven new rules, concerning forms adopted by reference. Specifically, §133.5, which would adopt by reference the Secondary Trading Exemption Notice form; §133.6, which would adopt by reference the Secondary Trading Exemption Renewal Notice form; §133.9, which would adopt by reference the Notice Filing Form For Third Party Brokerage Arrangements on Financial Entity Premises form; §133.11, which would adopt by reference the Sales Report for Non-continuous Offerings form; §133.29, which would adopt by reference the Intrastate Exemption Notice form; §133.30, which would adopt by reference the Information Concerning Projected Market Prices and Related Market Information form; and §133.34, which would adopt by reference the Undertaking Regarding Non-Issuer Sales form. Each new form would replace an existing form that is being concurrently proposed for repeal. No substantive changes have been made to the forms; they were merely updated for formatting and other cosmetic changes.

Patty Loutherback, Director, Registration Division; Joe Rotunda, Director, Enforcement Division; and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the new rules are in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the new rules.

Ms. Loutherback, Mr. Rotunda, and Mr. Zivley also have determined that for each year of the first five years the new rules are in effect the public benefit anticipated as a result of enforcing the new rules will be that outdated forms would be replaced by updated ones. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the new rules as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed sections in the Texas Register. Comments should be sent to David Weaver, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The new rules are proposed under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.


§133.5. Secondary Trading Exemption Notice.

The State Securities Board adopts by reference the Secondary Trading Exemption Notice form. This form is available from the State Securities Board, P.O. Box 13167, Austin, Texas 78711 and at www.ssb.state.tx.us.


The State Securities Board adopts by reference the Secondary Trading Exemption Renewal Notice form. This form is available from the State Securities Board, P.O. Box 13167, Austin, Texas 78711 and at www.ssb.state.tx.us.


The State Securities Board adopts by reference the Notice Filing for Third Party Brokerage Arrangements on Financial Entity Premises form. This form is available from the State Securities Board, P.O. Box 13167, Austin, Texas 78711 and at www.ssb.state.tx.us.

§133.11. Sales Report for Non-continuous Offerings.

The State Securities Board adopts by reference the Sales Report for Non-continuous Offerings form. This form is available from the State Securities Board, P.O. Box 13167, Austin, Texas 78711 and at www.ssb.state.tx.us.

§133.29. Intrastate Exemption Notice.

The State Securities Board adopts by reference the Intrastate Exemption Notice form. This form is available from the State Securities Board, P.O. Box 13167, Austin, Texas 78711 and at www.ssb.state.tx.us.

§133.30. Information Concerning Projected Market Prices and Related Market Information.

The State Securities Board adopts by reference the Information Concerning Projected Market Prices and Related Market Information form. This form is available from the State Securities Board, P.O. Box 13167, Austin, Texas 78711 and at www.ssb.state.tx.us.

§133.34. Undertaking Regarding Non-Issuer Sales.

The State Securities Board adopts by reference the Undertaking Regarding Non-Issuer Sales form. This form is available from the State Securities Board, P.O. Box 13167, Austin, Texas 78711 and at www.ssb.state.tx.us.
This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency’s legal authority to adopt.

Filed with the Office of the Secretary of State on March 10, 2010.
TRD-201001217
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 305-8303

TITLE 10. COMMUNITY DEVELOPMENT
PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS
CHAPTER 1. ADMINISTRATION
SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES
10 TAC §1.11
The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 1, Subchapter A, §1.11, concerning Definition of Service-Enriched Housing. The new section is proposed in order to define "service-enriched housing" as required by §2306.1091(b) of the Texas Government Code.

The Housing and Health Services Coordination Council (HHSCC) was created by Senate Bill 1878 during the 81st Texas Legislative Session. The purpose of this Council is to increase state efforts to offer service-enriched housing through increased coordination of housing and health services. The Council seeks to improve interagency understanding of housing and services and increase the number of staff in state housing and state health services agencies that are conversant in both housing and health care policies. The creation of this Council was recommended to the 81st Texas Legislature by the Legislative Budget Board's 2009 Government Effectiveness and Efficiency Report.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed section is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the section as proposed.

Mr. Gerber has also determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be enhanced compliance with formalized policy, all contractual and statutory requirements.

There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the section as proposed. The proposed section will not impact local employment.

The public comment period will be held between March 26, 2010 to April 26, 2010 to receive input on this section. Written comments may be submitted to Texas Department of Housing and Community Affairs, ATTN: Ashley Schweickart Division, HHSCC Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@td-hca.state.tx.us, or by fax to (512) 475-1672. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. APRIL 26, 2010.

The new section is proposed pursuant to the authority of the Texas Government Code, §2306.1091(b), which provides the Department the authority to adopt a rule defining "service-enriched housing."

The proposed new section affects no other code, article or statute.

§1.11. Definition of Service-Enriched Housing

(a) Purpose. It is the purpose of this section to define service-enriched housing for the Housing and Health Services Coordination Council.

(b) Definition. For the purpose of directing the work of the Housing and Health Services Coordination Council and its work products, including the biennial plan, Service-Enriched Housing is defined as integrated, affordable, and accessible housing that provides residents with the opportunity to receive on-site or off-site health-related and other services and supports that foster independence in living and decision-making for individuals with disabilities and persons who are elderly.

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

Filed with the Office of the Secretary of State on March 15, 2010.
TRD-201001311
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 475-3916

CHAPTER 5. COMMUNITY AFFAIRS PROGRAMS
SUBCHAPTER A. GENERAL PROVISIONS
10 TAC §§5.12, 5.16, 5.21, 5.22
The Texas Department of Housing and Community Affairs (the Department) proposes amendments to 10 TAC Chapter 5, Subchapter A, §§5.12, §5.16, and adding new §5.21, Subrecipient Contact Information, and new §5.22, Offsite Record Retention concerning the Community Affairs Division programs (Community Services Block Grant (CSBG) Program, the Comprehensive Energy Assistance Program (CEAP), and the Weatherization Assistance Program (WAP)). The proposed amendments make changes to the existing rules to clarify purchases and acquisition costs and timeline to respond to monitoring reports. The proposed new sections are to improve communication between the Department and subrecipients' board of directors and ensure client confidentiality.

Mr. Michael Gerber, Executive Director, has determined that for the first five year period the proposed sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections as proposed.

Mr. Gerber has also determined that for each year of the first five years the sections are in effect the public benefit anticipated will be to permit the adoption of new rules, thereby enhancing the
State’s ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. The proposed sections will not impact local employment.

The public comment period will be March 26, 2010 through April 26, 2010 to receive input on the proposed amendments and new sections and a public hearing will be held. Information on the public hearing may be found in the "In Addition" section of this issue of the Texas Register and may also be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2010 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcalem­ments@tdhca.state.tx.us, or by fax to (512) 475-4624. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. APRIL 26, 2010.

The amended and new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed amended and new sections.


Purchases of personal property, equipment, goods or services [Equipment purchases] with a unit [an] acquisition cost of over $5,000 [as greater per unit] for Community Services Block Grant (CSBG), Comprehensive Energy Assistance Program (CEAP), and Weatherization Assistance Program (WAP) and $500 or greater for Emergency Shelter Grant Program (ESGP) require prior approval from the TDHCA Community Affairs Division before the purchase can take place.

§5.16. Monitoring of Subrecipients.

(a) The Department’s Community Affairs Division (CAD) is responsible for ensuring that the Community Services Block Grant (CSBG), Comprehensive Energy Assistance Program (CEAP), and Emergency Shelter Grant Program (ESGP) program activities are completed and that the funds are expended in accordance with the contract provisions and applicable State and Federal rules, regulations, policies, and related statutes. In order to ensure such, the Department will conduct monitoring reviews of the subrecipients to evaluate the effectiveness of subrecipient’s performance and program compliance through on-site and desk monitoring as described in §5.15 of this chapter (relating to Federal Funding Accountability and Transparency Act (FFATA)) following the requirements of §678B of PL 105-285 Subtitle B, §2605(B)(10) of PL 97-35, as amended, 10 CFR §440.23(d), and 24 CFR §576.61 and §576.57(f) and (g), respectively.

(1) CAD employs a subrecipient monitoring procedure that is based upon an assessment of associated risks. The factors may include but are not limited to the status of the most recent monitoring report, timeliness of grant reporting, results of the last on-site monitoring review, number and funding amount of Department funded contracts, final expenditure rate, and single audit status or other factors. Ranking of subrecipients will determine whether an on-site review or a desk review is completed unless Department management determines an on-site review is needed.

(2) CAD may conduct unannounced on-site monitoring reviews of subrecipients identified as at risk for contract termination, if deficiencies identified from prior monitoring activities persist or remain unresolved for an unreasonable period of time. In the event of reports of fraud and abuse or other extenuating circumstances the Department may make an unannounced on-site monitoring review.

(3) Follow-up reviews may be performed to ensure implementa­tion of corrective action of subrecipients that failed to meet the goals, standards, and requirements established by the Department.

(4) Technical assistance and training will be provided to the subrecipient to address program deficiencies.

(5) A monitoring instrument is used to perform monitoring reviews. Support documentation is retained by the Department to verify: the achievement of performance goals; conduct of eligible activities; and compliance with other contractual regulatory provisions and financial accountability. Monitoring reviews of subrecipients also include reviewing annual financial reports and any related management letters and financial documents.

(6) Following the onsite monitoring review, a monitoring report is prepared and submitted to the subrecipients outlining any administrative, program, and financial deficiencies. The monitoring report also includes notes, recommended improvements, corrective actions or a corrective action plan. Subrecipients must respond to the monitoring report within forty-five (45) calendar days from the date of the monitoring report.

(A) Finding--The written description of a deficient condition which is significantly substandard according to the monitoring standards. Findings may also be deficiencies found with regard to compliance with program rules, required cost principles, federal, state and/or local laws, and generally accepted accounting procedures or Generally Accepted Accounting Principles. In general, findings require corrective action to create an acceptable level of risk for disbursement of funds. The description of a finding might include the cause and effect of the deficient condition.

(B) Recommended Improvement--Suggested best practice(s) to enhance program, operational, financial, or administrative practices.

(C) Note--An explanatory tool to further describe and clarify findings or recommended improvements. A note may also be used to include additional information related to the monitoring review but not related to a finding or recommended improvement.

(7) Subrecipients are required to have at a minimum the following documents available, and any other requested documents, for the monitoring review:

(A) Roster of staff (name, title, salary and status)--All Community Affairs programs;

(B) Current agency organization chart;

(C) List of Board of Directors to include: names, addresses and telephone numbers, tenure on the board, section represented by the board member, list of committees--CSBG and ESGP;

(D) Board election/selection materials--CSBG;

(E) Board minutes (previous six meetings) and attendance roster--CSBG and ESGP;

(F) List of neighborhood centers with names of staff--CSBG and CEAP;

(G) Personnel policies;

(H) Bylaws--CSBG and ESGP;

(I) Travel policies and records;

(J) Chart of accounts;
(K) Accounting records (journals/ledgers) and support documentation;
(L) Amount of Cash on Hand (at time of monitoring);
(M) Bank reconciliation records;
(N) Agency’s proof of fidelity bond coverage;
(O) Documentation of match requirements--ESGP;
(P) Closeout data for prior program year--CEAP and WAP;
(Q) Access to client files and documentation of performance--All Community Affairs programs;
(R) Declaration of Income Statement (DIS) Policy/Procedure--All Community Affairs programs;
(S) Appeals Procedures--CEAP and WAP;
(T) Subcontract agreements with appropriate procurement packages (if applicable)--All Community Affairs programs;
(U) Procurement policy;
(V) Documentation of current contract inventory--All Community Affairs programs;
(W) Documentation of coordination with other local programs (including contact person and phone numbers)--CSBG;
(X) Copies of most recent monitoring reports and/or performance reviews of all programs administered by the organization;
(Y) Copy of the most recent Single Audit Report--Organizations that expend more than $500,000 in federal funds during a fiscal year must have a single audit conducted for that year (A-133 Subpart B.200). Organizations that do not exceed the $500,000 federal fund expenditure threshold are exempt from the single audit requirements. If an organization is not required to have a single audit performed, the organization must provide the end-of-the-year financial statements (balance sheet, income statement, and statement of cash flow); and
(Z) If applicable, documentation of the most recent Head Start Onsite Monitoring Document review, including results, responses, and current status--CSBG.

(b) Subrecipients not exempt from the single audit requirements are responsible for submitting their Single Audit Report within thirty (30) days of completion of their audit and no later than nine (9) months after the end of the audit period (fiscal year end) to the Department’s Portfolio Management and Compliance Division as well as to the CA Division. Refer to 31 U.S.C. §7502.

(c) Monitoring reviews of subrecipients will include a review of the subrecipients annual financial reports and any related management letters and financial documents.

§5.21. Subrecipient Contact Information.

(a) Subrecipients will notify the Community Affairs Division (CAD) of key management staff vacancies and will provide contact information for key management staff new hires. Contact information will include, name, title, phone number, and direct email address.

(b) As vacancies occur within the organization’s board of directors, the CAD will be notified of such vacancies and, if applicable, the sector the board member represented.

(c) Contact information for the board of director’s board chair must be provided to CAD and shall include: the board chair’s name, mailing address (which must be different from the organization’s mailing address), phone number (different from the organization’s phone number), fax number (if applicable), and the direct e-mail address for the board chair.

§5.22. Offsite Record Retention.

Client Records. The Department requires subrecipient organizations that administer Community Affairs Programs and serve clients, to document client services and to arrange for the security of confidential client files in a manner to protect the privacy of each client and to maintain the same for future reference. Archiving of client files will be maintained offsite from subrecipient headquarters and shall be stored in a secure space in a manner that ensures confidentiality and in accordance with organization policies and procedures.

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

Filed with the Office of the Secretary of State on March 15, 2010.
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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 475-3916

§§5.204, 5.207, 5.211, 5.213

SUBCHAPTER B. COMMUNITY SERVICES BLOCK GRANT (CSBG)

10 TAC §§5.204, 5.207, 5.211, 5.213

The Texas Department of Housing and Community Affairs (the Department) proposes amendments to 10 TAC Chapter 5, Subchapter B, §§5.204, 5.207, 5.211, and 5.213, concerning the Community Services Block Grant (CSBG) Program. The proposed amendments make changes to the existing rules in response to federal grant guidance; to ensure equitable distribution of services and uniformity in reporting timelines.

Mr. Michael Gerber, Executive Director, has determined that for the first five year period the proposed sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections as proposed.

Mr. Gerber has also determined that for each year of the first five years the sections are in effect the public benefit anticipated will be to permit the adoption of new rules, thereby enhancing the State’s ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. The proposed sections will not impact local employment.

The public comment period will be March 26, 2010 through April 26, 2010 to receive input on the proposed amendments and a public hearing will be held. Information on the public hearing may be found in the “In Addition” section of this issue of the Texas Register and may also be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2010 Rule Comments, P.O. Box 13941, Austin, Texas 78771-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-4624. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. APRIL 26, 2010.
The amended sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed amended sections.

§5.204  Use of Funds.

(a) CSBG funds distributed to eligible entities for a fiscal year may be available for obligation during that fiscal year and the succeeding fiscal year. Eligible entities may use the funds for administrative support and/or for direct services such as: education, employment, housing, health care, nutrition, transportation, linkages with other service providers, youth programs, emergency services, i.e., utilities, rent, [mortgage] food, shelter, clothing etc. For additional requirements reference 42 U.S.C. §9908(b)(A)(i-vii) and Office of Management and Budget (OMB) Circulars A-122 and A-87.

(b) Utility and rent deposit refunds from vendors must be reimbursed to the subrecipient and not the client. Funds should be treated as program income.

§5.207  Subrecipient Performance.

(a) Budgets. CSBG eligible entities and any other funded organizations shall submit a budget to facilitate the contract execution process. A certification of board approval of CSBG budget form issued by the Department must also be submitted with planned budgets.

(b) Unexpended Funds. The Department reserves the right to deobligate funds.

(1) The U.S. Department of Health and Human Services Administration for Children and Families issues terms and conditions for receipt of funds under the CSBG. Subrecipients of CSBG funds will comply with the requirements of the terms and conditions of the CSBG award. Services must be provided on or before September 30th of the subsequent year and funds must be fully expended.

(2) The Coats Human Services Reauthorization Act of 1998, allows states to recapture unexpended CSBG funds in excess of 20% of the CSBG funds obligated to an eligible entity. This may be superseded by Congressional action in the appropriation process or by the terms and conditions issued by U.S. Department of Health and Human Services in the CSBG award letter.

(c) Services to Poverty Population. The subrecipient organizations administering services to clients in one or more CSBG service area counties shall ensure that such services are rendered reasonably and in an equitable manner to ensure fairness among all potential applicants eligible for services. Services rendered must reflect the poverty population ratios in the service area and services should be distributed based on the proportionate representation of the poverty population within a county. A variance of greater than plus or minus 20% will constitute a finding. Subrecipients with a service area of a single county shall demonstrate marketing and outreach efforts to render direct services to a reasonable percentage of the county’s eligible population based on the most recent decennial census. Services should also be distributed based on the proportionate representation of the poverty population within a county.

§5.211  Subrecipient Reporting Requirements.

(a) Monthly Performance and Expenditure Report. CSBG subrecipients must submit a monthly performance and expenditure report. Subrecipients shall submit the Monthly Expenditure Report and Monthly Performance Report no later than the fifteenth (15th) [twentieth (20th)] day of the month after each month of the contract period. Even if a fund reimbursement is not being requested, an Expenditure Report must be submitted electronically on or before the fifteenth (15th) [twentieth (20th)] day of each month of the grant period. A final Expenditure Report must be submitted within sixty (60) days after the CSBG contract ends. The "Community Affairs Contract User Guide System" may be accessed through the TDHCA website, www.tdhca.state.tx.us.

(b) Reporting. Federal requirements mandate all states to participate in the preparation of an annual performance measurement report (also referred to as the CSBG National Survey). To comply with the requirements of §678E of the CSBG Act, all CSBG eligible entities and other organizations receiving CSBG funds are required to participate.

§5.213  Board Structure.

(a) Private nonprofit entities, shall administer the CSBG program through a tripartite board that fully participates in the development, planning, implementation, and evaluation of the program to serve low-income communities. Some of the members of the board shall be selected by the private nonprofit entity and others through a democratic process; the board shall be composed so as to assure that the requirements of §676B(a)(2) of the CSBG Act are followed and are composed as follows:

1. One-third of the members of the board shall be elected public officials, holding office on the date of the selection, or their representatives. In the event that there are not enough elected public officials reasonably available and willing to serve on the board, the entity may select appointive public officials to serve on the board. [The entity may allow governing officials of the political jurisdiction to select and/or recommend an elected or appointive official to serve on the board.] The public officials selected to serve on the board may each choose one permanent representative or designate an alternate to serve on the board. Appointive public officials or their representatives or alternates may be counted in meeting the 1/3 requirement. Refer to subsection (d)(1)(B) of this section entitled "Permanent Representatives and Alternates" for related information;

2. not fewer than 1/3 of the members are persons chosen in accordance with democratic selection procedures adequate to assure that these members are representative of low-income individuals and families in the neighborhood served; and each representative of low-income individuals and families selected to represent a specific neighborhood within a community under subsection (b)(1)(B) of this section, resides in the neighborhood represented by the member;

3. the remainder are members of business, industry, labor, religious, law enforcement, education, or other major groups and interests in the community served.

(b) For public organizations to be considered to be an eligible entity for purposes of the CSBG Act, §676B(b), the entity shall administer the CSBG grant through tripartite boards as follows:

1. A tripartite board, which shall have members selected by the organization and shall be composed so as to assure that not fewer than 1/3 of the members are persons chosen in accordance with democratic selection procedures adequate to assure that these members:

   (A) are representative of low-income individuals and families in the neighborhood served;

   (B) reside in the neighborhood served; and

   (C) are able to participate actively in the development, planning, implementation, and evaluation of programs funded under this chapter; or

   (D) If conditions in subparagraphs (A)-(C) of this paragraph are not utilized, then another mechanism specified by the state
which meets the tripartite requirements may be used. Public organizations that choose to utilize another mechanism must submit to the Department, for review and approval, a description of the mechanism to be utilized to select low-income representatives. The mechanism must assure decision-making and participation by low-income individuals in the development, planning, implementation, and evaluation of programs funded under this chapter.

(2) One-third of the members of the board shall be elected public officials, holding office on the date of the selection, or their representatives. In the event that there are not enough elected public officials reasonably available and willing to serve on the board, the entity may select appointive public officials to serve on the board. [The entity may allow governing officials of the political jurisdiction to select and/or recommend an elected or appointive official to serve on the board.] The public officials selected to serve on the board may each choose one permanent representative or designate an alternate to serve on the board. Refer to subsection (d)(1)(B) of this section, entitled "Permanent Representatives and Alternates" for related information.

(3) The remainder of the members are officials or members of business, industry, labor, religious, law enforcement, education, or other major groups and interests in the community served.

(c) Eligible entities administering the Head Start Program must comply with, the Head Start Act (42 U.S.C. §9837) that requires the governing body membership to comply with the requirements of §642(c)(1) of the Head Start Act. Exceptions shall be made to the requirements of clauses (i) - (iv) of §642(c)(1) of the Head Start Act for members of a governing body when those members serve a public entity and are selected to their positions with the public entity by public election or political appointment.

(d) Selection. Pursuant to [As per] §676B of the CSBG Act, Private nonprofit entities and public organizations have the responsibility for selection and composition of the board.

(1) Public Officials:

(A) Elected public officials or appointed public officials, selected to serve on the board, shall have either general governmental responsibilities or responsibilities which require them to deal with poverty-related issues; They may not be officials with only limited, specialized, or administrative responsibilities; and

(B) Permanent Representatives and Alternates. The public officials selected to serve on the board may each choose one permanent representative or designate an alternate to serve on the board.

(i) Permanent Representatives. The public officials selected by a private nonprofit entity or public organization to serve on the board may each choose one permanent representative to serve on the board in a full-time capacity. The public officials of the public organization may choose a representative to serve on the board or other governmental body. The representative need not be a public official but shall have full authority to act for the public official at meetings of the board. Permanent representatives may hold an officer position on the board. If a permanent representative is not chosen, then an alternate may be designated by the public official selected to serve on the board. Alternates may not hold an officer position on the board.

(ii) Alternate Representatives. If the private nonprofit entity or public organization board chooses to allow alternates, the alternates for low-income representatives shall be elected at the same time and in the same manner as the board representative is elected to serve on the board. Alternates for representatives of private sector organizations may be designated to serve on the board and should be selected at the same time the board representative is selected. In the event that the board member or alternate ceases to be a member of the organization represented, he/she shall no longer be eligible to serve on the board. Alternates may not hold an officer position on the board.

(2) Low-Income Representatives:

(A) An essential objective of community action is participation by low-income individuals in the programs which affect their lives; therefore, the CSBG Act and its amendments require representation of low-income individuals on boards or state-specified governing bodies. The CSBG statute requires that not fewer than one-third of the members shall be representatives of low-income individuals and families and that they shall be chosen in accordance with democratic selection procedures adequate to assure that these members are representative of low-income individuals and families in the neighborhoods served; and that each representative of low-income individuals and families selected to represent a specific neighborhood within a community resides in the neighborhood represented by the member; or

(B) Board members representing low-income individuals and families must be selected in accordance with a democratic procedure. This procedure, as detailed in subparagraph (D) of this paragraph, may be either directly through election, public forum, or, if not possible, through a similar democratic process such as election to a position of responsibility in another significant service or community organization such as a school PTA, a faith-based organization leadership group; or an advisory board/governing council to another low-income service provider;

(C) Every effort should be made by the nonprofit entity or public organization to assure that low-income representatives are truly representative of current residents of the geographic area to be served, including racial and ethnic composition, as determined by periodic selection or reselection by the community. "Current" should be defined by the recent or annual demographic changes as documented in the needs/community assessment. This does not preclude extended service of low-income community representatives on boards, but it does suggest that continued board participation of longer term members be revalidated and kept current through some form of democratic process; and

(D) The procedure used to select the low-income representative must be documented to demonstrate that a democratic selection process was used. Among the selection processes that may be utilized, either alone or in combination, are:

(i) Selection and elections, either within neighborhoods or within the community as a whole; at a meeting or conference, to which all neighborhood residents, and especially those who are poor, are openly invited;

(ii) Selection of representatives to a community-wide board by members of neighborhood or sub-area boards who are themselves selected by neighborhood or area residents;

(iii) Selection, on a small area basis (such as a city block); or

(iv) Selection of representatives by existing organizations whose membership is predominately composed of poor persons.

(3) Representatives of Private Groups and Interests:

(A) The private nonprofit entity or public organization shall select the remainder of persons to represent the private sector on the board or it may select private sector organizations from which representatives of the private sector organization would be chosen to serve on the board; and
§5.311. Reports.

(a) The ESGP contract requires subrecipients to submit the Monthly Expenditure Report and Monthly Performance Report no later than the fifteenth (15th) [twentieth (20th)] day of the month after each month of the contract period.

(b) Even if a fund reimbursement is not being requested, an Expenditure Report must be submitted electronically no later than the fifteenth (15th) [on or before the twentieth (20th)] day of each month of the grant period. A final Expenditure Report must be submitted within sixty (60) days after the ESGP contract ends.

(c) A user name and password are needed to access the reporting system to submit monthly reports. The "Community Affairs Contract User Guide System" may be accessed through the TDHCA website, www.tdhca.state.tx.us, under "Interactive" "Contractor Tools".

(d) Subrecipients shall submit, by the thirtieth (30th) day of the month, a Monthly Service Summary Report of ESGP clients reported during the prior month in the Homeless Management Information Systems (HMIS) database.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency’s legal authority to adopt.
Written comments may be submitted to Texas Department of Housing and Community Affairs, 2010 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-4624. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. APRIL 26, 2010.

The amended sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed amended sections.

§ 5.422. General Assistance and Benefit Levels.

(a) Subrecipients shall not discourage anyone from applying for CEAP assistance. Subrecipients shall provide all potential clients with opportunity to apply for LIHEAP programs.

(b) CEAP provides assistance to targeted beneficiaries being households with low incomes at or below 200% of the Federal Poverty Level, with priority given to the elderly, persons with disabilities, families with young children; households with the highest energy costs or needs in relation to income, and households with high energy consumption.

(c) CEAP includes activities, as defined in Assurances 1-16 in Title XXVI of the Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35), as amended; such as education; and financial assistance to help very low- and extremely low-income consumers reduce their utility bills to an affordable level. CEAP services include utility payment assistance; heating and cooling system replacement, repair, and/or retrofit; energy education; and budget counseling.

(d) Sliding scale benefit for all CEAP components:

1. Benefit determinations are based on the household’s income, the household size, the energy cost and/or the need of the household, and the availability of funds. [-]

2. Energy assistance benefit determinations will use the following sliding scale (Except Heating and Cooling System Replacement, Repair and/or Retrofit Component):

   - (A) Households with Incomes of 0 to 50% of Federal Poverty Guidelines may receive an amount needed to address their energy payment shortfall not to exceed $1,600; [1,600.]

   - (B) Households with Incomes of 51% to 75% of Federal Poverty Guidelines may receive an amount needed to address their energy payment shortfall not to exceed $1,400; [1,400.]

   - (C) Households with Incomes of 76% to at or below 200% of Federal Poverty Guidelines may receive an amount needed to address their energy payment shortfall not to exceed $1,200; and [$1,200.]

   - (D) The Heating and Cooling System Replacement, Repair, and/or Retrofit Component maximum household benefit limit is $6,000 [6,000].

   (e) Subrecipient shall not establish lower local limits of assistance for any component.

   (f) Total maximum possible annual household benefit (all components combined) equals $10,800 [10,800].

   (g) Subrecipient shall determine client eligibility for utility payments and/or retrofit based on the agency’s household priority rating system and household’s income as a percent of poverty.

(h) Subrecipients shall provide only the following types of assistance with funds from CEAP:

1. Payment to vendors and suppliers of fuel/utilities, goods, and other services, such as electrical wiring, butane tanks, and lines, etc. for past due or current bills related to the procurement of energy for heating and cooling needs of the residence, not to include security lights and other items unrelated to energy assistance;

2. Payment to vendors–only one energy bill payment per month as required by component;

3. Needs assessment and energy conservation tips, coordination of resources, and referrals to other programs;

4. Energy assistance to low-income elderly and disabled individuals most vulnerable to high cost of energy for heating and cooling needs of the residence;

5. Payment of water bills only when such costs include expenses from operating an evaporative water cooler unit or when the water bill is an inseparable part of a utility bill. As a part of the intake process, outreach, and coordination, the subrecipient shall confirm that a client owns an operational evaporative cooler and has used it to cool the dwelling within sixty (60) days prior to application. Payment of other utility charges such as wastewater and waste removal are allowable only if these charges are an inseparable part of a utility bill. Documentation from vendor is required. Whenever possible, subrecipient shall negotiate with the utility providers to pay only the "home energy"--heating and cooling--portion of the bill;

6. Energy bills already paid by householders may not be reimbursed by the program;

7. Payment of reconnection fees in line with the registered rate filed with the Public Utility Commission and/or Texas Railroad Commission. Payment cannot exceed that stated tariff cost. Subrecipient shall negotiate to reduce the costs to cover the actual labor and material and to ensure that the utility does not assess a penalty for delinquency in payments;

8. Payment of security deposits only when state law requires such a payment, or if the Public Utility Commission or Texas Railroad Commission has listed such a payment as an approved cost, and where required by law, tariff, regulation, or a deferred payment agreement includes such a payment. Subrecipients shall not pay such security deposits that the energy provider will eventually return to the client;

9. While rates and repair charges may vary from vendor to vendor, Subrecipient shall negotiate for the lowest possible payment. Prior to making any payments to an energy vendor a Subrecipient shall have a signed vendor agreement on file from the energy vendor receiving direct LIHEAP payments from the Subrecipient;

10. Subrecipient may make payments to landlords on behalf of eligible renters who pay their utility and/or fuel bills indirectly. Subrecipient shall notify each participating household of the amount of assistance paid on its behalf. Subrecipient shall document this notification. Subrecipient shall maintain proof of utility or fuel bill payment. Subrecipient shall ensure that amount of assistance paid on behalf of client is deducted from client’s rent; and

11. In lieu of deposit required by an energy vendor, Subrecipient may make advance payments. The Department does not allow LIHEAP expenditures to pay deposits, except as noted in paragraph (7) of this subsection. Advance payments may not exceed an estimated two months’ billings. Funds for the Texas CEAP shall not be used to weatherize dwelling units, for medicine, food, transportation assis-
Energy Crisis Component.

(a) A bona fide energy crisis exists when extraordinary events or situations resulting from extreme weather conditions and/or fuel supply shortages or a terrorist attack have depleted or will deplete household financial resources and/or have created problems in meeting basic household expenses, particularly bills for energy so as to constitute a threat to the well-being of the household, particularly the elderly, the disabled, or children age 5 and younger.

(b) A utility disconnection notice may constitute an energy crisis if the client demonstrates a history of good faith in paying prior utility bills.

(c) Energy Crisis assistance for one household cannot exceed the maximum allowable benefit level in one year. Crisis assistance payments cannot exceed the minimum amount needed to resolve the crisis. If the client’s crisis requires more than the household limit to resolve, it exceeds the scope of this program. If crisis exceeds the household limit, subrecipient may pay up to the household limit but the rest of the bill will have to be paid from other funds to resolve the crisis. Payments may not exceed client’s actual utility bill. The assistance must result in resolution of the crisis.

(d) Where necessary to prevent undue hardships from a qualified energy crisis, subrecipients may issue vouchers to provide:

1. Temporary shelter not to exceed the annual household expenditure limit for the duration of the contract period in the limited instances that inoperable heating/cooling appliances or supply of power to the dwelling is disrupted—causing temporary evacuation;

2. Emergency deliveries of fuel up to 250 [100] gallons per crisis per household, at the prevailing price. This benefit may include coverage for safety precautions—up to the maximum household benefit;

3. Purchase of portable heating/cooling units (portable electric heaters are allowable only as a last resort) not to exceed household benefit limit during the contract period. Portable air conditioning and heating units may be purchased only in situations that threaten the life of the client;

4. Subrecipient shall meet local energy crisis criteria prior to purchasing portable units for clients;

5. Subrecipient shall maintain in the client file documentation of any special situation affecting client eligibility. For a client to qualify to receive a portable air conditioner or heater to protect life of household occupants, the subrecipient’s client file must contain documentation from a medical professional, stating that a health condition of household occupant requires such climate control. A doctor’s statement or prior written approval from the Department is required.

6. Portable heating/cooling units must meet Energy Star® or International Residential Code (IRC) compliant.

7. Crisis funds, whether for emergency fuel deliveries, purchase of portable heating/cooling units, or temporary shelter, shall be considered part of the total maximum household allowable assistance.

8. When natural disasters result in energy supply shortages or other energy-related emergencies, LIHEAP will allow home energy related expenditures for the following:

1. Costs to temporarily shelter or house individuals in hotels, apartments or other living situations in which homes have been destroyed or damaged, i.e., placing people in settings to preserve health and safety and to move them away from the crisis situation;

2. Costs for transportation (such as cars, shuttles, buses) to move individuals away from the crisis area to shelters, when health and safety is endangered by loss of access to heating or cooling;

3. Utility reconnection costs;

4. Repair or replacement costs for furnaces and air conditioners;

5. Insulation repair;

6. Coats and blankets, as tangible benefits to keep individuals warm;

7. Crisis payments for utilities and utility deposits; and

8. Purchase of fans, air conditioners and generators.

(g) Time Limits for Assistance—Subrecipients ensure that for clients who have already lost service or are in immediate danger of losing service, some form of assistance to resolve the energy crisis shall be provided within a 48 hour time limit (18 hours in life-threatening situations). The time limit commences upon completion of the application process. The application process is considered to be complete when an agency representative accepts an application and completes the eligibility process.

(b) Subrecipients maintain written documentation in client files showing crises resolved within appropriate timeframes. The Department disallows improperly documented expenditures.

§5.425. Elderly and Disabled Component.

(a) Elderly households include at least one member age sixty (60) or above. Disabled households include at least one member living with a disability. Documentation of disability, (i.e. Social Security, Supplemental Security Income statement, doctor’s letter) kept in client file will validate eligibility.

(b) Subrecipients make utility payments on behalf of elderly and disabled persons based on the previous twelve (12) month’s home energy consumption history, including allowances for cost inflation. In the absence of an available home energy consumption history, subrecipient may base payments on current program year’s bill. Subrecipients note such exceptions in client files. Benefit amounts exceeding the actual bill shall be treated as a credit with the utility company for the client.

(c) Elderly and/or disabled clients may receive benefits to cover up to 100% of the eight [four] highest remaining bills within the contract year as long as the cost does not exceed the maximum annual benefit.

(d) The Department requires Subrecipients to expend a minimum of 10% of their Direct Service funds in the Elderly/Disabled Component.


(a) The priority factors other than income eligibility for heating/cooling assistance include the degree of energy burden and household needs. Equipment replacement or repair under this component must reduce energy consumption and energy burden. "Household energy need" takes into account the unique situation of such household that results from having members of vulnerable populations, including children age 5 and younger, disabled individuals, and older individuals. The Department defines the household’s energy need as the requirement for energy used to heat and/or cool the dwelling unit, as well as energy required to heat water and refrigerate food.

(b) Equipment repair and replacement targets households with high energy burden, or equipment unsafe or inadequate to protect occupants from extreme temperatures. This component reduces clients’
energy burden by reducing excess demand from inefficient heating and cooling appliances. Questionably high energy bills during the heating or cooling season may indicate the need for an assessment of the condition of all major heating and cooling appliances in the client’s home. An energy assessment of the home demonstrates whether or not the expected savings from repair or replacement of equipment will exceed the cost and will reduce energy consumption. Appliances consuming the most energy receive highest priority. Estimated repair cost exceeding 60% of estimated replacement cost justifies replacement.

(c) Subrecipients must conduct whole house assessments on all eligible heating and cooling appliances. Subrecipients must incorporate the appliance replacement protocols and tools available on the Department website, for window units, water heaters, and refrigerators on all applicable appliances in the household. Printed results from the use of these tools must be placed in the client files and be available for review. Refrigerators manufactured after 1993 need to be evaluated utilizing the Department’s refrigerator assessment tool. Other eligible activities may include installation of Energy Star® rated ceiling fans, replacement of air filters, installation of compact fluorescent lights (CFLs) and water savers.

(d) Household appliances assessed for condition (health and safety) and efficiency may include any home heating or cooling appliances and propane tanks. The Program allows replacement of evaporative coolers with refrigerated air only for substantiated medical reasons. Subrecipients shall replace appliances with Energy Star® rated equipment or IRC compliant appliances.

(e) Acceptable assessments for appliances under consideration for repair, replacement or retrofit with CEAP funds may be considered valid for one (1) year from the date of assessment. While subrecipients must re-verify income eligibility, the previously obtained assessment would remain valid. Should it appear that appliances previously assessed that did not require repair, replacement, or retrofit at the time of the assessment had deteriorated, a new assessment could be performed on only the applicable appliances.

(f) Households that contain both evaporative coolers and refrigerated air must be assessed in order to make the household most energy efficient. When both units need replacement consideration must be based on what is most energy efficient. Special consideration may be given to climate area and medical need. Without medical documentation a waiver may be granted by the Department.

(g) Heating and cooling assessments may be charged to the Heating and Cooling Component on a per household basis. If the assessment cost is charged to the Heating and Cooling Component, the cost must be counted toward the household benefit of $5,000.

(h) All replacement units must meet Energy Star® or IRC compliant and must result in energy savings for the client. Heating and cooling funds may pay for zoning off a room in which the client spends a majority of time at home, incidental to the above improvements, if necessary to conserve conditioned air. In order to use heating and cooling funds for a room zone-off, the household must also be receiving a repair, replacement, or retrofit of a space heating or cooling unit.

(i) This component may be used to purchase, lease, or repair butane or propane tanks as well as the residential lines associated with the tanks or natural gas lines of the dwelling not to exceed the household’s maximum allowable assistance and only if such service ensures the flow of energy necessary for heating and cooling the household.

(j) This component may be used to purchase or repair of residential electric lines, not to exceed household’s maximum allowable assistance and only if such service ensures the flow of energy necessary for heating and cooling the household.

(k) The Department requires Subrecipients to expend a minimum of 10% of their Direct Service funds in the Heating and Cooling Component. This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency’s legal authority to adopt.

Filed with the Office of the Secretary of State on March 15, 2010.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 475-3916

SUBCHAPTER G. WEATHERIZATION ASSISTANCE PROGRAM LOW INCOME HOME ENERGY ASSISTANCE PROGRAM

10 TAC §5.705

The Texas Department of Housing and Community Affairs (the Department) proposes amendments to 10 TAC Chapter 5, Subchapter G, §5.705, concerning the Weatherization Assistance Program Low Income Energy Assistance Program (WAP LIHEAP). The proposed amendments make changes to the existing rules to increase subrecipients’ flexibility and efficiency in providing assistance to clients.

Mr. Michael Gerber, Executive Director, has determined that for the first five year period the proposed section is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the section as proposed.

Mr. Gerber has also determined that for each year of the first five years the section is in effect the public benefit anticipated will be to permit the adoption of new rules, thereby enhancing the State’s ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the section as proposed. The proposed section will not impact local employment.

The public comment period will be March 26, 2010 through April 26, 2010 to receive input on the proposed amendments and a public hearing will be held. Information on the public hearing may be found in the "In Addition" section of this issue of the Texas Register and may also be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2010 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcareulecomments@tdhca.state.tx.us, or by fax to (512) 475-4624. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. APRIL 26, 2010.

The amended section is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.
No other statutes, articles, or codes are affected by the proposed amended section.

§5.705. Other Measures.

(a) LIHEAP-WAP energy efficiency measures identified in this section must be entered into the Audit as an "other measure."

(b) Solar screens and window film must be installed in the order West, East, South, and North.

(c) Replacement of refrigerators after 1993 [or older or] that have an SIR of one or greater in Energy Audit or the Department's refrigerator assessment tool.

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

Filed with the Office of the Secretary of State on March 15, 2010.

TRD-201001310
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 475-3916

SUBCHAPTER I. WEATHERIZATION ASSISTANCE PROGRAM DEPARTMENT OF ENERGY AMERICAN RECOVERY AND REINVESTMENT ACT (WAP ARRA)

10 TAC §§5.900 - 5.905

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 5, Subchapter I, §§5.900 - 5.905, concerning the Weatherization Assistance Program Department of Energy American Recovery and Reinvestment Act (WAP ARRA). Under the American Recovery and Reinvestment Act of 2009 (ARRA), the Department is receiving funding from the United States Department of Energy for the Weatherization Assistance Program (WAP). The Department is adopting rules to establish the processes and criteria to be used for the Deobligation of WAP ARRA funds committed to a Subrecipient pursuant to the Department’s approved plan with the U.S. Department of Energy and the subsequent Reobligation of those funds. These sections will also apply to any New Providers of WAP ARRA Funds. The Department is adopting these sections in order to assure the timely and appropriate use of WAP ARRA funds; compliance with federal accountability, transparency, and programmatic requirements; and that WAP ARRA funds are expended to required deadlines. Unless otherwise specified herein, all definitions and requirements under 10 TAC Chapter 5, Subchapters E, F and G of this chapter apply to WAP ARRA.

§5.901. Definitions.

(a) Awarded Funds--The amount of WAP ARRA funds awarded through the Department plan, as amended, submitted to the United States Department of Energy to each Subrecipient or the amount of funds awarded by the Department to New Providers of WAP ARRA funds. The amount of funds awarded reflects the full multi-year amount of WAP ARRA funds awarded to the Subrecipient or New Provider and not only the amount reflected in a contract.

(b) WAP ARRA--The allocation of funds provided to the Department from the American Recovery Reinvestment Act of 2009 for the Department of Energy Weatherization Assistance Program.

(c) Deobligation--The partial or full removal of Awarded Funds from a Subrecipient or New Provider. Partial Deobligation is the removal of some portion of the full Awarded Funds from a Subrecipient or New Provider, leaving some remaining balance of Awarded Funds to be administered by the Subrecipient or New Provider. Full Deobligation is the removal of the full amount of Awarded Funds from a Subrecipient or New Provider.

(d) Department--The Texas Department of Housing and Community Affairs.

(e) Executive Director--The Executive Director of the Texas Department of Housing and Community Affairs.

(f) Expenditure--Funds having been drawn from the Department through the Contract System. For purposes of this rule, expenditure will include draws requested through the system.

(g) New Provider--An entity to which the Department has contractually obligated WAP ARRA funds subsequent to March 12, 2010.
(h) Production Schedule--A Production schedule signed by the applicable Executive Director/Chief Executive Officer of the Subrecipient or New Provider, and approved by the Department meeting the requirements of this definition. The Production Schedule shall include a total estimated number of units to be completed with all Awarded Funds, based on the average per unit cost for the Subrecipient or New Provider; the estimated monthly and quarterly unit production; and the estimated monthly and quarterly expenditure targets for all Awarded Funds reflecting achievement of the criteria identified in §5.902 of this chapter (relating to Criteria for Deobligation of Fund Award). The Production Schedule should reflect anticipated delays, and unit production estimates may vary significantly from month to month. The Production Schedule shall reflect by month estimated numbers that include for each month: total units to be produced; households that need to be income qualified; units to be assessed; audits to be performed; work orders to be issued; units for which weatherization is to be completed; units to have final inspections; and units to be invoiced. The Production Schedule is a requirement applicable to all WAP ARRA contracts administered by the Subrecipient or New Provider. The Production Schedule must demonstrate how all Awarded Funds will be expended by required ARRA deadlines. The Production Schedule as defined herein may differ significantly from the WAP ARRA plan production schedule submitted by the Department to the United States Department of Energy. In the case of any such conflict, the applicable Subrecipient or New Provider is required to comply with the Production Schedule;

(i) Subrecipient--An entity to which the Department contractually obligated WAP ARRA funds prior to March 12, 2010. Subrecipients may have one or more contracts for WAP ARRA funds and reference to Subrecipient herein may include only one, some, or all of those contracts;

(j) Reobligation--The reallocation of deobligated WAP ARRA funds to current Subrecipients and/or New Providers;

(k) Unit Production--A unit is considered "produced" for purposes of this rule when the unit is considered a final unit and the post-weatherization inspection and all other requirements have been satisfied.

§5.902. Criteria for Deobligation of Fund Award.

(a) The criteria noted in this section will prompt the Deobligation process under this rule. If the criteria are met, then notification and ensuing processes will apply as further described in this rule.

(b) The criteria for Deobligation for a Subrecipient are as follows:

(1) Subrecipient fails to provide a Production Schedule by April 1, 2010. The Production Schedule must be signed by the Subrecipient Executive Director/Chief Executive Officer and approved by the Department;

(2) By April 15, 2010, no unit production has occurred;

(3) By June 30, 2010, less than 20% of total expected unit production has occurred based on the Production Schedule, or less than 15% of total Awarded Funds have been expended;

(4) By August 31, 2010, less than 35% of total expected unit production has occurred based on the Production Schedule, or less than 25% of total Awarded Funds have been expended;

(5) By October 31, 2010, less than 40% of total expected unit production has occurred based on the Production Schedule, or less than 40% of total Awarded Funds have been expended;

(6) By December 31, 2010, less than 50% of total expected unit production has occurred based on the Production Schedule, or less than 50% of total Awarded Funds have been expended;

(7) The Subrecipient fails to submit a required monthly report explaining any variances between the Production Schedule and actual results on Production Schedule criteria;

(8) The Subrecipient’s monthly report, as required under the contract between the Department and the Subrecipient, for Subrecipients whose monthly production target is 50 units or greater reflects unit production that is 5% or more below the unit production amount to be completed, or for Subrecipients whose monthly production target is less than 50 units the monthly report reflects unit production that is 10% or more below the unit production amount to be completed, as of the end of the month according to the Production Schedule, or expenditure of funds is 5% or more below the amount of Awarded Funds to be expended as of the end of the month according to the Production Schedule; and

(9) The Subrecipient’s quarterly report, as required under the contract between the Department and the Subrecipient, for Subrecipients whose monthly production target is 50 units or greater reflects unit production that is 5% or more below the unit production amount to be completed, or for Subrecipients whose monthly production target is less than 50 units the monthly report reflects unit production that is 10% or more below the unit production amount to be completed, as of the end of the quarter according to the Production Schedule, or expenditure of funds is 5% or more below the amount of Awarded Funds to be expended as of the end of the quarter according to the Production Schedule.

(c) The criteria for Deobligation for a New Provider are as follows:

(1) The New Provider fails to provide a Production Schedule as described in this rule and required under the contract between the Department and the New Provider within fifteen (15) days of contract execution. The Production Schedule must be approved by the New Provider Executive Director/Chief Executive Officer;

(2) The New Provider fails to submit a required monthly report explaining any variances between the Production Schedule and actual results on Production Schedule criteria;

(3) The New Provider’s monthly report, as required under the contract between the Department and the New Provider, reflects unit production that is 5% or more below the unit production amount to be completed as of the end of the month according to the Production Schedule, or expenditure of funds is 5% or more below the amount of Awarded Funds to be expended as of the end of the month according to the Production Schedule;

(4) The New Provider’s quarterly report, as required under the contract between the Department and the New Provider, reflects unit production that is 5% or more below the unit production amount to be completed as of the end of the quarter according to the Production Schedule, or expenditure of funds is 5% or more below the amount of Awarded Funds to be expended as of the end of the quarter according to the Production Schedule; and

(d) At any time, a Subrecipient or New Provider fails to notify the Department of any adverse audit, inspection or internal control finding;

(e) At any time a Subrecipient or New Provider has recurrent findings or inspections reflecting work quality that do not conform fully to program requirements, lack of adequate and satisfactory inspections,
inadequate assessments or that insufficient quality control efforts are in place.

(f) At any time a Subrecipient or New Provider has unresolved WAP ARRA monitoring findings, violates their contract, and fails to implement timely all necessary changes identified during a monitoring visit.

(g) At any time the Department believes a Subrecipient or New Provider is at significant risk of not expending WAP ARRA Awarded Funds in accordance with the Production Schedule or is at significant risk of not providing appropriate and thorough controls on the expenditure of WAP ARRA funds.

§5.903 Notification and Action Plan.

(a) At any time that a Subrecipient or New Provider believes they may be at risk of meeting one of the criteria noted in §5.902 of this chapter (relating to Criteria for Deobligation of Fund Award), or of not achieving their Production Schedule goals, notification must be provided to the Department.

(b) A written "Notification of Possible Deobligation" will be sent to the Executive Director of the Subrecipient or New Provider as soon as a criterion included in §5.902 of this chapter is at risk of being met. Written notice will be sent electronically and by mail. The notice will include an explanation of the criteria met.

(c) Within fifteen (15) days of the date of the "Notification of Possible Deobligation" referenced in subsection (b) of this section, a Mitigation Action Plan must be submitted to the Department by the Subrecipient or New Provider in the format prescribed by the Department.

(d) A Mitigation Action Plan is not limited to but must include:

1. Explanation of why one or more of the criteria under §5.902 of this chapter occurred setting out all fully relevant facts.

2. Explanation of how the criteria under §5.902 of this chapter will be immediately, permanently, and adequately mitigated. For example, if production or expenditures are insufficient, the explanation would need to address how production or expenditures will be increased in the short- and long-term to restore projected full and timely execution of the contract with respect to all Awarded Funds.

3. If applicable because of failure to produce Unit Production or Expenditure targets under the existing Production Schedule, a revised Production Schedule reflecting how Unit Production and Expenditure targets will be achieved for each remaining month, including compensation for prior months of missed production, for all Awarded Funds.

4. An explanation of how remaining criteria under §5.902 of this chapter will be avoided. For example, if Unit Production criteria for June 30, reflected under §5.902(b) of this chapter were not met, then explanation will need to include how the ensuing criteria will be met and the criteria under §5.902(c) of this chapter, avoided.

5. If relating to a Unit Production or expenditure criteria, a description of activities currently being undertaken including an accurate description of the number of units in progress, broken down by number of units that have been qualified, audited, assessed, contracted, inspected, and invoiced and as reflected in an updated Production Schedule.

6. Provide any request for a reduction in Awarded Funds, reasons for the request, desired Awarded Fund and revised Production Schedule reflecting the reduced Awarded Fund.

(e) At any time after sending a Notification of Deobligation, the Department or a third-party assigned by the Department may mon-
(c) Month-to-month monitoring, site visits, assessments and/or oversight by the Department or a third-party assigned by the Department.

(d) Other mitigating action that may improve the performance of the Subrecipient or New Provider and ensure the delivery of services to the service area, consistent with the timely and full completion of contract and expenditure of Awarded Funds.

(e) In the event of Deobligation, the Subrecipient will place no further orders, or enter into further subcontracts for services, materials, or equipment. However, to the extent possible, the Department will allow continued delivery of eligible services to those customers whose unit has been assessed prior to the delivery of notice of Deobligation. In the event of Deobligation, the Subrecipient will identify any such customers and negotiate with the Department regarding the delivery of services to those customers.

§5.905. Reobligation.

(a) While it may not be possible in all circumstances, it is the Department’s primary goal to ensure that Deobligated Awarded Funds be expended in the existing geographic service area of the Deobligated Subrecipient or New Provider. So that Awarded Funds released through Deobligation can be recommitted to the geographic service area, the Department may immediately take the actions in paragraphs (1) and (2) of this subsection:

(1) Identify and reach agreements for increasing funding with Subrecipients who are capable of achieving unit production and expenditures in adjacent or non-adjacent geographic regions on a temporary or permanent basis; and/or

(2) Identify, initiate and complete the procurement process with one or more New Providers of weatherization services that can service one or more geographic service areas.

(b) In the event that no qualified provider can be identified to serve a geographic service area where a Subrecipient or New Provider has been Deobligated, the Department will consider the geographic reallocation of Awarded Funds for only the remainder of the WAP ARRA contract, to other existing Subrecipients or New Providers.

(c) Unless otherwise determined by the Executive Director, Subrecipients or a New Provider will only qualify for Reobligation of Awarded Funds if they meet the criteria in paragraphs (1) - (5) of this subsection:

(1) If applicable, they have achieved 95% or more of monthly unit and expenditure Production Schedule targets for the previous three months;

(2) Subrecipients must have achieved 30% of total Production Schedule goals by August 31, 2010;

(3) Have no significant outstanding unresolved monitoring findings;

(4) Have had no significant unit quality or other concerns; and

(5) Can demonstrate available capacity or expedited capacity building to administer additional Awarded Funds in a timely and appropriate manner.

(d) Awards of Reobligation. Awarded Funds to existing Subrecipients or New Providers will be based upon ability to meet Unit Production and Expenditures requirements as assessed by Department staff and other criteria consistent with ARRA, Department or state weatherization policy objectives. Priority will be given to serving priority populations as required by the Department of Energy.

(e) Subrecipients and New Providers may request an increase in their Awarded Funds with the Department or may be approached by the Department.

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

Filed with the Office of the Secretary of State on March 15, 2010.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs

Earliest possible date of adoption: April 25, 2010

For further information, please call: (512) 475-3916

CHAPTER 54. DISASTER RECOVERY

10 TAC §54.3

The Texas Department of Housing and Community Affairs proposes new 10 TAC Chapter 54, Disaster Recovery, §54.3, concerning Forms. The proposed new section will establish rules to formalize existing policy regarding the types of documentation that can be used to establish ownership under the disaster recovery program.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed section is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the section as proposed.

Mr. Gerber has also determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be enhanced compliance with formalized policy, all contractual and statutory requirements.

The proposed section will have no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the section as proposed. The proposed section will not impact local employment.

The new section is proposed pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department the authority to adopt rules governing the administration of the Department and its programs.

The proposed new section affects no other code, article or statute.

§54.3. Forms.

An applicant for federal assistance funds administered by the department and subject to this chapter to repair or rebuild a home damaged by a natural disaster such as a hurricane may establish ownership of the home through a deed to the property or non-traditional documentation of ownership. In accordance with Texas Government Code §2306.188 applications for federal disaster funds subject to this chapter where the applicant cannot produce record title but otherwise meets the requirements of the program will be processed as if the applicant were the owner provided the applicant provides the following:

(1) an affidavit in the form specified in paragraph (3) of this section in Appendix 1, setting forth the basis on which the applicant claims to be the owner and affirmation that either:

(A) there is no other person entitled to claim any ownership interest in the property; or
(B) each person who may be entitled to claim an ownership interest in the property has provided consent to the application or cannot be located after reasonable effort; and

(2) the applicant has evidence that the applicant exercised ownership of the property at the time of the disaster by providing copies of either:

(A) tax receipts reflecting that the applicant was the person who paid the property taxes on the property made the subject of the request for assistance;

(B) utility bills in the name of the applicant relating to the provision of utilities to the property made the subject of the request for assistance;

(C) evidence of a paid insurance policies for the property made the subject of the request for assistance and naming the applicant as the insured; or

(D) other evidence, reasonably acceptable to the Department, that establishes that the applicant exercised ownership over the property.

(3) The affidavit in this paragraph, Appendix I does not establish record ownership or otherwise alter legal ownership of the assisted property. The Department is not liable to any claimed owner of any interest in real property for administering federal disaster funds subject to this chapter.

Figure: 10 TAC §54.3(3)

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

Filed with the Office of the Secretary of State on March 15, 2010.
TRD-201001313
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 475-3916

PART 5. TEXAS STATE CEMETERY COMMITTEE

CHAPTER 71. TEXAS STATE CEMETERY

Introduction and Background.

The Texas State Cemetery Committee (Committee) proposes amendments to Chapter 71, §§71.3, 71.11, 71.13 - 71.15, 71.21, and 71.23 and proposes the repeal of §§71.1, 71.17, and 71.19. During its rule review, published in the December 25, 2009, issue of the Texas Register (34 TexReg 9489), the Committee reviewed and considered Texas Administrative Code, Title 13, Part 5, Chapter 71 for readoption, revision, or repeal in accordance with the Texas Government Code §2001.039 (Vernon 2008). The Committee has considered, among other things, whether the agency rulemaking authority and business necessity associated with the adoption of these rules continue to exist. No comments were received during the proposed rule review.

The Committee has determined that the agency rulemaking authority remains in effect and the business necessity for Chapter 71 also continues to exist. Revisions to these rules, however, are necessary to update agency references and definitions, to

Mr. Gibbs also has determined that, for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be the clarification of agency programs thereby allowing more Texas organizations, communities, and citizens to access agency information. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed. There will be no effect to small or micro businesses.

Comments on the proposal may be submitted to Gaye Greer, Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711-3406. Comments will be accepted through 5:00 p.m. on April 15, 2010.

The amendment is proposed under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

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


The Committee adopts by reference A Guide to Programs and Services (revised March 2010) [A Guide to Programs and Services (revised July 2009)]. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711. This document is also available online at www.arts.state.tx.us.

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

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TRD-201001318
Gary Gibbs, Ph.D.
Executive Director
Texas Commission on the Arts
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 936-6562
ensure consistency with governing statutes and clarify current business practices, to correct typographical errors, and to delete language that provides no additional guidance or direction than that reflected in the governing statutes. Rules that provide the public with no additional guidance or direction than that reflected in the governing statutes are proposed for repeal.

Accordingly, the Committee proposes readoption with amendment of Texas Administrative Code, Title 13, Part 5, Chapter 71. The revised rules are proposed pursuant to the Committee's rulemaking authority found in Texas Government Code, §§2165.256(i) (Vernon 2008) and §2165.2561(m) (Vernon Supp. 2009).

Section by Section Summary.

The Committee proposes to readopt with amendments Texas Administrative Code, Title 13, Part 5, Chapter 71, §§71.3, 71.11, 71.13 - 71.15, 71.21, and 71.23 as these rules were promulgated to direct Committee administration of the Texas State Cemetery and regulation of monuments on the grounds of the Texas State Cemetery under Texas Government Code, §2165.256 and §2165.2561, including definitions, monuments, vaults and gravitational, cenotaphs, landscaping, burial reservations, and cancellation of burial reservations. In addition, the Committee proposes to repeal Texas Administrative Code, Title 13, Part 5, Chapter 71, §§71.1, 71.17, and 71.19, concerning organization, designation of special burial areas, and the Cemetery Annex as these rules provide the public with no additional guidance or direction than that reflected in the governing statutes.

Fiscal Note.

Harry Bradley, Cemetery Superintendent, has determined that for each year of the first five-year period the proposed amendments and repeal are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposal.

Public Benefit/Cost Note.

Mr. Bradley has also determined that for each year of the first five-year period the proposed amendments and repeal are in effect the public benefit will be further clarification by updating agency references and definitions, correcting typographical errors, and ensuring consistency with governing statutes and clarifying current business practices, as well as by deleting language that provides no additional guidance or direction than that reflected in the governing statutes.

Mr. Bradley has further determined that there will be no effect on individuals or large, small, and micro-businesses as a result of the proposed amendments and repeal. Consequently, an Economic Impact Statement and Regulatory Flexibility Analysis, pursuant to Texas Government Code §2006.002 (Vernon 2008), are not required.

In addition, Mr. Bradley has determined that for each year of the first five-year period the proposed amendments and repeal are in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under Administrative Procedure Act, Texas Government Code §2001.022 (Vernon 2008).

Request for Comments.

Interested persons may submit written comments on the proposed amendments and repeal to General Counsel, Legal Services Division, Texas Facilities Commission, P.O. Box 13047, Austin, Texas 78711-3047. Comments may also be sent via email to rulescomments@tfc.state.tx.us. For comments submitted electronically, please include “Proposed Texas State Cemetery Rules” in the subject line. Comments must be received no later than 30 days from the date of publication of the proposed amendments and repeal in the Texas Register. Comments should be organized in a manner consistent with the organization of the proposed amendments and repeal. Questions concerning the proposed amendments and repeal may be directed to Susan Maldonado, Assistant General Counsel, at (512) 463-3960.

13 TAC §§71.1, 71.17, 71.19

(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 State Cemetery Committee or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

Statutory Authority.

The repeal is proposed under Texas Government Code, §2165.256(i) (Vernon 2008) and §2165.2561(m) (Vernon Supp. 2009).

Cross Reference to Statute.

The statutory provisions affected by the proposed repeal are those set forth in §2165.256 and §2165.2561 of the Texas Government Code.

§71.1. Organization.

§71.17. Designation of Special Burial Areas.


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

Filed with the Office of the Secretary of State on March 10, 2010.

TRD-201001233

Kay Molina

General Counsel

Texas State Cemetery Committee

Earliest possible date of adoption: April 25, 2010

For further information, please call: (512) 463-4257

13 TAC §§71.3, 71.11, 71.13 - 71.15, 71.21, 71.23

Statutory Authority.

The amendments are proposed under Texas Government Code, §2165.256(i) (Vernon 2008) and §2165.2561(m) (Vernon Supp. 2009).

Cross Reference to Statute.

The statutory provisions affected by the proposed amendments are those set forth in §2165.256 and §2165.2561 of the Texas Government Code.

§71.3. Definitions.

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

35 TexReg 2444  March 26, 2010  Texas Register
(1) Cemetery--The Texas State Cemetery burial grounds, including the Cemetery Annex, for those individuals who are eligible under Texas Government Code, §2165.256(d)(a). The Texas Legislature [An historical site of Texas] established the Cemetery in 1851.

(2) Cemetery Annex--The Texas State Cemetery Annex [that] is approximately 46.19 acres and more specifically described in Texas Government Code, §2165.256(b). The Texas State Cemetery Annex is located near the intersection of [at] Bull Creek Road and 45th Street in Austin, Texas and is dedicated for [future] cemetery purposes.

(3) Cenotaph--A monument erected in honor of an individual eligible for burial in the Cemetery whose remains are buried elsewhere.

(4) Columbarium Wall--The wall of niches, divided into separate East and West sections, reserved for a person’s cremains.

(5) Committee--The Texas State Cemetery Committee is the committee charged with the operations of and jurisdiction over the Cemetery and Cemetery Annex. Members consist of three voting gubernatorial appointees serving staggered terms and three non-voting advisory members, one each from the Texas Facilities Commission [General Services Commission], the Texas Parks and Wildlife Department, and the Texas Historical Commission.

(6) Cremains--That which is left after incineration of a person after death.

(7) Epitaph--The inscription which identifies the gravesite and memorializes a person on a monument, headstone or niche plate.

(8) General Services Commission--The funding agency for the Cemetery. Cemetery employees are General Services Commission personnel. One of four agencies, which through inter-agency contracts, participated in the Restoration and Enhancement of the Cemetery.

(9) Interment--The burial of a person’s remains or cremains within a cemetery.

(10) Interred--To put into a grave; buried.

(11) Monument--Any marker, headstone, gravestone, grave marker, tablet, memorial, columbarium, urn, niche, niche panel, ledger stone, boulder or any other structure, memorial of granite, marble or other material intended to commemorate the deceased.

(12) Remains--That which is left of a person after death; a corpse.

(13) Texas Department of Transportation--One of four agencies, which through inter-agency contracts, participated in the Enhancement and Restoration of the Cemetery.

(14) Texas Historical Commission--One of four agencies, which through inter-agency contracts, participated in the Enhancement and Restoration of the Cemetery.

(15) Texas Parks and Wildlife--One of four agencies, which through inter-agency contracts, participated in the Enhancement and Restoration of the Cemetery.

§71.11. Monuments.

(a) Monuments are subject to the approval and regulation of the Committee.

(b) All monument designs shall be submitted to the Cemetery Superintendent for review and compliance with the requirements set forth by the Committee. [All monument design submissions shall contain the information on the application form available at the Cemetery office.] Incomplete submissions will be returned.

(c) The Committee specifically reserves the right to reject any monument design, if, in the opinion of the Committee, the quality or craftsmanship of the monument design is not suitable, blocks the view of surrounding monuments or does not comply with the following:

(1) Only selected natural stone from established quarries, or bronze meeting the specifications of the United States Bureau of Standards should be used for monuments. In all cases, craftsmanship should be of superior quality.

(2) Curbs, fences, borders, benches, plantings or enclosures around any burial spaces must be approved by the Committee.

(3) Monuments and inscriptions on any monument shall be accurate and in keeping with the respect and dignity for the interred and for the Cemetery as a place of honor and to memorialize noteworthy Texans.

(4) Temporary markers of wood or concrete are prohibited. Temporary metal markers provided by funeral homes are permitted until replaced by a permanent monument. Permanent monuments, including gravesite markers, must be placed at future burial sites no later than two (2) years following the date of interment or, in the case of an existing burial site, no later than one (1) year following the effective date of this rule. Permanent gravesite markers are solely the responsibility of the decedent’s estate or family. Appeals for a time extension may be considered by the Committee.

(5) In the event a permanent marker is not established in accordance with this rule, the Committee will place a permanent marker at the gravesite pursuant to Section 2165.256(c) of the Texas Government Code.

(5) Monuments shall be constructed within the following dimensional specifications:

(A) Maximum height: 7 feet;

(B) The footprint of the monument shall not cover more than 20% of the surface of the lot being 7 feet in depth and 6.66 feet (80 inches) in width;

(C) If the width to height ratio of the monument exceeds a 2 to 1 ratio, the Committee will review the design. The design, size, and location of the monument will be considered by the Committee in making a decision.

(D) A flush installed ledger stone shall not exceed 7 feet in depth and 6.66 feet in width.

(6) The Committee may also evaluate any proposal for a new monument to ensure that the proposed design does not detract or otherwise impact the prominence of the Medal of Honor monument.

(d) Aboveground vaults, crypts and mausoleums are prohibited, except for interment in the Columbarium Wall [columbarium].

(e) Monuments are the property of the State of Texas [state].

§71.13. Vaults and Gravelliners. The use of metal, asphalt, concrete, and other types of below ground burial vaults [vaults] or gravelliners purchased at private expense in the Cemetery is required. Neither the superintendent [Superintendent] nor any Cemetery employee shall be involved in making these arrangements.


(a) Cenotaphs are subject to the approval and regulation of the Committee.
(b) Cenotaph designs shall be submitted to the Cemetery superintendent [Superintendent] for review and compliance with the regulations set forth by the Committee.

(c) The Committee specifically reserves the right to reject and prohibit the erection of a cenotaph, if, in the opinion of the Committee the cenotaph is of inferior quality or craftsmanship, or if it does not comply with the dimensions or material specifications established by the Committee.

(d) Cenotaphs shall be no taller than three (3) feet, five (5) [3 feet 5 inches], unless the Committee determines that an exception is in the best interest of the State of Texas.

(e) Cenotaphs are the property of the State of Texas.

§71.15. Landscaping.

(a) A tree, shrub, plant or flower may not be removed, relocated or planted in the Cemetery without the permission of the superintendent [Committee].

(b) The superintendent [Superintendent] shall oversee the removal, relocation or planting of trees, shrubs, plants and flowers within the Cemetery grounds. The Committee may authorize the superintendent [Superintendent] to carry out landscape programs at his discretion and report to the Committee in a timely manner.

[c] A digital map exhibiting the location of all existing vegetation shall be maintained by the Cemetery.

(c) Fresh cut flowers may be placed on the graves throughout the year. Floral items, fresh and artificial, will be removed from graves as soon as they become faded and unsightly. All artificial flowers or items removed from graves will be disposed of immediately.

(d) [cc] Floral items and other types of decorations or commemorative items are not to be secured or affixed by any means (wire, tape, string or adhesives) to the monuments.

(e) [cc] Planting of trees or shrubs is not permitted on or near the graves at any time, unless approved by the superintendent [Committee].

(1) Christmas wreaths, arrangements or floral grave blankets are permitted on graves during the season, beginning December 1st and will be removed no later than January 1st or at the discretion of the superintendent [Committee]. Grave floral blankets may not be larger in size than two (2) feet by three (3) feet. Christmas trees are not permitted. Christmas decorations are not permitted on any living tree in the Cemetery, at the Plaza [Cemetery or at the Plaza de Los Recuerdos] or on any statue.

(g) The Cemetery is not responsible for any items left on the graves. Permanent in-ground flower containers are authorized for placement with approval from the superintendent [Superintendent]. Existing containers may remain on graves until they become unserviceable.


(a) The Committee shall actively pursue burial reservations from eligible persons.

(b) The Committee shall delegate to the superintendent [Superintendent] or a designated representative, the authority to research persons eligible for burial at the Cemetery.

(c) Biographical information, documentation, photos, newspaper articles and other supporting material shall be collected for review by the Committee.

(d) The Committee shall review and consider those persons recommended by the superintendent [Superintendent] for eligibility for burial spaces during an open meeting [Open Meeting].

(e) The Committee shall encourage members of the legislature to advise constituents who are eligible for burial in the Cemetery. The Committee may elect to advise members of the legislature by formal written communication.

§71.23. Cancellation of Burial Reservations.

(a) An individual or the legal representative of an individual who has made a burial reservation in writing may cancel the reservation at any time by providing written notice [provided that notice of the cancellation is given] to the superintendent [Superintendent].

(b) The Committee may cancel a burial reservation if:

(1) the individual [Individual] for whom the reservation was made has been interred in another cemetery for at least two (2) [five (5)] years and no written reinterment request has been made to the Committee; and

(2) the Committee provides thirty (30) days notice, by certified mail to at least one member of the family of the individual or to the legal representative of the individual at the person’s last known address of the date, time and location of the open meeting where the Committee will consider canceling the burial reservation; and

(3) the Committee provides the family member or legal representative of the individual whose burial reservation is subject to cancellation the opportunity to appear in person or to submit written documentation clearly demonstrating why the burial reservation should not be canceled.

(c) Cancellation of a burial reservation does not preclude the family or legal representative of an individual whose burial reservation has been canceled from submitting an application to erect a cenotaph.

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

Filed with the Office of the Secretary of State on March 10, 2010.

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Kay Molina
General Counsel
Texas State Cemetery Committee
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 463-4257

TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 5. CARBON DIOXIDE

The Railroad Commission of Texas (Commission) proposes new Chapter 5, relating to Carbon Dioxide, to implement Senate Bill (SB) 1387, 81st Legislature (Regular Session, 2009), which was effective September 1, 2009. SB 1387 amended the Texas Water Code and the Texas Natural Resources Code to provide for the implementation of projects involving the capture, injection, sequestration, or geologic storage of carbon dioxide. The purpose of the proposed rules is to protect underground sources of
drinking water while promoting the capture and storage of anthropogenic carbon dioxide.

SB 1387 delegates to the Commission jurisdiction over the injection of anthropogenic carbon dioxide into productive formations and saline formations directly above and below the productive formations for the purpose of geological storage. The bill establishes an Anthropogenic Carbon Dioxide Storage Trust Fund to include fees established by the Commission for implementation. The bill also authorizes the Commission to issue a permit if the Commission finds that injection and geological storage of anthropogenic carbon dioxide will not endanger or injure any oil, gas, or other mineral formation; that with proper safeguards, both ground and surface fresh water can be adequately protected from carbon dioxide migration or displaced formation fluids; that the injection of carbon dioxide will not endanger or injure human health and safety; that the reservoir into which the carbon dioxide is injected is suitable for or capable of being made suitable for protecting against the escape or migration of carbon dioxide from the reservoir; and that the permit applicant meets all of the other statutory and regulatory requirements for the issuance of the permit.

SB 1387 requires the Commission to adopt rules and procedures, including rules for geologic site characterization; area of review and corrective action; well construction; operation; mechanical integrity testing; plugging; monitoring; post-injection site care and site closure; long-term stewardship of the geologic storage; enforcement; and the collection and administration of fees and penalties to cover the cost of permitting, monitoring, inspection, enforcement, and implementation associated with the program. SB 1387 requires coordination between the Commission and the Texas Commission on Environmental Quality (TCEQ) to ensure the regulation of carbon dioxide storage in Texas is being performed in an economically and environmentally sound manner. SB 1387 also requires that the permit applicant obtain and submit to the Commission a letter from the Executive Director of the TCEQ certifying that underground fresh water supplies will not be injured by the permitted activity.

SB 1387 also requires the Commission, TCEQ, and the University of Texas Bureau of Economic Geology (BEG) to conduct a study of, and report back to the legislature on, the appropriate agency to regulate the long-term storage of carbon dioxide into non-oil, gas, or geothermal producing geologic formations. SB 1387 further requires the Texas General Land Office (GLO), in conjunction with the Commission, TCEQ, and BEG, to develop recommendations for managing geologic storage of carbon dioxide on state-owned lands, including an assessment of storage capacity and new legal and regulatory frameworks that might be necessary. SB 1387 clearly states that the storage operator owns the anthropogenic carbon dioxide in a geologic storage facility and authorizes the Commission to regulate the withdrawal of any stored carbon dioxide. Finally, SB 1387 requires the Commission’s rules to be consistent with the regulations of the United States Environmental Protection Agency (EPA) and requires the Commission to seek enforcement primacy from the EPA for the program.

PROPOSED EPA REGULATIONS

On July 25, 2008, EPA proposed requirements for underground injection of carbon dioxide for geologic storage under the authority of the federal Safe Drinking Water Act (SDWA). The goal of the proposed regulations is to protect underground sources of drinking water (USDWs) while promoting carbon capture and storage. EPA proposed to create a new Class VI injection well class. EPA used as the beginning framework the program for Class I hazardous injection wells, then added requirements to address the unique nature of carbon dioxide injection for geologic storage, relative buoyancy of carbon dioxide, corrosivity in the presence of water, potential presence of impurities in the carbon dioxide stream, mobility within subsurface formations, and large injection volumes expected. EPA’s proposed rules would establish technical criteria for geologic site characterization; area of review and corrective action; well construction and operation; mechanical integrity testing and monitoring; monitoring of the carbon dioxide plume and pressure front; groundwater monitoring; well plugging; extended post-injection site care; long-term financial assurance to ensure proper site care and closure; and site closure. The Commission understands that EPA plans to make its rules final in September 2010.

As noted above, SB 1387 requires the Commission to seek enforcement authority (primacy) for the Underground Injection Control (UIC) program for geologic storage of anthropogenic carbon dioxide and the associated injection wells. Section 1425 of the federal SDWA allows states seeking primacy for Class II wells to demonstrate that their existing standards are effective in preventing endangerment of USDWs. These programs must include requirements for permitting, enforcement, inspection, monitoring, record-keeping, and reporting that demonstrate the effectiveness of their requirements. However, under Section 1422 of the federal SDWA, states applying to EPA for primary enforcement responsibility to administer the UIC program (primacy) must show that the state programs meet EPA’s minimum federal requirements for UIC programs, including construction, operating, monitoring and testing, reporting, and closure requirements for well owners or operators.

Absent some action from Congress, states will be required to apply for primacy for the UIC program for geologic storage of carbon dioxide under Section 1422 of the federal SDWA. Therefore, the state’s program must be at least as stringent as EPA’s program. Where states do not seek this responsibility or fail to demonstrate that they meet EPA’s minimum requirements, EPA is required to implement a UIC program for the state.

BACKGROUND

Increases in the demand for energy have contributed to increases in the levels of atmospheric carbon dioxide. One of the promising ways to reduce the amount of carbon dioxide in the atmosphere is to sequester, or store, it by injecting it into underground reservoirs. Geologic storage technology has been proven through successful pilot projects and over 35 years of experience in injecting carbon dioxide for enhanced oil recovery (EOR).

Carbon dioxide can be sequestered at the same time it is being used for enhanced recovery of oil or natural gas. Today approximately 90 percent of the carbon dioxide used in enhanced recovery operations is produced from naturally occurring geologic accumulations, primarily geologic domes in New Mexico, Colorado, and Mississippi. In the future, rather than using this naturally occurring carbon dioxide, operators will be using anthropogenic carbon dioxide. Sources of large volumes of anthropogenic—or man-made—carbon dioxide include power generation, iron and steel manufacturing, natural gas processing, cement manufacturing, ammonia production, hydrogen production, helium plants, and ethanol manufacturing plants.

The Commission has regulated the injection of carbon dioxide since the early 1970s, when the Commission permitted the
first carbon dioxide enhanced recovery project in the world (SACROC Unit, Kelly-Snyder Field, Scurry County). Half of all carbon dioxide enhanced recovery projects in the entire world are in the Permian Basin of Texas. The Commission has permitted over 10,000 wells for carbon dioxide injection, of which over 5,000 are currently active. Half of the production of Oxy Permian, Texas’ top oil producer, comes from carbon dioxide EOR projects. Oxy Permian injects over one billion cubic feet per day (Bcf/day) of carbon dioxide in its EOR projects. This accounts for over 70 million barrels per day, which is about seven percent of the State’s daily total crude oil production. Texas also has an outstanding safety record related to the much more toxic hydrogen sulfide operations and has a long and successful history of regulating the storage of natural gas in geologic formations.

In the course of a typical enhanced recovery operation, even where there is no intent to sequester, 30 to 50 percent of the injected carbon dioxide will remain in the reservoir after production operations cease. The balance is either dissolved within the produced oil or recycled for use in other reservoirs; it is not emitted to the atmosphere. Oil and gas reservoirs have proved capable of containing water-buoyant fluids and gases for millions of years. These reservoirs are well studied and offer the best opportunity to begin large-scale geologic storage of carbon dioxide. Accordingly, enhanced recovery operations using the same procedures now in place would result in sequestering anthropogenic carbon dioxide. Enhanced recovery operations that include carbon dioxide injection for the purpose of sequestration will remain regulated as Class II wells under 16 Tex. Admin. Code §3.46 (relating to Fluid Injection into Productive Reservoirs). Existing injection regulations require that injected fluids be confined to the authorized injection interval—the same goal as that of carbon dioxide storage. Many of the functions of geologic storage are effectively the same as those for the carbon dioxide enhanced recovery activities the Commission has historically regulated.

There is a wealth of information and experience in the industry and regulations, regulatory experience, and industrial best practices related to the injection of carbon dioxide. In areas where there are unknowns, however, extra care must be taken during initial stages of excursions into large-scale commercial storage. Because of the intense study of oil and gas reservoirs in Texas, there is much information regarding the characteristics of oil and gas reservoirs, but because of the intense development of these reservoirs, there are many more potential penetrations into the confining zones—in the form of oil and gas wells—which must be closely examined to prevent them from becoming conduits for the escape of the carbon dioxide from the storage reservoir. Generally there is a dearth of information about non-oil and gas reservoirs, but those may have fewer penetrations that could act as conduits for the escape of the carbon dioxide. In addition, because oil and gas and formation fluids have been produced from the oil and gas reservoirs, the pressure is reduced; in a non-oil and gas reservoir, such a pressure decrease has not occurred.

The Commission proposes new Chapter 5, relating to Carbon Dioxide.

The Commission proposes new Subchapter A, relating to General Provisions, and §5.101, relating to Purpose. The purpose of the proposed new chapter is to implement the portion of the state program for geologic storage of anthropogenic carbon dioxide over which the Commission has jurisdiction consistent with state and federal law related to protection of USDWs and mitigation of carbon dioxide emissions.

The Commission proposes new §5.102, relating to Definitions. Many of the terms defined in this new section are the same as or consistent with definitions of the same terms that are ubiquitous in the underground injection control program. These include definitions of “area of review,” “confining zone,” “corrective action,” “enhanced recovery operation,” “fracture pressure,” “injection zone,” “mechanical integrity,” “pressure front,” “transmissive fault or fracture,” “well stimulation,” and “workover.” The Commission has modified a few of these definitions as necessary for geologic sequestration.

The Commission proposes to define the term “underground source of drinking water,” a term used in the federal UIC program. Heretofore, the Commission has used the terms “fresh water” and “usable quality water” because they are used in the Texas statutes relating to underground injection. However, as noted before, use of the term “underground sources of drinking water” in the Commission’s rules will make it easier for the EPA to approve the Commission’s request for enforcement primacy. The Commission proposes to define “underground source of drinking water” as an aquifer or its portion which is not an exempt aquifer as defined in 40 Code of Federal Regulations §146.4 and which supplies any public water system; or contains a sufficient quantity of ground water to supply a public water system and currently supplies drinking water for human consumption or contains fewer than 10,000 mg/l total dissolved solids.

The Commission proposes to define other terms necessary to regulation of geologic storage of anthropogenic carbon dioxide. The Commission proposes to define the terms “anthropogenic carbon dioxide,” “geologic storage,” “geologic storage facility or storage facility,” and “reservoir” as those terms are defined in Texas Water Code, §27.002, as added by SB 1387.

The Commission’s proposed definitions of the terms “carbon dioxide plume,” “carbon dioxide stream,” “post-injection facility care,” and “facility closure” are modifications of the definitions of those terms proposed by EPA.

The Commission proposes new Subchapter B, relating to Geologic Storage and Associated Injection of Anthropogenic Carbon Dioxide. The Commission proposes new §5.201, relating to Applicability and Compliance, which states that Subchapter B applies to the geologic storage of anthropogenic carbon dioxide, and the injection of anthropogenic carbon dioxide into, a reservoir that is initially or may be productive of oil, gas, or geothermal resources or a saline formation directly above or below that reservoir. A saline formation that is directly above or below a reservoir that may be productive means a geologic formation containing saline fluids that is located immediately above the confining zone of a reservoir or that is located immediately below the bottom confining zone of such a reservoir. A reservoir that may be productive means an identifiable geologic unit that has had production in the past, which is similar to productive or previously productive reservoirs along the same or a similar trend, or potentially contains oil, gas, or geothermal resources based on analysis of geophysical and/or seismic data. If a well is authorized as or converted to an anthropogenic carbon dioxide injection well for geologic storage, this subchapter would apply to the well.

The Commission is aware of research possibly indicating accumulation of methane in reservoirs where carbon dioxide has been injected (Taggart, Ian, "Extraction of Dissolved Methane in Brines by CO₂ Injection: Implication for CO₂ Sequestration, Society of Petroleum Engineers," SPE 124630, 2009). In some
cases this may occur in areas not previously known to produce oil or gas. The Commission intends to address this issue as the program evolves and more information is available.

In accordance with SB 1387, the proposed section further states that Subchapter B does not apply to the injection of fluid through the use of an injection well regulated under 16 Tex. Admin. Code §3.46 (relating to Fluid Injection into Productive Reservoirs) for the primary purpose of enhanced recovery operations from which there is reasonable expectation of more than insignificantly future production volumes of oil, gas, or geothermal energy and operating pressures are no higher than reasonably necessary to produce such volumes or rates. However, the operator of an enhanced recovery project may propose simultaneously to permit the enhanced recovery project as a carbon dioxide geologic storage facility. There may not be much difference between injection pressures used for enhanced recovery and those for geologic storage; however, this may depend on the geology and hydrology of the storage facility and whether the operator proposes to allow the reservoir pressure to increase above the hydrostatic pressure on a long-term basis. The proposed new section requires the operator of a geologic storage facility to comply with all other applicable Commission rules and orders and states that, if a provision of Subchapter B conflicts with any provision or term of a Commission order or permit, the provision of the order or permit controls.

The Commission proposes new §5.202, relating to Permit Required. Proposed new subsection (a) states that a person may not begin drilling or operating an anthropogenic carbon dioxide injection well for geologic storage or constructing or operating a geologic storage facility regulated under this subchapter without first obtaining the necessary permits from the Commission. Proposed new subsection (b) outlines the requirements for amendment of an existing geologic storage facility permit. Proposed new subsection (c) sets forth the requirements for transfer of a permit for a geologic storage facility permit from one operator to another operator.

Proposed new subsection (d) states that the Commission has the authority to modify, cancel, or suspend a geologic storage facility permit after notice and opportunity for hearing under specific circumstances, listed in the subsection. Proposed new subsection (d) further states that in the event of an emergency that presents an imminent danger to life or property, or an imminent threat of uncontrolled escape of carbon dioxide, or an imminent threat of pollution, the director may immediately order suspension of the operation of the geologic storage facility until a final order is issued pursuant to a hearing, if any.

The Commission proposes new §5.203, relating to Application Requirements. Subsection (a) establishes the general requirements for the form of a permit application, the filing requirements, and providing general information. This subsection also states that the Commission may not issue a permit before receiving a complete application. The subsection further states that all reports must be prepared by a qualified and knowledgeable person that includes an interpretation of the results of all logs, surveys, sampling, and tests required in this subchapter and that a professional geoscientist or engineer, as appropriate and necessary, must conduct the logging, sampling, and testing, and affix the appropriate seal on the resulting reports required under this subchapter. Proposed new §5.203(b) establishes the requirements for surface map and information. Proposed new §5.203(c) establishes the geologic, geochemical, and hydrologic information required with an application. These requirements are consistent with EPA's proposed requirements.

Proposed new §5.203(d) establishes the application requirements for the area of review and corrective action. Paragraph (1) establishes the permit application requirements for the initial delineation of the area of review and the initial corrective action. Permit applicants must perform the initial delineation of the area of review using computational modeling and the proposed pressure and volume of carbon dioxide injection to predict the lateral and vertical migration of the carbon dioxide plume, the formation fluids, and the pressure differentials sufficient to cause movement of injected fluids or formation fluids into a USDW in the subsurface for three periods after initiation of injection: (1) five years after initiation of injection; (2) from initiation of injection to the end of the injection period proposed by the applicant; and (3) from initiation of injection to 10 years after the end of the injection period proposed by the applicant. The Commission has determined that delineation of the probable area of review after five years from commencement of injection will provide the operator and the Commission use information gathered in that time to verify the adequacy of the methods and programs used to delineate the areas of review throughout the life of the storage facility and to make any adjustments necessary shortly after the first five years of operation.

Proposed new §5.203(d) also establishes the application requirements for identification of penetrations and table of wells, which are generally the existing requirements for Class II wells, and establishes the application requirements for any necessary corrective action. These requirements are consistent with the existing requirements for Class II injection wells, except that the operator is required to perform corrective action using materials suitable for use with the carbon dioxide stream. Proposed new subsection (d) further requires that the applicant submit an area of review and corrective action plan, and details what that plan must include. The requirements in this subsection are consistent with those in EPA's proposed regulation.

Proposed new §5.203(e) establishes the requirements for construction of anthropogenic carbon dioxide injection wells. These requirements are consistent with the requirements for Class II injection wells, with the addition of one requirement included in EPA's proposed rules, i.e., verification of the integrity and location of the cement using technology capable of radial evaluation of cement quality and identification of the location of channels to ensure that underground sources of drinking water will not be endangered. Existing wells that have been associated with injection of carbon dioxide for the purpose of enhanced recovery may be exempt from provisions of these casing and cementing requirements if the applicant demonstrates that the well construction meets the general performance criteria. Proposed new §5.203(e) also establishes the requirements for the well construction information that must be submitted with a permit application, including a well construction plan and a well stimulation plan. Such information is necessary to allow the director to determine whether the wells will be constructed to prevent endangerment of USDWs and will isolate the injected fluids to the storage reservoir.

Proposed new §5.203(f), relating to logging, sampling, and testing, establishes the logging, sampling and testing results to be submitted with the application sufficient to determine the depth, thickness, porosity, permeability, and lithology of, and the geochemistry of any formation fluids in, all relevant geologic formations. Proposed new subsection (f) also requires the applicant...
to submit a plan for logging, sampling, and testing the injection well(s), after permitting but prior to injection well operation, that describes the logs, surveys, and tests to be conducted to verify the depth, thickness, porosity, permeability, and lithology of, and the salinity of any formation fluids in, the formations that are to be used for monitoring, storage, and confinement to assure compliance with the injection well construction requirements, and to establish accurate baseline data against which future measurements may be compared. The subsection further requires the applicant to submit a sampling plan. The subsection establishes the criteria and information for both plans. These requirements are a modification of the requirements in EPA’s proposed rule §146.87 for Class VI wells, except that the Commission has included more performance requirements and fewer mandates that operators perform specific tests to allow the operator to use whatever tests provide the necessary demonstration and to allow for technological advancements in testing methods.

Proposed new §5.203(g), relating to compatibility determination, requires an applicant to submit a determination of the compatibility of the carbon dioxide stream with the materials to be used to construct the well; fluids in the injection zone; and minerals in both the injection and the confining zone, based on the results of the formation testing program.

Proposed new §5.203(h), relating to mechanical integrity testing information, sets forth the criteria and information to be submitted in a mechanical integrity testing plan. These requirements are a modification of the requirements in EPA’s proposed rule §146.89. The requirements include an initial annulus pressure test; continuous monitoring of the injection pressure, rate, injected volumes, and pressure on the annulus between tubing and long string casing; an annual confirmation that the injected fluids are confined to the injection zone using a method approved by the director (e.g., diagnostic surveys, such as oxygen-activation logging or temperature or noise logs); and injection well testing after any workover that disturbs the seal between the tubing, packer, and casing, and at least once every five years to determine if leaks exist in the tubing, packer, or casing. The subsection further requires that the applicant submit a mechanical integrity testing plan and outlines the requirements of the plan.

Proposed new §5.203(i), relating to operating information, establishes the maximum injection pressure and the requirement for an operating plan. This requirement is consistent with EPA’s proposed rules, but does not set the limit to 90 percent of the fracture pressure of the injection zone, as in EPA’s proposed regulations. Rather, the Commission proposes to set the maximum injection pressure to one that takes into account the risks of tensile failure and, where appropriate, geomechanical or other studies that assess the risk of tensile failure and shear failure; that with a reasonable degree of certainty will avoid initiation or propagation of fractures in the confining zone or cause otherwise non-transmissive faults to transverse the confining zone to become transmissive; and that in no case may cause the movement of injection or formation fluids in a manner that endangers USDWs.

Proposed new §5.203(j), relating to monitoring, sampling, and testing plan, requires the applicant to prepare and submit a plan to verify that the geologic storage facility is operating as permitted and that the injected fluids are confined to the injection zone. The subsection establishes the requirements of the plan, which are consistent with EPA’s proposed rules.

Proposed new §5.203(k), relating to well plugging plan, sets forth the requirements for injection and monitor wells. In accordance with 16 Tex. Admin. Code §3.14 (relating to Plugging), operators must plug monitor wells that penetrate the base of usable quality water and, upon abandonment, all injection wells. Operators must plug all monitoring wells that do not penetrate the base of usable quality water, in accordance with 16 Tex. Admin. Code Chapter 76, relating to Water Well Driller’s and Water Well Plump Installers.

Proposed new §5.203(l), relating to emergency and remedial response plan, requires that the applicant submit an emergency and remedial response plan that describes actions to be taken to address escape from the permitted injection interval or movement of the injection or formation fluids that may cause an endangerment to USDWs during construction, operation, closure and post-closure periods; includes a safety plan that includes emergency response procedures, provisions to provide security against unauthorized activity, and carbon dioxide release detection and prevention measures; and includes a description of the training and testing that will be provided to each employee at the storage facility on operational safety and emergency response procedures to the extent applicable to the employee’s duties and responsibilities.

Proposed new §5.203(m), relating to financial responsibility, requires that an applicant demonstrate that the applicant has met the financial responsibility requirements under §5.205 of this subchapter. Such requirements are consistent with Texas Water Code, §27.050, and EPA’s proposed rule §146.85.

Proposed new §5.203(n), relating to post-injection facility care and facility closure plan, requires that an applicant submit a plan that includes the pressure differential between pre-injection and predicted post-injection pressures in the injection zone; the predicted position of the carbon dioxide plume and associated pressure front at closure as demonstrated in the area of review evaluation; a description of post-injection monitoring location, methods, and proposed frequency; a proposed schedule for submitting post-injection storage facility care monitoring results to the Commission; and the estimated cost of proposed post-injection care and closure.

Proposed new §5.203(o), relating to letter from the TCEQ, implements the requirement in Texas Water Code, §27.046, that an applicant submit a letter from the Executive Director of the TCEQ stating that drilling and operating the anthropogenic carbon dioxide injection well for geologic storage or operating the geologic storage facility will not injure any freshwater strata in that area and that the formation or stratum to be used for the geologic storage facility is not a freshwater formation or stratum.

Proposed new §5.203(p), relating to other information, requires that an applicant submit any other information requested by the director as necessary to discharge the Commission’s duties under Texas Water Code, Chapter 27, Subchapter B-1, or deemed necessary by the director to clarify, explain, and support the required attachments, consistent with Texas Water Code, §27.044, as amended by SB 1387.

The Commission proposes new §5.204, relating to Notice, Hearing, and Public Meeting. Proposed new subsection (a) requires the applicant to make a complete copy of the permit application available for the public to inspect and copy by filing a copy of the application with the County Clerk at the courthouse of the county or counties where the storage facility is to be located, or if approved by the director, at another equivalent public office. In addition, proposed new subsection (a) requires the applicant to make a copy of the complete application on an Internet website. The applicant must file any subsequent revision of an applica-
tion with each County Clerk or other approved public office and update the information on the website at the same time the revision is submitted to the Commission.

Proposed new §5.204(b), relating to notice requirements, establishes the notice requirements for a permit application under this subchapter. Such notice is consistent with the notice requirements for a gas storage facility under 16 Tex. Admin. Code §3.96 (relating to Underground Storage of Gas in Productive or Depleted Reservoirs), except that here the Commission proposes additional notice to surface owners and the groundwater conservation district (if one exists), as well as mineral leaseholders and surface leaseholders within one half mile of the outermost boundary of the area of review. Proposed new §5.205(c), relating to hearing requirements, is consistent with the hearing requirements for an enhanced recovery injection well under 16 Tex. Admin. Code §3.46 (relating to Fluid Injection into Productive Reservoirs). If the Commission receives a protest regarding an application for a new, or amendment of a permitted, geologic storage facility permit from a person who was notified pursuant to subsection (b) or from any other affected person within 30 days of the date of receipt of the application by the division, receipt of individual notice, or last publication of notice, whichever is later, or if the director determines that a hearing is in the public interest, then the applicant will be notified that the application cannot be administratively approved. The director will schedule a hearing on the application upon request of the applicant. The Commission must give notice of the hearing to all affected persons, local governments, and other persons who express, in writing, an interest in the application. After hearing, the examiner will recommend a final action by the Commission. If the Commission receives no protest regarding an application for a new, or amendment of a permitted, geologic storage facility permit from a person notified pursuant to subsection (a), or from any other affected person, the director may administratively approve the application. If the permit application for a new, or amendment of a permitted, geologic storage facility is administratively denied, a hearing will be scheduled upon written request of the applicant. After hearing, the examiner will recommend a final action by the Commission.

Proposed new §5.204(d), requires that, after the director has declared the application to be complete, the applicant schedule a public meeting to be held in the area of the proposed location of the geologic storage facility.

Proposed new §5.205 relates to Fees and Financial Assurance. Proposed new subsection (a), relating to fees, includes three non-refundable fees. The Commission proposes a base fee for each application to cover the Commission's costs for processing the application; an annual fee based on the number of metric tons injected into the geologic storage facility; and an annual post-injection care fee to be paid each year the operator does not inject into the geologic storage facility until the director has authorized storage facility closure. These fees are in addition to the fee required for each injection well by 16 Tex. Admin. Code §3.78 (relating to Fees and Financial Security Requirements). Proposed new subsection §5.205(b), relating to financial responsibility, is consistent with of the Texas Water Code, §27.050, as added by SB 1387.

Proposed new §5.205(c) establishes financial assurance requirements as required by Texas Water Code, §27.073, as added by SB 1387. The operator must comply with the requirements of 16 Tex. Admin. Code §3.78 (relating to Fees and Financial Security Requirements), for all monitoring wells that penetrate the base of usable quality water and all injection wells. In addition, an applicant for a geologic storage facility must file a bond or letter of credit that is in an amount approved by the director under this subsection and that meets the requirements of this subsection as to form and issuer. The Commission must approve the bond or letter of credit before issuing a permit.

Proposed new §5.205(d), relating to notice of adverse financial conditions, requires an operator notify the Commission of adverse financial conditions that may affect the operator’s ability to carry out injection well plugging, post-injection storage facility care, and storage facility closure. Proposed new subsection (d) requires that notice of bankruptcy be filed in accordance with 16 Tex. Admin. Code §3.1 (relating to Organization Report; Retention of Records; Notice Requirements). The bond must provide a mechanism for the bond or surety company to give prompt notice to the Commission and the operator of any action filed alleging insolvency or bankruptcy of the surety company or the bank or alleging any violation that would result in suspension or revocation of the surety or bank’s charter or license to do business. Upon the incapacity of a bank or surety company by reason of bankruptcy, insolvency, or suspension, or of revocation of its charter or license, the operator will be deemed to be without bond coverage. The Commission must issue a notice to any operator who is without bond coverage and specify a reasonable period to replace bond coverage, not to exceed 90 days.

The Commission proposes new §5.206, relating to Permit Standards. Proposed new subsection (a) establishes the general criteria for issuance of a permit. The language is consistent with Texas Water Code, §27.051(b-1), as added by SB 1387. The Commission proposes additional requirements, such as the applicant’s submission of the letter from the Executive Director of the TCEQ required by Texas Water Code, §27.046; the applicant’s demonstration that the applicant has a good faith claim to the necessary and sufficient property rights for construction and operation of the geologic storage facility; the applicant’s payment of the fee required in §5.205(a) of this subchapter; the director’s determination that the applicant has sufficiently demonstrated financial responsibility; and the applicant submitted to the director the required financial security.

Proposed new §5.206(b) requires that construction of anthropogenic carbon dioxide injection wells meet the criteria in §5.203(e) of this subchapter; that within 30 days after the completion or conversion of an injection well, the operator file a complete record of the well on the Commission’s approved form showing the current completion; and that an operator of a geologic storage facility must notify the director and obtain the director’s approval prior to conducting any well workover.

Proposed new §5.206(c) establishes the requirements for operating a geologic storage facility. The proposed new subsection requires the operator to maintain and comply with the approved operating plan and adhere to certain operating criteria relating to metering, injection pressure, annulus fluid, recording devices, and alarms and automatic shut-off systems.

Proposed new §5.206(d) requires that the operator maintain and comply with the approved monitoring, sampling, and testing plan to verify that the geologic storage facility is operating as permitted and that the injected fluids are confined to the injection zone.

Proposed new §5.206(e) requires that the operator maintain and comply with the approved mechanical integrity testing plan submitted in accordance with §5.203(h) of this subchapter, and
maintain mechanical integrity of the injection well at all times, except during periods of well workover.

Proposed new §5.206(f) requires that, at the frequency specified in the approved area of review and corrective action plan or permit, or when monitoring and operational conditions warrant, the operator of a geologic storage facility: (1) re-evaluate the area of review through computational modeling; (2) identify all wells in the re-evaluated area of review that require corrective action; (3) perform corrective action on wells requiring corrective action in the re-evaluated area of review; and (4) submit an amended area of review and corrective action plan or demonstrate to the director through monitoring data and modeling results that no change to the area of review and corrective action plan is needed.

Proposed new §5.206(g) requires that the operator maintain, update as necessary, and comply with the approved emergency and remedial response plan required by proposed new §5.203(l) that describes actions to be taken to address movement of the injection or formation fluids that may cause an endangerment to USDWs during construction, operation, closure and post-closure periods. Proposed new subsection (g) also states the action an operator must take if the operator obtains evidence that the injected carbon dioxide stream and associated pressure front may cause an endangerment to USDWs and states that the director may allow the operator to resume injection prior to remediation if the operator demonstrates that the injection operation will not endanger underground sources of drinking water. These requirements are consistent with the requirements in EPA’s proposed regulations at §146.94.

Proposed new §5.206(h) requires the operator to give the division the opportunity to witness all logging and testing.

Proposed new §5.206(i) requires the operator to maintain and comply with the approved well plugging plan required by proposed new §5.203(k).

Proposed new §5.206(j) requires the operator of an injection well to maintain and comply with the approved post-injection storage facility care and closure plan required under proposed new §5.203(n). Upon cessation of injection, the operator must either submit an amended plan or demonstrate to the director, through monitoring data and modeling results, that no amendment to the plan is needed, and must continue to conduct monitoring as specified in the approved plan until the director determines that the position of the carbon dioxide plume and pressure front are such that the geologic storage facility will not endanger USDWs. Prior to authorization for storage facility closure, the operator must submit to the director a demonstration, based on monitoring and other site-specific data, that the carbon dioxide plume and pressure front have stabilized and that no additional monitoring is needed to assure that the geologic storage facility will not endanger USDWs. Proposed new subsection (j) establishes the requirements necessary for the Commission to authorize closure. These requirements are generally consistent with EPA’s proposed regulation §146.93.

Proposed new §5.206(k) requires the operator of a geologic storage facility to record specific information in a notation on the deed to the facility property or any other document to put any potential purchaser of the property on notice of certain facts, including the fact that the land has been used to geologically store carbon dioxide.

Proposed new §5.206(l) requires that the operator retain for three years following storage facility closure certain records collected during the post-injection storage facility care period.

The proposed new subsection further requires that the operator deliver those records to the director at the conclusion of the retention period and that the records be retained at the Austin Headquarters of the Commission.

Proposed new §5.206(m) requires identification of each location at which geologic storage activities take place, including each injection well, by a sign that meets the requirements specified in §3.3 of this title (relating to Identification of Properties, Wells, and Tanks). In addition, each sign must include a telephone number at which the operator, or a representative of the operator, can be reached in the event of an emergency.

Proposed new §5.206(n) states that, in any permit for a geologic storage facility, the director will impose terms and conditions reasonably necessary to protect USDWs from pollution, including the necessary casing. The subsection further states that the permits issued under this subchapter continue in effect until revoked, modified, or suspended by the Commission. Operators must comply with each requirement set forth in this subchapter as a condition of the permit unless specifically modified by the terms of the permit.

The Commission proposes new §5.207 which establishes record-keeping and reporting requirements. The operator must file a complete record of all tests in duplicate with the district office within 30 days after the testing. In reporting the results of mechanical integrity tests to the director, the operator must include a description of the test(s) and the method(s) used. Various operating reports are due within 24 hours, within 30 days, semi-annually, annually, or on a cumulative basis. The operator must report to the district office orally as soon as practicable upon the discovery of any pressure changes or other monitoring data that indicate the presence of leaks in the well or the lack of confinement of the injected carbon dioxide stream to the geologic storage reservoir, and must confirm the report in writing within five working days. Operators must report to the appropriate District Office within 24 hours any significant pressure changes or other monitoring data indicating the presence of leaks in the well.

Within 30 days, the operator must report the results of periodic tests for mechanical integrity; the results of any other test of the injection well conducted by the operator if required by the director; and a description of any well workover. These reports must include summary cumulative tables of the required information.

Semi-annually, the operator must report a summary of well head pressure monitoring; changes to the physical, chemical and other relevant characteristics of the carbon dioxide stream from the proposed operating data; monthly average, maximum, and minimum values for injection pressure, flow rate and volume, and annular pressure; a description of any event that significantly exceeds operating parameters for annulus pressure or injection pressure as specified in the permit; a description of any event that triggers a shutdown device and the response taken; and the results of monitoring prescribed under proposed new §5.206(d).

Other information that may be obtained annually includes but is not limited to reports of corrective action performed; new wells installed and the type, location, number and information required in proposed new §5.203(e); re-calculated area of review; tons of carbon dioxide injected; and other information that may be required by a particular permit. Proposed new §5.207 also prescribes the reporting formats and record retention requirements.
The Commission proposes new §5.208, relating to Penalties, which states that violations of this subchapter may subject the operator to penalties and remedies specified in the Texas Natural Resources Code, Title 3, Texas Water Code, Chapter 27, and other statutes administered by Commission, and that the certificate of compliance for any oil, gas, or geothermal resource well may be revoked in the manner provided in §3.73 of this title (relating to Pipeline Connection; Cancellation of Certificate of Compliance; Severance) for violation of this subchapter.

Leslie Savage, Planning and Administration, Oil and Gas Division, has determined that for each year of the first five years that the proposed new rules will be in effect there will be negative fiscal implications for state government.

SB 1387 provided the Commission with a method for funding this new program by establishing the Anthropogenic Carbon Dioxide Storage Trust Fund through Texas Natural Resources Code, §120.003, and allowing the Commission to charge fees under Texas Water Code, §27.045. However, the Commission cannot collect any fees to fund the program until it receives applications. Therefore, for the first two years, the Commission will bear the costs of rulemaking, preparation of the EPA primary application, and initial implementation without any offsetting revenue.

EPA estimates that the cost to the Commission of preparing its primary application for oversight of Class VI wells will be approximately $43,852. EPA further estimates that the annual burden of its proposed rules to primary agencies such as the Railroad Commission is approximately $12,228, based on oversight of four Class VI facilities. The Commission finds that this estimate is low and has estimated that its total annual cost will be closer to $250,000, which is the basis for the Commission’s proposed fees. See “Information Collection Request for the Federal Requirements Under the Underground Injection Control Program for Carbon Dioxide Geologic Sequestration Wells—Proposed Rule,” OMB Control No. 2040-NEW, EPA ICR No. 2309.01, July 2008.

Staff estimates that the program will require at least one Engineering Specialist VII and an attorney for the first two fiscal years to help draft rules, coordinate with TCEQ and BEG, and prepare the Commission’s package for primary of the federal program for injection wells for the purpose of geologic storage of carbon dioxide. Staff estimates that the Engineering Specialist VII and an Administrative Assistant II, as well as some assistance from an attorney, will be needed in subsequent fiscal years to administer the program. In addition, the Commission will need to perform computer programming to add a new Underground Injection Control (UIC) type code and a new Drilling Permit purpose of filing code to both the mainframe and open system applications. This change affects 24 mainframe programs totaling 768 hours and open system programs totaling 380 hours for a total cost of $32,718 in fiscal year 2011. Commission personnel would perform these modifications.

Staff estimates the costs to be approximately $250,000, for fiscal year 2010 and 2011, and approximately $235,404 in subsequent fiscal years.

Texas Government Code, §2006.002, relating to Adoption of Rules with Adverse Economic Effect, directs that, as part of the rulemaking process, a state agency prepare an Economic Impact Statement that assesses the potential impact of a proposed rule on small businesses and micro-businesses, and a Regulatory Flexibility Analysis that considers alternative methods of achieving the purpose of the rule if the proposed rule will have an adverse economic effect on small businesses or micro-businesses.

The Commission’s proposed new rules in Chapter 5 are anticipated to have a potential cost impact on those persons performing geologic storage of anthropogenic carbon dioxide in depleted oil and gas reservoirs in this state, but because the Commission has issued no permits for geologic storage of carbon dioxide, the Commission has no historic information on which to base its analysis of the cost of compliance. Further, companies performing activities under the jurisdiction of the Commission are not required to make filings with the Commission reporting the number of employees or annual gross receipts, which are elements of the definitions of "micro-business" and "small business" in Texas Government Code, §2006.001; therefore, the Commission has no factual bases for determining whether any persons that will be engaged in geologic storage of carbon dioxide will be classified as small businesses or micro-businesses, as those terms are defined.

Specifically, Texas Government Code, §2006.001(2), defines a "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has fewer than 100 employees or less than $6 million in annual gross receipts. Texas Government Code, §2006.001(1), defines "micro-business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has not more than 20 employees. The Commission expects that the companies that will operate large-scale commercial facilities for the geologic storage of carbon dioxide in Texas are large companies having at least 500 employees or companies under common control of large companies, such as Denbury Resources, Tenaska, Summit Power Group, Occidental Petroleum, and SandRidge Energy; those companies do not meet two of the three elements of either definition.

Based on the information the Commission has received regarding the companies that are likely to pursue permits for facilities for the geologic storage of anthropogenic carbon dioxide, Ms. Savage concludes that it is extremely unlikely that any company that potentially could be affected by the proposed rules would be classified as a small business or micro-business, as those terms are defined in Texas Government Code, §2006.001. However, for purposes of performing the analysis mandated by Texas Government Code, §2006.002(c), the Commission assumes that at least one small business or micro-business will apply for a permit to operate a carbon dioxide geologic storage facility in Texas.

The North American Industrial Classification System (NAICS) sets forth categories of business types. There is no category for geologic storage of carbon dioxide. This category is not listed on the Texas Comptroller of Public Accounts website page entitled "HB 3430 Reporting Requirements-Determining Potential Effects on Small Businesses." The most suitable category on that website is business type 2212 (Natural Gas Distribution), for which there are listed 144 companies in Texas. This source further indicates that 119 companies (82 percent) are small businesses or micro-businesses as defined in Texas Government Code, §2006.002.

The Commission used information provided by EPA as support documentation for its proposed rules to estimate the cost of compliance with the Commission’s proposed rules. EPA estimated an overall cost of approximately $2.20 per ton of carbon dioxide stored over the lifetime of a commercial geologic storage project.
EPA estimated the cost of performing the necessary work for and preparing the application at approximately $1,481,775 per application, with which the Commission agrees. The Commission proposes to require a base application fee of $75,000 for a total estimated application cost of $1,556,775. EPA also estimated that the recurring costs for a facility that has been permitted and is operating will be $1,705,294 a year, the cost of post-injection monitoring and reporting at $216,092 a year; and the cost for a site closure report at $3,154. The Commission also agrees with these estimates. See "Information Collection Request for the Federal Requirements Under the Underground Injection Control Program for Carbon Dioxide Geologic Sequestration Wells—Proposed Rule," OMB Control No. 2040-NEW, EPA ICR No. 2309.01, July 2008.

The Commission’s proposed fee structure for applications and for monitoring during the post-injection care period is based on the estimated cost to the Commission of reviewing applications and monitoring geologic storage facilities. Because the Commission’s proposed annual fee, intended to provide revenue to the Trust Fund, is based on the volume of carbon dioxide injected, the fee generally will be proportional to the size of the facility. That does not necessarily mean, however, that the fee will be proportional to the size of the entity operating the facility, although it could tend to reduce the likely actual annual costs for smaller businesses and modestly increase the actual annual costs for the larger businesses. Other factors that might affect the distribution of the economic burden of regulating geologic storage of anthropogenic carbon dioxide, such as net value of carbon dioxide as established by the Federal government in a carbon credit program, cannot be calculated because Congress has not yet established such a program.

The Commission has determined that the economic impact of the proposed new rules will be the same for small businesses and micro-businesses as for larger businesses. The Commission has also determined that consideration of the use of regulatory methods that will achieve the purpose of the proposed rules while minimizing the adverse impacts on small businesses is not consistent with the health, safety, and environmental and economic welfare of the state, and therefore has not prepared a regulatory flexibility analysis. The primary reason for this is that absent some action from Congress, states will be required to apply for primacy for the UIC program for geologic storage of carbon dioxide under Section 1422 of the federal SDWA. Under that section, states must show that the state programs meet EPA’s minimum federal requirements for UIC programs, including construction, operating, monitoring and testing, reporting, and closure requirements for well owners or operators. The state’s program must be at least as stringent as EPA’s program.

The Commission anticipates that the creation of a facility for the geologic storage of carbon dioxide would likely affect a local economy; however, because the Commission has not issued any permits for such activities, the Commission has no historic information on which to base an analysis of the impact on a local economy. The Commission recognizes that some geologic storage facilities might be large enough to create new jobs in a local economy, but the Commission does not have any information regarding where such facilities might be located, how large the operations might be, or when such facilities might begin operations; therefore, the Commission has no factual bases on which to estimate the impact on any particular local economy. The Commission anticipates that the effect on any local economy would be similar to that of the oil and gas industry as a whole. Therefore, the Commission has not prepared a local employment impact statement pursuant to Texas Government Code, §2002.022.

The Commission has determined that the proposed new rules in Chapter 5 are not major environmental rules, because the rules do not meet the requirements set forth in Texas Government Code, §2001.0225(a).

Ms. Savage has determined that for each year of the first five years that the new rules will be in effect the public benefit will be a reduction in the amount of anthropogenic carbon dioxide released to the atmosphere and an enhanced ability of Texas industries to comply with future federal climate regulations.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.php; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission is particularly interested in comments regarding the financial assurance provisions in proposed new §5.205 (relating to Fees and Financial Assurance). Comments should refer to O&G Docket No. 20-0264802, and will be accepted until 5:00 p.m. on April 26, 2010, which is 31 days after publication in the Texas Register. The Commission finds that this comment period is reasonable because the proposal and an online comment form will be available on the Commission’s web site at least 16 days prior to Texas Register publication of the proposal, giving interested persons more than two additional weeks to review, analyze, draft, and submit comments. The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Ms. Savage at (512) 463-7308. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.php.

The Commission proposes the rules in new Chapter 5 pursuant to Texas Natural Resources Code, §81.051 and §81.052, which give the Commission jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission; Texas Natural Resources Code, Chapter 91, Subchapter R, as enacted by SB 1387, relating to authorization for multiple or alternative uses of wells; Texas Water Code, Chapter 27, Subchapter C-1, as enacted by SB 1387, which gives the Commission jurisdiction over the geologic storage of carbon dioxide in, and the injection of carbon dioxide into, a reservoir that is initially or may be productive of oil, gas, or geothermal resources or a saline formation directly above or below that reservoir; and Texas Water Code, Chapter 120, as enacted by SB 1387, which establishes the Anthropogenic Carbon Dioxide Storage Trust Fund, a special interest-bearing fund in the state treasury, to consist of fees collected by the Commission and penalties imposed under Texas Water Code, Chapter 27, Subchapter C-1, and to be used by the Commission for only certain specified activities associated with geologic storage facilities and associated anthropogenic carbon dioxide injection wells.

Texas Natural Resources Code, §81.051, §81.052; Texas Natural Resources Code, Chapter 91, Subchapter R; and Texas Water Code, Chapters 27 and 120, are affected by the proposed new rules.
§5.101. Purpose.

The purpose of the this chapter is to implement the portion of the state program for geologic storage of anthropogenic carbon dioxide over which the Railroad Commission has jurisdiction consistent with state and federal law related to protection of underground sources of drinking water and mitigation of carbon dioxide emissions.

§5.102. Definitions.

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

(A) Anthropogenic carbon dioxide--

(1) Affected person--A person who, as a result of actions proposed by an application for a geologic storage facility permit or an amendment or modification of an existing geologic storage facility permit, has suffered or may suffer actual injury or economic damage other than as a member of the general public.

(2) Anthropogenic carbon dioxide--

(A) carbon dioxide that would otherwise have been released into the atmosphere that has been:

(i) separated from any other fluid stream; or

(ii) captured from an emissions source, including:

(I) an advanced clean energy project as defined by Health and Safety Code, §382.003, or another type of electric generation facility; or

(II) an industrial source of emissions; and

(iii) any incidental associated substance derived from the source material for, or from the process of capturing, carbon dioxide described by clause (i) of this subparagraph; and

(iv) any substance added to carbon dioxide described by clause (i) of this subparagraph to enable or improve the process of injecting the carbon dioxide; and

(B) does not include naturally occurring carbon dioxide that is recaptured, recycled, and reinjected as part of enhanced recovery operations.

(3) Anthropogenic carbon dioxide injection well--An injection well used to inject or transmit anthropogenic carbon dioxide into a reservoir.

(4) Aquifer--A geologic formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring.

(5) Area of review--The three-dimensional area of a geologic storage facility that may be impacted by the injection activity as determined by computational modeling that considers the volumes and the physical and chemical properties of the carbon dioxide stream to be injected, the physical and chemical properties of the formation into which the carbon dioxide stream is to be injected, and available data including data available from logging or testing of wells.

(6) Carbon dioxide plume--The underground extent, in three dimensions, of an injected carbon dioxide stream.

(7) Carbon dioxide stream--Carbon dioxide that has been captured from an emission source, incidental associated substances derived from the source materials and the capture process, and any substances added to the stream to enable or improve the injection process. The term does not include any carbon dioxide stream that meets the definition of a hazardous waste under 40 Code of Federal Regulations Part 261.

(8) Commission--A quorum of the members of the Railroad Commission of Texas convening as a body in open meeting.

(9) Confining zone--A geologic formation, group of formations, or part of a formation that is capable of limiting fluid movement from an injection zone.

(10) Corrective action--Methods to assure that wells within the area of review do not serve as conduits for the movement of fluids into or between underground sources of drinking water, including the use of corrosion resistant materials, where appropriate.

(11) Delegate--The person authorized by the director to take action on behalf of the Railroad Commission of Texas under this subchapter.

(12) Director--The director of the Oil and Gas Division of the Railroad Commission of Texas or the director’s delegate.

(13) Division--The Oil and Gas Division of the Railroad Commission of Texas.

(14) Enhanced recovery operation--The use of any process for the displacement of hydrocarbons from a reservoir other than primary recovery and includes the use of any physical, chemical, thermal, or biological process and any co-production project. This term does not include pressure maintenance or disposal projects.

(15) Facility closure--The point at which the operator of a geologic storage facility is released from post-injection storage facility care responsibilities.

(16) Formation fluid--Fluid present in a formation under natural conditions.

(17) Fracture pressure--The pressure that, if applied to a subsurface formation, would cause that formation to physically fracture.

(18) Geologic storage--The long-term containment of anthropogenic carbon dioxide in a reservoir.

(19) Geologic storage facility or storage facility--The underground reservoir, underground equipment, injection wells, and surface buildings and equipment used or to be used for the geologic storage of anthropogenic carbon dioxide and all surface and subsurface rights and appurtenances necessary to the operation of a facility for the geologic storage of anthropogenic carbon dioxide. The term includes any reasonable and necessary area buffer, subsurface monitoring zones, and pressure fronts. The term does not include a pipeline used to transport carbon dioxide from the facility at which the carbon dioxide is captured to the geologic storage facility. The storage of carbon dioxide incidental to or as part of enhanced recovery operations does not in itself automatically render a facility a geologic storage facility.

(20) Groundwater conservation district--Any district or authority created under Texas Constitution, Article III, §52, or Texas Constitution, Article XVI, §59, that has the authority to regulate the spacing of water wells, the production from water wells, or both.
(21) Injection zone--A geologic formation, group of formations, or part of a formation that is of sufficient areal extent, thickness, porosity, and permeability to receive carbon dioxide through a well or wells associated with a geologic storage facility.

(22) Mechanical integrity--An anthropogenic carbon dioxide injection well has mechanical integrity if:

(A) there is no leak in the casing, tubing, or packer; and

(B) there is no fluid movement into a stratum containing an underground source of drinking water through channels adjacent to the injection well bore as a result of operation of the injection well.

(23) Monitoring well--A well either completed or re-completed for the purpose of observing subsurface phenomena, including the presence of anthropogenic carbon dioxide, pressure fluctuations, fluid levels and flow, temperature, and in situ water chemistry.

(24) Operator--A person, acting for himself or as an agent for others, designated to the Railroad Commission of Texas as the person with responsibility for complying with the rules and regulations regarding the permitting, physical operation, closure, and post-closure care of a geologic storage facility, or such person’s authorized representative.

(25) Person--A natural person, corporation, organization, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity.

(26) Pollution--Alteration of the physical, chemical, or biological quality of, or the contamination of, water that makes it harmful, detrimental, or injurious to humans, animal life, vegetation, or property, or to public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose.

(27) Post-injection facility care--Monitoring and other actions (including corrective action) needed following cessation of injection to assure that underground sources of drinking water are not endangered and that the anthropogenic carbon dioxide remains confined to the permitted injection interval.

(28) Pressure front--The zone of elevated pressure that is created by the injection of the carbon dioxide stream into the subsurface where there is a pressure differential sufficient to cause movement of the carbon dioxide stream or formation fluids from the injection zone into a underground source of drinking water.

(29) Reservoir--A natural or artificially created subsurface sedimentary stratum, formation, aquifer, cavity, void, or coal seam.

(30) Transmissive fault or fracture--A fault or fracture that has sufficient permeability and vertical extent to allow fluids to move beyond the confining zone.

(31) Underground source of drinking water--An aquifer or its portion which is not an exempt aquifer as defined in 40 Code of Federal Regulations §146.4 and which:

(A) supplies any public water system; or

(B) contains a sufficient quantity of ground water to supply a public water system; and

(ii) currently supplies drinking water for human consumption; or

(ii) contains fewer than 10,000 mg/l total dissolved solids.

(32) Well stimulation--Any of several processes used to clean the well bore, enlarge channels, and increase pore space in the interval to be injected thus making it possible for fluid to move more readily into the formation including, but not limited to, surging, jetting, blasting, acidizing, and hydraulic fracturing.

(33) Workover--An operation in which a down-hole component of a well is repaired or the engineering design of the well is changed. Workovers include operations such as sidetracking, the addition of perforations within the permitted injection interval, and the addition of liners or patches. For the purposes of this chapter, workovers do not include well stimulation operations.

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

Filed with the Office of the Secretary of State on March 9, 2010.

TRD-201001189
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 475-1295

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SUBCHAPTER B. GEOLOGIC STORAGE AND ASSOCIATED INJECTION OF ANTHROPOGENIC CARBON DIOXIDE

16 TAC §§5.201 - 5.208

The Commission proposes the rules in new Chapter 5 pursuant to Texas Natural Resources Code, §81.051 and §81.052, which give the Commission jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission; Texas Natural Resources Code, Chapter 91, Subchapter R, as enacted by SB 1387, relating to authorization for multiple or alternative uses of wells; Texas Water Code, Chapter 27, Subchapter C-1, as enacted by SB 1387, which gives the Commission jurisdiction over the geologic storage of carbon dioxide in, and the injection of carbon dioxide into, a reservoir that is initially or may be productive of oil, gas, or geothermal resources or a saline formation directly above or below that reservoir; and Texas Water Code, Chapter 120, as enacted by SB 1387, which establishes the Anthropogenic Carbon Dioxide Storage Trust Fund, a special interest-bearing fund in the state treasury, to consist of fees collected by the Commission and penalties imposed under Texas Water Code, Chapter 27, Subchapter C-1, and to be used by the Commission for only certain specified activities associated with geologic storage facilities and associated anthropogenic carbon dioxide injection wells.

Texas Natural Resources Code, §81.051, §81.052; Texas Natural Resources Code, Chapter 91, Subchapter R; and Texas Water Code, Chapters 27 and 120, are affected by the proposed new rules.

Statutory authority: Texas Natural Resources Code, §§81.051, §81.052; Texas Natural Resources Code, Chapter 91, Subchapter R; and Texas Water Code, Chapters 27 and 120.

Cross-reference to statute: Texas Natural Resources Code, §§81.051, §81.052; Texas Natural Resources Code, Chapter 91, Subchapter R; and Texas Water Code, Chapters 27 and 120.

Issued in Austin, Texas, on March 9, 2010.
§5.201. Applicability and Compliance.

(a) This subchapter applies to the geologic storage of anthropogenic carbon dioxide in, and the injection of anthropogenic carbon dioxide into, a reservoir that is initially or may be productive of oil, gas, or geothermal resources or a saline formation directly above or below that reservoir. A saline formation that is directly above or below a reservoir that may be productive means a geologic formation containing saline fluids that is located immediately above the confining zone of a reservoir or that is located immediately below the bottom confining zone of such a reservoir. A reservoir that may be productive means an identifiable geologic unit that has had production in the past, which is similar to productive or previously productive reservoirs along the same or a similar trend, or potentially contains oil, gas, or geothermal resources based on analysis of geophysical and/or seismic data.

(b) This subchapter applies to a well that is authorized as or converted to an anthropogenic carbon dioxide injection well for geologic storage.

(c) This subchapter does not apply to the injection of fluid through the use of an injection well regulated under §3.46 of this title (relating to Fluid Injection into Productive Reservoirs) for the primary purpose of enhanced recovery operations from which there is reasonable expectation of more than insignificant future production volumes of oil, gas, or geothermal energy and operating pressures are no higher than reasonably necessary to produce such volumes or rates. However, the operator of an enhanced recovery project may propose to also permit the enhanced recovery project as a carbon dioxide geologic storage facility simultaneously.

(d) If a provision of this subchapter conflicts with any provision or term of a Commission order or permit, the provision of such order or permit controls.

(e) The operator of a geologic storage facility must comply with the requirements of this subchapter as well as with all other applicable Commission rules and orders, including the requirements of Chapter 8 of this title (relating to Pipeline Safety Regulations) for pipelines and associated facilities.


(a) Permit required. A person may not begin drilling or operating an anthropogenic carbon dioxide injection well for geologic storage or constructing or operating a geologic storage facility regulated under this subchapter without first obtaining the necessary permits from the Commission.

(b) Permit amendment.

(1) An operator must file an application to amend an existing geologic storage facility permit with the director:

(A) prior to expanding the areal extent of the storage reservoir;

(B) prior to increasing the injection pressure;

(C) prior to adding injection wells; or

(D) at any time that conditions at the geologic storage facility materially deviate from the conditions specified in the permit or permit application.

(2) Compliance with plan amendments required by this subchapter does not necessarily constitute a material deviation in conditions.

(c) Permit transfer. An operator may transfer its geologic storage facility permit to another operator if the requirements of this subsection are met. A new operator may not begin operating the geologic storage facility without a valid permit.

(1) Notice. An applicant must submit written notice of an intended permit transfer to the director at least 60 days prior to the date the transfer is proposed to take place.

(A) The applicant’s notice to the director must contain all of the following:

(i) the name and address of the person to whom the geologic storage facility will be sold, assigned, transferred, leased, conveyed, exchanged, or otherwise disposed;

(ii) the name and location of the geologic storage facility and a legal description of the land upon which the storage facility is situated;

(iii) the date that the sale, assignment, transfer, lease conveyance, exchange, or other disposition is proposed to become final; and

(iv) the date that the transferring operator will relinquish possession as a result of the sale, assignment, transfer, lease conveyance, exchange, or other disposition.

(B) The person acquiring a geologic storage facility, whether by purchase, transfer, assignment, lease, conveyance, exchange, or other disposition, must notify the director in writing of the acquisition as soon as it is reasonably possible but not later than the date that the acquisition of the geologic storage facility becomes final. The director may not approve the transfer of a geologic storage facility permit until the new operator provides all of the following:

(i) the name and address of the operator from which the geologic storage facility was acquired;

(ii) the name and location of the geologic storage facility and a description of the land upon which the geologic storage facility is situated;

(iii) the date that the acquisition became or will become final;

(iv) the date that possession was or will be acquired; and

(v) the financial assurance required by this subchapter.

(2) Evidence of financial responsibility. The operator acquiring the permit must provide the director with evidence of financial responsibility satisfactory to the director in accordance with §5.205 of this subchapter (relating to Fees and Financial Assurance).

(3) Transfer of responsibility. An operator remains responsible for the geologic storage facility until the director approves in writing the sale, assignment, transfer, lease, conveyance, exchange, or other disposition and the person acquiring the storage facility complies with all applicable requirements.

(d) Modification, cancellation, or suspension of a geologic storage facility permit.

(1) General. The director may modify, suspend, or cancel a geologic storage facility permit after notice and opportunity for hearing under any of the following circumstances:

(A) There is a material change in conditions in the operation of the geologic storage facility, or there are material deviations from the information originally furnished to the director. A change in conditions at a facility that does not affect the ability of the facility to operate without causing a release of carbon dioxide is not considered to be material:
(B) Underground sources of drinking water are likely to
be polluted as a result of the continued operation of the geologic storage
facility;

(C) There are material violations of the terms and provi-
sions of the permit or of applicable Commission orders or regulations;

(D) The operator misrepresented material facts during
the permit application or issuance process; or

(E) Injected fluids are escaping or are likely to escape
from the geologic storage facility.

(2) Imminent danger. Notwithstanding the provisions of
paragraph (1) of this subsection, in the event of an emergency that
presents an imminent danger to life or property, or an imminent threat
of uncontrolled escape of carbon dioxide, or an imminent threat of pol-
lution, the director may immediately order suspension of the operation
of the geologic storage facility until a final order is issued pursuant to
a hearing, if any.

§5.203. Application Requirements.

(a) General.

(1) Form and filing. Each applicant for a permit to con-
struct and operate a geologic storage facility must file an applica-
tion with the division in Austin on a form prescribed by the Commissi-
on. The applicant must file one copy of the permit and all attachments
with the division in an electronic format. On the same date, the appli-
cant must file one copy with the appropriate district office(s) and one
copy with the Executive Director of the Texas Commission on Envi-
ronmental Quality. An applicant must ensure that the application is
executed by a party having knowledge of the facts entered on the form
and included in the required attachments. A professional geoscientist
or engineer, as appropriate, must conduct the geologic and hydrologic
evaluations required under this section, and must affix the appropriate
seal on the resulting reports of such evaluations.

(2) General information. On the application, the applicant
must include the name, mailing address, and location of the facility
for which the application is being submitted and the operator’s name,
address, telephone number, Commission Organization Report number,
and ownership of the facility.

(3) Application completeness. The Commission may not
issue a permit before receiving a complete application. A permit
application is complete when the director determines that the application
contains information addressing each application requirement of the
regulatory program and all information necessary to initiate the final
review by the director.

(4) Reports. An applicant must ensure that all descriptive
reports are prepared by a qualified and knowledgeable person and in-
clude an interpretation of the results of all logs, surveys, sampling, and
tests required in this subchapter. A professional geoscientist or engi-
eer, as appropriate and necessary, must conduct the logging, sampling,
and testing required under this subchapter and affix the appropriate
seal on the resulting reports. The applicant must include in the applica-
tion a quality assurance and surveillance plan for all testing and monitoring,
which includes, at a minimum, validation of the analytical laboratory
data, calibration of field instruments, and an explanation of the sam-
ping and data acquisition techniques.

(b) Surface map and information. Only information of public
record is required to be included on this map.

(1) The applicant must file with the director a surface map
delineating the proposed location(s) of injection well(s) and the bound-
ary of the geologic storage facility for which a permit is sought and the
applicable area of review.

(2) The applicant must show within the area of review on
the map the number or name and the location of:

(A) all known artificial penetrations through the con-
fining zone, including injection wells, producing wells, inactive wells,
plugged wells, or dry holes;

(B) the locations of cathodic protection holes, subsur-
face cleanup sites, bodies of surface water, springs, surface and sub-
surface mines, quarries, and water wells; and

(C) other pertinent surface features, including pipelines, roads, and structures intended for human occupancy.

(c) Geologic, geochemical, and hydrologic information.

(1) The applicant must submit a descriptive report prepared
by a knowledgeable person that includes an interpretation of the results
of appropriate logs, surveys, sampling, and testing sufficient to deter-
mine the depth, thickness, porosity, permeability, and lithology of, and
the geochemistry of any formation fluids in, all relevant geologic for-
mations.

(2) The applicant must submit information on the geologic
structure and reservoir properties of the proposed storage reservoir and
overlying formations, including the following information:

(A) geologic and topographic maps and cross sections
illustrating regional geology, hydrogeology, and the geologic structure
of the area from the ground surface to the base of the injection zone
within the area of review that indicate the general vertical and lateral
limits of all underground sources of drinking water within the area of
review, their positions relative to the storage reservoir and the direction
of water movement, where known;

(B) the depth, areal extent, thickness, mineralogy,
porosity, permeability and capillary pressure of, and the geochemistry
of any formation fluids in, the storage reservoir and confining zone
and any other relevant geologic formations, including geology/facies
changes based on field data, which may include geologic cores, outcrop data, seismic surveys, well logs, and lithologic descriptions,
and the analyses of logging, sampling, and testing results used to make
such determinations;

(C) the location, orientation, and properties of known or
suspected transmissive faults or fractures that may transect the confining
zone within the area of review and a determination that such faults
or fractures would not compromise containment;

(D) the seismic history, including the presence and
depth of seismic sources, and a determination that the seismicity
would not compromise containment;

(E) geomechanical information on fractures, stress,
ductility, rock strength, and in situ fluid pressures within the confining
zone;

(F) a description of the formation testing program and
the analytical results to determine the chemical and physical charac-
teristics, including the fracture pressures, of the injection zone and the
confining zone; and

(G) baseline geochemical data for subsurface for-
mations that will be used for monitoring purposes, including all
formations containing underground sources of drinking water within
the area of review.

(d) Area of review and corrective action. This subsection de-
scribes the standards for the information regarding the delineation of
the area of review, the identification of penetrations, and corrective action that an applicant must include in an application.

(1) Initial delineation of the area of review and initial corrective action. The applicant must delineate the area of review, identify all wells that require corrective action, and perform corrective action on those wells. Corrective action may be phased.

(A) Delineation of area of review.

(i) Using computational modeling and the proposed pressure and volume of carbon dioxide injection, the applicant must predict the lateral and vertical migration of the carbon dioxide plume, the formation fluids, and the pressure differentials sufficient to cause movement of injected fluids or formation fluids into an underground source of drinking water in the subsurface for the following time periods:

1. five years after initiation of injection;
2. from initiation of injection to the end of the injection period proposed by the applicant; and
3. from initiation of injection to 10 years after the end of the injection period proposed by the applicant.

(ii) The applicant must use a computational model that:

1. is based on geologic and reservoir engineering information collected to characterize the injection zone and the confining zone;
2. is based on anticipated operating data, including injection pressures, rates, and total volumes over the proposed duration of injection;
3. takes into account relevant geologic heterogeneities and data quality, and their possible impact on model predictions;
4. considers the physical and chemical properties of injected and formation fluids; and
5. considers potential migration through known faults, fractures, and artificial penetrations and beyond lateral spill points.

(iii) The applicant must provide the name and a description of the software, the assumptions used to determine the area of review, and the equations solved.

(B) Identification and table of penetrations. The applicant must identify, compile, and submit a table listing of all known or reasonably discoverable penetrations, including active, inactive, plugged, and unplugged wells and underground mines in the area of review that may penetrate the confining zone. The applicant must provide a description of each penetration's type, construction, date drilled or excavated, location, depth, and record of plugging and/or completion or closure.

(C) Corrective action. The applicant must demonstrate whether each of the wells on the table of penetrations has or has not been plugged and whether each of the underground mines on the table of penetrations has or has not been closed in a manner that prevents the movement of injected fluids or displaced formation fluids that may endanger underground sources of drinking water or allow the injected fluids or formation fluids to escape the permitted injection zone. The applicant must perform corrective action on all wells and underground mines in the area of review that are determined to need corrective action. The operator must perform corrective action using materials suitable for use with the carbon dioxide stream. Corrective action may be phased.

(2) Area of review and corrective action plan. As part of an application, the applicant must submit an area of review and corrective action plan that includes the following information:

(A) the method for delineating the area of review, including the model to be used, assumptions that will be made, and the site characterization data on which the model will be based;

(B) for the area of review, a description of:

1. the minimum frequency at which the applicant proposes to re-evaluate the area of review during the life of the geologic storage facility;
2. how monitoring and operational data will be used to re-evaluate the area of review; and
3. the monitoring and operational conditions that would warrant a reevaluation of the area of review prior to the next scheduled reevaluation;

(C) a corrective action plan that describes:

1. how the corrective action will be conducted;
2. how corrective action will be adjusted if there are changes in the area of review;
3. if a phased corrective action is planned, how the phasing will be determined; and
4. how site access will be secured for future corrective action.

(e) Injection well construction.

1. Criteria for construction of anthropogenic carbon dioxide injection wells. This paragraph establishes the criteria for the information about the construction and casing and cementing of, and special equipment for, anthropogenic carbon dioxide injection wells that an applicant must include in an application.

(A) General. The operator of a geologic storage facility must ensure that all anthropogenic carbon dioxide injection wells are constructed and completed in a manner that will:

1. prevent the movement of injected carbon dioxide or displaced formation fluids into any unauthorized zones or into any areas where they could endanger underground sources of drinking water;
2. allow the use of appropriate testing devices and workover tools; and
3. allow continuous monitoring of the annulus space between the injection tubing and long string casing.

(B) Casing and cementing of anthropogenic carbon dioxide injection wells.

1. The operator must ensure that injection wells are cased and the casing cemented in compliance with §3.13 of this title (relating to Casing, Cementing, Drilling, and Completion Requirements).

2. Casing, cement, cement additives, and/or other materials used in the construction of each injection well must have sufficient structural strength and must be of sufficient quality and quantity to maintain integrity over the design life of the injection well. All well materials must be suitable for use with fluids with which the well materials may be expected to come into contact and must meet or exceed test standards developed for such materials by the American Petroleum...
Institute, ASTM International, or comparable standards as approved by
the director.

(iii) Surface casing must extend through the base of the
lowermost underground source of drinking water above the injec-
tion zone and must be cemented to the surface.

(iv) At least one long string casing, using a sufficient
number of centralizers, must extend through the injection zone. The
long string casing must isolate the injection zone and other intervals
as necessary for the protection of underground sources of drinking wa-
ter and to ensure confinement of the injected and formation fluids to
the permitted injection zone using cement and/or other isolation tech-
niques.

(v) Circulation of cement may be accomplished by
staging. The director may approve an alternative method of cementing
in cases where the cement cannot be circulated to the surface, provided
the applicant can demonstrate by using logs that the cement does not
allow fluid movement between the casing and the well bore.

(vi) The applicant must verify the integrity and lo-
cation of the cement using technology capable of radial evaluation of
cement quality and identification of the location of channels to ensure
that underground sources of drinking water will not be endangered.

(vii) The director may exempt existing wells that
have been associated with injection of carbon dioxide for the purpose
of enhanced recovery from provisions of these casing and cementing
requirements if the applicant demonstrates that the well construction
meets the general performance criteria in paragraph (1)(A) of this
subsection.

(C) Special equipment.

(i) Tubing and packer. All injection wells must in-
ject fluids through tubing set on a mechanical packer. Packers must be
set no higher than 100 feet above the top of the permitted injection in-
terval or at a location approved by the director.

(ii) Pressure observation valve. The wellhead of
each injection well must be equipped with a pressure observation
valve on the tubing and each annulus of the well.

(2) Construction information. The applicant must provide
the following information for each well to allow the director to deter-
mine whether the proposed well construction and completion design
will meet the general performance criteria in paragraph (1) of this sub-
section:

(A) depth to the injection zone;

(B) hole size;

(C) size and grade of all casing and tubing strings (e.g.,
wall thickness, external diameter, nominal weight, length, joint spe-
cification and construction material, tubing tensile, burst, and collapse
strengths);

(D) proposed injection rate (intermittent or continuous),
maximum proposed surface injection pressure, and maximum proposed
volume of the carbon dioxide stream;

(E) type of packer and packer setting depth;

(F) a description of the capability of the materials to
withstand corrosion when exposed to a combination of the carbon diox-
ide stream and formation fluids;

(G) down-hole temperatures and pressures;

(H) lithology of injection and confining zones;

(I) type or grade of cement and additives;

(J) chemical composition and temperature of the carbon
dioxide stream; and

(K) schematic drawings of the surface and subsurface
construction details.

(3) Well construction plan. The applicant must submit an
injection well construction plan that meets the criteria in paragraph (1)
of this subsection.

(4) Well stimulation plan. The applicant must submit, as
applicable, a description of the proposed well stimulation program and
a determination that well stimulation will not compromise contain-
ment.

(f) Plan for logging, sampling, and testing of injection wells
after permitting but before injection. The applicant must submit a plan
for logging, sampling, and testing of each injection well after permit-
ting but prior to injection well operation. The plan must describe the
logs, surveys, and tests to be conducted to verify the depth, thickness,
porosity, permeability, and lithology of, and the salinity of any forma-
tion fluids in, the formations that are to be used for monitoring, storage,
and confinement to assure conformance with the injection well con-
struction requirements set forth in subsection (c) of this section, and
to establish accurate baseline data against which future measurements
may be compared. The plan must meet the following criteria and must
include the following information.

(1) Logs and surveys of the injection well.

(A) During the drilling of any hole that is constructed
by drilling a pilot hole that is enlarged by reaming or another method,
the operator must perform deviation checks at sufficiently frequent in-
tervals to determine the location of the borehole and to assure that ver-
tical avenues for fluid movement in the form of diverging holes are not
created during drilling.

(B) Before surface casing is installed, the operator must
run appropriate logs, such as resistivity, spontaneous potential, and
caliper logs.

(C) After each casing string is set and cemented, the
operator must run logs, such as a cement bond log, variable density
log, and a temperature log, to ensure proper cementing.

(D) Before long string casing is installed, the operator
must run logs appropriate to the geology, such as resistivity, sponta-
neous potential, porosity, caliper, gamma ray, and fracture finder logs,
to gather data necessary to verify the characterization of the geology
and hydrology.

(2) Testing and determination of hydrogeologic charac-
teristics of injection and confining zone.

(A) Upon injection well completion, but prior to opera-
tion, the operator must conduct tests to verify hydrogeologic charac-
teristics of the injection zone.

(B) The operator must perform an initial pressure fall-
of or other test and submit to the director a written report of the results
of the test, including details of the methods used to perform the test
and to interpret the results, all necessary graphs, and the testing log, to
verify permeability and injectivity.

(C) The operator must determine the fracture pressures
for the injection and confining zone.

(3) Sampling.
The operator must record and submit the formation fluid temperature, pH, and conductivity, the reservoir pressure, and the static fluid level of the injection zone.

The operator must submit analyses of whole cores or sidewall cores representative of the injection zone and confining zone and formation fluid samples from the injection zone. The director may accept data from cores and fluid samples from nearby wells if the operator can demonstrate that such data are representative of conditions at the proposed injection well.

Compatibility determination. Based on the results of the formation testing program required by subsection (f) of this section, the applicant must submit a determination of the compatibility of the carbon dioxide stream with:

1. the materials to be used to construct the well;
2. fluids in the injection zone; and
3. minerals in both the injection and the confining zone.

Mechanical integrity testing.

Criteria. This paragraph establishes the criteria for the mechanical integrity testing plan for anthropogenic carbon dioxide injection wells that an applicant must include in an application.

Other than during periods of well workover in which the sealed tubing-casing annulus is of necessity disassembled for maintenance or corrective procedures, the operator must maintain mechanical integrity of the injection well at all times.

Before beginning injection operations and at least once every five years thereafter, the operator must demonstrate mechanical integrity for each injection well by pressure testing the tubing-casing annulus.

Following an initial annulus pressure test, the operator must continuously monitor injection pressure, rate, injected volumes, and pressure on the annulus between tubing and long string casing to confirm that the injected fluids are confined to the injection zone.

At least once every five years, the operator must confirm that the injected fluids are confined to the injection zone using a method approved by the director (e.g., diagnostic surveys such as oxygen-activation logging or temperature or noise logs).

The operator must test injection wells after any workover that disturbs the seal between the tubing, packer, and casing in a manner that verifies mechanical integrity of the tubing and long string casing.

An operator must either repair and successfully retest or plug a well that fails a mechanical integrity test.

Mechanical integrity testing plan. The applicant must prepare and submit a mechanical integrity testing plan as part of a permit application. The plan must include a schedule for the performance of a series of tests at a minimum frequency of five years. The performance tests must be designed to demonstrate the internal and external mechanical integrity of each injection well. These tests may include:

1. a pressure test with liquid or inert gas;
2. a tracer survey such as oxygen-activation logging;
3. a temperature or noise log;
4. a casing inspection log; and/or
5. any alternative method that provides equivalent or better information and that are required and/or approved by the director.

Operating information.

Operating plan. The applicant must submit a plan for operating the injection wells and the geologic storage facility that complies with the criteria set forth in §5.206(c) of this title (relating to Permit Standards), and that outlines the steps necessary to conduct injection operations. The applicant must include the following proposed operating data in the plan:

1. the average and maximum daily injection rates and volumes of the carbon dioxide stream;
2. the average and maximum surface injection pressure;
3. the source(s) of the carbon dioxide stream and the volume of carbon dioxide from each source; and
4. an analysis of the chemical and physical characteristics of the carbon dioxide stream prior to injection.

Maximum injection pressure. The director will approve a maximum injection pressure limit that:

A. considers the risks of tensile failure and, where appropriate, geomechanical or other studies that assess the risk of tensile failure and shear failure;
B. with a reasonable degree of certainty will avoid initiation or propagation of fractures in the confining zone or cause otherwise non-transmissive faults transecting the confining zone to become transmissive; and
C. in no case may cause the movement of injection fluids or formation fluids in a manner that endangers underground sources of drinking water.

Plan for monitoring, sampling, and testing after initiation of operation. The applicant must submit a monitoring, sampling, and testing plan for verifying that the geologic storage facility is operating as permitted and that the injected fluids are confined to the injection zone. The plan must include the following:

1. the analysis of the carbon dioxide stream prior to injection with sufficient frequency to yield data representative of its chemical and physical characteristics;
2. the installation and use of continuous recording devices to monitor injection pressure, rate and volume; and the pressure on the annulus between the tubing and the long string casing, except during workovers;
3. after initiation of injection, the performance on a semiannual basis of corrosion monitoring of the well materials for loss of mass, thickness, cracking, pitting, and other signs of corrosion to ensure that the well components meet the minimum standards for material strength and performance set forth in subsection (c)(1)(A) of this section. The operator must report the results of such monitoring annually. Corrosion monitoring may be accomplished by:
   A. analyzing coupons of the well construction materials in contact with the carbon dioxide stream;
   B. routing the carbon dioxide stream through a loop constructed with the materials used in the well and inspecting the materials in the loop; or
   C. using an alternative method, materials, or time period approved by the director;
4. monitoring of reservoir formation fluid and ground water quality and geochemical changes, including:
(A) periodic sampling of the fluid temperature, pH, conductivity, reservoir pressure and static fluid level of the injection zone and for monitoring for pressure changes in a permeable and porous formation as near to and above the confining zone;

(B) periodic monitoring of the quality and geochemistry of the formation fluid in a permeable and porous formation as near to and above the confining zone to detect any movement of the injected carbon dioxide through the confining zone into that monitored formation;

(C) the location and number of monitoring wells justified on the basis of the area of review, injection rate and volume, geology, and the presence of artificial penetrations and other factors specific to the geologic storage facility; and

(D) the monitoring frequency and spatial distribution of monitoring wells based on baseline geochemical data collected under subsection (c)(2) of this section and any modeling results in the area of review evaluation;

(5) tracking the extent of the carbon dioxide plume and the position of the pressure front by using indirect, geophysical techniques, which may include seismic, electrical, gravity, or electromagnetic surveys and/or down-hole carbon dioxide detection tools; and

(6) additional monitoring as the director may determine to be necessary to support, upgrade, and improve computational modeling of the area of review evaluation and to determine compliance with the requirements that the injection activity not allow the movement of fluid containing any contaminant into underground sources of drinking water and that the injected fluid remain within the permitted interval.

(k) Well plugging plan. The applicant must submit a well plugging plan for all injection wells and monitoring wells that penetrate the base of usable quality water that includes:

(1) a proposal for plugging all monitoring wells that penetrate the base of usable quality water and all injection wells upon abandonment in accordance with §3.14 of this title (relating to Plugging):

(2) proposals for activities to be undertaken prior to plugging an injection well, specifically:

(A) flushing each injection well with a buffer fluid;

(B) performing tests or measures to determine bottom-hole reservoir pressure;

(C) performing final tests to assess mechanical integrity; and

(D) ensuring that the material to be used in plugging must be compatible with the carbon dioxide stream and the formation fluids;

(3) a proposal for giving notice of intent to plug monitoring wells that penetrate the base of usable quality water and all injection wells. The applicant’s plan must ensure that:

(A) the operator notifies the director at least 60 days before plugging a well. At this time, if any changes have been made to the original well plugging plan, the operator must also provide a revised well plugging plan. At the discretion of the director, an operator may be allowed to proceed with well plugging on a shorter notice period; and

(B) the operator will file a notice of intention to plug and abandon (Form W-3A) a well with the appropriate Commission district office and the division in Austin at least five days prior to the beginning of plugging operations;

(4) a plugging report for monitoring wells that penetrate the base of usable quality water and all injection wells. The applicant’s plan must ensure that within 30 days after plugging the operator will file a complete well plugging record (Form W-3) in duplicate with the appropriate district office. The operator and the person who performed the plugging operation (if other than the operator) must certify the report as accurate;

(5) a plan for plugging all monitoring wells that do not penetrate the base of usable quality water in accordance with 16 Tex. Admin. Code Chapter 76, relating to Water Well Drillers and Water Well Plump Installers; and

(6) a plan for certifying that all monitoring wells that do not penetrate the base of usable quality water will be plugged in accordance with 16 Tex. Admin. Code Chapter 76, relating to Water Well Drillers and Water Well Plump Installers.

(I) Emergency and remedial response plan. The applicant must submit an emergency and remedial response plan that:

(1) accounts for the entire area of review, regardless of whether or not corrective action in the area of review is phased;

(2) describes actions to be taken to address escape from the permitted injection interval or movement of the injection fluids or formation fluids that may cause an endangerment to underground sources of drinking water during construction, operation, closure and post-closure periods;

(3) includes plans to update the plan as changes require;

(4) includes a safety plan that includes emergency response procedures, provisions to provide security against unauthorized activity, and carbon dioxide release detection and prevention measures; and

(5) includes a description of the training and testing that will be provided to each employee at the storage facility on operational safety and emergency response procedures to the extent applicable to the employee’s duties and responsibilities. The operator must train all employees before commencing injection and storage operations at the facility. The operator must train each subsequently hired employee before that employee commences work at the storage facility. The operator must hold a safety meeting with each contractor prior to the commencement of any new contract work at a storage facility. Emergency measures specific to the contractor’s work must be explained in the contractor safety meeting. Training schedules, training dates, and course outlines must be provided to Commission personnel upon request for the purpose of Commission review to determine compliance with this paragraph.

(m) Financial responsibility. The applicant must demonstrate that it has met the financial responsibility requirements under §5.205 of this title (relating to Fees and Financial Assurance). The applicant’s demonstration of financial responsibility must account for the entire area of review, regardless of whether corrective action in the area of review is phased.

(1) The applicant must demonstrate financial responsibility and resources for corrective action, injection well plugging, post-injection storage facility care and storage facility closure, and emergency and remedial response until the director has provided to the operator a written verification that the director has determined that the facility has reached the end of the post-injection storage facility care period.

(2) In determining whether the applicant is financially responsible, the director must rely on the following:

(A) the person’s most recent audited annual report filed with the U. S. Securities and Exchange Commission under Section 13
or 15(d), Securities Exchange Act of 1934 (15 U.S.C. Section 78m or 78(d)). The date of the audit may not be more than one year before the
date of submission of the application to the division; and

(B) the person’s most recent quarterly report filed with
the U. S. Securities and Exchange Commission under Section 13 or
15(d), Securities Exchange Act of 1934 (15 U.S.C. Section 78m or
78(d)); or

(C) if the person is not required to file such a report, the
person’s most recent audited financial statement. The date of the audit
must not be more than one year before the date of submission of the
application to the division.

(n) Post-injection storage facility care and closure plan. The
applicant must submit a post-injection storage facility care and closure
plan. The plan must include:

(1) the pressure differential between pre-injection and pre-
dicted post-injection pressures in the injection zone;

(2) the predicted position of the carbon dioxide plume and
associated pressure front at closure as demonstrated in the area of re-
view evaluation required under subsection (d) of this section;

(3) a description of the proposed post-injection monitoring
location, methods, and frequency;

(4) a proposed schedule for submitting post-injection stor-
age facility care monitoring results to the division; and

(5) the estimated cost of proposed post-injection storage fa-
cility care and closure.

(o) Letter from the Texas Commission on Environmental
Quality. The applicant must submit a letter from the Executive Direc-
tor of the Texas Commission on Environmental Quality in accordance
with Texas Water Code, §27.046, stating that drilling and operating the
anthropogenic carbon dioxide injection well for geologic storage
or operating the geologic storage facility will not injure any freshwater
strata in that area and that the formation or stratum to be used for the
geologic storage facility is not freshwater stratum.

(p) Other information. The applicant must submit any other
information requested by the director as necessary to discharge the
Commission’s duties under Texas Water Code, Chapter 27, Subchapter
B-1, or deemed necessary by the director to clarify, explain, and sup-
port the required attachments.

§5.204 Notice, Hearing, and Public Meeting.

(a) Placement of copy of application for public inspection.
The applicant must make a complete copy of the permit application
available for the public to inspect and copy by filing a copy of the
application with the County Clerk at the courthouse of each county
where the storage facility is to be located, or if approved by the
director, at another equivalent public office. The applicant also must
provide a copy of the complete application on an Internet website.
The applicant must file any subsequent revision of the application with
the County Clerk or other approved public office and must update the
information on the Internet website at the same time the revision is
submitted to the Commission.

(b) Notice requirements.

(1) General notice by publication. To give general notice
to local governments and interested or affected persons, the applicant
must publish notice of the application for an original or amended stor-
age facility permit. The applicant must use the appropriate form of
notice, include the information as set forth in subparagraph (A) or (B)
of this paragraph, and cause the notice to be published once a week
for three consecutive weeks in each newspaper of general circulation
in each county where the storage facility is located or is to be located.
The applicant must file proof of publication of the notice with the ap-
lication.

(A) Form for notice by publication of an application for
an anthropogenic carbon dioxide geologic storage facility permit.
Figure: 16 TAC §5.204(b)(1)(A)

(B) Form for notice by publication of an application for
amendment of an existing carbon dioxide geologic storage facility per-
mit.
Figure: 16 TAC §5.204(b)(1)(B)

(C) The applicant must submit proof of publication of
notice in the following form:
Figure: 16 TAC §5.204(b)(1)(C)

(2) Individual notice.

(A) Persons to notify. By no later than the date the ap-
lication is mailed to or filed with the director, the applicant must give
notice of an application for a permit to operate a carbon dioxide storage
facility, or to amend an existing storage facility permit to:

(i) each mineral interest owner, other than the appli-
cant, of the proposed storage reservoir within one-half mile of the out-
most boundary of the proposed geologic storage facility;

(ii) each leaseholder of minerals lying above or be-
low the proposed storage reservoir;

(iii) each leaseholder of minerals offsetting the pro-
posed storage reservoir within one-half mile of the outermost boundary
of the proposed geologic storage facility;

(iv) each owner or leaseholder of any portion of the
surface overlying the proposed storage reservoir and the area within
one-half mile of the outermost boundary of the proposed geologic stor-
age facility;

(v) the groundwater conservation district for the area
in which the storage reservoir is located;

(vi) the clerk of the county or counties where the
proposed storage reservoir is located;

(vii) the city clerk or other appropriate city official
where the proposed storage reservoir is located within city limits; and

(viii) any other class of persons that the director de-
termines should receive notice of the application.

(B) Content of notice. Individual notice must consist of:

(i) the applicant’s intention to construct and operate
an anthropogenic carbon dioxide geologic storage facility;

(ii) a description of the geologic storage facility lo-
cation;

(iii) each physical location and the Internet address
at which a copy of the application may be inspected; and

(iv) a statement that:

(I) affected persons may protest the application;

(II) protests must be filed in writing and must be
mailed or delivered to Technical Permitting, Oil and Gas Division,
Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711;
and

(III) protests must be received by the director
within 30 days of the date of receipt of the application by the division,
receipt of individual notice, or last publication of notice, whichever is later.

(3) Individual notice by publication. The applicant must make diligent efforts to ascertain the name and address of each person identified under paragraph (2)(A) of this subsection. The exercise of diligent efforts to ascertain the names and addresses of such persons requires an examination of county records where the facility is located and an investigation of any other information that is publicly and/or reasonably available to the applicant. If, after diligent efforts, an applicant has been unable to ascertain the name and address of one or more persons required to be notified under paragraph (2)(A) of this subsection, the applicant satisfies the notice requirements for those persons by the publication of the notice of application as required in paragraph (1) of this subsection. The applicant must submit an affidavit to the director specifying the efforts that the applicant took to identify each person whose name and/or address could not be ascertained.

c) Hearing requirements.

(1) If the Commission receives a protest regarding an application for a new permit or for an amendment of an existing permit for a geologic storage facility from a person notified pursuant to subsection (b) of this section or from any other affected person within 30 days of the date of receipt of the application by the division, receipt of individual notice, or last publication of notice, whichever is later, or if the director determines that a hearing is in the public interest, then the director will notify the applicant that the director cannot administratively approve the application. Upon the written request of the applicant, the director will schedule a hearing on the application. The Commission must give notice of the hearing to all affected persons, local governments, and other persons who express, in writing, an interest in the application. After the hearing, the examiner will recommend a final action by the Commission.

(2) If the Commission receives no protest regarding an application for a new permit or for the amendment of an existing permit for a geologic storage facility from a person notified pursuant to subsection (b) of this section or from any other affected person, the director may administratively approve the application.

(3) If the director administratively denies an application for a new permit or for the amendment of an existing permit for a geologic storage facility, upon the written request of the applicant, the director will schedule a hearing. After hearing, the examiner will recommend a final action by the Commission.

d) Public meeting requirement. After the director has declared an application to be complete, the applicant must schedule a public meeting to be held in the area of the proposed location of the geologic storage facility:

(1) Purpose. The purpose of the meeting is to educate the local public about the proposed carbon dioxide geologic storage facility. At the public meeting, the applicant must give a brief presentation on geologic storage of carbon dioxide in general and on the proposed geologic storage facility. After the presentation, the applicant must allow time for questions from the participants.

(2) Notice. The applicant must send individual notice of this meeting to all persons listed in subsection (b)(2) and must publish notice of the public meeting for an original or amended storage facility permit application. Such notice must contain the same general information outlined in subsection (b)(1)(A) of this section and must be published by the applicant once a week for three consecutive weeks in a newspaper(s) of general circulation in the county(ies) where the storage facility is located or is to be located. The applicant must notify the director by sending a copy of the notice as soon as possible. The applicant must file proof of publication of the notice with the director in the same format outlined in subsection (b)(1)(C) of this section.

§5.205 Fees and Financial Assurance.

(a) Fees. In addition to the fee for each injection well required by §3.78 of this title (relating to Fees and Financial Security Requirements), the following non-refundable fees must be remitted to the Commission with the application:

(1) Base application fee.

(A) The applicant must pay to the Commission an application fee of $75,000 for each permit application for a geologic storage facility.

(B) The applicant must pay to the Commission an application fee of $50,000 for each application to amend a permit for a geologic storage facility.

(2) Injection fee. The operator must pay to the Commission an annual fee of $0.10 per metric ton of carbon dioxide injected into the geologic storage facility.

(3) Post-injection care fee. The operator must pay to the Commission an annual fee of $50,000 each year the operator does not inject into the geologic storage facility until the director has authorized storage facility closure.

(b) Financial responsibility.

(1) A person to whom a permit is issued under this subchapter must provide annually to the director evidence of financial responsibility that is satisfactory to the director. The operator must demonstrate and maintain financial responsibility and resources for corrective action, injection well plugging, post-injection storage facility care and storage facility closure, and emergency and remedial response until the director has provided written verification that the director has determined that the facility has reached the end of the post-injection storage facility care period.

(2) In determining whether the person is financially responsible, the director must rely on:

(A) the person’s most recent audited annual report filed with the U. S. Securities and Exchange Commission under Section 13 or 15(d), Securities Exchange Act of 1934 (15 U.S.C. Section 78m or 78o(d)); and

(B) the person’s most recent quarterly report filed with the U. S. Securities and Exchange Commission under Section 13 or 15(d), Securities Exchange Act of 1934 (15 U.S.C. Section 78m or 78o(d)), or

(C) if the person is not required to file such a report, the person’s most recent audited financial statement. The date of the audit must not be more than one year before the date of submission of the application to the director.

c) Financial assurance.

(1) Injection and monitoring wells. The operator must comply with the requirements of §3.78 of this title for all monitoring wells that penetrate the base of usable quality water and all injection wells.

(2) Geologic storage facility.

(A) The applicant must include in an application for a geologic storage facility permit:
(i) a written estimate of the maximum dollar amount necessary to perform post-injection monitoring and closure of the facility that shows all assumptions and calculations used to develop the estimate;

(ii) a copy of the form of the bond or letter of credit that will be filed with the Commission; and

(iii) information concerning the issuer of the bond or letter of credit including the issuer’s name and address and evidence of authority to issue bonds or letters of credit in Texas.

(B) A geologic storage facility may not receive carbon dioxide until a bond or letter of credit in an amount approved by the director under this subsection and meeting the requirements of this subsection as to form and issuer has been filed with and approved by the director.

(C) The determination of the amount of financial assurance for a geologic storage facility is subject to the following requirements:

(i) The director must approve the dollar amount of the financial assurance. The amount of financial assurance required to be filed under this subsection must be equal to or greater than the maximum amount necessary to perform post-injection monitoring and closure of the geologic storage facility, exclusive of plugging costs for any well or wells at the facility, at any time during the permit term in accordance with all applicable state laws, Commission rules and orders, and the permit;

(ii) A qualified professional engineer licensed by the State of Texas must prepare or supervise the preparation of a written estimate of the maximum amount necessary to close the geologic storage facility. The operator must submit to the director the written estimate under seal of a qualified licensed professional engineer; and

(iii) The Commission may use the proceeds of financial assurance filed under this subsection to pay the costs of plugging any well or wells at the facility if the financial assurance for plugging costs filed with the Commission is insufficient to pay for the plugging of such well or wells.

(D) Bonds and letters of credit filed in satisfaction of the financial assurance requirements for a geologic storage facility must comply with the following standards as to issuer and form.

(i) The issuer of any geologic storage facility bond filed in satisfaction of the requirements of this subsection must be a corporate surety authorized to do business in Texas. The form of bond filed under this subsection must provide that the bond be renewed and continued in effect until the conditions of the bond have been met or its release is authorized by the director.

(ii) Any letter of credit filed in satisfaction of the requirements of this subsection must be issued by and drawn on a bank authorized under state or federal law to operate in Texas. The letter of credit must be an irrevocable, standby letter of credit subject to the requirements of Texas Business and Commerce Code, §§5.101-5.118. The letter of credit must provide that it will be renewed and continued in effect until the conditions of the letter of credit have been met or its release is authorized by the director.

(E) The operator of a geologic storage facility must provide to the director annual written updates of the cost estimate to increase or decrease the cost estimate to account for any changes to the area of review and corrective action plan, the injection well plugging plan, and the post-injection storage facility care and closure plan. The operator must provide to the director upon request an adjustment of the cost estimate if the director has reason to believe that the original demonstration is no longer adequate to cover the cost of injection well plugging and post-injection storage facility care and closure.

(d) Notice of adverse financial conditions.

(1) The operator must notify the Commission of adverse financial conditions that may affect the operator’s ability to carry out injection well plugging and post-injection storage facility care and closure. An operator must file any notice of bankruptcy in accordance with §3.11(c) of this title (relating to Organization; Retention of Records; Notice Requirements).

(2) The operator filing a bond must ensure that the bond provides a mechanism for the bond or surety company to give prompt notice to the Commission and the operator of any action filed alleging insolvency or bankruptcy of the surety company or the bank or alleging any violation that would result in suspension or revocation of the surety or bank’s charter or license to do business.

(3) Upon the incapacity of a bank or surety company by reason of bankruptcy, insolvency or suspension, or revocation of its charter or license, the Commission must deem the operator to be without bond coverage. The Commission must issue a notice to any operator who is without bond coverage and must specify a reasonable period to replace bond coverage, not to exceed 90 days.

§5.206. Permit Standards.

(a) General criteria. The director may issue a permit under this subchapter if the director finds:

(1) that the injection and geologic storage of anthropogenic carbon dioxide will not endanger or injure any oil, gas, or other mineral formation;

(2) that, with proper safeguards, both underground sources of drinking water and surface water can be adequately protected from carbon dioxide migration or displaced formation fluids;

(3) that the injection of anthropogenic carbon dioxide will not endanger or injure human health and safety;

(4) that the reservoir into which the anthropogenic carbon dioxide is injected is suitable for or capable of being made suitable for protecting against the escape or migration of anthropogenic carbon dioxide from the storage reservoir;

(5) that the geologic storage facility will be sited in an area with suitable geology, which at a minimum must include:

(A) an injection zone of sufficient areal extent, thickness, porosity, and permeability to receive the total anticipated volume of the carbon dioxide stream; and

(B) a confining zone(s) that is laterally continuous and free of known transecting transmissive faults or fractures over an area sufficient to contain the injected carbon dioxide stream and displaced formation fluids and allow injection at proposed maximum pressures and volumes without compromising the confining zone or causing the movement of fluids that endangers underground sources of drinking water;

(6) that the applicant for the permit meets all of the other statutory and regulatory requirements for the issuance of the permit;

(7) that the applicant has provided a letter from the Executive Director of the Texas Commission on Environmental Quality stating that drilling and operating the anthropogenic carbon dioxide injection well for geologic storage or operating the geologic storage facility will not injure any underground sources of drinking water in that area and that the formation or stratum to be used for the geologic storage facility is not an underground source of drinking water;

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(8) that the applicant has provided a good faith claim to the
necessary and sufficient property rights for construction and operation
of the geologic storage facility;

(9) that the applicant has paid the fees required in §5.205(a)
of this title (relating to Fees and Financial Assurance);

(10) that the director has determined that the applicant
has sufficiently demonstrated financial responsibility as required in
§5.205(b) of this title; and

(11) that the applicant submitted to the director financial
assurance in accordance with §5.205(c) of this title.

(b) Injection well construction.

(1) Construction of anthropogenic carbon dioxide injection
wells must meet the criteria in §5.203(e) of this title (relating to Application
Requirements).

(2) Within 30 days after the completion or conversion of an
injection well subject to this subchapter, the operator must file with the
division a complete record of the well on the appropriate form showing
the current completion.

(3) The operator of a geologic storage facility must notify
the director and obtain the director’s approval prior to conducting any
well workover.

(c) Operating a geologic storage facility.

(1) Operating plan. The operator must maintain and com-
ply with the approved operating plan.

(2) Operating criteria.

(A) Injection between the outermost casing protecting
underground sources of drinking water and the well bore is prohibited.

(B) The total volume of carbon dioxide injected into the
storage facility must be metered through a master meter. The volume
of carbon dioxide injected into each injection well must be metered
through an individual well meter.

(C) The operator must comply with a maximum surface
injection pressure limit approved by the director and specified in the
permit. In approving a maximum surface injection pressure limit, the
director must consider the results of well tests and, where appropriate,
geomechanical or other studies that assess the risks of tensile failure
and shear failure. The director must approve limits that, with a reason-
able degree of certainty, will avoid initiation or propagation of frac-
tures in the confining zone or cause otherwise non-transmissive faults
or fractures transecting the confining zone to become transmissive. In
no case may injection pressure cause movement of injection fluids or
formation fluids in a manner that endangers underground sources of
drinking water. The director may approve a plan for controlled artifi-
cial fracturing of the injection zone.

(D) The operator must fill the annulus between the tub-
ing and the long string casing with a corrosion inhibiting fluid approved
by the director.

(E) The operator must install and use continuous
recording devices to monitor the injection pressure, and the rate, vol-
ume, and temperature of the carbon dioxide stream. The operator must
monitor the pressure on the annulus between the tubing and the long
string casing. The operator must continuously record, continuously
monitor, or control by a preset high-low pressure sensor switch the
wellhead pressure of each injection well.

(F) The operator must comply with the following re-
quirements for alarms and automatic shut-off systems.

(ii) The operator must install and use alarms and au-
tomatic shut-off systems designed to alert the operator and shut-in the
well when operating parameters such as annulus pressure, injection rate
or other parameters diverge from permitted ranges and/or gradients.
On offshore wells, the automatic shut-off systems must be installed
down-hole.

(ii) If an automatic shutdown is triggered or a loss
of mechanical integrity is discovered, the operator must immediately
investigate and identify as expeditiously as possible the cause. If, upon
investigation, the well appears to be lacking mechanical integrity, or if
monitoring otherwise indicates that the well may be lacking mechanical
integrity, the operator must:

(I) immediately cease injection;

(II) take all steps reasonably necessary to deter-
mine whether there may have been a release of the injected carbon di-
oxide stream into any unauthorized zone;

(III) notify the director as soon as practicable, but
within 12 hours;

(IV) restore and demonstrate mechanical in-
tegrity to the satisfaction of the director prior to resuming injection; and

(V) notify the director when injection can be ex-
pected to resume.

(d) Monitoring, sampling, and testing requirements. The op-
erator of an anthropogenic carbon dioxide injection well must maintain
and comply with the approved monitoring, sampling, and testing plan
to verify that the geologic storage facility is operating as permitted and
that the injected fluids are confined to the injection zone. The director
may require additional monitoring as necessary to support, upgrade,
and improve computational modeling of the area of review evaluation
and to determine compliance with the requirement that the injection
activity not allow movement of fluid that would endanger underground
sources of drinking water.

(e) Mechanical integrity.

(1) The operator must maintain and comply with the
approved mechanical integrity testing plan submitted in accordance with
§5.203(j) of this title.

(2) Other than during periods of well workover in which
the sealed tubing-casing annulus is of necessity disassembled for main-
tenance or corrective procedures, the operator must maintain mechnical
integrity of the injection well at all times.

(3) The operator must either repair and successfully retes-
 or plug a well that fails a mechanical integrity test.

(4) The director may require additional or alternative tests
if the results presented by the operator do not demonstrate to the direc-
tor that there is no leak in the casing, tubing, or packer or movement
of fluid into or between formations containing underground sources of
drinking water resulting from the injection activity.

(f) Area of review and corrective action. At the frequency
specified in the approved area of review and corrective action plan or
permit, or when monitoring and operational conditions warrant, the op-
erator of a geologic storage facility must:

(1) re-evaluate the area of review through computational
modeling;

(2) identify all wells in the re-evaluated area of review that
require corrective action;
(3) perform corrective action on wells requiring corrective action in the re-evaluated area of review; and

(4) submit an amended area of review and corrective action plan or demonstrate to the director through monitoring data and modeling results that no change to the area of review and corrective action plan is needed.

(g) Emergency, mitigation, and remedial response.

(1) Plan. The operator must maintain and comply with the approved emergency and remedial response plan required by §5.203(i) of this title that describes actions to be taken to address movement of the injection fluids or formation fluids that may cause an endangerment to underground sources of drinking water during construction, operation, closure, and post-closure periods. The plan must also include a safety plan that includes emergency response procedures, provisions to provide security against unauthorized activity, and carbon dioxide release detection and prevention measures. The operator must update the plan as changes require. The operator must make copies of the plan available at the storage facility and at the company headquarters.

(2) Training.

(A) The operator must train all employees before commencing injection and storage operations at the facility. The operator must train each subsequently hired employee before that employee commences work at the storage facility.

(B) The operator must hold a safety meeting with each contractor prior to the commencement of any new contract work at a storage facility. The operator must explain emergency measures specific to the contractor’s work in the contractor safety meeting.

(C) The operator must provide training schedules, training dates, and course outlines to Commission personnel upon request for the purpose of Commission review to determine compliance with this subparagraph.

(3) Action. If an operator obtains evidence that the injected carbon dioxide stream and associated pressure front may cause an endangerment to underground sources of drinking water, the operator must:

(A) immediately cease injection;

(B) take all steps reasonably necessary to identify and characterize any release;

(C) notify the director as soon as practicable but within at least 12 hours; and

(D) implement the approved emergency and remedial response plan.

(4) Resumption of injection. The director may allow the operator to resume injection prior to remediation if the operator demonstrates that the injection operation will not endanger underground sources of drinking water.

(h) Commission witnessing of testing and logging. The operator must provide the division with the opportunity to witness all logging and testing. The operator must submit a schedule of such activities to the Commission at least 30 days prior to conducting the first test and submit any changes to the schedule at least 48 hours prior to the next scheduled test. No logging or testing required by this subchapter may commence until a Commission representative is present to witness the test or the director has waived its right to witness an event.

(i) Well plugging. The operator of a geologic storage facility must maintain and comply with the approved well plugging plan required by §5.203(k) of this title.

(j) Post-injection storage facility care and closure.

(1) Post-injection storage facility care and closure plan.

(A) The operator of an injection well must maintain and comply with the approved post-injection storage facility care and closure plan.

(B) The operator must submit for review and approval a revised plan to account for any proposed significant modification to the plan.

(C) Upon cessation of injection, the operator of a geologic storage facility must either submit an amended plan or demonstrate to the director through monitoring data and modeling results that no amendment to the plan is needed.

(2) Post-injection storage facility monitoring.

(A) Following cessation of injection, the operator must continue to conduct monitoring as specified in the approved plan until the director determines that the position of the carbon dioxide plume and pressure front are such that the geologic storage facility will not endanger underground sources of drinking water.

(B) Prior to authorization for storage facility closure, the operator must submit to the director a demonstration, based on monitoring and other site-specific data, that the carbon dioxide plume and pressure front have stabilized and that no additional monitoring is needed to assure that the geologic storage facility will not endanger underground sources of drinking water.

(3) Prior to closure. Prior to authorization for storage facility closure, the operator must demonstrate to the director, based on monitoring, other site-specific data, and modeling that is reasonably consistent with site performance that no additional monitoring is needed to assure that the geologic storage facility will not endanger underground sources of drinking water. The operator must demonstrate, based on the current understanding of the site, including monitoring data and/or modeling, all of the following:

(A) the estimated magnitude and extent of the facility footprint (the carbon dioxide plume and the area of elevated pressure);

(B) that there is no leakage of either carbon dioxide or displaced formation fluids that will endanger underground sources of drinking water;

(C) that the injected or displaced fluids are not expected to migrate in the future in a manner that encounters a potential leakage pathway into underground sources of drinking water;

(D) that the injection wells at the site completed into or through the injection zone or confining zone are plugged and abandoned in accordance with these requirements; and

(E) any remaining facility monitoring wells are properly plugged or are being managed by a person and in a manner approved by the director.

(4) Notice of intent for storage facility closure. The operator must notify the director at least 120 days before storage facility closure. At the time of such notice, if the operator has made any changes to the original plan, the operator also must provide the revised plan. The director may approve a shorter notice period.

(5) Authorization for storage facility closure. No operator may initiate storage facility closure until the director has approved closure of the storage facility in writing. After the director has authorized storage facility closure, the operator must plug all wells in accordance with the approved plan required by §5.203(k) of this title.
(6) Storage facility closure report. Once the director has authorized storage facility closure, the operator must submit a storage facility closure report within 90 days that must thereafter be retained by the Commission in Austin. The report must include the following information:

(A) documentation of appropriate injection and monitoring well plugging. The operator must provide a copy of a survey plat that has been submitted to the Regional Administrator of Region 6 of the United States Environmental Protection Agency. The plat must indicate the location of the injection well relative to permanently surveyed benchmarks;

(B) documentation of appropriate notification and information to such State and local authorities as have authority over drilling activities to enable such State and local authorities to impose appropriate conditions on subsequent drilling activities that may penetrate the injection and confining zones; and

(C) records reflecting the nature, composition and volume of the carbon dioxide stream.

(k) Deed notation. The operator of a geologic storage facility must record a notation on the deed to the facility property or any other document that is normally examined during title search that will in perpetuity provide any potential purchaser of the property the following information:

(1) the fact that land has been used to geologically store carbon dioxide;

(2) the fact that the survey plat has been filed with the Commission;

(3) the address of the office of the United States Environmental Protection Agency, Region 6, to which the operator sent a copy of the survey plat; and

(4) the volume of fluid injected, the injection zone or zones into which it was injected, and the period over which injection occurred.

(l) Retention of records. The operator must retain for five years following storage facility closure records collected during the post-injection storage facility care period. The operator must deliver the records to the director at the conclusion of the retention period, and the records must thereafter be retained at the Austin headquarters of the Commission.

(m) Signs. The operator must identify each location at which geologic storage activities take place, including each injection well, by a sign that meets the requirements specified in §3.3(1), (2), and (5) of this title (relating to Identification of Properties, Wells, and Tanks). In addition, each sign must include a telephone number where the operator or a representative of the operator can be reached twenty-four hours a day, seven days a week in the event of an emergency.

(n) Other permit terms and conditions. In any permit for a geologic storage facility, the director must impose terms and conditions reasonably necessary to protect underground sources of drinking water from pollution. Permits issued under this subchapter continue in effect until revoked, modified, or suspended by the Commission. The operator must comply with each requirement set forth in this subchapter as a condition of the permit unless modified by the terms of the permit.

§5.207 Reporting and Record-Keeping.

(a) The operator of a geologic storage facility must provide, at a minimum, the following reports to the director and retain the following information:

(1) Test records. The operator must file a complete record of all tests in duplicate with the district office within 30 days after the testing. In conducting and evaluating the tests enumerated in this subchapter or others to be allowed by the director, the operator and the director must apply methods and standards generally accepted in the industry. When the operator reports the results of mechanical integrity tests to the director, the operator must include a description of the test(s) and the method(s) used. In making this evaluation, the director must review monitoring and other test data submitted since the previous evaluation.

(2) Operating reports. The operator also must include summary cumulative tables of the information required by the reports listed in this paragraph.

(A) Report within 24 hours. The operator must report to the appropriate district office the discovery of any pressure changes or other monitoring data that indicate the presence of leaks in the well or the lack of confinement of the injected gases to the geologic storage reservoir. Such report must be made orally as soon as practicable following the discovery of the leak, and must be confirmed in writing within five working days. The operator must report to the appropriate district office within 24 hours any significant pressure changes or other monitoring data indicating the presence of leaks in the well.

(B) Report within 30 days. The operator must report:

(i) the results of periodic tests for mechanical integrity;

(ii) the results of any other test of the injection well conducted by the operator if required by the director; and

(iii) a description of any well workover.

(C) Semi-annual report. The operator must report:

(i) a summary of well pressure monitoring;

(ii) changes to the physical, chemical, and other relevant characteristics of the carbon dioxide stream from the proposed operating data;

(iii) monthly average, maximum and minimum values for injection pressure, flow rate and volume, and annular pressure;

(iv) a description of any event that significantly exceeds operating parameters for annulus pressure or injection pressure as specified in the permit;

(v) a description of any event that triggers a shut-down device and the response taken; and

(vi) the results of monitoring prescribed under §5.206(d) of this title (relating to Permit Standards).

(D) Annual reports. Other information that may be obtained less frequently, including but not limited to:

(i) corrective action performed;

(ii) new wells installed and the type, location, number, and information required in §5.203(e) of this title (relating to Application Requirements);

(iii) re-calculated area of review;

(iv) tons of carbon dioxide injected; and

(v) other information as required by the permit.

(b) Report format. The operator must report the results of injection pressure and injection rate monitoring of each injection well on Form H-10, Annual Disposal/Injection Well Monitoring Report, and
the results of mechanical integrity testing on Form H-5, Disposal/Injection Well Pressure Test Report. Operators must submit other reports in a format acceptable to the Commission. At the discretion of the director, other formats may be accepted.

(c) Record retention. The operator must retain all wellhead pressure records, metering records, and integrity test results for at least five years.

§5.208 Penalties

(a) General. An operator that violates this subchapter may be subject to penalties and remedies specified in the Texas Natural Resources Code, Title 3, Texas Water Code, Chapter 27, and other statutes administered by the Commission.

(b) Certificate of compliance. The Commission may revoke a certificate of compliance for any gas, oil, or geothermal resource well in the manner provided in §3.73 of this title (relating to Pipeline Connection; Cancellation of Certificate of Compliance; Severance) for violation of this subchapter.

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

Filed with the Office of the Secretary of State on March 9, 2010.

TRD-201001190
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 475-1295

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) proposes new §25.33 and §25.482, relating to the Prompt Payment Act. The rules will ensure that customers who are “governmental entities” under Texas Government Code §2251.001-055 (Vernon 2007 and Supp. 2009) (Prompt Payment Act or PPA) are billed by electric utilities (utilities), aggregators, and retail electric providers (REPs) in compliance with the PPA. Project Number 37981 is assigned to this proceeding.

Janis Ervin, Senior Utility Analyst, Infrastructure and Reliability Division, has determined that for each year of the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Ervin has determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be to ensure that utilities, aggregators, and REPs comply with the PPA.

There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing these rules. Therefore, no regulatory flexibility analysis is required. There may be economic costs to persons who are required to comply with the rules as a result of the rules’ requirement that utilities, aggregators, and REPs inquire of all applicants whether they are governmental entities as defined in the PPA and, for existing customers for which a utility, aggregator, or REP does not know whether they are governmental entities as defined in the PPA, that the utility, aggregator, or REP shall inquire within six months of the effective date of these rules whether the customers are governmental entities. These costs will vary from business to business, and are difficult to ascertain. However, this requirement is necessary to ensure compliance with the PPA by utilities, aggregators, and REPs.

Ms. Ervin has also determined that for each year of the first five years these rules are in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the APA, §2001.029, at the commission’s offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Thursday, May 20, 2010, at 9:00 a.m. CST. The request for a public hearing must be received within 31 days after publication.

Comments on the new rules may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. Sixteen copies of comments are required to be filed pursuant to §22.71(c) of this title. Initial comments may be submitted by April 26, 2010 (within 31 days after publication), and reply comments may be submitted by May 10, 2010 (within 45 days after publication). Comments should be organized in a manner consistent with the organization of the rules. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the rules. The commission will consider the costs and benefits in deciding whether to adopt the rules. All comments should refer to Project Number 37981.

SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

16 TAC §25.33

The new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2009) (PURC), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURC §§14.101, 17.004, 39.101, 39.352, and 39.353, which authorize the Commission to adopt and enforce rules to protect customers from fraudulent, unfair, misleading, deceptive, or anticompetitive practices by utilities, aggregators, and REPs.


§25.33 Prompt Payment Act.

(a) Application. This section applies to billing by an electric utility (utility) to a “governmental entity” as defined in Texas Government Code, Chapter 2251, the Prompt Payment Act (PPA). This section controls over other sections of this chapter to the extent they conflict.

(b) Bill due date. A bill issued by a utility to a governmental entity shall be due as provided in the PPA.
(c) Disputed bills. If there is a billing dispute between a governmental entity and a utility about any bill for utility service, the dispute shall be resolved as provided in the PPA.

(d) Penalty on delinquent bills for retail service. Any penalty for delinquency of payment for utility billing to a governmental entity shall be in accordance with the PPA.

(e) Disclosure. A utility shall disclose to all governmental entities that they will be billed in accordance with the PPA.

(f) Inquiry. Aggregators and REPs shall inquire of all applicants for service whether they are governmental entities as defined in the PPA. For existing customers for whom an aggregator or REP does not know whether they are governmental entities as defined in the PPA, the aggregator or REP shall inquire within six months of the effective date of this section whether such customers are governmental entities, except that an aggregator is not required to make this inquiry for customers for which REPs bill for the aggregator’s services.

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

Filed with the Office of the Secretary of State on March 12, 2010.
TRD-201001287
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 936-7223

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

16 TAC §26.33

The Public Utility Commission of Texas (commission) proposes new §26.33, relating to the Prompt Payment Act. The rule will ensure that customers that are “governmental entities” under Texas Government Code §2251.001-055 (Vernon 2007 and Supp. 2009) (Prompt Payment Act or PPA) are billed by certificated telecommunications utilities (CTUs) in compliance with the PPA. Project Number 36260 is assigned to this proceeding.

Janis Ervin, Senior Utility Analyst, Infrastructure and Reliability Division, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Ervin has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to ensure that CTUs comply with the PPA.

There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rule. Therefore, no regulatory flexibility analysis is required. There may be economic costs to persons who are required to comply with the rule as a result of the rule’s requirement that a CTU inquire of all applicants whether they are governmental entities as defined in the PPA and, for existing customers for which a CTU does not know whether they are governmental entities as defined in the PPA, that the CTU inquire within six months of the effective date of this rule whether the customers are governmental entities. These costs will vary from business to business, and are
difficult to ascertain. However, this requirement is necessary to
ensure compliance with the PPA by CTUs.

Ms. Ervin has also determined that for each year of the first five
years the rule is in effect there should be no effect on a local
economy, and therefore no local employment impact statement
is required under Administrative Procedure Act (APA), Texas

The commission staff will conduct a public hearing on this rule-
making, if requested pursuant to the APA, §2001.029, at the
commission’s offices located in the William B. Travis Building,
1701 North Congress Avenue, Austin, Texas 78701 on Thurs-
day, May 20, 2010, at 9:00 a.m. CST. The request for a public
hearing must be received within 31 days after publication.

Comments on the rule may be submitted to the Filing Clerk, Pub-
lic Utility Commission of Texas, 1701 North Congress Avenue,
P.O. Box 13326, Austin, Texas 78711-3326. Sixteen copies of
comments are required to be filed pursuant to §22.71(c) of this
title. Initial comments may be submitted by April 26, 2010 (within
31 days after publication), and reply comments may be submitted
by May 10, 2010 (within 45 days after publication). Com-
ments should be organized in a manner consistent with the or-
organized of the rule. The commission invites specific com-
ments regarding the costs associated with, and benefits that will
be gained by, implementation of the rule. The commission will
consider the costs and benefits in deciding whether to adopt
the rule. All comments should refer to Project Number 36260.

The new section is proposed under the Public Utility Regulatory
Act, Texas Utilities code Annotated §14.002 (Vernon 2007 and Supp. 2009) (PUA), which provides the commission with the
authority to make and enforce rules reasonably required in the
exercise of its powers and jurisdiction; and specifically, PURA
§§17.004 and 64.004, which authorize the Commission to adopt
and enforce rules to protect customers from fraudulent, unfair,
misleading, deceptive, or anticompetitive practices by CTUs.

Cross Reference to Statutes: Public Utility Regulatory Act
§§14.002, 17.004, and 64.004.

§26.33 Prompt Payment Act

(a) Application. This section applies to billing by a certified
 telecommunication utility (CTU) to a “governmental entity” as defined
in Texas Government Code, Chapter 2251, the Prompt Payment Act
(PPA). This section controls over other sections of this chapter to
the extent that they conflict.

(b) Bill due date. A bill issued by a CTU to a governmental
entity shall be due as provided in the PPA.

(c) Disputed bills. If there is a billing dispute between a gov-
ernmental entity and a CTU about any bill for CTU service, the dispute
shall be resolved as provided in the PPA.

(d) Penalty on delinquent bills for retail service. Any penalty
for delinquency of payment of CTU billing to a governmental entity
shall be in accordance with the PPA.

(e) Disclosure. A CTU shall disclose to all governmental en-
tities that they will be billed in accordance with the PPA.

(f) Inquiry. A CTU shall inquire of all applicants for service
whether they are governmental entities as defined in the PPA. For ex-
isting customers for whom a CTU does not know whether they are gov-
ernmental entities as defined in the PPA, the CTU shall inquire within
six months of the effective date of this section whether such customers
are governmental entities.

This agency hereby certifies that the proposal has been reviewed
by legal counsel and found to be within the agency’s legal author-
ity to adopt.

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Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 936-7223

PART 9. TEXAS LOTTERY
COMMISSION

CHAPTER 402. CHARITABLE BINGO
ADMINISTRATIVE RULES

SUBCHAPTER A. ADMINISTRATION

16 TAC §402.101

The Texas Lottery Commission (Commission) proposes amend-
ments to 16 TAC §402.101 (relating to Advisory Opinions). The
purpose of the proposed amendments is to make the language in
the rule consistent with language in the Bingo Enabling Act.
Specifically, at subsection (e)(5), the language, “A requestor may
rely upon an advisory opinion if the” has been added and, “An
advisory opinion may be relied upon by the requestor as well as
any other person whose” has been deleted.

Kathy Pyka, Controller, has determined that for each year of the
first five years the proposed amendments will be in effect, there
will be no significant fiscal impact for state or local governments
as a result of the proposed amendments. There will be no ad-
verse effect on small businesses, micro businesses, or local or
state employment. There will be no additional economic cost to
persons required to comply with the amendments as proposed.
Furthermore, an Economic Impact Statement and Regulatory
Flexibility Analysis is not required because the proposed amend-
ments will not have an economic effect on small businesses as
defined in Texas Government Code §2006.001(2).

Philip D. Sanderson, Director of the Charitable Bingo Operations
Division, has determined that for each year of the first five years
the proposed amendments will be in effect, the public benefit antici-
pated is a clear understanding of the advisory opinion request
process.

The Commission requests comments on the proposed amend-
ments from any interested person. Comments on the proposed
amendments may be submitted to Sandra Joseph, Special
Counsel, by mail at Texas Lottery Commission, P.O. Box 16630,
Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or
by email at legal.input@lottery.state.tx.us. The Commission will
hold a public hearing on this proposal at 10:00 a.m. on Wednes-
day, April 14, 2010, at 611 E. 6th Street, Austin, Texas 78701.
Comments must be received within 30 days after publication of
this proposal in order to be considered.

The amendments are proposed under Texas Occupations Code
§2001.054, which authorizes the Commission to adopt rules to
enforce and administer the Bingo Enabling Act, and under Texas
Government Code §467.102, which authorizes the Commission
to adopt rules for the enforcement and administration of this chapter and the laws under the Commission’s jurisdiction.

The proposed amendments implement Texas Occupations Code, Chapter 2001.

(a) - (d) (No change.)
(e) Response
(1) A request for an advisory opinion that contains sufficient facts shall initially be referred to any appropriate personnel within the Charitable Bingo Operations Division for review and written comment.
(2) If the Commission determines that a request for an advisory opinion has already been answered by the Commission, then the Commission may provide a written response to the requestor that cites the prior advisory opinion.
(3) The Commission may publish the response on its website.
(4) The response shall clearly state that the opinion is advisory in nature and is restricted to the fact situation identified in the opinion.
(5) A requestor may rely upon an advisory opinion if the [An advisory opinion may be relied upon by the requestor as well as any other person whose conduct is substantially consistent with the opinion and the facts stated in the request.]
(6) The Commission cannot grant or confer legal authority beyond the statute or rule which is the subject of the request for advisory opinion.
(7) A previously issued advisory opinion not in accord with the current Commission statutes and rules may be modified or revoked, but in such an instance the modification or revocation shall operate prospectively only.

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

Filed with the Office of the Secretary of State on March 15, 2010.
TRD-201001301
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 344-5012

SUBCHAPTER D. LICENSING REQUIREMENTS

16 TAC §402.450

The Texas Lottery Commission (Commission) proposes new 16 TAC §402.450 (relating to Request for Waiver). The purpose of the proposed new rule is to provide the requirements for an organization to request a waiver to the maximum amount of operating capital that can be maintained in the bingo account in accordance with new language §2001.451(j) and (k) of the Bingo Enabling Act resulting from recent legislation H.B. 1474 effective October 1, 2009. Specifically, the new rule provides definitions for the terms "waiver" and "force majeure". The new rule also sets forth provisions on: (1) detrimental charitable purpose waiver; (2) Commission’s request for additional information to consider a waiver application; (3) deadline for licensed authorized organizations or units to provide documentation requested by the Commission; (4) criteria for approval of waiver applications; (5) notification requirements; and (6) submission of a new application for a waiver when circumstances or business plan change.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed new rule will be in effect, there will be no significant fiscal impact for state or local governments as a result of the new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed new rule will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Philip D. Sanderson, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed new rule will be in effect, the public benefit anticipated is availability of information on how to request a waiver in accordance with §2001.451(j) and (k) of the Bingo Enabling Act.

The Commission requests comments on the proposed new rule from any interested person. Comments on the proposed rule may be submitted to Sandra Joseph, Special Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 10:00 a.m. on Wednesday, April 14, 2010, at 611 E. 6th Street, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The new rule is proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission’s jurisdiction.

The proposed new rule implements Texas Occupations Code, Chapter 2001.

§402.450. Request for Waiver.

(a) Definitions. The following words or terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:
(1) Detrimental charitable purpose waiver (waiver)--A determination by the Commission authorized under §2001.451(k) of the Act to exempt a licensed authorized organization from the requirements of §2001.451 or §2001.457 of the Act because compliance with the requirement(s) of these sections is detrimental to the organization’s existing or planned charitable purposes.
(2) Force majeure--Some unforeseen event beyond the control of the licensed authorized organization or unit that results in non-compliance with specific sections of the Act or Rules.
(b) Detrimental Charitable Purpose Waiver.
(1) A licensed authorized organization may submit to the Commission a written request for a waiver to be exempt from the requirements that:

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(A) bingo operations must result in net proceeds over the organization’s license period; or

(B) a licensed authorized organization must disburse the required amount of net proceeds for charitable purposes for a specific calendar quarter.

(2) An application for a waiver must include the following:

(A) the reason for the request;

(B) an explanation of how compliance with the requirement is detrimental to the organization’s existing or planned charitable purposes;

(C) the intended purpose of future charitable distributions;

(D) the specific calendar quarter or license year for which the waiver is being requested, as applicable; and

(E) either of the following:

(i) a credible business plan; or

(ii) if the request is due to force majeure, documentation from outside sources supporting force majeure. Examples of acceptable documentation include newspaper articles, copies of local ordinance changes, police or fire department reports, notification of road construction, or photographs.

(3) A Credible Business Plan may include the following:

(A) the stated project goal of the organization as it applies to the application for waiver;

(B) a detailed description of the charitable activities of the organization for the four quarters immediately preceding the application;

(C) a detailed description of the charitable activities of the proposed charitable activities for the time period of the request;

(D) a current balance sheet and income statement for the four quarter period immediately preceding the application;

(E) projected cash flow from the conduct of bingo and from sources other than bingo that may be used to supplement the bingo proceeds towards the accomplishment of the project for the time period of the request;

(F) a cash flow analysis for the organization’s or unit’s bingo account for the four quarter period immediately preceding the application;

(G) a market analysis for the local economy, in general, and the local bingo industry, specifically, conducted within six months of the date of the application;

(H) a cost analysis for the project goal;

(I) the total amount of additional retained operating capital or reduced charitable distribution amount;

(J) the period of time required to accomplish the project goal; and

(K) documentation from outside sources supporting the reason for the application, the total project cost, and any additional resources that will be used towards the accomplishment of the project.

(c) The Commission may request additional information or documentation as needed to consider the application for a waiver.

(d) The licensed authorized organization or unit must provide all information or documentation requested by the Commission within 21 calendar days of notice from the Commission. Failure to provide information or documentation requested by the Commission within the time frame indicated may result in disapproval of the application.

(e) Criteria for Approval of Waiver Applications. The Commission may consider the following in the approval of waiver applications:

(1) the credible business plan or force majeure that necessitates the organization’s not meeting the requirements of §2001.451 or §2001.457 of the Act;

(2) the amount of net proceeds from licensed authorized organization’s or unit’s bingo operations during the past one or more years; and

(3) the length of time the organization has conducted bingo and compliance history.

(f) Within 21 calendar days of receipt of the written application for waiver and all required attachments and documentation, the Commission will notify the organization or unit in writing of its decision to approve or disapprove the application for a waiver.

(g) An organization or unit may not act as if a waiver is approved until it is notified by the Commission of approval.

(h) An organization or unit whose circumstances or credible business plan changes may submit a new application for a waiver.

This 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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Kimberly L. Kiplin
General Counsel
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16 TAC §402.451

The Texas Lottery Commission (Proposes new 16 TAC §402.451 (relating to Operating Capital). The purpose of the proposed new rule is to facilitate implementation of revisions to §2001.451 of the Bingo Enabling Act resulting from recent legislation H.B. 1474 effective October 1, 2009. Specifically, the new rule provides definitions for the terms, "average unit member operating capital", "bingo account", "quarterly report" and "retained operating capital limit". The new rule also addresses bingo account balance requirements, the transfer of bingo account funds, licensed authorized organizations calculations, accounting unit's calculations, retained operating capital limits, disbursement time frames, recalculation of operating capital, application for increase in capital limit, and compliance requirements.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed new rule will be in effect, there will be no significant fiscal impact for state or local governments as a result of the new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed new rule will not have an
Government economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Philip D. Sanderson, Director of the Charitable Bingo Operations Division, has determined that for each of the first five years the proposed new rule will be in effect, the public benefit anticipated is availability of information on licensee compliance with §2001.451 of the Bingo Enabling Act.

The Commission requests comments on the proposed new rule from any interested person. Comments on the proposed rule may be submitted to Sandra Joseph, Special Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 10:00 a.m. on Wednesday, April 14, 2010, at 611 E. 6th Street, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The new rule is proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

The proposed new rule implements Texas Occupations Code, Chapter 2001.


(a) Definitions. The following words or terms, when used in this chapter, shall have the meanings, unless the context clearly indicates otherwise.

(1) Average unit member operating capital--An amount equal to the allowable retained operating capital of the unit divided by the number of unit members.

(2) Bingo account--The bingo checking account, bingo savings account, and petty cash if bingo funds, of a licensed authorized organization or unit.

(3) Quarterly report--The Texas Bingo Quarterly Report.

(4) Retained operating capital limit--The maximum amount of funds that may be retained in the bingo account of a licensed authorized organization or unit, which is equal to the organization’s or unit’s actual quarterly average bingo expenses, excluding prizes paid, for the preceding license period but does not exceed $50,000 per organization.

(b) The bingo account balance of a licensed authorized organization on the last day of each calendar quarter may not exceed the total of:

(1) the organization’s or unit’s retained operating capital limit;

(2) prize fees held in the bingo account to be paid to the Commission; and

(3) net proceeds from the conduct of bingo for the current quarter.

(c) Bingo account funds may be transferred between the bingo checking account, bingo savings account, and petty cash, where applicable. All funds from the bingo checking account, bingo savings account, and petty cash shall be included in the bingo account balance reported on the quarterly report on the last day of each calendar quarter, including funds in transit between the various accounts.

(d) Licensed Authorized Organization’s Calculations.

(1) The retained operating capital limit for a licensed authorized organization with a one year license will be calculated based on the quarterly reports for the four (4) calendar quarters immediately preceding the license start date.

(2) The retained operating capital limit for a licensed authorized organization with a two year license will be calculated for each 12-month period of the license.

(3) The retained operating capital limit for a licensed authorized organization submitting the first renewal of their license to conduct bingo will be calculated based on the quarterly reports for the three (3) calendar quarters immediately preceding the license start date.

(4) The retained operating capital limit is effective for the four (4) calendar quarters beginning on the first day of the calendar quarter immediately following the license start date.

(e) Accounting Unit’s Calculations.

(1) The retained operating capital limit for an accounting unit will be calculated based on the quarterly reports for the four (4) quarter period beginning October 1 through September 30 of each year.

(2) The retained operating capital limit for an accounting unit is effective from January 1 through December 31 of each year.

(f) A licensed authorized organization’s or unit’s most recent quarterly report information at the time of the calculation will be used to calculate its retained operating capital limit.

(g) Retained Operating Capital Limits.

(1) The retained operating capital in the bingo account of a licensed authorized organization may not exceed a total of $50,000 for the first year of licensure.

(2) The retained operating capital in the bingo account of a newly formed unit may not exceed the total of the retained operating capital limits of all the licensed authorized organizations forming the unit.

(3) If a licensed authorized organization joins a unit, the retained operating capital in the unit’s bingo account may be increased by an amount that is equal to the average unit member operating capital, not to exceed a total of $50,000.

(4) If a licensed authorized organization withdraws from a unit and will no longer utilize unit accounting, its retained operating capital limit will be equal to the average unit member operating capital of the unit prior to withdrawal, not to exceed a total of $50,000.

(5) Upon withdrawal of a unit member, the retained operating capital in the bingo account of a unit must be decreased by an amount that is equal to the average unit member operating capital, for the last day of the calendar quarter immediately following the unit member’s withdrawal date.

(h) The bingo account balance as of October 1, 2009, in excess of a licensed authorized organization’s or unit’s retained operating capital limit as of January 1, 2010, must be disbursed within the following time frame:

Figure: 16 TAC §402.451(h)

(i) Recalculation of Operating Capital.

(1) A licensed authorized organization or unit that files an original or amended quarterly report for a period used to calculate its retained operating capital limit may submit a written request to the Commission to re-calculate the limit.
(2) A request to re-calculate a retained operating capital limit must include:
   
   (A) the reason for the request identifying the specific quarter that the original or amended quarterly report was filed; and
   
   (B) the signature of the bingo chairperson if the request is submitted by a licensed authorized organization, the unit manager if the unit is managed by a unit manager, or the designated agent if the unit is not managed by a unit manager.
   
   (j) A licensed authorized organization or unit may apply for an increase in its retained operating capital limit.
   
   (k) The failure of a licensed authorized organization or unit to receive notification from the Commission of its retained operating capital limit by the effective date does not relieve the organization or unit from complying with the retained operating capital limit.
   
   (l) All net proceeds in excess of the retained operating capital limit must be disbursed in accordance with the Act and Rules.

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

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Kimberly L. Kiplin
General Counsel
Texas Lottery Commission

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16 TAC §402.452

The Texas Lottery Commission (Commission) proposes new 16 TAC §402.452 (relating to Net Proceeds). The purpose of the proposed new rule is to facilitate implementation of revisions to §2001.451 of the Bingo Enabling Act resulting from recent legislation H.B. 1474 effective October 1, 2009. Specifically, the new rule sets forth provisions on the calculation of net proceeds for a license period and calculation of net proceeds for units.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed new rule will be in effect, there will be no significant fiscal impact for state or local governments as a result of the new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed new rule will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Philip D. Sanderson, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed new rule will be in effect, the public benefit anticipated is availability of information on licensee compliance with §2001.451 of the Bingo Enabling Act.

The Commission requests comments on the proposed new rule from any interested person. Comments on the proposed rule may be submitted to Sandra Joseph, Special Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 10:00 a.m. on Wednesday, April 14, 2010, at 611 E. 6th Street, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The new rule is proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Government Code §487.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission’s jurisdiction.

The proposed new rule implements Texas Occupations Code, Chapter 2001.

§402.452 Net Proceeds.

(a) Net proceeds from the conduct of bingo must result in a positive amount over the organization’s license period. If the organization has a two year license, the net proceeds from the conduct of bingo must result in a positive amount over each year of the organization’s license period.

(b) Calculation of Net Proceeds for a License Period.

(1) The current quarterly report information of the organization or unit will be used to determine if the bingo operations of the organization resulted in net proceeds.

(2) The calculation of net proceeds for a one year license will be based on the quarterly reports for the four (4) calendar quarters immediately preceding the license end date.

(3) Net proceeds for a two-year license will be calculated for each year of the license. The calculation of net proceeds for the first year of the license will be based on the quarterly reports for the four (4) calendar quarters immediately preceding the first year anniversary of the license beginning date. The calculation of net proceeds for the second year of the license will be based on the quarterly reports for the four (4) calendar quarters immediately preceding the license end date.

(4) The calculation of net proceeds for an organization submitting the first renewal of its license to conduct bingo will be based on the quarterly reports for the three (3) calendar quarters immediately preceding the license end date. If the bingo operations of an organization fail to result in positive net proceeds for the first renewal of a license, the Commission shall recalculate the net proceeds using the quarterly reports for the three (3) calendar quarters immediately preceding the license end date and the quarterly report for the one (1) calendar quarter in which the license end date falls to determine compliance.

(c) Calculation of Net Proceeds for Units.

(1) Net proceeds for units will be calculated at the end of each quarter for the prior four (4) quarter period.

(2) Members of units failing to meet the net proceed requirement may subject their license to conduct bingo to administrative action, up to and including revocation.

(3) The calculation of net proceeds for a licensed authorized organization that withdraws from a unit will be based on the following for the four (4) calendar quarters immediately preceding the license end date:

(A) the amount of distributions received from the unit; and

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(B) the licensed authorized organization’s quarterly reports.

(4) The Commission may request additional information from a member of a unit to assist in the determination of compliance with this section.

(d) Net proceeds may be recalculated for an organization or unit who has filed an original or amended return for a filing period used in the calculation of net proceeds when deemed necessary by the Commission or upon written request of the bingo chairperson of an organization.

(e) A licensed authorized organization may apply for a waiver from the net proceeds requirement by showing good cause that compliance is detrimental to the organization’s existing or planned charitable purposes. Waiver applications must be submitted in accordance with §402.450 of this chapter (relating to Request for Waiver).

This 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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Kimberly L. Kiplin
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16 TAC §402.453

The Texas Lottery Commission (Commission) proposes new 16 TAC §402.453 (relating to Request for Operating Capital Increase). The purpose of the proposed new rule is to facilitate implementation of revisions to §2001.451 of the Bingo Enabling Act resulting from recent legislation H.B. 1474 effective October 1, 2009. Specifically, the new rule sets forth definitions for "force majeure", "request to exceed the operating capital limit" and "retained operating capital". The new rule also sets forth provisions on applying for a request to exceed operating capital limit and criteria for approval.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed new rule will be in effect, there will be no significant fiscal impact for state or local governments as a result of the new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed new rule will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Philip D. Sanderson, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed new rule will be in effect, the public benefit anticipated is availability of information on licensee compliance with §2001.451 of the Bingo Enabling Act.

The Commission requests comments on the proposed new rule from any interested person. Comments on the proposed rule may be submitted to Sandra Joseph, Special Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 10:00 a.m. on Wednesday, April 14, 2010, at 611 E. 6th Street, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The new rule is proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Government Code §487.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission’s jurisdiction.

The proposed new rule implements Texas Occupations Code, Chapter 2001.

§402.453. Request for Operating Capital Increase.

(a) Definitions. The following words or terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Force majeure--Some unforeseen event beyond the control of the licensed authorized organization or unit that results in non-compliance with specific sections of the Act or Rules.

(2) Request to exceed the operating capital limit--An application to the Bingo Operations Director in accordance with §2001.451(b)(2)(B) and (i) of the Act to increase the retained operating capital limit for one organization or unit.

(3) Retained operating capital--The amount of operating capital the licensed authorized organization or unit retains in the organization’s or unit’s bingo account.

(b) Applying for a Request to Exceed Operating Capital Limit.

(1) A licensed authorized organization or unit requesting to increase its operating capital limit must submit a written request prior to the end of the quarter for which the increase in its retained operating capital limit is being requested.

(2) The retained operating capital limit may not be increased for the purpose of decreasing a licensed authorized organization’s or unit’s disbursement of net proceeds for charitable purposes.

(3) A request to exceed the operating capital limit must include the following:

(A) the total amount of retained operating capital requested;

(B) the reason for the request;

(C) the period for the increase; and

(D) either of the following:

(i) a credible business plan; or

(ii) if the request is due to force majeure, documentation from outside sources supporting force majeure or evidence of circumstances beyond the control of the organization. Examples of acceptable documents include newspaper articles, copies of local ordinance changes, police or fire department reports, notification of road construction, or photographs.

(4) A credible business plan for the organization’s bingo operation may include the following:

(A) the stated project goal of the organization as it applies to the request;
(B) a detailed description of the charitable activities of the organization for the four quarters immediately preceding the request;

(C) a detailed description of the proposed charitable activities for the time period of the request;

(D) a current balance sheet and income statement for the four quarters immediately preceding the request;

(E) projected cash flow from the conduct of bingo and from sources other than bingo that may be used to supplement the bingo proceeds towards the accomplishment of the project for the time period of the request;

(F) a cash flow analysis for the organization’s or unit’s bingo account for the four quarters immediately preceding the request;

(G) a market analysis for the local economy, in general, and the local bingo industry, specifically, conducted within six months of the date of the request;

(H) a cost analysis for project goal;

(I) the total amount of additional retained operating capital or reduced charitable distribution amount;

(J) the period of time required to accomplish the project goal; and

(K) documentation from outside sources supporting the reason for the request, the total project cost, and any additional resources that will be used towards the accomplishment of the project.

(c) An organization that has been licensed to conduct bingo for less than one year may provide a detailed explanation of why the increase in the operating capital limit is necessary with supporting documentation in lieu of a credible business plan.

(d) The Commission may request additional information or documentation as needed to consider the request to exceed the operating capital limit.

(e) The licensed authorized organization or unit must provide all information or documentation requested by the Commission within 21 calendar days of notice from the Commission. Failure to provide information or documentation requested by the Commission within the time frame indicated may result in disapproval of the request.

(f) Criteria for Approval. The Commission shall consider the following in the approval of requests to exceed the operating capital limit:

(1) the reason or circumstances beyond the control of the organization, including force majeure, that necessitates the increase in retained operating capital;

(2) the project goal and eventual charitable use of bingo proceeds applicable to the organization’s charitable purposes as defined in §2001.454 of the Act;

(3) the necessity of the project goal;

(4) the amount of net proceeds from the licensed authorized organization’s or unit’s bingo operations during the past one or more years; and

(5) the length of time the organization has conducted bingo and compliance history.

(g) Within 21 calendar days of receipt of the written request to exceed the operating capital limit and all required attachments and documentation, the Commission will notify the organization or unit in writing of the decision to approve or disapprove the request.

(h) An organization or unit may not increase its retained operating capital until it is notified by the Commission of the approval of the request.

(i) An organization or unit whose circumstances or credible business plan changes may submit a new request.

This 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 E. BOOKS AND RECORDS

16 TAC §402.506

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §402.506 (relating to Disbursement Records Requirements). The purpose of the proposed amendments is to make the rule consistent with changes to the Bingo Enabling Act resulting from recent legislation H.B. 1474 effective October 1, 2009. Specifically, the amendments: (1) add "; including the address and telephone number" to subsection (b)(1)(A); (2) delete subsection (b)(7) and renumber accordingly; (3) add "Actual or imaged bank" to newly renumbered subsection (b)(7); (4) add new subsection (b)(9) and (b)(10); (5) add "operations of the organization and the allocation of the expenditure" to subsection (d); and (6) add new subsections (e), (f), and (g).

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Philip D. Sanderson, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed amendments will be in effect, the public benefit anticipated is to provide organizations with a clear understanding of documentation required to substantiate expenses.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to Sandra Joseph, Special Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.inpu@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 10:00 a.m. on Wednesday, April 14, 2010, at 611 E. 6th Street, Austin, Texas 78701.
Comments must be received within 30 days after publication of this proposal in order to be considered.

The amendments are proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission’s jurisdiction.

The proposed amendments implement Texas Occupations Code, Chapter 2001.

§402.506. Disbursement Records Requirements.

(a) The licensed authorized organization or unit shall maintain records to substantiate bingo expenses. Bank statements, cancelled checks and cancelled check images may not be adequate to substantiate bingo expenses.

(b) The records listed below are acceptable to substantiate bingo expenses for each type of expense listed:

1. Invoices, itemized billing statements, sales receipts or similar documents that have information about the items purchased or services provided and contain the following details:
   (A) the name and contact information of the person or entity selling the goods or providing the service, including the address and telephone number;
   (B) an adequate description of goods or services purchased;
   (C) the quantity of each product purchased or service received;
   (D) the price of each product purchased or service received which may include the pricing information for services provided pursuant to a service agreement;
   (E) the total dollar amount billed; and
   (F) the date of the transaction.

2. Written lease agreement, if any, between the commercial lessor and the licensed authorized organization or unit stating the amount of rent charged for the use of bingo premises. If there is no written agreement, the organization must support the rental payments with an invoice from the lessor stating location, rental dates, and rental amounts by occasion.

3. Rent forgiveness letter or lease amendment signed by the commercial lessor stating the amount of any rent forgiven or permanently or temporarily reduced.

4. Payroll records that include a listing for each employee showing:
   (A) primary position worked;
   (B) date and occasion number worked (if more than one occasion held on a single day);
   (C) total number of hours worked per occasion (if paid hourly);
   (D) rate and criteria (hourly, per occasion, etc.);
   (E) gross wages;
   (F) all taxes and payroll deduction amounts; and
   (G) net payroll amount.

5. Federal and state payroll tax returns, including related deposit slips and receipts or other documentation that the deposits were accepted.

6. Documentation of the payment of other federal, state, and local taxes, which may include tax returns, 1099’s and property tax paid.

7. Commission loan approval letter for repayment of approved loans.

8. Actual or imaged bank statements, deposit slips and cancelled checks or cancelled check images.

9. Debit card transactions reports.

10. The purpose, amount and payee for each electronic transfer from the organization’s bingo checking account.

11. A licensed authorized organization or unit shall maintain records to document any expenses for promotions or door prizes.

12. The licensed authorized organization or unit shall maintain records to document the allocation method for bingo expenses which are shared by organizations in a hall.

13. The licensed authorized organization or unit shall maintain records to document the allocation method for expenses that are divided between bingo and non-bingo operations of the organization and the allocation of the expenditure (expense or) between bingo expense and charitable distribution.

14. All expenses from the bingo checking account must be listed on a Cash Disbursements Journal on forms provided by the Commission or in another format that shows the information for each check written, electronic fund transfers, bank fees, and cash shortages or overages. Each expense shall be grouped into the category that corresponds with the Texas Bingo Quarterly Report.

15. A Cash Disbursements Journal shall be maintained on a cash basis and include information for checks written, electronic fund transfers, bank fees and cash shortages or overages that are dated during the calendar quarter.

16. Cash Disbursement Journal Required Information:

   (A) organization or unit name;
   (B) taxpayer or unit number;
   (C) calendar quarter;
   (D) date of check or date the expense was paid or deducted from bingo check account;
   (E) check number, transaction number or confirmation number;
   (F) name of payee;
   (G) amount of expense;
   (H) expense category--each expense item shall correspond to the category on the Texas Bingo Quarterly Report; and
   (I) totals--Each expense category shall be totaled quarterly and match the information reported to the Commission on the Texas Bingo Quarterly Report. Any changes made on the Texas Bingo Quarterly Report shall be documented on the Cash Disbursements Journal.

(f) A licensed authorized organization or unit shall maintain sufficient funds in the bingo checking account to cover all checks written and electronic fund transfers. Bank fees incurred because the organization fails to maintain sufficient funds in its account to cover ex-
penditures from the bingo account will not be considered a reasonable or necessary expense.

(g) All disbursement records must be complete, accurate, legal, and maintained for four (4) years by the licensed authorized organization.

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

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Kimberly L. Kiplin
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16 TAC §402.514

The Texas Lottery Commission (Commission) proposes new 16 TAC §402.514 (relating to Electronic Fund Transfers). The purpose of the proposed new rule is to facilitate implementation of §2001.452 of the Bingo Enabling Act resulting from recent legislation H.B. 1474 effective October 1, 2009. Specifically, the new rule sets forth provisions on electronic fund transfers related to controls over electronic fund transfers, recordkeeping requirements, and discrepancies or misapplications.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed new rule will be in effect, there will be no significant fiscal impact for state or local governments as a result of the new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed new rule will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Philip D. Sanderson, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed new rule will be in effect, the public benefit anticipated is availability of information on licensee compliance with §2001.452 of the Bingo Enabling Act.

The Commission requests comments on the proposed new rule from any interested person. Comments on the proposed rule may be submitted to Sandra Joseph, Special Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 10:00 a.m. on Wednesday, April 14, 2010, at 611 E. 6th Street, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The new rule is proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission’s jurisdiction.

The proposed new rule implements Texas Occupations Code, Chapter 2001.

§402.514. Electronic Fund Transfers.

(a) Electronic Fund Transfers. Electronic fund transfers (EFT) refers to the transfer of funds using a computer system, electronic terminal, telephone, mobile phone, or other non-paper based method that may be used for both credit transfers, such as deposits into an account, and debit transfers, such as payments from an account.

(b) Controls over Electronic Fund Transfers.

(1) Licensed authorized organizations or units shall use for all EFT transactions the same financial policies, procedures, and controls that govern disbursement by check and the receipt of funds into the bingo bank account. (See §2001.452 of the Bingo Enabling Act and §402.505 of this chapter (relating to Permissible Expense) and §402.506 of this chapter (relating to Disbursement Records Requirements).)

(2) The licensed authorized organization or unit shall implement the following controls for EFT transactions:

(A) Only authorized person(s) shall be allowed to execute an EFT transaction on behalf of the organization or unit.

(B) The licensed authorized organization or unit shall maintain documentation of board approval of changes in the person(s) authorized to execute electronic funds transfers.

(3) The bingo chairperson and bookkeeper shall review accounting records and bank statements to ensure that only authorized EFTs are executed. Each EFT shall be accounted for when completing monthly bank reconciliations.

(c) Recordkeeping for Electronic Funds Transfers.

(1) EFT receipts into the bingo bank account shall be recorded in the accounting records. At a minimum the organization or unit must record the following information regarding EFT receipts:

(A) payee name;

(B) amount paid;

(C) date paid;

(D) purpose of the funds received; and

(E) the EFT confirmation receipt, if provided.

(2) The organization or unit shall maintain in its accounting records a copy of each EFT payment transaction together with the invoice or billing statement. The following information must be maintained supporting the payment:

(A) payee name;

(B) amount paid;

(C) date paid;

(D) account number from which the transfer is made;

(E) nature of payment;

(F) the name of the person executing the EFT transaction on behalf of the organization or unit; and

(G) the EFT confirmation receipt, if provided.

(3) All records relating to electronic fund transfers into or out of the bingo checking account of a licensed authorized organization or unit must be retained for a period of not less than four years.
(d) Discrepancies or Misapplication of Electronic Fund Transfers. The bingo chairperson or other person authorized to sign on the bingo bank account shall notify the organization’s financial institution immediately to report problems or if it is suspected that someone has access to the bingo bank account without authorization.

This 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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Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
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For further information, please call: (512) 344-5012

SUBCHAPTER F. PAYMENT OF TAXES, PRIZE FEES AND BONDS

16 TAC §402.600

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §402.600 (relating to Bingo Reports). The purpose of the proposed amendments is to make the rule consistent with changes to the Bingo Enabling Act resulting from recent legislation H.B. 1474 effective October 1, 2009. Specifically, the amendments: (1) replace "15th of the month" with "25th of the month" at subsection (a); (2) add the sentence, "For quarterly reports submitted electronically, the report will be deemed filed as of the date and time sent from the specified e-mail address" at the end of subsection (b); (3) add a new subsection (c) regarding signature provisions, and reletter the remaining subsections accordingly; (4) add the following language to newly relettered subsection (e)(1), "The report shall also include information regarding property taxes on the facility, water, electric, and gas utility expenses, property and casualty insurance premiums for the facility that are paid by the lessor, and reimbursed by an authorized organization or unit to the lessor"; (5) delete existing subsections (g) and (h) regarding provisions relating to a system service provider license; (6) delete the following from newly relettered subsection (i), "If a licensee fails to file a quarterly report as required by Occupations Code, §2001.504, the Charitable Bingo Operations Division will mail to the licensee a letter stating the quarterly report has not been filed. The applicable penalty and/or interest is due on the amount of prize fee or rental tax that was not filed timely."; and (7) add the sentence "Failure to file a required report by the due date may result in an administrative penalty." to the end of newly relettered subsection (i).

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the amendments rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Philip D. Sanderson, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed amendments will be in effect, the public benefit anticipated is to ensure language in the rule that is consistent with the Bingo Enabling Act.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to Sandra Joseph, Special Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 10:00 a.m. on Wednesday, April 14, 2010, at 611 E. 6th Street, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The amendments are proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission’s jurisdiction.

The proposed amendments implement Texas Occupations Code, Chapter 2001.

§402.600. Bingo Reports.

(a) On or before the 25th [15th] of the month prior to the end of the calendar quarter, the Commission will mail the "Texas Bingo Conductor’s Quarterly Reports", "Texas Lessor Quarterly Reports", and "Manufacturer/Distributor Quarterly Reports and Supplements" to its licensees.

(b) Quarterly reports and payments due to be submitted on a date occurring on a Saturday, Sunday, or legal holiday will be due the next business day. The report will be deemed filed when deposited with the United States Postal Service or private mail service, postage or delivery charges paid and the postmark or shipping date indicated on the envelope is the date of filing. For quarterly reports submitted electronically, the report will be deemed filed as of the date and time sent from the specified e-mail address.

(c) Signature provisions.

(1) For the valid filing of paper quarterly reports, an officer, director, or bookkeeper must sign the report. By signing a report, the officer, director, or bookkeeper declares that the information in the report is true and correct to the best of their knowledge and belief.

(2) For the valid filing of electronic quarterly reports, the signature will be the e-mail address of the person sending the quarterly report.

(d) (new) Quarterly Report for information relating to the conduct of bingo games.

(1) An authorized organization holding an annual license, temporary license, or a temporary authorization to conduct bingo must file on a form prescribed by the Commission or in an electronic format prescribed by the Commission a quarterly report for financial and statistical information relating to the conduct of bingo games. The report must be filed with the Commission on or before the 25th day of the month following the end of the calendar quarter even if there were no games conducted during that quarter.

(2) The report must be filed under oath attesting to the information being true and correct. Each officer and director is responsible for knowing the contents of the report. The person signing the
report must promptly provide a copy of the report to such officer and
director upon his/her request.

(e) (a) Quarterly report for information relating to the lease of
bingo premises.

(1) A commercial lessor holding a license to lease bingo
premises must file on a form prescribed by the Commission or in an
electronic format prescribed by the Commission a quarterly report stat-
ing the rental income received. The report shall also include information
regarding property taxes on the facility, water, electric, and gas util-
ity expenses, property and casualty insurance premiums for the facility
that are paid by the lessor, and reimbursed by an authorized organiza-
tion or unit to the lessor. The report must be filed with the Commission
on or before the 25th day of the month following the end of the calen-
dar quarter regardless of whether income was received.

(2) The report must be filed under oath attesting to the in-
formation being true and correct. Each officer and director is respon-
sible for knowing the contents of the report. The person signing the
report must promptly provide a copy of the report to such officer and
director upon his/her request.

(f) (d) Quarterly report for information relating to a manu-
ufacturer or distributor license.

(1) A manufacturer or distributor shall file a report on a
form prescribed by the Commission or in an electronic format pre-
scribed by the Commission, reflecting each sale or lease of bingo equi-
ipment, and the total sales of cards, sheets, pads and instant bingo to a
person or organization in this state or for use in this state.

(2) The report shall be filed with regard to each calendar
quarter and is due on or before the last day of the month following the
end of the quarter. The report is due to the Commission regardless of
whether sales or lease of bingo equipment occurred during the quarter.

(3) The report must be filed under oath attesting to the in-
formation being true and correct.

(4) The Commission will deny a renewal application or re-
voke a license of a manufacturer or distributor where the licensee has
failed to timely file with the Commission the required reports three
times within four consecutive quarters.

(g) (b) A manufacturer or distributor shall use the eleven digit
taxpayer numbers on file with the Commission when submitting infor-
mation relating to the sale or lease of bingo equipment, sales of cards,
sheets, pads and instant bingo. If six or more taxpayer numbers are
incorrect on the report, the Commission will return the report to the manu-
ufacturer or distributor for correction. If five or less taxpayer num-
bers are incorrect, the Commission will notify the licensee in writing of the
taxpayer numbers that were changed and the correct numbers to be used in the future.

(h) (f) Quarterly report for information relating to a system
service provider license.

(1) A system service provider shall file a report on a form
prescribed by the Commission or in an electronic format prescribed by
the Commission, reflecting each sale or lease of an automated bingo
system to a person or organization in this state or for use in this state.

(2) The report shall be filed with regard to each calendar
quarter and is due on or before the last day of the month following the
end of the quarter. The report is due to the Commission regardless of
whether a sale or lease of an automated bingo system occurred during the
quarter.

(3) The report must be filed under oath attesting to the in-
formation being true and correct.

(i) (e) Failure to receive forms. The failure of a licensee to
receive forms from the Commission does not relieve the licensee from
the requirement of filing reports and remitting prize fees or taxes as
applicable on a timely basis.

(j) (d) Incorrect calculation of "Texas Bingo Conductor's
Quarterly Report". If the total receipts and total expenses do not total
correctly, the Commission will mail the conductor a letter, with a copy of
the adjusted report, stating an adjustment has been made to the
quarterly report. If the adjusted quarterly report is correct, the licensee
will maintain the copy in its file and no further action is required.
If the licensee does not agree with the adjusted quarterly report, an
amended quarterly report reflecting the correct data must be submitted to
the Commission by the licensee.

(k) (c) The Commission will deny a renewal application for
a license to conduct bingo or a license to lease bingo premises or revoke
a license to conduct bingo or a license to lease bingo premises if the li-
ence has failed to pay timely the prize fee or rental tax due three times
within four consecutive quarters and a final jeopardy determination has
been made by the commission for three of the four consecutive quar-
ters in accordance with Occupations Code [Sections] §2001.510 and
§2001.511.

(l) (b) Extensions.

(1) Filing extension because of natural disaster.

(A) The Director will grant to a licensee who has been
identified as a victim of a natural disaster an extension of not more than
90 days to file a quarterly report or pay rental tax or prize fees provided
the licensee has filed a timely request for an extension. In determining
the natural disaster victims, the Commission shall recognize the coun-
ties that have been identified by the Comptroller of Public Accounts.

(B) The person owing the quarterly report, rental tax or
prize fees must file a written request for an extension at any time before
the expiration of five working days after the original due date in order to
obtain an extension.

(C) If an extension under this paragraph is granted, in-
terest on the unpaid rental tax or prize fee does not begin to accrue
until the day after the day on which the extension expires, and rental
tax, prize fees, and penalties are assessed and determined as though the
last day of the extension were the original due date.

(2) Filing extension for reasons other than natural disaster.
(A) The Director may grant an extension of not more than 30 days for the filing of a quarterly report. Before a request for extension may be granted, a written request setting out the reasons or grounds for an extension and 90% of the prize fees or rental tax estimated to be due must be received by the Commission postmarked on or before the due date of the quarterly report.

(B) The granting of a request is within the discretion of the Director and the licensee will be notified in five working days of the request of the decision of the Director.

(C) If the request is denied, there will be no penalty assessed if the return is filed and remaining prize fee or rental tax is paid not later than ten days from the date of the denial of the request of the extension.

(3) A request postmarked after the due date for the filing of a request will not be considered.

This 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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Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 102. EDUCATIONAL PROGRAMS

SUBCHAPTER EE. COMMISSIONER’S RULES CONCERNING PILOT PROGRAMS

19 TAC §102.1057

The Texas Education Agency (TEA) proposes new §102.1057, concerning the intensive reading or language intervention pilot program. The proposed new section would implement the requirements of the Texas Education Code (TEC), §29.094.

The TEC, §29.094, as added by House Bill (HB) 3468, 79th Texas Legislature, 2005, permitted the commissioner by rule to establish a pilot program in which a participating campus provides intensive reading and language intervention to participating students. HB 1270, 80th Texas Legislature, 2007, amended the TEC, §29.094, to require an intensive reading and language intervention pilot program that had been permissive. The commissioner by rule must establish a pilot program in which a participating campus provides intensive reading or language intervention to participating students.

The commissioner is to select campuses for participation in the pilot that have failed to improve student performance in reading based on reading performance standards required for student promotion under the TEC, §28.0211. The legislation requires the commissioner to adopt criteria by which reading or language intervention programs will be approved. The approved programs will then be used by campuses in the pilot.

Proposed new 19 TAC §102.1057 would implement the TEC, §29.094, by establishing requirements for the Intensive Reading or Language Intervention Pilot Program. Specifically, the proposed new rule would include provisions relating to the purpose of the pilot program, application process and terms, applicant notification, products approved for use in the program, implementation of the pilot program, program evaluation, and funding.

Participants in the pilot will be required to report pre- and post-test results to the TEA in the time and manner described in the request for applications. School districts participating in the pilot program will be required to collect data and maintain paperwork as necessary to provide the TEA with reports on implementation of the pilot program.

Anita Givens, associate commissioner for standards and programs, has determined that for the first five-year period the proposed new section is in effect there will be no additional costs for state or local government as a result of enforcing or administering the new section.

Ms. Givens has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the rule action will be to provide students in participating schools with intensive reading or language intervention to assist them in successfully completing the state assessment at grade levels where advancement is tied to satisfactory performance on the assessment. There is no anticipated economic cost to persons who are required to comply with the proposed new section.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins March 26, 2010, and ends April 26, 2010. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 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. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the Texas Register on March 26, 2010.

The new section is proposed under the Texas Education Code, §29.094, which requires the commissioner of education to adopt rules necessary to implement the intensive reading or language intervention pilot program.

The amendment implements the TEC, §29.094.

§102.1057  Intensive Reading or Language Intervention Pilot Program.

(a) Program purpose. In accordance with the Texas Education Code (TEC), §29.094, the Texas Education Agency (TEA) shall establish and implement a pilot program in which a participating local education agency (LEA) provides intensive reading or language intervention to participating students.

(b) Application. LEAs shall submit applications in accordance with instructions provided by the TEA through the request for application (RFA) process. The following terms apply to each LEA applicant seeking participation in the pilot program.
(1) Eligible LEAs will be determined to be eligible based on a review of Grade 3 statewide assessment scores in reading.

(2) LEA campuses that are awarded grants under this program shall select an intensive reading or language intervention program from the TEA Commissioner’s List of Approved Providers, which shall be determined through a competitive process.

(3) The LEA shall be responsible for ensuring that funds flow to campuses that serve students in Kindergarten-Grade 2 as appropriate.

(4) Participating LEA campuses shall administer pre- and post-tests to students served, including but not limited to, the Texas Primary Reading Inventory (TPRI) or Tejas LEE and program benchmarks.

(c) Notification. The TEA shall notify each applicant in writing of the selection or non-selection for participation.

(d) Approved products. In order to be selected by a participating LEA campus for use in providing intensive reading or language intervention, a program must:

(1) be neuroscience-based;
(2) have scientifically validated methods;
(3) include scientifically based reading interventions or instructional tools that have been proven to accelerate language acquisition and reading proficiency for struggling readers;
(4) include a sufficient quantity and quality of professional development to train teachers and administrators in successful implementation and use of the program;
(5) include explicit ties to the student expectations in the Texas Essential Knowledge and Skills;
(6) incorporate repeated assessment of student proficiency that informs classroom instruction; and
(7) include the ability to administer benchmark measures at the beginning and end of the program.

(e) Implementation. Participating LEA campuses shall purchase a product from the Commissioner’s List of Approved Providers, participate in required professional development, and implement the program in accordance with the TEC, §29.094, to serve eligible/targeted students.

(f) Evaluation. Each LEA must comply with evaluation procedures established by the commissioner of education as detailed in the RFA.

(g) Funding. Implementation of the pilot is contingent upon sufficient funding in accordance with the TEC, §29.094, and the General Appropriations Act.

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

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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency

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CHAPTER 109. BUDGETING, ACCOUNTING, AND AUDITING
SUBCHAPTER AA. COMMISSIONER’S RULES CONCERNING FINANCIAL ACCOUNTABILITY RATING SYSTEM
19 TAC §§109.1001 - 109.1005

The Texas Education Agency (TEA) proposes amendments to §§109.1001-109.1005, concerning the financial accountability rating system. The sections establish provisions that detail the purpose, ratings, types of ratings, criteria, reporting, and sanctions for the financial accountability rating system. The proposed amendments would update the rating system by specifying new provisions that will be implemented beginning with ratings based on data from fiscal year 2008-2009, including a new worksheet and calculations. The proposed amendments would also incorporate open-enrollment charter schools into the School FIRST system.

Through 19 TAC Chapter 109, Budgeting, Accounting, and Auditing, Subchapter AA, Commissioner’s Rules Concerning Financial Accountability Rating System, the commissioner of education established provisions for the financial accountability rating system, in accordance with Senate Bill 218, 77th Texas Legislature, 2001. The rules include the financial accountability rating form entitled “School FIRST - Rating Worksheet” that explains the indicators that the TEA will analyze to assign school district financial accountability ratings. This form specifies the minimum financial accountability rating information that a district is to report to parents and taxpayers in the district. HB 3, 81st Texas Legislature, 2009, modified and renumbered the TEC, §§39.201-39.205, relating to financial accountability for school districts. Changes required by HB 3 include the addition of open-enrollment charter schools to the financial accountability rating system.

The amendments presented in this proposal would update the rating system by specifying new provisions that will be implemented beginning with ratings based on data from fiscal year 2008-2009, including the deletion and enhancement of indicators and a new worksheet and calculations. Language would be added throughout the subchapter to include open-enrollment charter schools. The proposed amendments to 19 TAC Chapter 109, Subchapter AA, are as follows.

The proposed amendment to 19 TAC §109.1001, Purpose of Financial Accountability Rating System, would update the rating system by adding open-enrollment charter schools into the School FIRST system.

The proposed amendment to 19 TAC §109.1002, Financial Accountability Ratings, would update the rating system by deleting two noncritical indicators and enhancing other existing indicators. The revised rating system will be applicable to school district and open-enrollment charter school financial accountability ratings assigned, beginning with ratings based on data from fiscal year 2008-2009 (the ratings that will be issued in summer 2010). Specifically, the proposed amendment to 19 TAC §109.1002 would include the following changes from current text.

Language would be added to subsection (c) to specify the applicable fiscal years to which the previous rating worksheet, dated August 2006, applies.
New subsection (d) would be added to establish the applicable fiscal years to which the new rating worksheet, dated March 2010, applies. The new worksheet and accompanying calculation instructions would be added as new Figure: 19 TAC §109.1002(d).

New subsection (e) would be added to establish the rating worksheet for charter schools, dated March 2010. The new charter school rating worksheet would be added as new Figure: 19 TAC §109.1002(e).

Subsequent subsections would be relettered accordingly.

Relettered subsection (g) would be modified to reference open-enrollment charter schools, to use the term "appeal" instead of "request for review," and to delete language regarding the 65% expenditure standard. The subsection would also be modified to reflect the fact that charter school shared service arrangement reporting requirements are different than those established for traditional districts.

The following changes from the previously adopted School FIRST rating worksheet are reflected in the new School FIRST rating worksheet, Figure: 19 TAC §109.1002(d).

For indicator 10, the threshold for each point was adjusted to reflect the actual results reported for fiscal year 2008. Indicator 10 relates to per-student debt service.

The points awarded for a cash management indicator, renumbered to Indicator 22, were increased to 5 points in order to accommodate the realignment of total points awarded for indicators due to the deletion of indicators 13 and 14 related to the 65% expenditure requirement. The threshold for each point was also adjusted to reflect the actual results reported for fiscal year 2008, also allowing for decreased investment opportunities in 2009. Indicator 22 relates to per-student investment earnings, excluding debt service and capital projects funds.

As reflected in the new School FIRST rating worksheet, information related to the determination of financial accountability ratings and the applicable number of points was modified due to the reduction of the number of indicators. Also, the date of the form was updated from August 2006 to March 2010.

The new School FIRST rating worksheet for open-enrollment charter schools, reflected in Figure: 19 TAC §109.1002(e), would address receipt of the annual financial audit report, indication of assets greater than or equal to 80% of liabilities, and determination of the independent auditor’s report.

The proposed amendment to 19 TAC §109.1003, Types of Financial Accountability Ratings, would incorporate the possibility of additional corrective actions in response to a lowered rating. The existing types of ratings would continue to apply during fiscal year 2008-2009, in accordance with the procedures, scores, and classifications established in 19 TAC §109.1002. The proposed amendment would also add the types of ratings for open-enrollment charter schools.

The proposed amendment to 19 TAC §109.1004, Criteria for Financial Accountability Ratings, would add open-enrollment charter schools into the School FIRST system.

The proposed amendment to 19 TAC §109.1005, Reporting, would clarify provisions for publication of public hearing notices.

The proposed amendments would update and add worksheets and calculations used beginning with fiscal year 2008-2009 data to report school district and open-enrollment charter school financial accountability information. TEA staff will continue to generate school district and open-enrollment charter school financial accountability ratings based on data submitted by school districts and open-enrollment charter schools. Open-enrollment charter schools will now be required to report financial accountability results and annual financial management reports to the parents and the public of the charter school. The proposed amendments would have no new locally maintained paperwork requirements.

Laura Taylor, associate commissioner for accreditation, has determined that for the first five-year period the proposed amendments are in effect there will be no additional costs for state or local government as a result of enforcing or administering the amendments.

Ms. Taylor has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the rule action will be updates to the financial accountability rating system. This system benefits the public by having in place a system to ensure that school districts and open-enrollment charter schools will be held accountable for the quality of their financial management practices and achieve improved performance in the management of their financial resources. There is no anticipated economic cost to persons who are required to comply with the proposed amendments.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins March 26, 2010, and ends April 26, 2010. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 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. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the Texas Register on March 26, 2010.

The amendments are proposed under the Texas Education Code, §§39.085, as renumbered by House Bill 3, 81st Texas Legislature, 2009, which requires the commissioner of education to adopt rules as necessary for the implementation and administration of financial accountability rating systems for school districts and open-enrollment charter schools.


The purpose of the financial accountability rating system is to ensure that school districts and open-enrollment charter schools will be held accountable for the quality of their financial management practices and achieve improved performance in the management of their financial resources. The system is designed to encourage Texas public schools to manage their financial resources better in order to provide the maximum allocation possible for direct instructional purposes. The system will also disclose the quality of local management and decision-making processes that impact the allocation of financial resources in Texas public schools. An evaluation of the long-term effectiveness of the system should disclose a measurable improvement in the quality of Texas public schools’ financial decision-making processes.

(a) In accordance with Texas Education Code (TEC), Chapter 39, Subchapter D [I], each school district and open-enrollment charter school must be assigned a financial accountability rating by the Texas Education Agency (TEA). The specific procedures for determining financial accountability ratings will be established annually by the commissioner of education and communicated to all school districts and open-enrollment charter schools.

(b) For fiscal years 2002-2003, 2003-2004, 2004-2005, and 2005-2006, each financial accountability rating of a school district is based on its overall performance on certain financial measurements, ratios, and other indicators established by the commissioner of education in the financial accountability rating form provided in this subsection entitled "School FIRST - Rating Worksheet," effective May 2003. Figure: 19 TAC §109.1002(b) (No change.)

(c) For [Beginning with fiscal years] 2006-2007 and 2007-2008, the financial accountability rating of a school district is based on its overall performance on certain financial measurements, ratios, and other indicators established by the commissioner of education in the financial accountability rating form provided in this subsection entitled "School FIRST - Rating Worksheet Effective August 2006." On this form, Indicator 13 entitled, "Was The Percent Of Operating Expenditures Expended For Instruction More Than or Equal to 65%?" was [will be] phased in over a three-year period, as follows. Figure: 19 TAC §109.1002(c) (No change.)

(1) For fiscal year 2006-2007, the indicator was [will be] "Was The Percent Of Operating Expenditures Expended For Instruction More Than or Equal to 55%?"

(2) For fiscal year 2007-2008, the indicator was [will be] "Was The Percent Of Operating Expenditures Expended For Instruction More Than or Equal to 60%?"

(3) For fiscal year 2008-2009 and beyond, the indicator was repealed. [will be "Was The Percent Of Operating Expenditures Expended For Instruction More Than or Equal to 65%?"

(d) Beginning with fiscal year 2008-2009, the financial accountability rating of a school district is based on its overall performance on certain financial measurements, ratios, and other indicators established by the commissioner of education in the financial accountability rating form provided in this subsection entitled "School FIRST - Rating Worksheet Dated March 2010."

Figure: 19 TAC §109.1002(d)

(e) Beginning with fiscal year 2008-2009, the financial accountability rating of an open-enrollment charter school is based on its overall performance on certain financial measurements, ratios, and other indicators established by the commissioner of education in the financial accountability rating form provided in this subsection entitled "Charter School - School FIRST - Rating Worksheet Dated March 2010."

Figure: 19 TAC §109.1002(e)

(f) [E] A financial accountability rating by a voluntary association is a local option of the district or open-enrollment charter school, but it does not substitute for a financial accountability rating by the TEA.

(g) [E] The TEA will issue a preliminary financial accountability rating to a school district or open-enrollment charter school within 150 days of its [district's] complete financial data being made available to the TEA staff.

(i) The issuance of the preliminary rating will not be delayed if a district or open-enrollment charter school fails to meet the statutory deadline for submitting the annual financial and compliance report.

(2) A district or open-enrollment charter school may submit a written appeal requesting [request] that the TEA review a preliminary rating if the preliminary rating was based on a data error solely attributable to the TEA's review of the data for any of the indicators.

(A) The TEA office responsible for financial audits must receive the appeal [request for review] no later than 30 days after the TEA's release of the preliminary rating, and the appeal [request] must include substantial evidence that supports the district's or open-enrollment charter school's position.

(i) Only appeals that would result in a change of the [district's] preliminary rating will be considered.

(ii) The TEA staff will review information submitted by the district or open-enrollment charter school to validate the statements made to the extent possible. The TEA will examine all relevant data.

(iii) The TEA staff will prepare a recommendation and forward it to an external panel for review. This review panel will provide independent oversight to the appeals process.

(iv) The external review panel will examine the appeal, supporting documentation, staff research, and the staff recommendations. The review panel will determine its recommendation.

(v) The external review panel's recommendation will be forwarded to the commissioner.

(vi) The commissioner will make a final decision in accordance with the timeline specified in subparagraph (E) [F] of this paragraph.

(B) Appeals [Requests for review] received 31 days or more after the TEA issues a preliminary rating will not be considered.

(C) Errors by a district or open-enrollment charter school in recording data or submitting data through the TEA data collection and reporting system do not constitute a valid basis for appealing [requesting a review of] a preliminary rating.

[D] A district that does not meet the 65% instructional expenditure standard (Indicator 13) may publish on their website their check register (excluding their payroll register) and their yearly payroll expenditure and receive full credit (3 points) for this indicator. The district must notify the TEA within the 30-day review process that they have posted their register on the district's website and provide the website address to receive credit for this indicator.

[D] [E] A district that is the fiscal agent for a shared service arrangement (SSA) and has the staff of the SSA on their payroll may appeal Indicators 17 [18] and 18 [20] if they fail these indicators due to the number of staff that are SSA staff. The district must provide the TEA with the number of staff that are employees of the district and the number of staff that are part of the SSA. This adjustment should not be a factor for an open-enrollment charter school that is a fiscal agent since the SSA reporting requirements are different than a school district.

(E) [E] If the TEA receives an appeal of [a request to review] a preliminary rating, a final rating will be issued to the school district or open-enrollment charter school no later than 45 days after the appeal [district's request for review] has been received by the TEA.

(F) [E] If the TEA does not receive an appeal of [a request to review] a preliminary rating, the preliminary rating auto-
matically becomes a final rating on the 31st day after issuance of the preliminary rating.

(G) [¶¶] A final rating issued by the TEA pursuant to this section may not be appealed under the TEC, §7.057, or any other law or rule.


(a) The types of ratings districts may receive are as follows.

(1) Superior Achievement. In accordance with the procedures established in §109.1002 of this title (relating to Financial Accountability Ratings), a district shall be classified as Superior Achievement if it scores within the applicable range established by the commissioner of education for Superior Achievement.

(2) Above Standard Achievement. In accordance with the procedures established in §109.1002 of this title, a district shall be classified as Above Standard Achievement if it scores within the applicable range established by the commissioner of education for Above Standard Achievement.

(3) Standard Achievement. In accordance with the procedures established in §109.1002 of this title, a district shall be classified as Standard Achievement if it scores within the applicable range established by the commissioner of education for Standard Achievement.

(4) Substandard Achievement. In accordance with the procedures established in §109.1002 of this title, a district shall be classified as Substandard Achievement if the district responds negatively to specified indicators or if the district scores within the applicable range established by the commissioner of education for Substandard Achievement. The commissioner of education may apply sanctions to a district that is assigned a Substandard Achievement rating and may require other corrective actions.

(5) Suspended--Data Quality. If serious data quality issues are disclosed by the commissioner of education, a Suspended--Data Quality rating shall be assigned to the school district. The Suspended--Data Quality rating will be assigned until the district successfully resolves the data quality issues. The commissioner of education may apply sanctions to a district that is assigned a Suspended--Data Quality rating and may require other corrective actions.

(b) The types of ratings open-enrollment charter schools may receive are as follows.

(1) Standard Achievement. In accordance with the procedures established in §109.1002 of this title, an open-enrollment charter school shall be classified as Standard Achievement if it scores within the applicable range established by the commissioner of education for Standard Achievement.

(2) Substandard Achievement. In accordance with the procedures established in §109.1002 of this title, an open-enrollment charter school shall be classified as Substandard Achievement if the open-enrollment charter school responds negatively to specified indicators or if the open-enrollment charter school scores within the applicable range established by the commissioner of education for Substandard Achievement. The commissioner of education may apply sanctions to an open-enrollment charter school that is assigned a Substandard Achievement rating and may require other corrective actions.

(3) Suspended--Data Quality. If serious data quality issues are disclosed by the commissioner of education, a Suspended--Data Quality rating shall be assigned to the open-enrollment charter school. The Suspended--Data Quality rating will be assigned until the open-enrollment charter school successfully resolves the data quality issues. The commissioner of education may apply sanctions to an open-enrol-ment charter school that is assigned a Suspended--Data Quality rating and may require other corrective actions.

The criteria for financial accountability ratings will be based upon indicators established by the commissioner of education and reflected in §109.1002 of this title (relating to Financial Accountability Ratings), in accordance with requirements in state law and after consultation with the comptroller of public accounts. The commissioner of education shall evaluate the rating system annually and may modify the system in order to improve the effectiveness of the rating system. Changes to criteria for ratings and their effective dates will be communicated to school districts and open-enrollment charter schools.


(a) Each school district and open-enrollment charter school is required to report financial and accountability ratings to parents and taxpayers by implementing the following reporting procedures.

(1) Each school district and open-enrollment charter school is required to prepare and distribute an annual financial management report in accordance with subsection (b) of this section.

(2) The public must be provided an opportunity to comment on the report at a public hearing in accordance with subsection (c) of this section.

(b) The annual financial management report prepared by the school district and open-enrollment charter school must include:

(1) a description of its [the district's] financial management performance based on a comparison, provided by the Texas Education Agency (TEA), of its [the district's] performance on the indicators established by the commissioner of education and reflected in §109.1002 of this title (relating to Financial Accountability Ratings). The report will contain information that discloses:

(A) state-established standards; and

(B) the district’s or open-enrollment charter school’s financial management performance under each indicator for the current and previous years’ financial accountability ratings;

(2) any descriptive information required by the commissioner of education, including:

(A) a copy of the superintendent’s current employment contract. The school district or open-enrollment charter school may publish the superintendent’s employment contract on the school district’s or open-enrollment charter school’s Internet site in lieu of publication in the annual financial management report;

(B) a summary schedule for the fiscal year (12-month period) of total reimbursements received by the superintendent and each board member, including transactions resulting from use of the school district’s or open-enrollment charter school’s credit card(s) to cover expenses incurred by the superintendent and each board member. The summary schedule shall separately report reimbursements for meals, lodging, transportation, motor fuel, and other items (the summary schedule of total reimbursements is not to include reimbursements for supplies and materials that were purchased for the operation of the school district or open-enrollment charter school);

(C) a summary schedule for the fiscal year of the dollar amount of compensation and/or fees received by the superintendent from another school district or open-enrollment charter school or any other outside entity in exchange for professional consulting and/or other personal services. The schedule shall separately report the amount received from each entity;
(D) a summary schedule for the fiscal year of the total dollar amount by the executive officers and board members of gifts that had an economic value of $250 or more in the aggregate in the fiscal year. This reporting requirement only applies to gifts received by the school district’s or open-enrollment charter school’s (or charter holder’s) executive officers and board members (and their immediate family as described by Government Code, Chapter 573, Subchapter B, as a person related to another person within the first degree by consanguinity or affinity) from an outside entity that received payments from the school district or open-enrollment charter school (or charter holder) in the prior fiscal year, and gifts from competing vendors that were not awarded contracts in the prior fiscal year. This reporting requirement does not apply to reimbursement of travel-related expenses by an outside entity when the purpose of the travel is to investigate or explore matters directly related to the duties of an executive officer or board member, or matters related to attendance at education-related conferences and seminars whose primary purpose is to provide continuing education (this exclusion does not apply to trips for entertainment-related purposes or pleasure trips). This reporting requirement excludes an individual gift or a series of gifts from a single outside entity that had an aggregate economic value of less than $250 per executive officer or board member; and

(E) a summary schedule for the fiscal year of the dollar amount by board member for the aggregate amount of business transactions with the school district or open-enrollment charter school (or charter holder). This reporting requirement is not to duplicate the items disclosed in the summary schedule of reimbursements received by board members; and

(3) any other information the board of trustees of the district or open-enrollment charter school determines to be useful.

(c) The board of trustees of each school district or open-enrollment charter school shall hold a public hearing on the annual financial management report within two months after receipt of a final financial accountability rating (including a final rating of Suspended—Data Quality). The public hearing is to be held at a location in the district’s or open-enrollment charter school’s facilities. The board shall give notice of the hearing to owners of real property in the geographic boundaries of the district or open-enrollment charter school and to parents of district or charter school students. In addition to other notice required by law, notice of the hearing must be provided:

(1) to a newspaper of general circulation in the geographic boundaries of the district or open-enrollment charter school once a week for two weeks prior to holding the public meeting, providing the time and place where the hearing is to be held. The first notice in the newspaper may not be more than 30 days prior to or less than 14 days prior to the public meeting. If there is not a newspaper published in the county in which the district’s or open-enrollment charter school’s central administration office is located, then the notice is to be published in the county nearest the county seat of the county in which the district’s or open-enrollment charter school’s central administration office is located; and

(2) through electronic mail to media serving the district or open-enrollment charter school.

(d) At the hearing, the annual financial management report shall be disseminated to the district’s or open-enrollment charter school’s parents and taxpayers that are in attendance.

(e) The annual financial management report is to be retained in the district or open-enrollment charter school for at least a three-year period after the public hearing and will be made available to parents and taxpayers upon request.

(f) A corrective action plan is to be filed with the TEA by each school district or open-enrollment charter school that received a rating of Substandard Achievement or Suspended—Data Quality. The corrective action plan, which is to be prepared in accordance with instructions from the commissioner of education, is to be filed within one month after the district’s or open-enrollment charter school’s public hearing. The commissioner of education may require certain information in the corrective action plan to address the factor(s) that may have contributed to a district’s or open-enrollment charter school’s rating of Substandard Achievement or Suspended—Data Quality. This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency’s legal authority to adopt.

Filed with the Office of the Secretary of State on March 10, 2010.
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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 475-1497

CHAPTER 153. SCHOOL DISTRICT PERSONNEL
SUBCHAPTER BB. COMMISSIONER’S RULES CONCERNING PROFESSIONAL DEVELOPMENT

19 TAC §153.1011

The Texas Education Agency (TEA) proposes an amendment to §153.1011, concerning the beginning teacher induction and mentoring program. The section establishes provisions for the administration of the mentor program. The proposed amendment would implement the requirements of the Texas Education Code (TEC), §21.458, as amended by Senate Bill (SB) 1290, 81st Texas Legislature, 2009.

The TEC, §21.458, directed the commissioner to adopt rules addressing qualifications of a mentor and uses for mentor program funding. In accordance with the TEC, §21.458, the commissioner exercised rulemaking authority to adopt 19 TAC §153.1011 to be effective May 31, 2007. The rule established definitions and provisions relating to the beginning teacher induction and mentoring program, including program implementation and the qualifications, assignment, and duties of a mentor teacher. In accordance with statute, the rule also established that a classroom teacher who has less than two years of teaching experience may be assigned a mentor teacher.

SB 1290, 81st Texas Legislature, 2009, amended the TEC, §21.458, to authorize school districts to assign a mentor teacher to a teacher assigned to a new subject or grade level. SB 1290 also provided that to the extent practicable a teacher assigned as a mentor must teach in the same school.

The proposed amendment to 19 TAC §153.1011 would incorporate the TEC, §21.458, changes. Subsection (a) would be updated to define a beginning teacher as a classroom teacher who has less than two years of teaching experience in the subject or grade level to which the teacher is assigned. Subsection (d)
would be revised to update language regarding a mentor teacher assignment.

The proposed amendment would have no new procedural and reporting implications. The proposed amendment would have no new locally maintained paperwork requirements.

Jerel Booker, associate commissioner for educator and student policy initiatives, has determined that for the first five-year period the proposed amendment is in effect there will be no additional costs for state or local government as a result of enforcing or administering the amendment.

Mr. Booker 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 rule action will be the positive impact the program will have in increasing the potential for student performance through instruction provided by high-quality teachers. The public would realize a benefit of having increasingly better prepared classroom teachers to teach students. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins March 26, 2010, and ends April 26, 2010. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 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. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the Texas Register on March 26, 2010.

The amendment is proposed under the Texas Education Code, §21.458, which requires the commissioner of education to adopt rules necessary to administer the mentor program, including rules concerning the duties and qualifications of a teacher who serves as a mentor.

The amendment implements the TEC, §21.458.

§153.1011. Beginning Teacher Induction and Mentoring Program.

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

(1) Agency--Texas Education Agency.

(2) Beginning teacher--A classroom teacher who has less than two years of teaching experience in the subject or grade level to which the teacher is assigned.

(3) Beginning Teacher Induction and Mentoring Program--An annual grant program established in accordance with the Texas Education Code (TEC), §21.458, under which a school district may receive funds to establish a mentoring program at each eligible campus where a mentor teacher is assigned to each classroom teacher who has less than two years of teaching experience.

(4) Classroom teacher--An educator who is employed by a school district and who, not less than an average of four hours each day, teaches in an academic instructional setting or a career and technology instructional setting. The term does not include a teacher’s aide or a full-time administrator.

(A) For a school district, a classroom teacher, as defined in this subsection, must hold an appropriate certificate issued by the State Board for Educator Certification and must meet the specifications regarding instructional duties defined in this paragraph.

(B) For a charter school, a classroom teacher is not required to be certified but must meet the qualifications of the employing charter school and the specifications regarding instructional duties defined in this paragraph.

(5) Commissioner--Commissioner of education.

(6) Mentor teacher--A classroom teacher in Texas who provides effective support to help beginning teachers successfully transition into the teaching assignment.

(7) School district--For the purposes of this section, the definition of school district includes open-enrollment charter school.

(8) School district board of trustees--For the purposes of this section, the definition of a school district board of trustees includes a charter holder board.

(b) Program implementation. A beginning teacher induction and mentoring program must be a research-based mentoring program that, through external evaluation, has demonstrated success in improving new teacher quality and teacher retention. Programs must be approved by the commissioner in a process to be determined by the Agency. Such a program must provide orientation and mentoring specifically tailored for beginning teachers that includes the following:

(1) a process for the recruitment of mentor teachers;

(2) a structured mentoring component based upon research in:

(A) teacher induction;

(B) beginning teacher development; and

(C) quality professional development;

(3) regular teacher observations and standards-based assessments;

(4) continuous support and ongoing professional development tailored to the needs of beginning teachers that includes:

(A) collecting and analyzing student performance data;

(B) classroom management; and

(C) pertinent topics related to pedagogy and student achievement;

(5) continuous support and ongoing professional development tailored to the needs of mentor teachers that includes topics listed in paragraph (4) of this subsection and scheduled release time in order for a mentor teacher to fulfill mentoring duties as described in this section; and

(6) training for administrators on implementing and supporting an induction and mentoring program.

(c) Qualifications of a mentor teacher. To serve as a mentor teacher, a teacher must:

(1) have a minimum of three years of teaching experience with a superior record of assisting students in achieving improvement in student performance;
(2) complete a research-based mentor and induction training program approved by the commissioner; and

(3) complete a mentor training program provided by the district.

(d) Assignment of a mentor teacher. Each school district may assign a mentor teacher to a beginning teacher.

(1) In order for a teacher to be assigned as a mentor teacher, in accordance with the TEC, §21.458, the teacher must:

   (A) to the extent practicable, teach in the same school [as the beginning teacher]; (and)

   (B) to the extent practicable, teach the same subject or grade level, as applicable; and

   (C) [¶] meet the qualifications specified in subsection (c) of this section.

(2) The organization may elect to use funds to employ retired teachers or other instructional personnel who meet the definition and qualifications of a mentor teacher described in this section.

[¶] To the extent practicable, a school district will assign a mentor teacher to a beginning teacher who teaches or has taught the same subject or grade level. A local school district board of trustees’ decision determining whether such an assignment is practicable is final and may not be appealed to the commissioner.

(e) Duties of a mentor teacher. A mentor teacher must:

(1) participate in beginning teacher orientation;

(2) meet weekly with the beginning teacher;

(3) maintain documentation of mentor/beginning teacher activities;

(4) attend regularly scheduled campus mentor support meetings and trainings;

(5) provide support to new teachers in collecting and analyzing student data, classroom management, curriculum planning, and other activities related to pedagogy and improved student achievement;

(6) conduct observations and assessments of the beginning teacher; and

(7) complete all requirements of the school district’s beginning teacher induction and mentoring program.

(f) Allocation and use of funds. In accordance with the TEC, §21.458, funds may only be used for the following:

(1) mentor teacher stipends;

(2) release time for mentor teachers and beginning teachers to meet regularly for conferencing, observations, networking sessions, shared professional development, and other mentoring activities; and

(3) mentoring support through providers of mentor training.

(g) Audit of funds. The Agency may audit, disallow, and recover grant funds. A decision to award, audit, disallow, or recover funds by the commissioner or commissioner’s designee is final.

(h) Program review. School districts awarded grant funds must agree to submit all information requested by the Agency through periodic activity/progress reports. Reports will be due no later than 30 days after the close of the reporting period and must contain all requested information in the format prescribed by the commissioner. A final evaluation report must include:

(1) the total number of beginning teachers and mentor teachers who actually participated in the beginning teacher induction and mentoring program;

(2) the use of funds and activities conducted; and

(3) any other pertinent information deemed appropriate by the commissioner.

This 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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For further information, please call: (512) 475-1497

TITLE 22. EXAMINING BOARDS

PART 3. TEXAS BOARD OF CHIROPRACTIC EXAMINERS

CHAPTER 75. RULES OF PRACTICE

22 TAC §75.23

The Texas Board of Chiropractic Examiners (Board) proposes a new rule, §75.23, concerning spinal screenings. The proposed new rule sets forth the minimal standards for conducting out-of-facility spinal screenings, such as at a health fair or other community event. In drafting this rule, the Board consulted the rules of the Department of State Health Services, codified at 25 Texas Administrative Code (TAC) Chapter 37, in addition to other sources. The proposed new rule provides standards for the training required of persons conducting out-of-facility spinal screenings and for the information that must be provided to the public at such screenings. School spinal screenings would still need to be conducted in compliance with the rules and guidelines of the Texas Department of State Health Services.

Mr. Glenn Parker, Executive Director of the Texas Board of Chiropractic Examiners, has determined that, for each year of the first five years that this rule will be in effect, there will be no additional cost to state or local governments.

Mr. Parker has also determined that, for each year of the first five years that this rule will be in effect, the public benefit of this rule will be clearer standards for conducting out-of-facility spinal screenings. Mr. Parker has also determined that there will be no adverse economic effect to individuals and small or micro businesses during the first five years that this rule will be in effect, other than for the minimal costs of preparing signs or placards and keeping records.

Comments on the proposal and any request for a public hearing may be submitted to Glenn Parker, Executive Director, Texas Board of Chiropractic Examiners, 333 Guadalupe St, Tower III, Suite 825, Austin, TX 78701, fax: (512) 305-6705 fax, no later than 30 days from the date that this rule is published in the Texas Register.
This new rule is proposed under Texas Occupations Code §201.152, relating to rules, and §201.1525, relating to rules clarifying scope of chiropractic. Section 201.152 authorizes the Board to adopt rules necessary to regulate the practice of chiropractic. Section 201.1525 authorizes the Board to adopt rules requiring a licensee to obtain additional training or certification to perform certain procedures or use certain equipment.

No other statutes, articles, or codes are affected by this proposed new rule.

§75.23. **Spinal Screenings.**

(a) The purpose of this section is to set forth the minimal standards for conducting out-of-facility spinal screenings. A licensee may offer a spinal screening outside of a registered facility only if they are in compliance with this section.

(b) At all out-of-facility spinal screenings, the following items must be prominently displayed:

1. proof of licensure of the sponsoring licensee, such as a copy of their chiropractic license or the Board-issued wallet-size license;
2. a copy of the current facility registration certificate for the facility at which the sponsoring licensee practices;
3. a copy of the spinal screener certificate from the Texas Department of State Health Services for any person performing spinal screenings that is not licensed or that is not a student at an accredited chiropractic college as described in subsection (d) of this section; and
4. a placard that complies with the following requirements:
   A. the placard must be placed in a location that can be readily viewed by the public;
   B. the placard must be legible from a distance of at least three feet; and
   C. the placard must include the following language:
      "This spinal screening is being offered free of charge and free of any commitment. The screening process does not diagnose a spinal deformity or condition. You are free to seek an opinion from the health care provider of your choice for a more thorough examination and treatment. Any complaints regarding the conduct at this spinal screening may be directed to the Texas Board of Chiropractic Examiners, www.tbec.state.tx.us, (512) 305-6707."
5. A licensee sponsoring a spinal screening is responsible for ensuring compliance with §77.2 of this title (relating to Publicity).
6. A licensee may allow or direct a student from an accredited chiropractic college who has credit for at least six trimesters of chiropractic education to conduct a spinal screening.
7. A licensee may allow or direct any other person with a spinal screening certificate from Texas Department of State Health Services to conduct a spinal screening. When a licensee or a student that meets the requirements of subsection (d) of this section is present, they may allow or direct another person to assist with a spinal screening.
8. A licensee shall create and maintain, for at least 12 months following the event, a log for each screening event that contains, at a minimum, the following information:
   1. date and location of the event;
   2. name and license number of the sponsoring licensee;
   3. name and registration number of the chiropractic facility of the sponsoring licensee;
   4. names of all persons performing spinal screenings; and
   5. the names of each person screened at the event.

(g) Any persons representing a licensee at an out-of-facility spinal screening must be qualified and properly trained as provided in §80.1 of this title (relating to Delegation of Authority).

(h) School spinal screening must be conducted in compliance with rules and guidelines of the Texas Department of State Health Services.

(i) The provisions for out-of-facility spinal screenings in this section supersede the requirements of §80.7 of this title (relating to Out-of-Facility Practice).

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

Filed with the Office of the Secretary of State on March 15, 2010. TRD-201001321

Glenn Parker
Executive Director
Texas Board of Chiropractic Examiners

Earliest possible date of adoption: April 25, 2010

For further information, please call: (512) 305-6716

PART 14. **TEXAS OPTOMETRY BOARD**

CHAPTER 271. **EXAMINATIONS**

22 TAC §271.7

The Texas Optometry Board (Board) proposes new §271.7 concerning requests for criminal history evaluation letters authorized by House Bill 963, 81st Legislature, Regular Session. The rule will allow persons who are considering entering optometry school to request a letter from the Board concerning the possible effect of the person's criminal history on the person's ability to obtain a license after graduation.

Chris Kloeris, executive director of the Texas Optometry Board, has determined that for the first five-year period the new rule is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rule proposal. The fee set in proposed amendments to §273.4 for the criminal history evaluation letter request is discussed with the fiscal implications for state government in the preamble to that section published in this issue of the Texas Register.

Chris Kloeris also has determined that for each of the first five years the new rule is in effect, the public benefit anticipated as a result of enforcing the amendments will be that persons who are considering entering school to complete the extensive education required for license will have a mechanism before entering or completing school to determine whether a bar exists to obtaining a license. The rule proposal allows the agency to implement House Bill 963, 81st Legislature, Regular Session.

Economic Impact Statement and Regulatory Flexibility Analysis

The Board licenses approximately 3,700 optometrists and therapeutic optometrists. The Board does not license or regulate persons entering or enrolled in optometry school. The economic costs for persons who are required to comply with the new rule will be the costs of obtaining official documents of court records.
to include with the request for the criminal history evaluation letter. This fee may range from $16.00 to $100.00 depending on the number of documents. Persons requesting the letter are also required to order a criminal history report from the Department of Public Safety and the FBI. The fee for these reports is $44.20. These costs are imposed on individuals and therefore no disparate effect is foreseen on small or micro-businesses. The costs are only required of persons requesting a criminal history evaluation letter, which will require the Board to obtain information and conduct an investigation before issuing the letter. Comments are solicited if a disparate cost of compliance can be established. The fee set in proposed amendments to §273.4 for the criminal history evaluation letter request is discussed in the preamble to that section published in this issue of the Texas Register.

Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is thirty days after publication in the Texas Register.

The new rule is proposed under the Texas Optometry Act, Texas Occupations Code, §351.151 and §351.152, and House Bill 963, 81st Legislature, Regular Session. No other sections are affected by the new rule.

The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession and §351.152 as granting the Board the authority to establish by rule reasonable and necessary fees to cover the costs of administering the act. House Bill 963 authorizes persons to request criminal history evaluation letters from the Board.

§271.7. Criminal History Evaluation Letters.

(a) Authority. A person may request the Board to issue a criminal history evaluation letter regarding the person’s eligibility for a license as authorized by Chapter 53 of the Texas Occupations Code.

(b) Eligibility. Only a person planning to enroll or who is enrolled in optometry school and who has reason to believe that the person is ineligible for licensure due to a conviction or deferred adjudication for a felony or misdemeanor offense may request the criminal history evaluation letter.

(c) Request. The request must include:

(1) A completed Board request form available from the Board;

(2) A statement by the person of the basis for the person’s potential ineligibility;

(3) The required fee set out in §273.4 of this title (relating to Fees (Not Refundable));

(4) Official copies of all court documentation regarding a conviction or deferred adjudication which the person believes may make that person ineligible for license; and

(5) Proof that the person has requested the Federal Bureau of Investigation and the Texas Department of Public Safety to provide a criminal history report to the Board based on fingerprints submitted by the person.

(d) Investigation. The Board has the same powers to investigate a request submitted under this section and the person’s eligibility that the Board has to investigate a person applying for a license. The Board may request additional information from the person in order to complete the investigation. The person must timely respond to requests from the Board.

(e) Issuance of Letter. The Board will issue a letter stating that a ground for ineligibility does not exist or a letter setting out each basis for potential ineligibility and the Board’s determination as to eligibility, within 90 days of the receipt of the items listed in subsection (c) of this section, and receipt of the criminal history report on the person from the Federal Bureau of Investigation and the Texas Department of Public Safety. The 90 day period may be extended if the person has not timely provided information requested by the Board.

(f) Limitation of Board’s Determination. In the absence of new evidence known to but not disclosed by the person or not reasonably available to the Board at the time the letter is issued, the Board’s ruling on the request determines the person’s eligibility with respect to the grounds for potential ineligibility set out in the letter. The letter is limited to the law in effect on the date the letter is issued.

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

Filed with the Office of the Secretary of State on March 9, 2010.

TRD-201001185

Chris Kloeris
Executive Director
Texas Optometry Board

Earliest possible date of adoption: April 25, 2010

For further information, please call: (512) 305-8502

CHAPTER 273. GENERAL RULES

22 TAC §273.4

The Texas Optometry Board proposes an amendment to §273.4 concerning fees. The amendment sets a fee for the request of a criminal history evaluation letter as authorized by House Bill 963, 81st Legislature, Regular Session.

Chris Kloeris, executive director of the Texas Optometry Board, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for local government as a result of enforcing or administering the amendment. For state government, there will be increased revenue of $1,875 for the first year of the biennium and $1,250 each year thereafter.

Chris Kloeris also has determined that for each of the first five years the amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be that persons who are considering entering school to complete the extensive education required for license will have a mechanism before entering or completing school to determine whether a bar exists to obtaining a license. The amendment allows the agency to implement House Bill 963, 81st Legislature, Regular Session.

Economic Impact Statement and Regulatory Flexibility Analysis

The Board licenses approximately 3,700 optometrists and therapeutic optometrists. The Board does not license or regulate persons entering or enrolled in optometry school. The economic costs for persons who are required to comply with the amendment will be a $125.00 fee. The fee is imposed on individuals and therefore no disparate effect is foreseen on small or micro-businesses. The fee is only required of persons requesting a criminal
history evaluation letter, which will require the Board to obtain information and conduct an investigation before issuing the letter. Comments are solicited if a disparate cost of compliance can be established. Additional expenses for persons requesting the letters are discussed in the preamble to new §271.7 published in this issue of the Texas Register.

Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is thirty days after publication in the Texas Register.

The amendment is proposed under the Texas Optometry Act, Texas Occupations Code, §351.151 and §351.152, and House Bill 963, 81st Legislature, Regular Session. No other sections are affected by the amendment.

The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession and §351.152 as granting the Board the authority to establish by rule reasonable and necessary fees to cover the costs of administering the act. House Bill 963 authorizes the Board to set a fee for the criminal history evaluation letters.

§273.4. Fees (Not Refundable).

(a) - (p) (No change.)

(q) Request for Criminal History Evaluation Letters $125.00.

This 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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Chris Kloeris
Executive Director
Texas Optometry Board

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For further information, please call: (512) 305-8502

PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 281. ADMINISTRATIVE PRACTICE AND PROCEDURES

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §281.9

The Texas State Board of Pharmacy proposes amendments to §281.9 concerning Grounds for Discipline for a Pharmacy Technician or a Pharmacy Technician Trainee. The proposed amendments, if adopted, implement S.B. 1853 as passed by the 81st Texas Legislature. S.B. 1853 amended the Texas Pharmacy Act to specify that the Board may discipline a pharmacy technician if the technician has: (a) performed a duty only a pharmacist may perform; (b) used alcohol or drugs in an "intemperate" manner; (c) engaged in negligent, unreasonable, or inappropriate conduct when working in a pharmacy; (d) violated a disciplinary order; (e) been convicted of a criminal offense that requires registration as a sex offender; or (f) been disciplined by pharmacy or other health regulatory board; specify that a disciplinary action affecting the registration of a pharmacy technician trainee remains in effect if the trainee obtains registration as a pharmacy technician; and give the Board the authority on probable cause, to order a pharmacy technician to submit to a mental or physical evaluation.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure that the agency is able to consistently and effectively enforce the Texas Pharmacy Act regarding disciplinary actions against pharmacy technicians and pharmacy technician trainees. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., April 30, 2010.

The amendments are proposed under §§551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§281.9. Grounds for Discipline for a Pharmacy Technician or a Pharmacy Technician Trainee.

(a) Pharmacy technicians and pharmacy technician trainees shall be subject to all disciplinary grounds set forth in §568.003 of the Act.

(b) For the purposes of the Act, §568.003(a)(10), "negligent, unreasonable, or inappropriate conduct" shall include, but not be limited to:

(1) delivering or offering to deliver a prescription drug or device in violation of this Act, the Controlled Substances Act, the Dangerous Drug Act, or rules promulgated pursuant to these Acts;

(2) acquiring or possessing or attempting to acquire or possess prescription drugs in violation of this Act, the Controlled Substances Act, or Dangerous Drug Act or rules adopted pursuant to these Acts;

(3) failing to perform the duties of a pharmacy technician or pharmacy technician trainee in an acceptable manner consistent with the public health and welfare, which contributes to a prescription not being dispensed or delivered accurately;

(4) obstructing a board employee in the lawful performance of his duties of enforcing the Act;

(5) violating the provisions of an agreed board order or board order;

(6) physically abusing a board employee during the performance of such employees lawful duties; or
(7) failure to repay a guaranteed student loan, as provided in the Texas Education Code, §57.491.

(c) [Reserved] For the purposes of the Act, §568.003(a)(2), the term "gross immorality" shall include, but not be limited to:

(1) conduct which is willful, flagrant, and shameless, and which shows a moral indifference to standards of the community;
(2) engaging in an act which is a felony;
(3) engaging in an act that constitutes sexually deviant behavior; or
(4) being required to register with the Department of Public Safety as a sex offender under Chapter 62, Code of Criminal Procedure.

(d) [Reserved] For the purposes of the Act, §568.003(a)(3), the terms "fraud," "deceit," or "misrepresentation" shall apply to an individual seeking a registration as a pharmacy technician, as well as making an application to any entity that certifies or registers pharmacy technicians, and shall be defined as follows:

(1) "Fraud" means an intentional perversion of truth for the purpose of inducing the board in reliance upon it to issue a registration; a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives or is intended to deceive the board.
(2) "Deceit" means the assertion, as a fact, of that which is not true by any means whatsoever to deceive or defraud the board.
(3) "Misrepresentation" means a manifestation by words or other conduct which is a false representation of a matter of fact.

The board may take disciplinary action if a pharmacy technician or pharmacy technician trainee violates the provisions of an agreed board order or board order.

This 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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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

SUBCHAPTER C. DISCIPLINARY GUIDELINES

22 TAC §281.64

The Texas State Board of Pharmacy proposes amendments to §281.64 concerning Sanctions for Criminal Offenses. The proposed amendments, if adopted, provide clarification for offenses involving impairment and reference the Texas Pharmacy Act citations.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enacting or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enacting the rule will ensure that individuals with criminal offenses involving impairment are properly disciplined. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., April 30, 2010.

The amendments are proposed under §§551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §§551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§281.64. Sanctions for Criminal Offenses.
(a) - (b) (No change.)
(c) The board has determined that the nature and seriousness of certain crimes outweigh other factors to be considered in §281.63(g) of this title (relating to Considerations for Criminal Offenses) and necessitate the disciplinary action listed below. The following sanctions apply to individuals with the criminal offenses as described below:

(1) - (2) (No change.)
(3) Misdemeanor offenses:
(A) Drug-related offenses, such as those listed in Chapter 481 or 483, Health and Safety Code:
(i) Offenses involving manufacture, delivery, or possession with intent to deliver, fraud, or theft of drugs:
(II) Currently on probation--denial or revocation;
(II) 0-10 years since date of disposition--5 years probation;
(III) Over 10 years since date of disposition--3 years probation;
(ii) Offenses involving possession of drugs:
(II) Pharmacists:
(1) 0-5 years since date of disposition--[evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and] 5 years probation;
(III) 6-10 years since date of disposition--[evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and] 3 years probation;
(II) Pharmacy Technicians and Pharmacy Technician Trainees:
(1) 0-5 years since date of disposition and offense determined to be in violation of §568.003(a)(5) or (9) of the Act [determined to have a drug or alcohol dependency]-3 years probation;
(1) 0-5 years since date of disposition and determined not [not determined] to have a drug or alcohol dependency-1 year probation;
(-c-) 6-10 years since date of disposition and offense determined to be in violation of §568.003(a)(5) or (9) of the Act determined to have a drug or alcohol dependency]-3 years probation;

(B) Intoxication and alcoholic beverage offenses as defined in the Texas Penal Code, if two such offenses occurred in the previous ten years:

(i) Pharmacists:

(I) 0-5 years since date of disposition and offense determined to be in violation of §565.001(a)(4) or (7) of the Act—[evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and] 5 years probation;

(II) 6-10 years since date of disposition and offense determined to be in violation of §565.001(a)(4) or (7) of the Act—[evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and] 3 years probation;

(ii) Pharmacy Technicians and Pharmacy Technician Trainees: 0-5 years since date of disposition and offense determined to be in violation of §568.003(a)(5) or (9) of the Act determined to have a drug or alcohol dependency]-5 years probation;

(C) Other misdemeanor offenses involving moral turpitude: 0-5 years since date of disposition—reprimand.

(d) (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.

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Texas State Board of Pharmacy
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CHAPTER 291. PHARMACIES
SUBCHAPTER A. ALL CLASSES OF PHARMACIES
22 TAC §291.7, §291.29

The Texas State Board of Pharmacy proposes new §291.7, concerning Prescription Drug Recalls by the Manufacturer, and new §291.29, concerning Professional Responsibility of Pharmacists. New rule §291.7, if adopted, provides the requirements for pharmacies to follow in the event of a prescription drug recall by the manufacturer. New rule §291.29, if adopted, clarifies the requirements for a pharmacist’s corresponding responsibility in verifying the validity of prescriptions issued via the internet or without a valid patient-practitioner relationship.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Dodson has determined that, for each year of the first five-year period the rules will be in effect, the public benefit anticipated as a result of enforcing the rules will ensure that proper procedures are followed by pharmacies in the event of a prescription drug recall by the manufacturer and that pharmacists have a corresponding responsibility in verifying the validity of prescriptions issued via the internet or without a valid patient-practitioner relationship. With regard to new rule §291.7, it is difficult to determine if there would be any fiscal impact to individuals, small or large business due to unknown factors such as extent of the recall, number of patient’s effected, and method by which pharmacy contacts the patients. With regard to new rule §291.29, there is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed new rules may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., April 30, 2010.

The new rules are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the new rules: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.7. Prescription Drug Recalls by the Manufacturer.

(a) The pharmacist-in-charge shall develop and implement a written procedure for proper management of drug recalls by the manufacturer. Such procedures shall include, where appropriate, contacting patients to whom the recalled drug products have been dispensed.

(b) The written procedure shall include, but not be limited to, the following:

(1) the pharmacist-in-charge shall reasonably ensure that a recalled drug has been removed from inventory no more than 24 hours after receipt of the recall notice, and quarantined until proper disposal or destruction of the drug; and

(2) if the drug that is the subject to a recall is maintained by the pharmacy in a container without a lot number, the pharmacist-in-charge shall consider this drug included in the recall.

§291.29. Professional Responsibility of Pharmacists.

(a) Pharmacist shall exercise sound professional judgment with respect to the accuracy and authenticity of any prescription drug order dispensed. If the pharmacist questions the accuracy or authenticity of a prescription drug order, the pharmacist shall verify the order with the practitioner prior to dispensing.

(b) A pharmacist shall make every reasonable effort to ensure that any prescription drug order, regardless of the means of transmission, has been issued for a legitimate medical purpose by a practitioner in the course of medical practice. A pharmacist shall not dispense a prescription drug if the pharmacist knows or should have known that the order for such drug was issued without a valid pre-existing patient-practitioner relationship as defined by the Texas Medical Board in 22 Texas Administrative Code (TAC) §174.4 (relating to Use of the Internet in Medical Practice) and §190.8 (relating to Violation Guidelines).

(1) A prescription drug order may not be dispensed or delivered by means of the Internet unless pursuant to a valid prescription
that was issued for a legitimate medical purpose in the course of medical practice by a practitioner, or practitioner covering for another practitioner, who has conducted at least one in-person medical evaluation of the patient.

(2) A prescription drug order may not be dispensed or delivered if the pharmacist has reason to suspect that the prescription drug order may have been authorized in the absence of a valid patient-practitioner relationship, or otherwise in violation of the practitioner’s standard of practice.

(c) If a pharmacist has reasons to suspect that a prescription was authorized solely based on the results of a questionnaire and/or in the absence of a documented patient evaluation including a physical examination, the pharmacist shall ascertain if that practitioner’s standard of practice allows that practitioner to authorize a prescription under such circumstances. Reasons to suspect that a prescription may have been authorized in the absence of a valid patient-practitioner relationship, or in violation of the practitioner’s standard of practice, include:

1. the number of prescriptions authorized on a daily basis by the practitioner;
2. the manner in which the prescriptions are authorized by the practitioner or received by the pharmacy;
3. the geographical distance between the practitioner and the patient;
4. knowledge by the pharmacist that the prescription was issued solely based on answers to a questionnaire; or
5. knowledge by the pharmacist that the pharmacy he/she works for directly or indirectly participates in or is otherwise associated with an Internet site that markets prescription drugs to the public without requiring the patient to provide a valid prescription order from the patient’s practitioner.

(d) A pharmacist shall ensure that prescription drug orders for the treatment of chronic pain have been issued in accordance with the guidelines set forth by the Texas Medical Board in 22 TAC §174.4 (relating to Use of the Internet in Medical Practice), prior to dispensing or delivering such prescriptions.

This 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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Gay Dodson, R.Ph.
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Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)
22 TAC §291.32, §291.33

The Texas State Board of Pharmacy proposes amendments to §291.32, concerning Personnel, and §291.33, concerning Operational Standards. The proposed amendments to §291.32, if adopted, provide requirements for pharmacists providing cognitive services and electronic verification of prescriptions from remote sites. The proposed amendments to §291.33, if adopted, implement provisions of H.B. 19 passed during the 81st Regular Session of the Texas Legislature requiring pharmacists to place the statement "Do not flush unused medications or pour down a sink or drain" on the prescription label and clarify the requirements for pharmacists performing drug regimen reviews from remote locations.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Dodson has determined that, for each year of the first five-year period the rules will be in effect, the public benefit anticipated as a result of enforcing the rules will ensure that consumers receive appropriate information with their prescriptions on handling the safe disposal of the medications and ensure that pharmacists providing cognitive services and electronic verification from remote sites are appropriately licensed. Pharmacies may have a programming cost to modify the pharmacy’s computer system to provide the information regarding the disposal of prescription medications. The Board is unable to determine that cost and the fiscal impact to individuals, small or large businesses, or to other entities which are required to comply with these sections because of the multitude of pharmacy software programs used by pharmacies.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., April 30, 2010.

The amendments are proposed under §§551.002 and 554.051, of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §§551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §§554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §§562.006 and §562.0061 as authorizing the agency to adopt rules regarding the prescription label and written information provided to consumers.

The statutes affected by the amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.32. Personnel.

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

(c) Pharmacists.

(1) General.

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

(C) Pharmacists are solely responsible for the direct supervision of pharmacy technicians and pharmacy technician trainees and for designating and delegating duties, other than those listed in paragraph (2) of this subsection, to pharmacy technicians and pharmacy technician trainees. Each pharmacist shall be responsible for any delegated act performed by pharmacy technicians and pharmacy technician trainees under his or her supervision.

(D) Pharmacists are solely responsible for the direct supervision of pharmacy technicians and pharmacy technician trainees and for designating and delegating duties, other than those listed in paragraph (2) of this subsection, to pharmacy technicians and pharmacy technician trainees. Each pharmacist.

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(iii) shall verify the accuracy of all acts, tasks, and functions performed by pharmacy technicians and pharmacy technician trainees; and

(iii) shall be responsible for any delegated act performed by pharmacy technicians and pharmacy technician trainees under his or her supervision.

(D) Pharmacists shall directly supervise pharmacy technicians and pharmacy technician trainees who are entering prescription data into the pharmacy’s data processing system by one of the following methods.

(i) Physically present supervision. A pharmacist shall be physically present to directly supervise a pharmacy technician or pharmacy technician trainee who is entering prescription data into the data processing system. Each prescription entered into the data processing system shall be verified at the time of data entry. If the pharmacist is not physically present due to a temporary absence as specified in §291.33(b)(4) of this title (relating to Operational Standards), on return the pharmacist must:

(1) conduct a drug regimen review for the prescriptions data entered during this time period as specified in §291.33(c)(2) of this title; and

(II) verify that prescription data entered during this time period was entered accurately.

(ii) Electronic supervision. A pharmacist may electronically supervise a pharmacy technician or pharmacy technician trainee who is entering prescription data into the data processing system provided the pharmacist:

(II) is on-site, in the pharmacy where the technician/trainee is located;

(II) has immediate access to any original document containing prescription information or other information related to the dispensing of the prescription. Such access may be through imaging technology provided the pharmacist has the ability to review the original, hardcopy documents if needed for clarification; and

(III) verifies the accuracy of the data entered prior to the release of the information to the system for storage and/or generation of the prescription label.

(iii) Electronic verification of data entry by pharmacy technicians or pharmacy technician trainees. A pharmacist may electronically verify the data entry of prescription information into the data processing system provided:

(I) a pharmacist is onsite in the pharmacy where the pharmacy technicians/trainees are located;

(II) the pharmacist electronically conducting the verification is a Texas licensed pharmacist;

(III) the pharmacy establishes controls to protect the privacy and security of confidential records; and

(IV) the pharmacy keeps permanent records of prescriptions electronically verified for a period of two years.

(A) Except as provided in subparagraph (B) of this paragraph, the ratio of on-site pharmacists to pharmacy technicians and pharmacy technician trainees may be 1:3. provided the pharmacist is on-site and at least one of the three is a pharmacy technician. The ratio of pharmacists to pharmacy technician trainees may not exceed 1:2.

(B) As specified in §568.006 of the Act, a Class A pharmacy may have a ratio of on-site pharmacists to pharmacy technicians/trainee of 1:5 provided:

(i) the Class A pharmacy: (I) dispenses no more than 20 different prescription drugs; and

(ii) the following conditions are met:

(I) at least four are pharmacy technicians and not pharmacy technician trainees; and

(II) the pharmacy has written policies and procedures regarding the supervision of pharmacy technicians and pharmacy technician trainees, including requirements that the pharmacy technicians and pharmacy technician trainees included in a 1:5 ratio may be involved only in one process at a time. For example, a technician/trainee who is compounding non-sterile preparations or who is involved in the preparation of prescription drug orders may not also call physicians for authorization of refills.

(e) (No change.)

§291.33. Operational Standards.

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

(c) Prescription dispensing and delivery.

(1) Patient counseling and provision of drug information.

(A) (No change.)

(B) Such communication:

(i) shall be provided with each new prescription drug order;

(ii) shall be provided for any prescription drug order dispensed by the pharmacy on the request of the patient or patient’s agent;

(iii) shall be communicated orally in person unless the patient or patient’s agent is not at the pharmacy or a specific communication barrier prohibits such oral communication;

(iv) effective, June 1, 2010, shall be documented by recording the initials or identification code of the pharmacist providing the counseling in the prescription dispensing record on either the original hard-copy prescription, in the pharmacy’s data processing system or in an electronic logbook; and

(v) shall be reinforced with written information relevant to the prescription and provided to the patient or patient’s agent. The following is applicable concerning this written information.

(I) Written information must be in plain language designed for the consumer and printed in an easily readable font size comparable to but no smaller than ten-point Times Roman.

(II) When a compounded product is dispensed, information shall be provided for the major active ingredient(s), if available.
(III) For new drug entities, if no written information is initially available, the pharmacist is not required to provide information until such information is available, provided:

(a) the pharmacist informs the patient or the patient’s agent that the product is a new drug entity and written information is not available;

(b) the pharmacist documents the fact that no written information was provided; and

(c) if the prescription is refilled after written information is available, such information is provided to the patient or patient’s agent.

(IV) Effective January 1, 2011, the written information accompanying the prescription or the prescription label shall contain the statement "Do not flush unused medications or pour down a sink or drain." A drug product on a list developed by the Federal Food and Drug Administration of medicines recommended for disposal by flushing is not required to bear this statement.

(C) - (I) (No change.)

(2) Pharmaceutical care services.

(A) Drug regimen review.

(i) - (ii) (No change.)

(iii) The drug regimen review may be conducted by remotely accessing the pharmacy’s electronic data base from outside the pharmacy by:

(I) an individual Texas licensed pharmacist employee of the pharmacy provided the pharmacy establishes controls to protect the privacy of the patient and the security of confidential records; or

(II) a pharmacist employed by a Class E pharmacy provided the pharmacies have entered into a written contract or agreement which outlines the services to be provided and the responsibilities and accountabilities of each pharmacy in compliance with federal and state laws and regulations.

(iii) The drug regimen review may be conducted by remotely accessing the pharmacy’s electronic data base from outside the pharmacy by an individual Texas licensed pharmacist employee of the pharmacy or a pharmacist employed by a Class E pharmacy provided the pharmacy establishes controls to protect the privacy of the patient and the security of confidential records.

(iv) Any questions regarding a prescription drug order must be resolved with the prescriber and written documentation of these discussions made and maintained.

(B) (No change.)

(3) - (6) (No change.)

(7) Labeling.

(A) At the time of delivery of the drug, the dispensing container shall bear a label in plain language and printed in an easily readable font size, unless otherwise specified, with at least the following information:

(i) name, address and phone number of the pharmacy;

(ii) unique identification number of the prescription that is printed in an easily readable font size comparable to but no smaller than ten-point Times Roman;

(iii) date the prescription is dispensed;

(iv) initials or an identification code of the dispensing pharmacist;

(v) name of the prescribing practitioner;

(vi) name of the patient or if such drug was prescribed for an animal, the species of the animal and the name of the owner that is printed in an easily readable font size comparable to but no smaller than ten-point Times Roman;

(vii) instructions for use that is printed in an easily readable font size comparable to but no smaller than ten-point Times Roman;

(viii) quantity dispensed;

(ix) appropriate ancillary instructions such as storage instructions or cautionary statements such as warnings of potential harmful effects of combining the drug product with any product containing alcohol;

(x) if the prescription is for a Schedules II - IV controlled substance, the statement "Caution: Federal law prohibits the transfer of this drug to any person other than the patient for whom it was prescribed";

(xi) if the pharmacist has selected a generically equivalent drug pursuant to the provisions of the Acts, Chapters 562 and 563, the statement "Substituted for Brand Prescribed" or "Substituted for 'Brand Name'" where "Brand Name" is the actual name of the brand name product prescribed;

(xii) the name of the advanced practice nurse or physician assistant, if the prescription is carried out or signed by an advanced practice nurse or physician assistant in compliance with Subtitle B, Chapter 157, Occupations Code;

(xiii) the name of the pharmacist who signed the prescription for a dangerous drug under delegated authority of a physician as specified in Subtitle B, Chapter 157, Occupations Code;

(xiv) the name and strength of the actual drug product dispensed that is printed in an easily readable font size comparable to but no smaller than ten-point Times Roman, unless otherwise directed by the prescribing practitioner; [and]

(I) The name shall be either:

(a) the brand name; or

(b) if no brand name, then the generic name and name of the manufacturer or distributor of such generic drug. (The name of the manufacturer or distributor may be reduced to an abbreviation or initials, provided the abbreviation or initials are sufficient to identify the manufacturer or distributor. For combination drug products or non-sterile compounded drug products having no brand name, the principal active ingredients shall be indicated on the label.)

(II) Except as provided in clause (xi) of this subparagraph, the brand name of the prescribed drug shall not appear on the prescription container label unless it is the drug product actually dispensed.

(xv) effective June 1, 2010, if the drug is dispensed in a container other than the manufacturer’s original container, the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacturer, the beyond-use-date shall be one year from the date the drug is dispensed or the manufacturer’s expiration date, whichever is earlier. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication; and [.
(xvi) effective January 1, 2011, either on the prescription label or the written information accompanying the prescription, the statement "Do not flush unused medications or pour down a sink or drain." A drug product on a list developed by the Federal Food and Drug Administration of medicines recommended for disposal by flushing is not required to bear this statement.

(B) - (D) (No change.)

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

(h) Customized patient medication packages.

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

(3) Label.

(A) The patient med-pak shall bear a label stating:

(i) the name of the patient;

(ii) the unique identification number for the patient med-pak itself and a separate unique identification number for each of the prescription drug orders for each of the drug products contained therein;

(iii) the name, strength, physical description or identification, and total quantity of each drug product contained therein;

(iv) the directions for use and cautionary statements, if any, contained in the prescription drug order for each drug product contained therein;

(v) if applicable, a warning of the potential harmful effect of combining any form of alcoholic beverage with any drug product contained therein;

(vi) any storage instructions or cautionary statements required by the official compendia;

(vii) the name of the prescriber of each drug product;

(viii) the date of preparation of the patient med-pak and the beyond-use date assigned to the patient med-pak (which such beyond-use date shall not be later than 60 days from the date of preparation);

(ix) the name, address, and telephone number of the pharmacy;

(x) the initials or an identification code of the dispensing pharmacist;

(xi) effective June 1, 2010, the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacturer, the beyond-use-date shall be one year from the date the med-pak is dispensed or the earliest manufacturer’s expiration date for a product contained in the med-pack if it is less than one-year from the date dispensed. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication; and

(xii) effective January 1, 2011, either on the prescription label or the written information accompanying the prescription, the statement "Do not flush unused medications or pour down a sink or drain." A drug product on a list developed by the Federal Food and Drug Administration of medicines recommended for disposal by flushing is not required to bear this statement.

(xiii) any other information, statements, or warnings required for any of the drug products contained therein.

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

(4) - (8) (No change.)

(i) (No change.)

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

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy

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For further information, please call: (512) 305-8028

SUBCHAPTER D. INSTITUTIONAL PHARMACY (CLASS C)

22 TAC §§291.72 - 291.75

The Texas State Board of Pharmacy proposes amendments to §291.72, concerning Definitions, §291.73, concerning Personnel, §291.74, concerning Operational Standards, and §291.75, concerning Records. The amendments, if adopted, will implement the provisions of H.B. 1924 as passed by the 81st Texas Legislature which establish a new definition for a rural hospital; add current rule language that outlines the procedures for a nurse to enter a pharmacy when the pharmacy is closed and remove drugs for administration to a patient to the Act; allow pharmacy technicians in a "rural hospital" to perform certain duties without the direct supervision of a pharmacist; eliminate references to Carisoprodol that are no longer needed; and correct grammatical errors.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Dodson has determined that, for each year of the first five-year period the rules will be in effect, the public benefit anticipated as a result of enforcing the rules will ensure that patients receiving pharmacy services in rural hospitals are adequately protected. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with these sections.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., April 30, 2010.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Texas Pharmacy Act (Act).
The statutes affected by the amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.72. Definitions.

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

(1) - (41) (No change.)

(42) Rural hospital--A licensed hospital with 75 beds or fewer that:

(A) is located in a county with a population of 50,000 or less as defined by the United States Census Bureau in the most recent U.S. census; or

(B) has been designated by the Centers for Medicare and Medicaid Services as a critical access hospital, rural referral center, or sole community hospital.

(43) [442] Sample--A prescription drug which is not intended to be sold and is intended to promote the sale of the drug.

(44) [443] Supervision--

(A) Physically present supervision--In a Class C pharmacy, a pharmacist shall be physically present to directly supervise pharmacy technicians or pharmacy technician trainees.

(B) Electronic supervision--In a Class C pharmacy in a facility with 100 beds or less, a pharmacist licensed in Texas may electronically supervise pharmacy technicians or pharmacy technician trainees to perform the duties specified in §291.73(e)(2) of this title (relating to Personnel) provided:

(i) the pharmacy uses a system that monitors the data entry of medication orders and the filling of such orders by an electronic method that shall include the use of one or more the following types of technology:

(I) digital interactive video, audio, or data transmission;

(II) data transmission using computer imaging by way of still-image capture and store and forward; and

(III) other technology that facilitates access to pharmacy services;

(ii) the pharmacy establishes controls to protect the privacy and security of confidential records;

(iii) the pharmacist responsible for the duties performed by a pharmacy technician or pharmacy technician trainee verifies:

(I) the data entry; and

(II) the accuracy of the filled orders prior to release of the order; and

(iv) the pharmacy keeps permanent digital records of duties electronically supervised and data transmissions associated with electronically supervised duties for a period of two years.

(C) If the conditions of subparagraph (B) of this paragraph are met, electronic supervision shall be considered the equivalent of direct supervision for the purposes of the Act.

(45) [444] Tech-Check-Tech--Allowing a pharmacy technician to verify the accuracy of work performed by another pharmacy technician relating to the filling of floor stock and unit dose distribution systems for a patient admitted to the hospital if the patient’s orders have previously been reviewed and approved by a pharmacist.

(46) [§453] Texas Controlled Substances Act--The Texas Controlled Substances Act, the Health and Safety Code, Chapter 481, as amended.

(47) [§466] Unit-dose packaging--The ordered amount of drug in a dosage form ready for administration to a particular patient, by the prescribed route at the prescribed time, and properly labeled with name, strength, and expiration date of the drug.

(48) [§472] Unusable drugs--Drugs or devices that are unusable for reasons, such as they are adulterated, misbranded, expired, defective, or recalled.

(49) [§481] Written protocol--A physician’s order, standing medical order, standing delegation order, or other order or protocol as defined by rule of the Texas Medical Board under the Texas Medical Practice Act Subtitle B, Chapter 157, Occupations Code.

§291.73. Personnel.

(a) (No change.)

(b) Pharmacist-in-charge.

(1) General.

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

(C) A pharmacist-in-charge may be in charge of one facility with 101 beds or more and one facility with 100 beds or less, including a rural hospital, provided the total number of beds does not exceed 150 beds.

(D) - (E) (No change.)

(2) (No change.)

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

(e) Pharmacy technicians and pharmacy technician trainees.

(1) General.

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

(C) In addition to the training requirements specified in subparagraph (A) of this paragraph, pharmacy technicians working in a rural hospital and performing the duties specified in paragraph (2)(D)(ii) of this subsection shall complete the following. Training on the:

(i) procedures for verification of the accuracy of actions performed by pharmacy technicians including required documentation;

(ii) duties which may and may not be performed by pharmacy technicians in the absence of a pharmacist; and

(iii) the pharmacy technician’s role in preventing dispensing and distribution errors.

(2) Duties. Duties may include, but need not be limited to, the following functions under the supervision of and responsible to a pharmacist:

(A) (No change.)

(B) Facilities with 100 beds or less.

(i) Physically present supervision. The following functions must be performed under the physically present supervision of a pharmacist unless the pharmacy meets the requirements for a rural hospital and has been approved by the board to allow pharmacy
technicians to perform the duties specified in §552.1011 of the Texas Pharmacy Act (Act) and subparagraph (D)(ii) of this paragraph:

(I) - (IV) (No change.)

(ii) (No change.)

(C) (No change.)

(D) Rural Hospitals.

(i) A rural hospital may allow a pharmacy technician to perform the duties specified in clause (ii) of this subparagraph when a pharmacist is not on duty, if:

(I) the pharmacy technician:

(-a-) is a registered pharmacy technician and not a pharmacy technician trainee; and

(-b-) meets the training requirements specified in §297.6 of this title and those specified in paragraph (1) of this subsection;

(II) a pharmacist is accessible at all times to respond to any questions and needs of the pharmacy technician or other hospital employees, by telephone, answering or paging service, e-mail, or any other system that makes a pharmacist immediately accessible;

(III) the pharmacy is appropriately staffed to meet the needs of the pharmacy; and

(IV) a nurse or practitioner at the rural hospital or a pharmacist through electronic supervision as specified in paragraph (2)(B)(ii) of this subsection, verifies the accuracy of the actions of the pharmacy technician.

(ii) If the requirements of clause (i) of this subparagraph are met, the pharmacy technician may, during the hours that the institutional pharmacy in the hospital is open, perform the following duties in the pharmacy without the direct supervision of a pharmacist:

(I) enter medication order and drug distribution information into a data processing system;

(II) prepare, package, or label a prescription drug according to a medication order if a licensed nurse or practitioner verifies the accuracy of the order before administration of the drug to the patient;

(III) fill a medication cart used in the rural hospital;

(IV) distribute routine orders for stock supplies to patient care areas; and

(V) access and restock automated medication supply cabinets.

(3) (No change.)

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

§291.74. Operational Standards.

(a) Licensing requirements.

(1) - (14) (No change.)

(15) A rural hospital that wishes to allow a pharmacy technician to perform the duties specified in §291.73(e)(2)(D) of this title (relating to Personnel), shall make application to the board as follows.

(A) For an initial applications prior to September 1, 2010, the pharmacist-in-charge must submit a letter to the board containing the following information:

(i) name, address, and pharmacy license number;

(ii) name and license number of the pharmacist-in-charge;

(iii) name and registration number of the pharmacy technicians;

(iv) a statement indicating that pharmacy technicians will be performing the duties specified in §291.73(e)(2)(D) of this title; and

(v) documentation that the hospital is a rural hospital with 75 or fewer beds and that the rural hospital is either:

(I) located in a county with a population of 50,000 or less as defined by the United States Census Bureau in the most recent U.S. census; or

(II) designated by the Centers for Medicare and Medicaid Services as a critical access hospital, rural referral center, or sole community hospital.

(B) After September 1, 2010 and prior to allowing a pharmacy technician to perform the duties specified in §291.73(e)(2)(D) of this title, the pharmacist-in-charge must submit an application on a form provided by the board, containing the following information:

(i) name, address, and pharmacy license number;

(ii) name and license number of the pharmacist-in-charge;

(iii) name and registration number of the pharmacy technicians;

(iv) proposed date the pharmacy wishes to start allowing pharmacy technicians to perform the duties specified in §291.73(e)(2)(D) of this title;

(v) documentation that the hospital is a rural hospital with 75 or fewer beds and that the rural hospital is either:

(I) located in a county with a population of 50,000 or less as defined by the United States Census Bureau in the most recent U.S. census; or

(II) designated by the Centers for Medicare and Medicaid Services as a critical access hospital, rural referral center, or sole community hospital; and

(vi) any other information specified on the application.

(C) A rural hospital that makes application after September 1, 2010 may not allow a pharmacy technician to perform the duties specified in §291.73(e)(2)(D) of this title until the board has reviewed and approved the application and issued an amended license to the pharmacy.

(D) Every two years in conjunction with the application for renewal of the pharmacy license, the pharmacist-in-charge shall update the application for pharmacy technicians to perform the duties specified in §291.73(e)(2)(D) of this title:

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

(e) Absence of a pharmacist.

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

(3) Rural hospitals. In rural hospitals when a pharmacy technician performs the duties listed in §291.73(e)(2)(D) of this title, the following is applicable:
(A) the pharmacy technician shall make a record of all drugs distributed from the pharmacy. The record shall be maintained in the pharmacy for two years and contain the following information:

(i) name of patient or location where floor stock is distributed;
(ii) name of device or drug, strength, and dosage form;
(iii) dose prescribed or ordered;
(iv) quantity distributed;
(v) time and date of the distribution; and
(vi) signature (first initial and last name or full signature) or electronic signature of nurse or practitioner that verified the actions of the pharmacy technician.

(B) The original or direct copy of the medication order may substitute for the record specified in subparagraph (A) of this paragraph, provided the medication order meets all the requirements of subparagraph (A) of this paragraph.

(C) The pharmacist shall:

(i) verify and document the verification of all distributions made from the pharmacy in the absence of a pharmacist as soon as practical, but in no event more than seven (7) days from the time of such distribution;

(ii) perform a drug regimen review for all medication orders as specified in subsection (g)(1)(B) of this section as soon as practical, but in no event more than seven (7) days from the time of such distribution and document such verification including any discrepancies noted by the pharmacist;

(iii) review any discrepancy noted by the pharmacist with the pharmacy technician(s) and make any change in procedures or processes necessary to prevent future problems; and

(iv) report any adverse events that have a potential for harm to a patient to the appropriate committee of the hospital that reviews adverse events.

(f) Drugs.

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

(5) Distribution.

(A) (No change.)

(B) Procedures.

(i) (No change.)

(ii) The written policies and procedures for the drug distribution system shall include, but not be limited to, procedures regarding the following:

(1) - (XXXIV) (No change.)

(XXXV) procedures for a pharmacy technician to verify the accuracy of work performed by another pharmacy technician, if applicable;

(XXXVI) operation of the pharmacy when a pharmacist is not on-site; and

(XXXVII) emergency preparedness plan, to include continuity of patient therapy and public safety.

(XXXVIII) emergency preparedness plan, to include continuity of patient therapy and public safety; and}

§291.75. Records.

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

(c) Patient records.

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

(6) General requirements for records maintained in a data processing system.

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

(C) Change or discontinuance of a data processing system.

(i) Records of distribution and return for all controlled substances and [nalbuphine (e.g., Nubain) and carisoprodol (e.g., Soma)]. A pharmacy that changes or discontinues use of a data processing system must:

(1) - (II) (No change.)

(ii) - (iii) (No change.)

(D) (No change.)

(7) Data processing system maintenance of records for the distribution and return of all controlled substances and [nalbuphine (e.g., Nubain) and carisoprodol (e.g., Soma)] to the pharmacy.

(A) Each time a controlled substance or [nalbuphine (e.g., Nubain) and carisoprodol (e.g., Soma)] is distributed from or returned to the pharmacy, a record of such distribution or return shall be entered into the data processing system.

(B) (No change.)

(C) An audit trail printout for each strength and dosage form of these drugs distributed during the preceding month shall be produced at least monthly and shall be maintained in a separate file at the facility unless the pharmacy complies with subparagraph (D) of this paragraph [section]. The information on this printout shall be sorted by drug name and list all distributions/returns for that drug chronologically.

(D) (No change.)

(8) - (10) (No change.)

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

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

Filed with the Office of the Secretary of State on March 12, 2010.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy

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For further information, please call: (512) 305-8028

PROPOSED RULES March 26, 2010 35 TexReg 2501
SUBCHAPTER F. NON-RESIDENT PHARMACY (CLASS E)

22 TAC §291.104

The Texas State Board of Pharmacy proposes amendments to §291.104, concerning Operational Standards. The proposed amendments, if adopted, implement provisions of H.B. 19 passed during the 81st Regular Session of the Texas Legislature requiring pharmacists to place the statement "Do not flush unused medications or pour down a sink or drain" on the prescription label and clarify the requirements for pharmacists performing drug regimen reviews from remote locations.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure that consumers receive appropriate information with their prescriptions on handling the safe disposal of the medications. Pharmacies may have a programming cost to modify the pharmacy’s computer system to provide the information regarding the disposal of prescription medications. The Board is unable to determine that cost and the fiscal impact to individuals, small or large businesses, or to other entities which are required to comply with this section because of the multitude of pharmacy software programs used by pharmacies.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., April 30, 2010.

The amendments are proposed under §551.002 and §554.051, of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §562.006 and §562.0061 as authorizing the agency to adopt rules regarding the prescription label and written information provided to consumers.

The statutes affected by the amendment: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.104. Operational Standards.

(a) (No change.)

(b) Prescription dispensing and delivery.

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

(3) Patient counseling and provision of drug information.

(A) (No change.)

(B) Such communication:

(i) - (iii) (No change.)

(iv) shall be reinforced with written information.

The following is applicable concerning this written information:

(I) Written information designed for the consumer, such as the USP DI patient information leaflets, shall be provided.

(II) When a compounded product is dispensed, information shall be provided for the major active ingredient(s), if available.

(III) For new drug entities, if no written information is initially available, the pharmacist is not required to provide information until such information is available, provided:

(-a-) the pharmacist informs the patient or the patient’s agent that the product is a new drug entity and written information is not available;

(-b-) the pharmacist documents the fact that no written information was provided; and

(-c-) if the prescription is refilled after written information is available, such information is provided to the patient or patient’s agent.

(IV) Effective January 1, 2011, the written information accompanying the prescription or the prescription label shall contain the statement "Do not flush unused medications or pour down a sink or drain." A drug product on a list developed by the Federal Food and Drug Administration of medicines recommended for disposal by flushing is not required to bear this statement.

(C) - (H) (No change.)

(4) Labeling. At the time of delivery, the dispensing container shall bear a label that contains the following information:

(A) the name, physical address, and phone number of the pharmacy,

(B) effective June 1, 2010, if the drug is dispensed in a container other than the manufacturer’s original container, the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacture, the beyond-use-date shall be one year from the date the drug is dispensed or the manufacturer’s expiration date, whichever is earlier. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication; [and]

(C) effective January 1, 2011, either on the prescription label or the written information accompanying the prescription, the statement, "Do not flush unused medications or pour down a sink or drain." A drug product on a list developed by the Federal Food and Drug Administration of medicines recommended for disposal by flushing is not required to bear this statement; and

(D) [CG] any other information that is required by the pharmacy or drug laws or rules in the state in which the pharmacy is located.

(c) - (f) (No change.)

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

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy

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For further information, please call: (512) 305-8028

† † †

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CHAPTER 106. PERMITS BY RULE

SUBCHAPTER L. FEED, FIBER, AND
FERTILIZER

The Texas Commission on Environmental Quality (commission
or TCEQ) proposes an amendment to §106.283 and the repeal
of §106.302.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS
FOR THE PROPOSED RULES

The TCEQ has been developing seven air quality standard per-
mits, which if issued, would provide a new method of autho-
rization for a variety of agricultural operations. These agricul-
tural standard permits have been proposed under a separate
action; more information concerning the proposed agricultural
standard permits is available in the November 6, 2009, issue of
the Texas Register (34 TexReg 7845). The proposed agricultural
standard permits are intended to update and streamline the au-
thorizations used for non-major agricultural facilities, and as part
of this effort, the TCEQ also reviewed permits by rule (PBRs) in
Chapter 106, which have typically been claimed by the types of
agricultural facilities that could potentially be authorized by the
proposed standard permits. The TCEQ identified two permits
by rule (§106.283, Grain Handling, Storage, and Drying, and
§106.302, Portable Pipe Reactor) that should be revised and re-
pealed, respectively, to maximize the effectiveness of the pro-
posed standard permits, maintain protectiveness, and eliminate
redundancy. If the proposed standard permits are not issued by
the commission, the proposed changes to Chapter 106 will be
withdrawn.

SECTION BY SECTION DISCUSSION

§106.283, Grain Handling, Storage, and Drying

The commission proposes an amendment to §106.283, which
would delete existing §106.283(2), concerning grain facilities in
commercial use. The TCEQ is proposing this change because a
review of agency records indicates that this section for com-
commercial facilities is rarely used, and the proposed standard permit
for grain handling facilities contains requirements that are more
appropriate for these sources. The proposed standard permit is
more flexible than §106.283(2) in terms of facility size and dis-
tance limitations, and the proposed standard permit would not
require written approval and registration as does §106.283(2).

The effect of the proposed change is that new grain handling,
storage, or drying facilities in commercial use would not be able
to claim §106.283 as authorization, and would be required to be
authorized in some other manner (such as a standard permit,
case-by-case new source review permit, or some other applica-
ble PBR). Commercial facilities would still be eligible to use
proposed §106.283(2) to add grain storage capacity, as is cur-
rently allowed. Existing commercial sources which are already
registered under §106.283 would remain authorized under the
PBR unless there is a modification of the facility, in which case
the owner or operator would be required to obtain another appli-
cable authorization mechanism (such as the standard permit for
grain handling facilities, or a case-by-case permit).

§106.302, Portable Pipe Reactor

The commission proposes the repeal of §106.302. The pro-
posed standard permit for polyphosphate blending operations
(also known as pipe reactors) contains more appropriate, up-
to-date requirements for these types of facilities. The proposed
standard permit would allow a wider range of operating config-
urations and a more flexible operating schedule compared to the
PBR, while maintaining protectiveness. The effect of the repeal
of this section is that new pipe reactors (polyphosphate blenders)
would not be able to claim this PBR as authorization, and would
be required to be authorized in some other manner (such as a
standard permit, case-by-case new source review permit, or some
other applicable PBR). Existing portable pipe reactors al-
ready registered under §106.302 can continue to operate at the
authorized site under the PBR until the operating time allowed
under that PBR has been exhausted (72 operating hours/four
months). However, if a portable pipe reactor registered under
§106.302 leaves the site at which it is authorized, the PBR au-
thorization at that site immediately expires.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVER-
NMENT

Nina Charnness, Analyst, Strategic Planning and Assessment,
has determined that for the first five-year period the proposed
rules are in effect, agency revenue will increase, although the
increase is not expected to be significant. No fiscal implications
are anticipated for other units of state or local governments as
a result of administration or enforcement of the proposed rules.
The proposed rules affect portable pipe reactors used to produce
liquid fertilizer, and grain handling, storage, and drying facilities.
State agencies and local governments do not typically own or
operate such facilities, and agency records indicate that no per-
mits for these activities have been issued to local governments.

The proposed rules would amend Chapter 106 by repealing the
PBR for portable pipe reactors, and by revising the PBR for
grain handling, storage, and drying facilities so that its use would
only be to authorize non-commercial facilities. PBRs issued for
portable pipe reactors and commercial grain handling, storage,
and drying facilities will be superseded by new standard permits,
proposed in a separate action, that contain more appropriate re-
quirements for these facilities.

The proposed repeal of the PBR for portable pipe reactors used
to produce liquid fertilizer will require these facilities to obtain
the proposed new standard permit for polyphosphate blending op-
erations or a case-by-case permit. For the new polyphosphate
blending (pipe reactor) standard permit, agency staff will be re-
quired to conduct more complex permit reviews compared to the
pipe reactor PBR. However, the proposed revision to the PBR for
commercial grain handling facilities, which requires registration
and processing by agency staff, will allow a commercial facility
owner or operator to claim the standard permit without registra-
tion or staff review. The overall change in agency workload is
not expected to be significant and will be managed with existing
agency staff and resources.

Initially, the agency does expect to collect higher fees for the
new standard permit for pipe reactors since the PBR for these
facilities will be repealed, and the standard permit has a higher fee than the PBR. However, fee increases are not expected to have a significant impact on agency revenue. New or modified pipe reactor facilities will pay a $900 fee for the standard permit registration instead of the PBR registration fee, which is $450 for a large business and $100 for a small business. Staff estimates that 80% of pipe reactor facilities are owned by small businesses and 20% are owned by large businesses. Typical annual fees from pipe reactor PBRs total $1,700 statewide, with eight small businesses renewing at $100 per PBR and two large businesses renewing at $450 per PBR.

Most pipe reactor facilities are expected to transition to the proposed standard permit during the first year. The rules are in effect. As more pipe reactors transition to the standard permit in the second through fifth years, the annual increase in fee revenue received by the agency is expected to decline. Staff estimates that about 30 pipe reactor facilities will transition to the new standard permit during the first year and that about ten pipe reactor facilities per year will transition to the standard permit during the second through fifth years. The increase in agency revenue for the first year the rule is in effect could be as much as $25,300 ($900 x 30 standard permit registrations, totaling $27,000 less $1,700 typically received for pipe reactor PBRs). During the second through fifth years the proposed rules are in effect, the agency could see an annual revenue increase of $7,300.

The agency expects revenue from commercial grain handling facilities to decrease since there will be no fee for the grain handling standard permit. However, since the agency receives few PBR requests for commercial grain holding facilities (approximately three per year), any revenue decrease for this transition will not have a significant impact on agency revenue. The current fee for a PBR for a commercial grain handling facility is $450 for a large business and $100 for a small business. The annual estimated decrease in agency revenue is estimated to range from $300 to $1,350.

Other state agencies and local governments are not expected to experience fiscal impacts as a result of the proposed rules since these entities do not tend to operate facilities that produce liquid fertilizer or conduct commercial operations for grain handling and storage. Agency records indicate that no permits for these activities have been issued to local governments.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be greater protection of public health and the environment due to more appropriate permitting of portable pipe reactor facilities and commercial grain handling facilities.

Individuals that purchase liquid fertilizer from pipe reactor facilities could experience cost increases if those facilities decide to charge more to cover costs of the proposed standard permit associated with emission testing and possible stack modification. The fiscal impact on individuals will depend on decisions made by owners and operators of pipe reactor facilities regarding cost recovery.

The proposed rules regarding grain handling facilities are not expected to have a significant fiscal impact on individuals since owners or operators of commercial facilities are expected to see a decrease, which is not expected to be significant, in permit fees. Grain handling facility owners or operators will make decisions on whether or not to pass on fee decreases to their customers depending on their particular situations. The proposed rules are not expected to require commercial grain handling facilities to use additional controls or modify practices to control emissions that would increase operating costs. Other rules, business practices, and safety practices are already in place to limit emissions, limit product loss, and reduce the risk of fire or explosion.

The current PBR for pipe reactor facilities is for temporary operations and is issued for a four-month period, with a maximum operating time of 72 hours within that period. Owners or operators that wish to continue operations after the expiration of their PBR will be required to get a new permit since the proposed rules repeal the PBR. The proposed repeal of the pipe reactor PBR will require businesses to transition to a standard permit or a case-by-case permit. Large businesses will pay $450 more to obtain a standard permit, which is renewed every ten years. To comply with standard permit requirements, businesses that own or operate these facilities may incur increased costs for emission testing, but this testing will be a one time cost unless facility modification takes place. Pipe reactors will also be required to have at least a 12-foot stack, and those facilities having a shorter stack will incur increased costs to comply. Most owners or operators of pipe reactor facilities (approximately 80%) are small businesses. Large businesses that own or operate pipe reactor facilities will incur the same costs for equipment and emission testing as a small business to comply with the standard permit. The fiscal impact of those costs can be found in the SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT of this fiscal note.

Under the proposed rules, owners or operators of new or modified commercial grain handling facilities will be required to use the standard permit or a case-by-case source review permit. The proposed rules do not impose a fee for the proposed grain handling standard permit as opposed to the current fee for a PBR of $450 for a large business and $100 for a small business. Commercial grain handling facilities are expected to see a decrease in permitting costs. The proposed rules are not expected to increase operating costs since grain handling facilities already use controls to comply with other emission and nuisance rules or to reduce product loss or the risk of fire or explosions.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Adverse fiscal implications are anticipated for small or micro-businesses that own or operate pipe reactor facilities that are used to produce liquid fertilizer. The proposed rules repeal the PBR for pipe reactor facilities, which is issued for a four-month period and authorizes temporary facilities. The significance of the fiscal impact of the proposed rules will depend on the amount of revenue usually generated by these businesses. Small businesses owning or operating pipe reactor facilities will be required to transition to the standard permit that will cost $800 more in fees than a PBR for small businesses. The standard permit is renewable once every ten years, and this increase is not expected to have a significant fiscal impact. However, businesses owning or operating a pipe reactor will be required to have a 12-foot stack, which is estimated to cost $5,000 to $10,000 per facility, and emission testing for particulate matter (PM), ammonia, and fluorides will be required. Emission testing costs could range from $10,000 to $30,000 per facility, but unless a pipe reactor facility is modified, these testing costs would be one time costs.

Small businesses that own or operate grain handling facilities should not experience any adverse fiscal impact as a result of the proposed rules since there is no fee for the proposed standard permit and because they are already required to use controls to
comply with other rules, to prevent loss of product, or to reduce the risk of fire or explosions.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to protect human health and the environment for the first five years that the proposed rules are in effect. However, the agency did consider controlling emissions from pipe reactor and grain handling facilities by establishing separate emission limits and control requirements in addition to the requirements of the existing PBRs. Staff believes that this alternative approach would be more confusing to a small business and that it would be easier for a small business to comply with regulations if all the requirements were codified in a standard permit or a case-by-case permit.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules do not meet the definition of a "major environmental rule." Under Texas Government Code, §2001.0225, a "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rules are intended to more effectively focus commission resources by eliminating duplication and providing a clear regulatory structure. While aspects of this proposed rulemaking are intended to protect the environment or reduce risks to human health from environmental exposure, the proposed rules generally improve regulatory flexibility to regulated facilities and are therefore unlikely to adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. Because this rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, the rulemaking does not fit the Texas Government Code, §2001.0225 definition of "major environmental rule."

Under Texas Government Code, §2001.0225, only a major environmental rule requires a regulatory impact analysis. Because this proposal does not constitute a major environmental rule, a regulatory impact analysis is not required. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or a governmental action that affects an owner’s private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner’s right to the property that would otherwise exist in the absence of the governmental action and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The commission has determined that the promulgation and enforcement of the rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposed rules also will not affect private real property in a manner that restricts or limits an owner’s right to the property that would otherwise exist in the absence of the governmental action. The amendment is administrative and does not impose any new regulatory requirements. The amendment to §106.283 and the repeal of §106.302 are intended to ensure appropriate authorization for subject facilities, eliminate duplication, and provide a clear regulatory structure. This change does not impact existing authorization under these sections. The proposed rules are reasonably taken to fulfill requirements of state law. Therefore, the proposed rules will not cause a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this proposed rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). The proposed rulemaking will indirectly benefit the environment because the amendment to §106.283 and the repeal of §106.302 is expected to ensure appropriate authorization for subject facilities, eliminate duplication, and provide a clear regulatory structure. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal areas (31 TAC §501.32). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies. Written comments on the consistency of the proposed rulemaking may be submitted to the
contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Most facilities affected by this rule change are minor sources and not subject to the Federal Operating Permits Program. In addition, these rule changes would not directly affect existing authorized sources unless those sources are modified and require new authorization. Therefore, there should be no direct effect on sites subject to the federal operating permits program.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on April 19, 2010, at 10:00 a.m., in Building E, Room 201S, at the commission’s central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: http://www5.tceq.state.tx.us/rules/ecomments/. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-025-106-PR. The comment period closes April 26, 2010. Copies of the proposed rule making can be obtained from the commission’s Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Michael Wiholt, Air Permits Division, at (512) 239-1222.

DIVISION 1. FEED

30 TAC §106.283

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended section is also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission’s purpose to safeguard the state’s air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state’s air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state’s air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.05196, concerning Permits by Rule, which authorizes the commission to adopt permits by rule for certain types of facilities; and §382.057, concerning Exemption, which authorizes exemptions from permitting.

The proposed amendment implements Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05196, and 382.057.

§106.283. Grain Handling, Storage, and Drying.

Any grain handling, storage, and drying facility which meets paragraphs (1) or (2) [or (3)] of this section is permitted by rule.

(1) The facility is in noncommercial use only—that is, used only to handle, dry, and/or store grain produced by the owner(s) of the facility if the following conditions are satisfied:

(A) the total storage capacity does not exceed 750,000 bushels;

(B) the grain handling capacity does not exceed 4,000 bushels per hour;

(C) the facility is located at least 500 feet from any recreational area or residence or business not occupied or used solely by the owner of the facility.

(2) The facility is in commercial use and the following conditions are satisfied:

(A) the total storage capacity of the new and any existing facility or facilities does not exceed 1.5 million bushels;

(B) the facility shall be located at least 1/4 mile from any recreational area or residence or other structure not occupied or used solely by the owner or operator of the facility or the owner of the property upon which the facility is located.

(C) before construction of the facility begins, written site approval shall be received from the executive director and the facility shall be registered with the commission using Form PL-7.

(3) The installation of additional grain storage capacity which satisfies the following conditions:

(A) there shall be no increase in hourly grain handling capacity;

(B) existing grain receiving and loadout facilities are utilized;

(C) grain shall be conveyed by closed conveying systems and air suction shall not be pulled on any conveying unit;

(D) written site approval shall be received from the executive director before construction begins for facilities utilizing existing grain receiving facilities when new gravity or auger loadout systems are to be installed.

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

Filed with the Office of the Secretary of State on March 12, 2010.

TRD-201001270
SUBCHAPTER B. RATES, RATE-MAKING, AND RATES/TARIFF CHANGES
30 TAC §291.31, §291.34

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §291.31 and §291.34.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The 81st Legislature, 2009, passed Senate Bill (SB) 2306. SB 2306 amended Texas Water Code (TWC), Chapter 13, Subchapter E, by amending §13.131, which requires the commission by rule to allow water and/or sewer utilities to claim the book cost less net salvage of depreciable utility plant retired be charged in its entirety to the accumulated depreciation account, consistent with accounting treatment of regulated electric and gas utilities in this state.

SECTION BY SECTION DISCUSSION

The commission proposes to amend §291.31(b)(1)(B). This section was amended to include net salvage value in annual depreciation for determining allowable expenses in order to establish consistency of accounting. SB 2306 requires that rules adopted under the legislation be consistent with accounting treatment of regulated electric and gas utilities in this state. The regulatory practice for both industries includes determination of net salvage value in a depreciable utility plant when an asset is retired as well as in annual depreciation calculations relating to allowable expenses when an asset is placed into service. That is because the "methodologies used to compute depreciation expense and accumulated depreciation in rate base should be consistent. City of Weslaco v. General Telephone Co. of S.W., 359 S.W.2d 260 (Tex. Civ. App.-San Antonio, 1962, writ ref'd n.r.e.)." Natural Gas Rate Review Handbook, Gas Services Division, Railroad Commission of Texas (June 2007, page 35). Additionally, the proposed amendment requires the utility to submit "reasonable" estimations of net salvage value. Reasonable is meant to include the submission of sufficient evidence to establish net salvage value, such as estimates of removal costs. This is consistent with the practice of electric and gas utility regulations in the state. "Determining a reasonably accurate estimate of the average or future net salvage value is not an easy task; estimates can be the subject of considerable discussion and controversy between regulators and utility personnel. When estimating future net salvage, every effort should be made to ensure that the estimate is as accurate as possible." Public Utilities Depreciation Manual, NARUC, page 157 (1996)) (from the direct testimony of Nara V. Srinivasa, P.E., Infrastructure Reliability Division, Public Utility Commission of Texas, March 23, 2007, Application of AEP Texas Central Company for Authority to Change Rates Before the State Office of Administrative Hearings, SOAH Docket Number 473-07-0833, PUC Docket Number 33309).

The commission proposes to amend §291.31(c)(2)(A) to make a grammatical change.

The commission proposes to add new §291.31(c)(2)(B). This change addresses the concern that a retired plant could no longer be included in the rate base under prior commission practices because it was not used and useful in providing utility service after retirement. Consistent with the practice in the regulated electric and gas utilities in this state, the new subparagraph clarifies that retired assets can be included in
rate base if they were used and useful in providing utility service before retirement.

The commission proposes to renumber §291.31(c)(2)(A)(i) and (ii) to §291.31(c)(2)(B)(i) and (ii) for numbering consistency. The commission also proposes to amend §291.31(c)(2)(B)(i) and (ii) by adding language making it clear that the bookkeeping for accumulated depreciation, original cost, and salvage value apply to both §291.31(c)(2)(A) and (B). The commission further amended §291.31(c)(2)(B)(i) and (ii) to prescribe the methodology that will allow water and/or sewer utilities to include net salvage in depreciable utility plant retired to be charged in its entirety to the accumulated depreciation account, consistent with accounting treatment of regulated electric and gas utilities in this state. The proposed rule also includes language allowing group accounting of assets. SB 2306 requires that the rules adopted under it must be consistent with accounting treatment of regulated electric and gas utilities in this state. The electric and gas utility regulatory practice is to allow group accounting. Language allowing group accounting is included in the proposed rule to provide public notice of this change and to allow for maximum flexibility in the implementation of SB 2306. The TCEQ has not made a practice of allowing the use of group accounting for assets, but instead has used itemized accounting. The TCEQ has used itemized accounting because complete verification of whether or not an asset is used and useful is difficult to confirm for particular assets with group accounting. Group accounting involves the practice of averaging service lives and salvage values of all assets in a particular category. This methodology assumes the averaging of many assets in a category accurately reflects the real life depreciation of each utility asset. This methodology facilitates consistency with requirements of other governmental accounting regulations, both federal and state, applicable to utilities that operate in other states as well as this state. Also, this methodology may decrease a utility’s expense in preparing an application and proving it in a contested case hearing. In order to create transparency of group accounting the proposed rules require accounting for all assets and their retirement to be supported by an approved accounting system. In the electric and gas utility industries such transparency is required. For instance, in the gas utility industry, "Historical Commission practice has been to disallow depreciation rate adjustments unless fully supported by a depreciation study. The study should include the average service lives of the property groups, salvage factors and adequacy of the present booked depreciation reserve." Natural Gas Rate Review Handbook, Gas Services Division, Railroad Commission of Texas (June 2007, page 35). The proposed rules do not require any particular supporting documents. Other possible support could be provided by documents, such as continuing property records and/or professional certifications. The new methods of including net salvage in depreciable utility plant will apply to applications declared administratively complete after the date that this rulemaking becomes effective. Because SB 2306 was not retroactive, only assets removed from service after June 19, 2009 (the date the bill became effective) are affected. Additionally, because assets may be retired outside of a test year, the amendment allows inclusion of retired assets in the first full rate application filed by a utility after the date on which the asset was removed from service, excluding alternative rate method applications, such as single issue rate change applications. In order to address the concern that a utility will be able to collect a return on an asset long after the asset has been retired; the proposed amendments provide that the utility cannot include the retired asset in its net plant calculations in any subsequent rate applications. Furthermore, the amendments require the utility to bear the burden of proof and provide credible evidence on the decision to retire assets early, consistent with the methods for electric and gas utility regulations in the state. The proposed amendments also require the utility to provide information to show that it used due diligence in recovering maximum salvage value of a retired asset. Examples include any insurance recovery, scrap value, warranty claims, and competitive bids for tear down and removal of retired assets. Additionally, because of concerns that affiliated interests might benefit from business transactions involving the retirement of the utility’s assets, the proposed rule makes it clear that the requirements of TWC, §13.185(e) also apply.

The commission proposes to reletter §291.31(c)(2)(B) to §291.31(c)(2)(C) to account for these changes previously outlined.

The commission also proposes to amend §291.34(d)(2)(B) to allow water and/or sewer utilities that use a cash basis rate methodology to follow the same method prescribed in §291.31(b)(1)(B). The commission proposes these amendments in order to implement SB 2306.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency. The proposed rules will allow water and sewer utilities to use a depreciation methodology similar to the accounting practices of regulated electric and gas utilities when applying for a rate adjustment for their services. The proposed rulemaking is not expected to affect local governments that own or operate water or sewer utilities since their rate setting activities do not fall under the jurisdiction of the agency.

The proposed rules implement the provisions of SB 2306, which requires the agency, as a part of its rate making duties, to require book cost less net salvage of a depreciable utility plant asset retired to be charged in its entirety to the accumulated depreciation account consistent with the accounting treatment for state regulated electric and gas utilities. Current rules allow water and sewer utilities to include depreciation as a cost of service when applying for a rate change. The proposed rules amend §291.31 and §291.34 to require a depreciation methodology of charging the entirety of book cost less net salvage value of utility plant assets, when retired, to depreciation costs as a part of the cost of service considered when rates for services are set by the agency.

Specifically, for rate applications declared administratively complete after the date that these rules become effective, water and sewer utilities are required to: decide if salvage value (including removal costs) will be included in depreciation calculations; submit sufficient evidence to establish that salvage estimates are reasonable; account for actual salvage value when the asset is actually retired in the first rate application filed after the date on which the asset was removed from service, even if it was not retired during the test year; and provide evidence of original cost, salvage value, removal costs, and any other amounts, such as insurance, that is recovered. If a water or sewer utility decides that the salvage value of an asset is zero, depreciation is computed on a straight line, remaining life basis.

Typically, rate change requests are filed with the agency once every two to three years. The proposed rules will allow for the recovery of remaining investment in capital plant assets as a part of cost of service by allowing the remaining depreciation of a
retired asset to be included in its entirety in that cost. The agency has little jurisdiction over the rates charged by utilities owned by local governments. Therefore, the proposed rules will not have a significant impact on local governments.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and continued and adequate water and sewer utility service to customers by allowing water and sewer utilities to recover more of their investment in capital assets.

There may be fiscal implications for individuals who are water or sewer customers of investor owned utilities due to the implementation of the proposed rules. These individuals may see an increase in the rates they pay for water or sewer service. Investor owned utilities may benefit from the proposed rules as they would be able to adjust their fees based upon how their cost of service is determined.

The proposed rules may allow for rates for some customers of investor owned utilities to increase depending on how a water or sewer utility accounts for the value of a capital asset. The exact fiscal impact of the proposed rules depends on many factors, including the type of capital equipment used by the utility, cost of that equipment, salvage value and removal costs, when the equipment is retired, and other operating costs. Some customers could experience significant rate increases, but exact impacts of the rule cannot be determined until all factors of rate determination are evaluated. If salvage value of equipment is determined to be zero, then customers may not experience a significant fiscal impact as a result of the proposed rules. If the utility estimates salvage value, which includes removal costs, when determining the cost of an asset, depreciation costs, and remaining value, then rates could increase.

The proposed rules may have a significant fiscal impact on investor owned utilities by allowing them to recover costs invested in capital assets when they apply for a rate change. Staff estimates there are 746 investor owned water and sewer utilities, all of which are considered to be small businesses. The fiscal impact to these utilities will be discussed in the SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT of this fiscal note.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Staff estimates that there may be as many as 746 investor owned water and sewer utilities that are considered to be small businesses in the state. These small businesses may experience benefits, which could be significant, in recovering their investments in capital assets under the proposed rules when they request a rate change. The exact fiscal impact of the proposed rules will depend on the particular operating environment and capital investments of each investor owned utility.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Administrative Procedure Act. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to incorporate changes made by SB 2306 to TWC, §13.131(c). TWC, §13.131(c) requires the commission to "fix proper and adequate rates and methods of depreciation, amortization, or depletion of several classes of property of each utility and shall require every utility to carry a proper and adequate depreciation account in accordance with those rates and methods with any other rules the commission requires." SB 2306 added the following language: "Rules adopted under this subsection must require the book cost less net salvage of depreciable utility plant retired to be charged in its entirety to the accumulated depreciation account in a manner consistent with accounting treatment of regulated electric and gas utilities in this state." The specific intent of the proposed rulemaking is to amend the commission's rules to incorporate recent legislative changes that account for net salvage value of utility property to be included in depreciation calculations. Therefore, the proposed rulemaking does not meet the definition of a "major environmental rule." Even if the proposed rules were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: 1) does not involve any standard set by federal law; 2) does not exceed the requirements of TWC, §13.131(c) or any other state law; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and 4) is not proposed solely under the general powers of the agency, but rather specifically under TWC, §13.131(c), which requires the commission to adopt rules to implement the statute. Therefore, this proposed rulemaking does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The commission invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted.
to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this proposed rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rulemaking is to incorporate changes to TWC, §13.131(c) made by SB 2306. The proposed rules will substantially advance this stated purpose by incorporating the additional requirements of this statute into the commission’s rules.

The commission’s analysis indicates that Texas Government Code, Chapter 2007 does not apply to the proposed rules because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). The commission is the regulatory agency for statutes found in TWC, Chapter 13, Subchapter E, which contains TWC, §13.131(c).

Nevertheless, the commission further evaluated the proposed rules and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Pro- mulgation and enforcement of the proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner’s rights in private real property because this rulemaking does not burden nor restrict or limit the owner’s right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, the proposed rules require compliance with a state statute to require the adoption of rules regarding how salvage value is to be included in depreciation calculations for utility rate applications and proceedings without burdening or restricting or limiting the owner’s right to property and reducing its value by 25% or more. Therefore, the proposed rules do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section to this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on April 19, 2010, at 2:00 p.m. in Building E, Room 201S, at the commission’s central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposed 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: http://www.tceq.state.tx.us/rules/ecomments/. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-042-291-OW. The comment period closes April 26, 2010. Copies of the proposed rulemaking can be obtained from the commission’s Web site at http://www.tceq.state.tx.us/Nav/rules/propose_adopt.html. For further information, please contact Brian Dickey, Water Supply Division, Utilities and Districts Section, at (512) 239-0963.

STATUTORY AUTHORITY

These amendments are proposed under Texas Water Code (TWC), §5.102, which establishes the commission’s general authority necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission’s general authority to adopt rules; TWC, §5.105, which establishes the commission’s authority to set policy by rule; TWC, §13.041, which requires the commission to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction; and TWC, §13.132 and §13.181, which empower and require the commission to enforce the requirements contained in TWC, Chapter 13, Subchapters E and F, respectively.

The proposed amendments implement TWC, §13.131(c).

§291.31. Cost of Service.

(a) Components of cost of service. Rates are based upon a utility’s cost of rendering service. The two components of cost of service are allowable expenses and return on invested capital.

(b) Allowable expenses. Only those expenses that are reasonable and necessary to provide service to the ratepayers may be included in allowable expenses. In computing a utility’s allowable expenses, only the utility’s historical test year expenses as adjusted for known and measurable changes may be considered.

(1) Components of allowable expenses. Allowable expenses, to the extent they are reasonable and necessary, and subject to this section, may include, but are not limited to, the following general categories:

(A) operations and maintenance expense incurred in furnishing normal utility service and in maintaining utility plant used by and useful to the utility in providing such service (payments to affiliated interests for costs of service, or any property, right, or thing, or for interest expense are not allowed as an expense for cost of service except as provided in Texas Water Code (TWC), §13.185(e));

(B) depreciation expense based on original cost and computed on a straight line basis over the useful life of the asset as approved by the commission. Depreciation is allowed on all currently used depreciable utility property owned by the utility except for property provided by explicit customer agreements or funded by customer contributions in aid of construction. Depreciation on all currently used and useful developer or governmental entity contributed property is allowed in the cost of service. On all applications declared administratively complete after the effective date of these rules, the depreciation accrual for all assets must account for net salvage value before the depreciation rate is calculated, and the depreciation must...
be calculated on a straight line, remaining life method. Utilities must calculate depreciation on a straight line basis, but are not required to use the remaining life method if salvage value is zero. Calculations of net salvage value in rate applications must be reasonable:

(C) assessments and taxes other than income taxes;
(D) federal income taxes on a normalized basis (federal income taxes must be computed according to the provisions of TWC, §13.185(f), if applicable);
(E) reasonable expenditures for ordinary advertising, contributions, and donations; and
(F) funds expended in support of membership in professional or trade associations, provided such associations contribute toward the professionalism of their membership.

(2) Expenses not allowed. The following expenses are not allowed as a component of cost of service:

(A) legislative advocacy expenses, whether made directly or indirectly, including, but not limited to, legislative advocacy expenses included in professional or trade association dues;
(B) funds expended in support of political candidates;
(C) funds expended in support of any political movement;
(D) funds expended in promotion of political or religious causes;
(E) funds expended in support of or membership in social, recreational, fraternal, or religious clubs or organizations;
(F) funds promoting increased consumption of water;
(G) additional funds expended to mail any parcel or letter containing any of the items mentioned in subparagraphs (A) - (F) of this paragraph;
(H) costs, including, but not limited to, interest expense of processing a refund or credit of sums collected in excess of the rate finally ordered by the commission;
(I) any expenditure found by the commission to be unreasonable, unnecessary, or not in the public interest, including, but not limited to, executive salaries, advertising expenses, rate case expenses, legal expenses, penalties and interest on overdue taxes, criminal penalties or fines, and civil penalties or fines; and
(J) the costs of purchasing groundwater from any source if:

(i) the source of the groundwater is located in a priority groundwater management area; and

(ii) a wholesale supply of surface water is available.

(c) Return on invested capital. The return on invested capital is the rate of return times invested capital.

(1) Rate of return. The commission shall allow each utility a reasonable opportunity to earn a reasonable rate of return, which is expressed as a percentage of invested capital, and shall fix the rate of return in accordance with the following principles.

(A) The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.

(B) The commission shall consider the efforts and achievements of the utility in the conservation of resources, the quality of the utility’s services, the efficiency of the utility’s operations, and the quality of the utility’s management, along with other relevant conditions and practices.

(C) The commission may, in addition, consider inflation, deflation, the growth rate of the service area, and the need for the utility to attract new capital. In each case, the commission shall consider the utility’s cost of capital, which is the composite of the cost of the various classes of capital used by the utility.

(i) Debt capital. The cost of debt capital is the actual cost of debt.

(ii) Equity capital. The cost of equity capital must be based upon a fair return on its value. For companies with ownership expressed in terms of shares of stock, equity capital commonly consists of the following classes of stock.

(I) Common stock capital. The cost of common stock capital must be based upon a fair return on its value.

(II) Preferred stock capital. The cost of preferred stock capital is its annual dividend requirement, if any, plus an adjustment for premiums, discounts, and cost of issuance.

(2) Invested capital, also referred to as rate base. The rate of return is applied to the rate base. Components to be included in determining the rate base are as follows:

(A) original cost, less accumulated depreciation, of utility plant, property, and equipment used by and useful to the utility in providing service;

(B) original cost, less net salvage and accumulated depreciation at the date of retirement, and property retired by the utility; and

(i) original cost under subparagraph (A) of this paragraph or this subparagraph is the actual money cost, or the actual money value of any consideration paid other than money, of the property at the time it was dedicated to public use, whether by the utility that is the present owner or by a predecessor. Assets may be booked in itemized or group accounting, but all accounting for assets and their retirements must be supported by an approved accounting system. On all assets removed from service after June 19, 2009, the original cost of an asset must be the book cost less net salvage value. If a utility calculates annual depreciation expense for an asset with allowance for salvage value, then it must account for the actual salvage amounts when the asset is actually retired. The utility must include the actual salvage calculation(s) in its net plant calculation(s) in the first full rate change application (excluding alternative rate method applications as described in 30 TAC §291.34) it files after the date on which the asset was removed from service, even if it was not retired during the test year;

(ii) reserve for depreciation under subparagraph (A) of this paragraph or this subparagraph is the accumulation of recognized allocations of original cost, representing recovery of initial investment, over the estimated useful life or remaining life of the asset. If salvage value is zero, depreciation must be computed on a straight line basis over the expected useful life of the item or facility. If salvage value is not zero, depreciation must be computed on a straight line, remaining life basis. For an asset removed from service after June 19, 2009, accumulated depreciation will be calculated on book cost less net salvage of the asset. The retirement of a plant asset from service is accounted for by crediting the book cost to the utility plant account in which it is included. Accumulated depreciation must also be debited with the original cost and the cost of removal and cred-
ited with the salvage value and any other amounts recovered. Return is allowed for assets removed from service after June 19, 2009, after their removal from service if the utility proves that the decision to retire the asset was financially prudent, unavoidable, necessary because of technological obsolescence, or otherwise reasonable. The utility must also provide evidence establishing the original cost of the asset, the cost of removal, salvage value, any other amounts recovered, the useful life of the asset (or remaining life as may be appropriate), the date the asset was taken out of service, and the accumulated depreciation up to the date it was taken out of service. Additionally, the utility must show that it used due diligence in recovering maximum salvage value of a retired asset. TWC, §13.185(e) relating to dealings with affiliated interests, will apply to business dealings with any entity involved in the retirement, removal, or recovery of assets. Retired assets will be included in a utility’s application for a rate change if the application is the first application for a rate change filed by the utility after the date the asset was retired. The utility cannot include the retired asset in its net plant calculations in any subsequent applications;

(iii) the original cost of plant, property, and equipment acquired from an affiliated interest may not be included in invested capital except as provided in TWC, §13.185(e);

(iv) utility property funded by explicit customer agreements or customer contributions in aid of construction such as surcharges may not be included in original cost or invested capital; and

(C) [H] working capital allowance to be composed of, but not limited to, the following:

(i) reasonable inventories of materials and supplies, held specifically for purposes of permitting efficient operation of the utility in providing normal utility service;

(ii) reasonable prepayments for operating expenses (prepayments to affiliated interests) are subject to the standards set forth in TWC, §13.185(e); and

(iii) a reasonable allowance up to one-eighth of total annual operations and maintenance expense excluding amounts charged to operations and maintenance expense for materials, supplies, and prepayments (operations and maintenance expense does not include depreciation, other taxes, or federal income taxes).

(3) Terms not included in rate base. Unless otherwise determined by the commission, for good cause shown, the following items will not be included in determining the overall rate base.

(A) Miscellaneous items. Certain items that include, but are not limited to, the following:

(i) accumulated reserve for deferred federal income taxes;

(ii) unamortized investment tax credit to the extent allowed by the Internal Revenue Code;

(iii) contingency and/or property insurance reserves;

(iv) contributions in aid of construction; and

(v) other sources of cost-free capital, as determined by the commission.

(B) Construction work in progress. Under ordinary circumstances, the rate base consists only of those items that are used and useful in providing service to the public. Under exceptional circumstances, the commission may include construction work in progress in rate base to the extent that the utility has proven that:

(i) the inclusion is necessary to the financial integrity of the utility; and

(ii) major projects under construction have been efficiently and prudently planned and managed. However, construction work in progress may not be allowed for any portion of a major project that the utility has failed to prove was efficiently and prudently planned and managed.

(d) Recovery of positive acquisition adjustments.

(1) For utility plant, property, and equipment acquired by a utility from another retail public utility as a sale, merger, etc. of utility service area for which an application for approval of sale has been filed with the commission on or after September 1, 1997, and that sale application closed thereafter, a positive acquisition adjustment will be allowed to the extent that the acquiring utility proves that:

(A) the property is used and useful in providing water or sewer service at the time of the acquisition or as a result of the acquisition;

(B) reasonable, prudent, and timely investments will be made if required to bring the system into compliance with all applicable rules and regulations;

(C) as a result of the sale, merger, etc.:

(i) the customers of the system being acquired will receive higher quality or more reliable water or sewer service or that the acquisition was necessary so that customers of the acquiring utility’s other systems could receive higher quality or more reliable water or sewer service;

(ii) regionalization of retail public utilities (meaning a pooling of financial, managerial, or technical resources that achieve economies of scale or efficiencies of service) was achieved; or

(iii) the acquiring system will become financially stable and technically sound as a result of the acquisition, or the system being acquired that is not financially stable and technically sound will become a part of a financially stable and technically sound utility;

(D) any and all transactions between the buyer and the seller entered into as a part or condition of the sale are fully disclosed to the executive director and were conducted at arm’s length;

(E) the actual purchase price is reasonable in consideration of the condition of the plant, property, and equipment being acquired; the impact on customer rates if the acquisition adjustment is granted; the benefits to the customers; and the amount of contributions in aid of construction in the system being acquired;

(F) in a single or multi-stage sale, the owner of the acquired retail public utility and the final acquiring utility are not affiliated. A multi-stage sale is where a stock transaction is followed by a transfer of assets in what is essentially a single sales transaction. A positive acquisition adjustment is allowed only in those cases where the multi-stage transaction was fully disclosed to the executive director in the application for approval of the initial stock sale. Any multi-stage sale occurring between September 1, 1997 and February 4, 1999 is exempt from the requirement for executive director notification at the time of the approval of the initial sale, but must provide such notification by April 5, 1999; and

(G) the rates charged by the acquiring utility to its preacquisition customers will not increase unreasonably because of the acquisition.

(2) The amount of the acquisition adjustment approved by the regulatory authority must be amortized using a straight line method
over a period equal to the weighted average remaining useful life of
the acquired plant, property, and equipment, at an interest rate equal
to the rate of return determined under subsection (c) of this section.
The acquisition adjustment may be treated as a surcharge and may be
recovered using non-system-wide rates.

(3) The authorization for and the amount of an acquisition
adjustment can only be determined as a part of a rate change application.

(4) The acquisition adjustment can only be included in
rates as a part of a rate change application.

§291.34. Alternative Rate Methods.

(a) Alternative rate methods. To ensure that retail customers
receive a higher quality, more affordable, or more reliable water or
sewer service, to encourage regionalization, or to maintain financially
stable and technically sound utilities, the commission may utilize alterna-
tive methods of establishing rates. The commission shall assure that
rates, operations, and service are just and reasonable to the consumers
and to the utilities. The executive director may prescribe modified rate
filing packages for these alternate methods of establishing rates.

(b) Single issue rate change. Unless a utility is using the cash
needs method, it may request approval to increase rates to reflect a
change in any one specific cost component. The following conditions
apply to this type of request.

(1) The proposed effective date of the single issue rate
change request must be within 24 months of the effective date of the
last rate change request in which a complete rate change application
was filed.

(2) The change in rates is limited to those amounts nec-
essary to recover the increase in the specific cost component and the
increase will be allocated to the rate structure in the same manner as in
the previous rate change.

(3) The scope of a single issue rate proceeding is limited
to the single issue prompting a change in rates. For capital items this
includes depreciation and return determined using the rate of return
established in the prior rate change proceeding.

(4) The utility shall provide notice as described in
§291.22(a) - (e) of this title (relating to Notice of Intent To Change Rates), and the notice must describe the cost component and reason
for the increased cost.

(5) A utility exercising this option shall submit a complete
rate change application within three years following the effective date
of the single issue rate change request.

(c) Phased and multi-step rate changes. In a rate proceeding,
the commission may authorize a phased, stepped, or multi-year
approach to setting and implementing rates to eliminate the requirement
that a utility file another rate application.

(1) A utility may request to use the phased or multi-step
rate method:

(A) to include the capital cost of installation of utility
plant items that are necessary to improve service or achieve compli-
ance with commission regulations in the utility’s rate base and operat-
ing expenses in the revenue requirement when facilities are placed in
service;

(B) to provide additional construction funds after major
milestones are met;

(C) to provide assurance to a lender that rates will be
immediately increased when facilities are placed in service;

(D) to allow a utility to move to metered rates from un-
metered rates as soon as meters can be installed at all service connec-
tions;

(E) to phase in increased rates when a utility has been
acquired by another utility with higher rates;

(F) to phase in rates when a utility with multiple rate
schedules is making the transition to a system-wide rate structure; or

(G) when requested by the utility.

(2) Construction schedules and cost estimates for new fa-
cilities that are the basis for the phased or multi-step rate increase must
be prepared by a licensed professional engineer.

(3) Unless otherwise specified in the commission order, the
next phase or step cannot be implemented without verification of com-
pletion of each step by a licensed professional engineer, agency inspec-
tor, or agency subcontractor.

(4) At the time each rate step is implemented, the utility
shall review actual costs of construction versus the estimates upon
which the phase-in rates were based. If the revenues received from
the phased or multi-step rates are higher than what the actual costs indi-
cate, the excess amount must be reported to the executive director
prior to implementing the next phase or step. Unless otherwise speci-
fied in a commission order or directed by the executive director, the
utility may:

(A) refund or credit the overage to the customers in a
lump sum; or

(B) retain the excess to cover shortages on later phases
of the project. Any revenues retained but not needed for later phases
must be proportioned and refunded to the customers at the end of the
project with interest paid at the rate on deposits.

(5) The original notice to customers must include the pro-
posed phased or multi-step rate change and informational notice must
be provided to customers and the executive director 30 days prior to
the implementation of each step.

(6) A utility that requests and receives a phased or multi-
step rate increase cannot apply for another rate increase during the pe-
riod of the phase-in rate intervals unless:

(A) the utility can prove financial hardship; or

(B) the utility is willing to void the next steps of the
phase-in rate structure and undergo a full cost of service analysis.

(d) Cash needs method. The cash needs method of establish-
ing rates allows a utility to recover reasonable and prudently incurred
debt service, a reasonable cash reserve account, and other expenses not
allowed under standard methods of establishing rates.

(1) A utility may request to use the cash needs method of
setting rates if:

(A) the utility is a nonprofit corporation controlled by
individuals who are customers and who represent a majority of the cus-
tomers; or

(B) the utility can demonstrate that use of the cash needs
basis:

(i) is necessary to preserve the financial integrity of
the utility;

(ii) will enable it to develop the necessary financial,
managerial, and technical capacity of the utility; and

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(iii) will result in higher quality and more reliable utility service for customers.

(2) Under the cash needs method, the allowable components of cost of service are: allowable operating and maintenance expenses; depreciation expense; reasonable and prudently incurred debt service costs; recurring capital improvements, replacements, and extensions that are not debt-financed; and a reasonable cash reserve account.

(A) Allowable operating and maintenance expenses. Only those expenses that are reasonable and necessary to provide service to the ratepayers may be included in allowable operations and maintenance expenses and they must be based on the utility’s historical test year expenses as adjusted for known and measurable changes and reasonably anticipated, prudent projected expenses.

(B) Depreciation expense. Depreciation expense may be included on any used and useful depreciable plant, property, or equipment that was paid for by the utility and that has a positive net book value on the effective date of the rate change in the same manner as described in §291.31(b)(1)(B) of this title (relating to Cost of Service).

(C) Debt service costs. Debt service costs are cash outlays to an unaffiliated interest necessary to repay principal and interest on reasonably and prudently incurred loans. If required by the lender, debt service costs may also include amounts placed in a debt service reserve account in escrow or as required by the commission, Texas Water Development Board, or other state or federal agency or other financial institution. Hypothetical debt service costs may be used for:

(i) self-financed major capital asset purchases where the useful life of the asset is ten years or more. Hypothetical debt service costs may include the debt repayments using an amortization schedule with the same term as the estimated service life of the asset using the prime interest rate at the time the application is filed; and

(ii) prospective loans to be executed after the new rates are effective. Any pre-commitments, amortization schedules, or other documentation from the financial institution pertaining to the prospective loan must be presented for consideration.

(D) Recurring capital improvements, replacements, and extensions that are not debt-financed. Capital assets, repairs, or extensions that are a part of the normal business of the utility may be included as allowable expenses. This does not include routine capital expenses that are specifically debt-financed.

(E) Cash reserve account. A reasonable cash reserve account, up to 10% of annual operation and maintenance expenses, must be maintained and revenues to fund it may be included as an allowable expense. Funds from this account may be used to pay expenses incurred before revenues from rates are received and for extraordinary repair and maintenance expenses and other capital needs or unanticipated expenses if approved in writing by the executive director. The utility shall account for these funds separately and report to the commission as required by the executive director. Unless the utility requests an exception in writing and the exception is explicitly allowed by the executive director in writing, any funds in excess of 10%, shall be refunded to the customers each year with the January billing either as a credit on the bill or refund accompanied by a written explanation that explains the method used to calculate the amounts to be refunded. Each customer must receive the same refund amount. These reserves are not for the personal use of the management or ownership of the utility and may not be used to compensate an owner, manager, or individual employee above the amount approved for that position in the most recent rate change request unless authorized in writing by the executive director.

(3) If the revenues collected exceed the actual cost of service, defined in paragraph (2) of this subsection, during any calendar year, these excess cash revenues must be placed in the cash reserve account described in paragraph (2)(D) of this subsection and are subject to the same restrictions.

(4) If the utility demonstrates to the executive director that it has reduced expenses through its efforts, and has improved its financial, managerial, and technical capability, the executive director may allow the utility to retain 50% of the savings that result for the personal use of the management or ownership of the utility rather than pass on the full amount of the savings through lower rates or refund all of the amounts saved to the customers.

(5) If a utility elects to use the cash needs method, it may not elect to use the utility method for any rate change application initiated within five years after beginning to use the cash needs method. If after the five-year period, the utility does elect to use the utility method, it may not include in rate base, or recover the depreciation expense, for the portion of any capital assets paid for by customers as a result of including debt service costs in rates. It may, however, include in rate base, and recover through rates, the depreciation expense for capital assets that were not paid for by customers as a result of including debt service costs in rates. The net book value of these assets may be recovered over the remaining useful life of the asset.

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

Filed with the Office of the Secretary of State on March 12, 2010.
TRD-201001273
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 239-6090

TITLE 34. PUBLIC FINANCE
PART 1. COMPTROLLER OF PUBLIC ACCOUNTS
CHAPTER 19. STATE ENERGY CONSERVATION OFFICE
SUBCHAPTER E. TEXAS BUILDING ENERGY PERFORMANCE STANDARDS
34 TAC §19.53

The Comptroller of Public Accounts proposes new §19.53, concerning building energy efficiency performance standards. The new section is created in compliance with Health and Safety Code, §388.003(b-1), which authorizes the State Energy Conservation Office (SECO) to adopt equivalent or more stringent energy codes than those adopted in Health and Safety Code, §388.003(a) and (b). New §19.53(a) adopts the energy efficiency provisions of the International Residential Code as they existed on May 1, 2009, as

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the energy code for single family residential dwellings, as that term is defined in Health and Safety Code, §388.002(12). New §19.53(b) adopts the International Energy Conservation Code as it existed on May 1, 2009, for all other residential, commercial, and industrial construction in this state.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by establishing energy efficiency performance standards for building construction. The proposed section would have no fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the new section may be submitted to Dub Taylor, Director, State Energy Conservation Office, Comptroller of Public Accounts, Post Office Box 13528, Capitol Station, Austin, Texas 78711-3528.

This new rule is proposed pursuant to Health and Safety Code, §388.003.

The new section implements Health and Safety Code, §388.003.


(a) Single-family residential construction. Effective January 1, 2012, the energy efficiency provisions of the International Residential Code as they existed on May 1, 2009, are adopted as the energy code in this state for single-family residential construction as it is defined in Health and Safety Code, §388.002(12).

(b) All other residential, commercial, and industrial construction. Effective January 1, 2011, the International Energy Conservation Code as it existed on May 1, 2009, is adopted as the energy code for use in this state for all residential, commercial, and industrial construction that is not single-family residential construction under subsection (a) of this section.

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

Filed with the Office of the Secretary of State on March 11, 2010.

TRD-2010001236
Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 475-0387

SUBCHAPTER C. AMBER ALERT NETWORK FOR ABDUCTED CHILDREN

37 TAC §9.22

The Texas Department of Public Safety (the department) proposes amendments to §9.22, concerning the Amber Alert Network for Abducted Children. Amendments are necessary to implement HB 3385, which amended Texas Government Code, §411.355. The graphic material has been revised to include additional criteria for the alleged abduction of a child that is in immediate danger of becoming a victim of sexual assault, along with additional criteria for situations in which a child under the age of 14 is taken willingly or unwillingly from the custody of the child’s parent or legal guardian without permission by a person who is more than 3 years older than the child and is not a relative of the child. Additionally, the graphic material has been modified to clarify that a preliminary investigation shall be conducted before an alert is issued.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government or local economies.

Ms. MacBride also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Ms. MacBride has determined that for each year for the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be current and updated rules.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to Heidi Fischer, Program Supervisor for Missing Persons Clearinghouse, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0450; or by electronic mail to Heidi.Fischer@txdps.state.tx.us. For further information, call Heidi Fischer or Lt. Stacy Schwab at (512) 424-5074. The department will accept comments for 30 days following publication of the proposal in the Texas Register.

The amendments are proposed pursuant to Texas Government Code, §411.353(b), which requires the director to adopt rules and issue directives as necessary to ensure proper implementation of the alert system with the rules and directives to include instructions on the procedures for activating and deactivating the alert system; and Texas Government Code, §411.353(c), which

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 9. PUBLIC SAFETY COMMUNICATIONS

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requires the director to prescribe forms for use by local law enforcement agencies in requesting activation of the alert system. Texas Government Code, §411.353(b) and §411.353(c) are affected by this proposal.

§9.22. Local Law Enforcement Responsibility.
A local law enforcement agency with jurisdiction over the investigation of an abducted child may submit a request for activation of the Amber Alert Network. The request must be submitted on DPS Form MP-24. A local law enforcement agency may submit the form after it has verified that all statutory criteria for activation are clearly established by the specific facts of the case.

Figure: 37 TAC §9.22

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

Filed with the Office of the Secretary of State on March 10, 2010.

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Stuart Platt
General Counsel
Texas Department of Public Safety

Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 424-5848

CHAPTER 28. DNA, CODIS, FORENSIC ANALYSIS, AND CRIME LABORATORIES
SUBCHAPTER A. DEFINITIONS AND GENERAL CODIS PROVISIONS
37 TAC §§28.1, 28.5, 28.7

The Texas Department of Public Safety (the department) proposes amendments to §§28.1, 28.5, and 28.7, concerning Definitions and General CODIS Provisions. The department proposes conforming amendments in Chapter 28. These rules are required by 81st Legislature, 2009, SB 727, which expanded the individuals mandated to provide a DNA Record by amending Government Code, §411.148, Code of Criminal Procedure, Article 42.12, §11, as well as adding Texas Family Code, §54.0409.

In proposed §28.1, the definitions for "CODIS user laboratory" and "forensic DNA laboratory" have been clarified. As a result of the 81st Legislature, 2009, SB 1969 eliminating the term "institutional division" from Penal Code, §1.07, "institutional division" and its definition have also been deleted from §28.1. Additional non-substantive changes were made to §§28.1, 28.5, and 28.7 due to the reorganization of Chapter 28.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the rule is in effect, there will be no fiscal impact for state and local government or local economies.

Ms. MacBride has determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be an increase in public safety by solving unsolved crimes and removing recidivist offenders from the public.

Ms. MacBride has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to D. Pat Johnson, Deputy Assistant Director, Crime Laboratory Service, MSC 0460, Texas Department of Public Safety, P.O. Box 4143, Austin, TX 78765-4143, (512) 424-2143.

The rules are proposed pursuant to the director’s rule-making authority in Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d).

Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d) are affected by this proposal.

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

(1) Accredited laboratory--A [means a] laboratory accredited by the director under Subchapter I [H] of this chapter.

(2) CODIS--The [means the] Combined DNA Index System sponsored by the Federal Bureau of Investigation (FBI).

(3) CODIS user laboratory--A [means a] DNA laboratory subject to Subchapter G [E] of this chapter. [The term does not include a forensic DNA laboratory subject to Subchapter E of this chapter.]

(4) Crime laboratory--[means]:
(A) an accredited laboratory;
(B) a CODIS user laboratory; or
(C) a forensic DNA laboratory.

(5) Criminal justice or law enforcement agency or agency--The [means the] Texas Department of Criminal Justice, the Texas Youth Commission, the Texas Juvenile Probation Commission, the Criminal Justice Policy Council, a community supervision or probation department of this state, a criminal justice agency described by Government Code, §411.082, a city police department of this state, a county sheriff’s department of this state, the department, or another agency or subdivision of this state which is authorized to employ or commission peace officers.

(6) Department [or] (DPS)--The [means the] Texas Department of Public Safety.

(7) Director--The [means the] director of the department.

(8) DNA--[means] Deoxyribonucleic acid.
(9) DNA database—The [means the] database that contains forensic DNA records maintained by the director.

(10) DNA laboratory—A [means a] laboratory that performs forensic DNA analysis on samples or specimens derived from a human body or crime scene. The term includes a CODIS user laboratory or a forensic DNA laboratory.

(11) DNA record—The [means the] results of a forensic DNA analysis performed by a DNA laboratory, including a profile, and, if known [known], the name of the person who is the subject of the analysis.

(12) DPS accreditation—Accreditation [means accreditation] of a laboratory or other entity by the director under Subchapter I [H] of this chapter.

(13) FBI—The [means the] Federal Bureau of Investigation.

(14) Forensic analysis—has the meaning assigned by §28.142 [§28.132] of this title (relating to Definitions).

(15) Forensic DNA laboratory—A [means a] laboratory subject to Subchapter F [E] of this chapter. [The term does not include a CODIS user laboratory subject to Subchapter F of this chapter.]

(16) Forensic DNA testing—Forensic [means forensic] DNA analysis conducted for use in a criminal proceeding under Code of Criminal Procedure, Article 38.35.

(17) Institution of higher education—has the meaning assigned by Education Code, §61.003.

(18) Institutional division and penal institution—have the meanings assigned by Penal Code, §1.07.

(19) Penitentiary—The [means the] complete 13 locus CODIS STR DNA profile used for law enforcement identification.

(20) Recognized accreditation—Accreditation [means accreditation] of a laboratory or other entity by an accrediting body recognized by the director under Subchapter I [H] of this chapter.

(21) Recognized accrediting body—An [means an] entity outside DPS that:

(A) is recognized by the director under Subchapter I [H] of this chapter;

(B) issues an accreditation accepted throughout the relevant scientific community; and

(C) accredits a laboratory or other entity, including its personnel, procedures, and facilities, whether the body uses ‘accreditation,’ ‘certification,’ or a similar term. The term accreditation does not include the certification of an individual unless that certification is relevant to an accreditation review of personnel employed by a laboratory or entity.

(22) Substantial deficiency—A [means a] failure to comply with an accreditation or operational standard that is reasonably likely to impair:

(A) the integrity or trustworthiness of a test result; and

(B) the admissibility of that result. The term does not include a minor deficiency.

(23) TDCJ—The [means the] Texas Department of Criminal Justice.

(24) TYC—The [means the] Texas Youth Commission.

§28.5. SampleSubmittedToDirector.
A person who collects a sample under Subchapter C, D, or H [G] of this chapter shall send the sample to the director at the DPS Crime Laboratory Service.

§28.7. Communications.
(a) Information about this chapter is available at the following web site: http://www.txdps.state.tx.us.

(b) Except as provided by §28.109 [§28.09] of this title (relating to CODIS Communications) and §28.130 [§28.120] of this title (relating to DNA Communications), a forensic DNA laboratory or accredited laboratory shall communicate with the department or the director through the DPS Crime Laboratory Service at:

(1) telephone number: (512) 424-2105;

(2) fax number: (512) 424-5645;

(3) e-mail address: LABQA@txdps.state.tx.us;

(4) Post Office Box mailing address: Crime Laboratory Service, Attention Quality Assurance, MSC 0460, Texas Department of Public Safety, P.O. Box 4143, Austin, Texas 78765-4143; and

(5) physical mailing address: Crime Laboratory Service, QA MSC 0460, Texas Department of Public Safety, 5805 North Lamar Boulevard, Austin, Texas 78752-4422.

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

Filed with the Office of the Secretary of State on March 11, 2010.

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Stuart Platt
General Counsel
Texas Department of Public Safety

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For further information, please call: (512) 424-5848

SUBCHAPTER B. CODIS RESPONSIBILITIES OF THE DIRECTOR
37 TAC §§28.23, 28.24, 28.30, 28.31

The Texas Department of Public Safety (the department) proposes amendments to §§28.23, 28.24, 28.30, and 28.31, concerning CODIS Responsibilities of the Director. The department proposes conforming amendments in Chapter 28. These rules are required by 81st Legislature, 2009, SB 727, which expanded the individuals mandated to provide a DNA Record by amending Government Code, §411.148, Code of Criminal Procedure, Article 42.12, §11, as well as adding Texas Family Code, §54.0409.

The department proposes simplifying §28.23, Types of DNA Files, by referencing the applicable statute, Texas Government Code, §411.142. Non-substantive changes were made to
Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the rule is in effect, there will be no fiscal impact for state and local government or local economies.

Ms. MacBride has determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be an increase in public safety by solving unsolved crimes and removing recidivist offenders from the public.

Ms. MacBride has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to D. Pat Johnson, Deputy Assistant Director, Crime Laboratory Service, MSC 0460, Texas Department of Public Safety, P.O. Box 4143, Austin, TX 78765-4143, (512) 424-2143.

The rules are proposed pursuant to the director’s rule-making authority in Texas Government Code, §§28.24, 411.146(c)(1), and 411.152(a) and (d).

Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d) are affected by this proposal.

§28.23. Types of DNA Files.

The DNA database may contain DNA records, including profiles, for the following types of records described in Government Code, §411.142:  
1. An individual described by §28.61 of this title (relating to Sample Collection by TDCJ).  
2. A juvenile described by §28.61 of this title (relating to Sample Collection by TYC).  
3. An individual charged with, convicted of, or placed on deferred adjudication for certain offenses described in subchapter G of this chapter.  
4. A biological sample of a deceased victim of a crime.  
5. A biological sample that is legally obtained in the investigation of a crime, regardless of origin.  
6. An unidentified missing person, or unidentified skeletal remains or body parts.  
7. A close biological relative of a person who has been reported missing to a law enforcement agency.  
8. A person at risk of becoming lost, such as a child or a person declared by a court to be mentally incapacitated, if the record is required by court order or a parent, conservator, or guardian of the person consents to the record; or  
9. An unidentified person, if the record does not contain personal identifying information.


(a) The director may release a DNA sample, analysis, profile, or record, only:

1. To a criminal justice agency for law enforcement identification purposes;
2. To a court for a judicial proceeding, if otherwise admissible under law;
3. To a criminal defendant for defense purposes, if related to the case in which the defendant is charged; or
4. If personally identifiable information is removed, for:

   A. A population statistics database;
   B. Identification research and protocol development; or
   C. Quality control.

(b) The director may release a DNA sample, analysis or record to a law enforcement agency laboratory for law enforcement purposes.

(c) The director shall maintain a record of requests made under this section. The director may release a record of the number of requests made for a defendant’s DNA record and the name of the requesting person.

(d) A file, fingerprint, or other identifying record submitted to the director by TYC or a local juvenile probation department under this chapter and relating to or identifying a juvenile shall be maintained separately from adult records. This subsection does not apply to storage or use of a DNA record in the DNA database.


If a sample has been erroneously taken from an individual that is not required by statute to provide a sample, the agency collecting the sample shall provide a formal request to the director asking that the sample be destroyed. Prior to destruction, a check of the offender’s criminal history will be conducted to verify that there are no qualifying offenses. If an individual is determined to have a qualifying offense, and a satisfactory sample has not been previously submitted, the agency will be notified that the sample is being retained. If there are no qualifying offenses, the sample and its associated records will be removed, and the collecting agency notified of the removal. Communications may be made as detailed in §28.109 (§28.29) of this title (relating to CODIS Communications).

§28.31. Court Order.

If any person subject to this chapter fails or refuses to comply with this chapter or with Government Code, Chapter 411, Subchapter H [G], the director may request a district or county attorney or the attorney general to seek compliance with the act through a court order.

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

Filed with the Office of the Secretary of State on March 11, 2010.
The Texas Department of Public Safety (the department) proposes the repeal of Subchapter E, §§28.81 and 28.82, concerning Forensic DNA Laboratories. Repeal of Subchapter E, §§28.81 and 28.82, is necessary due to the reorganization of Chapter 28 and the simultaneous filing of a new Subchapter F. The repealed sections will be renumbered as new §§28.91 and 28.92 in a simultaneous filing.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government or local economies.

Ms. MacBride also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeal as proposed. There are no anticipated economic costs to individuals who are required to comply with the repeal as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride has also determined that for each year of the first five-year period the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be current and updated rules.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this repeal. Accordingly, the department is not required to complete a takings impact assessment regarding this repeal.

Comments on the repeal may be submitted to D. Pat Johnson, Deputy Assistant Director, Crime Laboratory Service, MSC 0460, Texas Department of Public Safety, P.O. Box 4143, Austin, TX 78765-4143, (512) 424-2143.
The department has determined that Chapter 2007 of the Texas Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to D. Pat Johnson, Deputy Assistant Director, Crime Laboratory Service, MSC 0460, Texas Department of Public Safety, P.O. Box 4143, Austin, TX 78765-4143, (512) 424-2143.

The rules are proposed pursuant to the director’s rule-making authority in Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d).

Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d) are affected by this proposal.

§28.81. Sample Collection by Community Supervision Agency.

The following individuals shall provide one or more DNA samples taken by or at the request of a community supervision and corrections department or a local juvenile probation department ("supervising agency") for the purpose of creating a DNA record:

(1) an individual, other than a juvenile, who is ordered by a magistrate or court to provide a DNA sample under Code of Criminal Procedure, Article 42.12 or other law as part of an order granting community supervision to the individual; and

(2) a juvenile who, following an adjudication for conduct constituting a felony, is placed on probation, if the conduct constitutes a felony described by Family Code, §54.0409.

§28.82. Community Supervision Agency’s Responsibilities.

The supervising agency shall:

(1) obtain samples from individuals under this subchapter;

(2) preserve each sample collected;

(3) maintain a record of the collection of the sample; and

(4) send the sample to the director for scientific analysis under Subchapter B of this chapter (relating to CODIS Responsibilities of the Director).

§28.83. Sample Collection.

(a) Time to collect. The supervising agency shall obtain the sample from an individual at or near the time the agency accepts supervision of that individual.

(b) Use of force. A supervising agency employee may use force against an individual required to provide a sample under this subchapter when and to the degree the employee reasonably believes the force is immediately necessary to collect the sample.

(c) Contracts. The supervising agency may contract for collection services under this subchapter.

§28.84. Fingerprint and Signature.

(a) The supervising agency shall collect and forward thumbprints with each DNA sample collected under this subchapter.

(b) The thumbs must be rolled to capture the entire print.

(c) The supervising agency shall provide a legible signature of the person collecting the sample and, for identification purposes, should make reasonable efforts to collect a legible signature from the subject providing the sample.

This 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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Stuart Platt
General Counsel
Texas Department of Public Safety
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SUBCHAPTER F. CODIS USER LABORATORIES

37 TAC §§28.91 - 28.99

(Editors’ note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Public Safety or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Public Safety (the department) proposes the repeal of Subchapter F, §§28.91 - 28.99, concerning CODIS User Laboratories. Repeal of Subchapter F, §§28.91 - 28.99, is necessary due to the reorganization of Chapter 28 and the simultaneous filing of a new Subchapter G. The repealed sections will be renumbered as new §§28.101 - 28.109 in a simultaneous filing.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government or local economies.

Ms. MacBride also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeal as proposed. There are no anticipated economic costs to individuals who are required to comply with the repeal as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride also has determined that for each year of the first five-year period the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be current and updated rules.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this repeal. Accordingly, the department is not required to complete a takings impact assessment regarding this repeal.

Comments on the repeal may be submitted to D. Pat Johnson, Deputy Assistant Director, Crime Laboratory Service, MSC 0460, Texas Department of Public Safety, P.O. Box 4143, Austin, TX 78765-4143, (512) 424-2143.
The repeal is proposed pursuant to the director’s rule-making authority in Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d).

Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d) are affected by this proposal.

§28.91. Purpose and Applicability.
§28.92. CODIS Laboratory Application.
§28.94. Entry and Inspection.
§28.95. CODIS Records and Reports.
§28.96. Analysis of CODIS Records and Reports.
§28.98. Prohibition of CODIS User Laboratory Activity.
§28.99. CODIS Communications.

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

Filed with the Office of the Secretary of State on March 11, 2010.

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Stuart Platt
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 424-5848

SUBCHAPTER F. FORENSIC DNA LABORATORIES
37 TAC §28.91, §28.92

The Texas Department of Public Safety (the department) proposes new Subchapter F, §28.91 and §28.92, concerning Forensic DNA Laboratories. New Subchapter F (former §28.81 and §28.82) sets forth the director’s rules that govern the regulation of DNA laboratories located in this state with non-substantive changes made to the former sections due to the reorganization of Chapter 28.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the rule is in effect, there will be no fiscal impact for state and local government or local economies.

Ms. MacBride has determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be an increase in public safety by solving unsolved crimes and removing recidivist offenders from the public.

Ms. MacBride has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to D. Pat Johnson, Deputy Assistant Director, Crime Laboratory Service, MSC 0460, Texas Department of Public Safety, P.O. Box 4143, Austin, TX 78765-4143, (512) 424-2143.

The rules are proposed pursuant to the director’s rule-making authority in Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d).

Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d) are affected by this proposal.

§28.91. Purpose and Applicability.

(a) This subchapter contains the director’s rules that govern the regulation of DNA laboratories located in this state.

(b) The rules contained in this subchapter apply to forensic DNA laboratories, including a CODIS user laboratory, and do not apply to:

(1) any laboratory, including a crime laboratory, which does not conduct DNA testing; or

(2) any entity that conducts DNA testing, if that testing is performed for a purpose other than forensic analysis under Code of Criminal Procedure, Article 38.35.

§28.92. Minimum Standards.

(a) A forensic DNA laboratory shall comply with the rules in this subchapter.

(b) Before conducting a DNA test, a forensic DNA laboratory shall:

(1) obtain DPS accreditation under Subchapter I of this chapter (relating to Accreditation); and or

(2) comply with the audit standards required by the laboratory’s recognized accrediting body.

(c) A forensic DNA laboratory shall establish and maintain a procedure that requires prompt reporting of each substantial deficiency by the laboratory. Laboratory personnel shall promptly report an incident of substantial deficiency by the laboratory to appropriate authorities, including the laboratory’s director, the director of the department, the laboratory’s recognized accrediting body, and the appropriate prosecutor or other criminal justice or law enforcement agency. This section does not apply to a deficiency that laboratory personnel reasonably believe to be minor and not substantial.

(d) If a forensic DNA laboratory agrees or is required to report the results of an analysis, comparison, or other match to a criminal justice or law enforcement agency, the laboratory shall make reasonable efforts to submit the report to the agency no later than 30 days after completing its report of the comparison or match.
The Texas Department of Public Safety (the department) proposes new Subchapter G, §§28.101 - 28.109, concerning CODIS User Laboratories. New Subchapter G (former §§28.91 - 28.99) sets forth the director’s rules that govern the regulation of CODIS user laboratories located in this state with non-substantive changes made to the sections due to the reorganization of Chapter 28.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the rule is in effect, there will be no fiscal impact for state and local government or local economies.

Ms. MacBride has determined that for each year of the five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be an increase in public safety by solving unsolved crimes and removing recidivist offenders from the public.

Ms. MacBride has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to D. Pat Johnson, Deputy Assistant Director, Crime Laboratory Service, MSC 0460, Texas Department of Public Safety, P.O. Box 4143, Austin, TX 78765-4143, (512) 424-2143.

The rules are proposed pursuant to the director's rule-making authority in Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d).

Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d) are affected by this proposal.

§28.101. Purpose and Applicability.
(a) This subchapter contains the director’s rules that govern the regulation of a CODIS user laboratory located in this state.
(b) The rules contained in this subchapter apply to a CODIS user laboratory and do not apply to:
   (1) a forensic DNA laboratory that does not participate in CODIS;
   (2) any laboratory which does not conduct DNA testing; or
   (3) any entity that conducts DNA testing, if that testing is performed for a purpose other than forensic analysis under Code of Criminal Procedure, Article 38.35.

§28.102. CODIS Laboratory Application.
A DNA laboratory in this state that is maintained by a criminal justice agency may apply to become a CODIS user laboratory by completing an application form provided by the director and providing requested information.

§28.103. Policy, Procedure, and Rule Compliance.
A CODIS user laboratory shall:
   (1) comply with CODIS policy and with this chapter, including the collection, preservation, shipment, and analysis of a sample or specimen and access and use of the DNA database;
   (2) follow the procedures established by the director under this chapter and specified by the FBI, including the use of comparable test procedures, profiles, laboratory equipment, supplies and computer software;
   (3) maintain accreditation under Subchapter I of this chapter; and
   (4) be subject to the provision of the annual audit described by the FBI DNA Quality Assurance Audit Document. The laboratory shall inform the director within 30 days of the completion of such annual audit, and shall provide the director with a copy of the notification, by the FBI, of the determination on all external audits within 30 days of receipt.

§28.104. Entry and Inspection.
The director may enter and inspect a CODIS user laboratory during reasonable business hours and to monitor operations related to:
   (1) the collection, preservation, shipment, and analysis of samples;
   (2) the access and use of the DNA database; and
   (3) any other matters including compliance with FBI guidelines.

§28.105. CODIS Records and Reports.
(a) A CODIS user laboratory conducting a DNA analysis under this subchapter shall transmit the DNA record of the analysis, including profiles, to the director at the DPS Crime Laboratory Service.
(b) If a CODIS user laboratory agrees or is required to report the results of an analysis, comparison, or other match to a criminal justice or law enforcement agency, the laboratory shall make reasonable
efforts to submit the report to the agency no later than 30 days after completing its report of the comparison or match.

§28.106. Analysis of CODIS Records and Reports.
A CODIS user laboratory may analyze a biological sample collected under this chapter or other DNA sample only:

1. to type the genetic markers contained in the sample;
2. for criminal justice and law enforcement purposes; or
3. for other purposes described by this subchapter or a purpose described by §28.22 of this title (relating to DNA Database Purposes).

Because the convicted offender CODIS sample and its analysis are intended only to point to a suspect, if possible a second DNA sample must be obtained from a suspect in a criminal investigation if forensic DNA evidence is necessary for use as substantive evidence in the prosecution of a case.

§28.108. Prohibition of CODIS User Laboratory Activity.
If a CODIS user laboratory violates this subchapter, the director may prohibit the laboratory from:

1. exchanging DNA records with another DNA laboratory or criminal justice or law enforcement agency; or
2. accessing the CODIS system.

§28.109. CODIS Communications.
(a) Information about this subchapter is available at the following web site: http://www.txdps.state.tx.us/codis.

(b) To inquire about information and administrative matters with, transmit to, or otherwise contact the department, director, or Crime Laboratory Service with respect to this subchapter:

1. the telephone number is: (512) 424-2105 x3888;
2. the fax number is: (512) 424-2386;
3. the e-mail address is: codislab@txdps.state.tx.us;
4. the Post Office Box mailing address is: Crime Laboratory Service, Attention CODIS, MSC 0461, Texas Department of Public Safety, P.O. Box 4143, Austin, Texas 78765-0461; and
5. the physical mailing address is: Crime Laboratory Service MSC 0461, Texas Department of Public Safety, 5805 N. Lamar Blvd., Austin, Texas 78752-4422.

This 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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Stuart Platt
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SUBCHAPTER G. DATABASE RECORDS

37 TAC §§28.111 - 28.120

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

The Texas Department of Public Safety (the department) proposes the repeal of Subchapter G, §§28.111 - 28.120, concerning Database Records. Repeal of Subchapter G, §§28.111 - 28.120, is necessary due to the reorganization of Chapter 28 and the simultaneous filing of a new Subchapter H. The repealed sections will be renumbered as new §§28.121 - 28.130 in a simultaneous filing.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government or local economies.

Ms. MacBride also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeal as proposed. There are no anticipated economic costs to individuals who are required to comply with the repeal as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride has also determined that for each year of the first five-year period the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be current and updated rules.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this repeal. Accordingly, the department is not required to complete a takings impact assessment regarding this repeal.

Comments on the repeal may be submitted to D. Pat Johnson, Deputy Assistant Director, Crime Laboratory Service, MSC 0460, Texas Department of Public Safety, P.O. Box 4143, Austin, TX 78765-4143, (512) 424-2143.

The repeal is proposed pursuant to the director’s rule-making authority in Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d).

Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d) are affected by this proposal. Subchapter G. Database Records.

§28.111. Subchapter Definitions.
§28.112. Purpose and Applicability.
§28.114. Approval of Outside Laboratory.
§28.115. Collection of Sample.
§28.117. DNA Record.
§28.118. Additional Sample.
§28.119 Notification and Information.
§28.120 DNA Communications.
This 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 H DATABASE RECORDS
37 TAC §§28.121 - 28.130
The Texas Department of Public Safety (the department) proposes new Subchapter H, §§28.121 - 28.130, concerning Database Records. New Subchapter H (former §§28.111 - 28.130) sets forth the director’s rules that governing the taking of a biological sample from certain eligible individuals by an agency in order to populate the DPS DNA database with non-substantive changes made to the sections due to the reorganization of Chapter 28.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the rule is in effect, there will be no fiscal impact for state and local government or local economies.

Ms. MacBride has determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be an increase in public safety by solving unsolved crimes and removing recidivist offenders from the public.

Ms. MacBride has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to D. Pat Johnson, Deputy Assistant Director, Crime Laboratory Service, MSC 0460, Texas Department of Public Safety, P.O. Box 4143, Austin, TX 78765-4143, (512) 424-2143.

The rules are proposed pursuant to the director’s rule-making authority in Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d).

Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d) are affected by this proposal.

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

1. Approved laboratory or lab--A public or private forensic laboratory that is approved by the director under this subchapter. The term does not include the department’s crime laboratory service.
2. Defendant--A suspect or arrestee.
3. DNA Database Card--A form (LAB-13) available from the director to be used by an agency to make a record under this subchapter.
4. DNA Procedural Guidelines--The latest draft of the director’s publication by that name and any cross-referenced material, including a procedure or specimen collection method approved by the director.
5. Standard DNA sample--A DNA sample, normally a blood sample, taken under Subchapter A through F of this chapter, including a standard sex offender DNA sample.

§28.122 Purpose and Applicability.
(a) Purpose. This subchapter contains the director’s rules governing the taking of a biological sample from certain eligible individuals by an agency in order to populate the DPS DNA database.
(b) Applicability. The general law and rules governing CODIS apply to this subchapter except as otherwise provided by this subchapter.

1. This subchapter applies to a DNA sample taken from an eligible individual for an offense covered by this subchapter.
2. This subchapter does not apply to:
A a standard DNA sample or record maintained by the director under Subchapters A through G of this chapter; or
B a suspect reference sample that is not a voluntary sample described by §28.123(7) of this title (relating to Eligible Individual).

§28.123 Eligible Individual.
This subchapter applies to an eligible individual described in this section, including an individual who is:

1. indicted for a felony prohibited or punishable under Penal Code:
   A §20.04(a)(4) (aggravated kidnapping with intent to cause bodily injury or violate or abuse sexually);
   B §21.11 (indecency with child);
   C §22.011 (sexual assault);
   D §22.021 (aggravated sexual assault);
   E §25.02 (prohibited sexual conduct or ‘incest’);
   F §30.02(d) (burglary of a habitation committing, attempting, or with intent to commit a non-theft felony);
   G §43.05 (compelling prostitution);
   H §43.25 (sexual performance by child); or

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If an agency frequently submits unusable samples, the director may require additional training before accepting further samples.

(e) Statutory prohibition. Under Government Code, §411.1471(d), no agency may take a blood sample for the purpose of creating a DNA record under this subchapter.

(f) Court-ordered sample. If a court, including a magistrate, orders the taking of a DNA sample under this subchapter, the director encourages but does not require the court to order that the sample be taken by an agency that has the personnel, training, and other resources necessary to efficiently and properly take the sample. The director expects these personnel will normally be:

1. a booking clerk or another individual performing a similar function at a county jail; or

2. a member of a sex offender registration unit or another individual performing a similar function for the agency.

(g) Criminal history check. If an agency arrestes an individual for a felony offense potentially covered by this subchapter, the director encourages but does not require the agency to take reasonable steps to determine if the individual has the criminal history sufficient to take a DNA sample under this subchapter. These steps should include inquiry into each appropriate information system available to law enforcement.

(b) Duty—standard sample. The duty to require or take a standard sample:

1. is affected by the fact that an individual proves that a DNA sample has already been collected under this subchapter; and

2. is not affected by the fact that:

   A. an individual asserts or proves that a standard specimen has already been collected; or

   B. a standard profile appears to already exist for the individual.

§28.126. Processing of Sample.

(a) Preservation. The agency collecting the DNA sample shall use a preservation method and procedure approved by the director and described in the DNA Procedural Guidelines.

(b) Forwarding. The collecting agency shall forward the sample together with the original DNA Database Card to the director or an approved lab no later than the end of the third business day after the collection.

(c) After forwarding. If the collecting agency forwards the sample kit and its associated database card to an approved lab, the agency:

1. may request the lab to return a copy of the profile to the agency; and

2. must instruct the lab that the lab shall, as soon as is reasonably practicable after creating the profile, forward to the director:

   A. the profile;

   B. all remaining sample material, including the unprocessed buccal swab and any remaining extracted DNA, and

   C. all other original kit components, including the original database card.

(d) Acceptance or rejection. The director:

1. may accept a usable sample that substantially complies with this subchapter;
§28.127.  DNA Record.  

(a) Maintenance by agency.  An agency collecting a DNA sample from an eligible individual shall maintain a record of the collection under this section, including a copy of the DNA Database Card and any associated record.

(b) Certification.  The individual agency representative who collects the sample shall certify compliance with the DNA Procedural Guidelines.  The individual shall make the certification on a DNA Database Card completed at the time of collection.  The card (LAB-13) includes a certification that:

1. the individual is properly trained; and
2. the DNA sample was taken in compliance with this subchapter.

(c) Retention period.  Unless a court orders differently, the collecting agency shall retain the copy of the DNA Database Card and any associated record for a period of three years from the date of collection.

(d) Maintenance by DPS.  The director shall maintain a DNA sample and record under this subchapter using standard CODIS laboratory procedures.

§28.128.  Additional Sample.

(a) Prosecutor determines no profile.  The director encourages but does not require the appropriate felony prosecutor to file a motion for a DNA sample to be taken under this subchapter, if an original DNA sample:

1. was never taken;
2. was lost or rejected; or
3. did not otherwise produce a valid DNA profile under this subchapter.

(b) Request from a felony prosecutor.  If the defendant has already submitted a DNA sample, an attorney representing the state in felony prosecutions may submit a written request to the director to determine that a defendant should provide a standard DNA sample.  The request must include justification demonstrating to the director that the interests of justice or public safety require that the defendant provide an additional DNA sample.

(c) DPS determines no profile.  If the director determines that no valid DNA profile exists for a defendant under this subchapter, the director deems that the interests of justice and public safety require that a defendant provide an additional, standard sample.  The director may contact an appropriate felony prosecutor to submit a written request under this section to ensure that each defendant, who is required to provide a sample, does provide at least one profiled DNA sample.

(d) Profile does exist.  If the director determines that a valid DNA record does exist for a defendant, the director:

1. shall not solicit an additional DNA sample to be taken by TDCJ or TYC without a written request from a felony prosecutor;
2. may contact the appropriate felony prosecutor to submit a written request under this section; and
3. may store an unsolicited sample for future testing.

§28.129.  Notification and Information.

If this subchapter requires or permits an agency to communicate with the department or the director, the agency must communicate with the department or the director through the DPS Crime Laboratory Service.

§28.130.  DNA Communications.

(a) Information about this subchapter is available at the following web site: http://www.txdps.state.tx.us/codis.

(b) To inquire about information and administrative matters with, transmit to, or otherwise contact the department, director, or Crime Laboratory Service with respect to this subchapter:

1. the telephone number is: (512) 424-2105 x3888;
2. the fax number is: (512) 424-2386;
3. the e-mail address is: codislab@txdps.state.tx.us;
4. the Post Office Box mailing address is: Crime Laboratory Service, Attention CODIS, MSC 0461, Texas Department of Public Safety, P.O. Box 4143, Austin, Texas 78765-0461; and
5. the physical mailing address is: Crime Laboratory Service MSC 0461, Texas Department of Public Safety, 5805 N. Lamar Blvd., Austin, Texas 78752-4422.

This 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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Stuart Platt
General Counsel
Texas Department of Public Safety
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SUBCHAPTER H.  ACCREDITATION

37 TAC §§28.131 - 28.141

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

The Texas Department of Public Safety (the department) proposes the repeal of Subchapter H, §§28.131 - 28.141, concerning Accreditation.  Repeal of Subchapter H, §§28.131 - 28.141, is necessary due to the reorganization of Chapter 28 and the simultaneous filing of a new Subchapter H.  The repealed sections will be renumbered as new §§28.141 - 28.151 in a simultaneous filing.
Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government or local economies.

Ms. MacBride also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeal as proposed. There are no anticipated economic costs to individuals who are required to comply with the repeal as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride has also determined that for each year of the first five-year period the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be current and updated rules.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this repeal. Accordingly, the department is not required to complete a takings impact assessment regarding this repeal.

Comments on the repeal may be submitted to D. Pat Johnson, Deputy Assistant Director, Crime Laboratory Service, MSC 0460, Texas Department of Public Safety, P.O. Box 4143, Austin, TX 78765-4143, (512) 424-2143.

The repeal is proposed pursuant to the director’s rule-making authority in Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d).

Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d) are affected by this proposal.

§28.131. Purpose.
§28.134. List of Recognized Accrediting Bodies.
§28.135. Disciplines and Subdisciplines Subject to DPS Accreditation.
§28.139. Provisional DPS Accreditation.
§28.140. Accreditation Term.

This 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 I. ACCREDITATION
37 TAC §§28.141 - 28.151

The Texas Department of Public Safety (the department) proposes new Subchapter I, §§28.141 - 28.151, concerning Accreditation. New Subchapter I (former §§28.131 - 28.141) sets forth the director’s rules that govern the recognition of an accrediting body by the director and the accreditation of an individual laboratory or other entity by the director with non-substantive changes made to the sections due to the reorganization of Chapter 28.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the rule is in effect, there will be no fiscal impact for state and local government or local economies.

Ms. MacBride has determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be an increase in public safety by solving unsolved crimes and removing recidivist offenders from the public.

Ms. MacBride has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to D. Pat Johnson, Deputy Assistant Director, Crime Laboratory Service, MSC 0460, Texas Department of Public Safety, P.O. Box 4143, Austin, TX 78765-4143, (512) 424-2143.

The rules are proposed pursuant to the director’s rule-making authority in Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d).
Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d) are affected by this proposal.

§28.141. Purpose.
(a) Generally. This subchapter contains the director’s rules adopted under Government Code, §411.0205, that govern:

(1) the recognition of an accrediting body by the director; and

(2) the accreditation of an individual laboratory or other entity by the director.

(b) Accreditation sequence. To be accredited by the director under this subchapter, a laboratory must first be accredited by a recognized accrediting body.

(c) Source of evidence predicate. The Code of Criminal Procedure, Article 38.35, requires DPS accreditation of an individual laboratory or other entity for admission of evidence or testimony if the laboratory or entity conducts a forensic analysis of physical evidence for use in a criminal proceeding.

(d) Statutory DPS accreditation. A laboratory may apply to the director for statutory DPS accreditation if accreditation is required for evidence admissibility under Code of Criminal Procedure, Article 38.35.

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

(1) Environmental testing--An analysis by a laboratory conducted for the purpose of determining the chemical, molecular, carcinogenic, radioactive, or pathogenic components of air, water, soil, or other environmental media for use in an administrative, civil, or criminal matter.

(2) Forensic analysis--has the meaning assigned by Code of Criminal Procedure, Article 38.35. The term does not include:

(A) an expert examination or test excluded under Code of Criminal Procedure, Article 38.35, subsection (a)(1);

(B) an expert examination or test conducted principally for the purpose of scientific research, medical practice, civil or administrative litigation, or other purpose unrelated to determining the connection of physical evidence to a criminal action;

(C) the location, identification, collection, or preservation of physical evidence by laboratory or investigative personnel unless the activity is integral to an expert examination or test;

(D) field, spot, screening, or other presumptive testing unless the activity is integral to an expert examination or test for which an expert opinion is rendered.

(3) Forensic pathology--Includes that portion of an autopsy conducted by a medical examiner or other forensic pathologist who is a licensed physician. The term does not include a toxicology or other laboratory associated with the office of a medical examiner.

(4) Laboratory--An entity that conducts a forensic analysis of physical evidence for use in a criminal proceeding. The term includes a forensic DNA laboratory and a CODIS user laboratory.

(5) Physical evidence--has the meaning assigned by Code of Criminal Procedure, Article 38.35.

The director shall recognize an accrediting body under this section if the director determines that the accrediting body:

(1) issues an accreditation that is accepted throughout the relevant scientific community and appropriate or available to a laboratory;

(2) has established adequate accreditation criteria reasonably likely to ensure trustworthy forensic analysis;

(3) requires a periodic competency audit or review of the personnel, facilities, and procedures employed by a laboratory to conduct a forensic analysis; and

(4) withholds, grants, or withdraws its accreditation of a laboratory based on its own determination of a reasonable likelihood of meaningful corrective action for each deficiency noted during the periodic audit or review.

§28.144. List of Recognized Accrediting Bodies.
(a) The director recognizes the following accrediting bodies, subject to the stated discipline or subdiscipline limitations:

(1) American Board of Forensic Toxicology (ABFT)—recognized for accreditation of toxicology discipline only.

(2) American Society of Crime Laboratory Directors, Laboratory Accreditation Board (ASCLD/LAB)—recognized for accreditation of all disciplines which are eligible for accreditation under this subchapter.

(3) Forensic Quality Services (FQS and FQS-I); formerly known as the National Forensic Science Technology Center (NFSTC)—recognized for accreditation of all disciplines which are eligible for accreditation under this subchapter.

(4) Substance Abuse and Mental Health Services Administration of the Department of Health and Human Services (SAMH—formerly known as the National Institute on Drug Abuse of the Department of Health and Human Services (NIDA)—recognized for accreditation of toxicology discipline in the subdiscipline of Urine Drug Testing for all classes of drugs approved by the accrediting body.

(5) College of American Pathologists (CAP)—recognized for accreditation of toxicology discipline only in the subdiscipline of Urine Drug Testing for all classes of drugs approved by the accrediting body.

(b) If an accrediting body is recognized under subsection (a) of this section and the recognized body approves a new discipline, subdiscipline, or procedure, the director may temporarily recognize the new discipline, subdiscipline, or procedure. A temporary approval shall be effective for 120 days.

§28.145. Disciplines and Subdisciplines Subject to DPS Accreditation.
(a) ’Forensic analysis’/recognized accreditation. This section describes a discipline or subdiscipline that involves forensic analysis for use in a criminal proceeding and for which accreditation is available from a recognized accrediting body.

(b) By entire discipline. A laboratory may apply to the director for DPS accreditation for one or more of the following disciplines:

(1) controlled substances;

(2) toxicology;

(3) biology;

(4) firearms/toolmark;

(5) questioned documents;

(6) trace evidence; or
(7) other discipline if approved by a recognized accrediting body and the director.

(c) Limited to subdiscipline. A laboratory may apply to the director for DPS accreditation limited to one or more of the following subdisciplines:

(1) under the controlled substances discipline, subdiscipline may include controlled substances marijuana, precursor analysis, and clandestine laboratory analysis or;

(2) under the toxicology discipline, subdiscipline may include forensic toxicology, urine drug testing, and blood alcohol analysis;

(3) under the biology discipline, subdiscipline may include biology, serology, and DNA;

(4) under the firearms/toolmark discipline, subdiscipline may include: firearms, ballistics, and toolmarks;

(5) under the questioned documents discipline, subdiscipline may include: questioned documents, handwriting, and ink analysis;

(6) under the trace evidence discipline, subdiscipline may include: fire debris, explosives, fibers, gun shot residue, glass, hairs, paint, filaments, and unknown substances; and

(7) other discipline and its related subdiscipline if accredited by a recognized accrediting body and the director.

(d) A laboratory may chose to assign a particular subdiscipline to a different administrative section or unit in the laboratory. For example, the subdiscipline of impression evidence, including footwear, tire track, and similar impression evidence, may be administratively assigned by the laboratory to its trace evidence section, firearms section, or questioned document section. The director deems impression evidence to be a subdiscipline of several disciplines under this subchapter, including trace evidence, firearms/toolmark, or questioned documents.

(e) If an accreditation for a subdiscipline is accompanied by the term 'only' or a similar notation, the director will deem the accreditation to exclude other subdisciplines in that discipline.

(f) Accreditation of a confirmation test procedure does not carry automatic accreditation of an associated field, spot, screening, or other presumptive test.

§28.146. Disciplines, Subdisciplines, and Procedures to Which Statutory DPS Accreditation Does Not Apply. This section describes disciplines, subdisciplines, or procedures excluded from the definition of forensic analysis or otherwise exempted by the Code of Criminal Procedure, Article 38.35, or by this subchapter based on their nature.

(1) This paragraph describes a discipline, subdiscipline, or procedure that is excluded from the definition of forensic analysis or otherwise exempted by the Code of Criminal Procedure, Article 38.35, and for which no recognized accreditation is appropriate or available. A laboratory may not apply to the director for DPS accreditation for:

(A) breath specimen testing under Transportation Code, Chapter 724;

(B) latent print examination;

(C) digital evidence (including computer forensics, audio, or imaging); or

(D) an examination or test excluded by rule under Government Code, §411.0205(c).

(E) the portion of an autopsy conducted by a medical examiner or other forensic pathologist who is a licensed physician.

(2) This paragraph describes a discipline, subdiscipline, or procedure that does not normally involve forensic analysis of physical evidence for use in a criminal proceeding and for which recognized accreditation is inappropriate or unavailable. A laboratory may not apply to the director for DPS accreditation for:

(A) forensic photography;

(B) non-criminal paternity testing;

(C) non-criminal testing of human or nonhuman blood, urine, or tissue;

(D) a crime scene search team (whether or not associated with an accredited laboratory) if the team does not engage in forensic analysis because it only engages in the location, identification, collection, or preservation of physical evidence and the activity is not integral to an expert examination or test;

(E) other evidence processing or handling that is excluded under §28.142(2) of this title (relating to Definitions); or

(F) other discipline or subdiscipline so determined by the director.


(a) This section describes a discipline, subdiscipline, or procedure that is "forensic analysis" but is not subject to accreditation by one or more recognized accrediting bodies.

(b) Even though a discipline or subdiscipline is forensic analysis, the director has determined that no accreditation is appropriate or available from a recognized accrediting body for the following disciplines, subdisciplines, or procedures and a laboratory may not apply to the director for DPS accreditation for:

(1) sexual assault examination of the person;

(2) forensic anthropology, entomology, or botany;

(3) environmental testing;

(4) facial or traffic accident reconstruction;

(5) serial number restoration;

(6) polygraph examination;

(7) voice stress, voiceprint, or similar voice analysis;

(8) forensic hypnosis;

(9) statement analysis;

(10) profiling; or

(11) other discipline or subdiscipline so determined by the director, including those identified and listed at the department’s website.

(c) A request for exemption shall be submitted in writing to the director.


(a) Issuance and renewal. The director may issue or renew accreditation under this section.

(b) Application. An applicant for full DPS accreditation shall complete and submit to the director a current form LAB-3 and attach copies of the following:
(1) an accreditation certificate and letter of notification of accreditation from a recognized accrediting body; and

(2) each document provided by the recognized accrediting body that identifies the discipline or subdiscipline for which the laboratory has received accreditation and any limitation or restriction regarding that accreditation.

(c) Additional information. The director may require additional information to properly evaluate the application either as part of the original application or as supplemental information.

(d) Reports to director.

(1) If accredited by ASCLD/LAB, a laboratory shall provide the director with a copy of each Annual Accreditation Review Report. If accredited by another recognized accrediting body, a laboratory shall provide the director with a copy of each equivalent annual accreditation assessment document. The copy shall be submitted to the director at the same time that it is due to the recognized accrediting body.

(2) A laboratory shall provide the director with a copy of correspondence and each report or communication between the laboratory and the recognized accrediting body. The laboratory shall submit the copy to the director no later than 30 days after the date the laboratory receives or transmits the correspondence, report, or communication.

(3) A laboratory that discontinues a specific forensic discipline or subdiscipline:

(A) if known beforehand, should submit written notification to the director at least 30 days before the effective date of the discontinuation; or

(B) if unknown beforehand, shall submit written notification to the director at least 5 business days after the effective date of the discontinuation.

(e) Federal forensic laboratories. A federal forensic laboratory is deemed to be accredited by the director without application provided that the laboratory is accredited by a recognized accrediting body as provided under §28.144 of this title (relating to List of Recognized Accrediting Bodies). A laboratory deemed accredited is not subject to the reporting requirements of this subchapter or the processes provided under Subchapter J of this chapter (relating to Complaints, Special Review, and Administrative Action).

§28.149. Provisional DPS Accreditation.

(a) Issuance and renewal. The director may issue provisional accreditation under this section that is non-renewable for that discipline, subdiscipline, or procedure.

(b) Application. An applicant for provisional DPS accreditation shall complete and submit to the director a current form LAB-5 as referenced in §28.148(b) of this title (relating to Full DPS Accreditation) and attach copies of the following:

(1) the application for accreditation by a recognized accrediting body;

(2) the initial audit, inspection, or review report from an independent auditor based on the standards of the recognized accrediting body;

(3) a full response in writing to the initial audit, inspection, or review report described in paragraph (2) of this subsection; and

(4) each document provided by the recognized accrediting body that identifies the discipline or subdiscipline for which the laboratory seeks accreditation.

(c) Provisional-Interim. If a laboratory is in good standing with its accrediting body and has made application to renew or replace its accreditation, the laboratory may apply for Provisional DPS Accreditation if necessary to cover a period between times that it qualifies for full DPS accreditation. For this Provisional DPS Accreditation, the laboratory may complete and submit to the director a current form LAB-5 as referenced in §28.148(b) of this title and attach copies of the following:

(1) the application for accreditation by a recognized accrediting body; and

(2) each document provided by the recognized accrediting body that identifies the discipline or subdiscipline for which the laboratory seeks accreditation.

(d) Additional information. The director may require additional information to properly evaluate the application either as part of the original application or as supplemental information.

(e) Reports to director.

(1) The laboratory shall request that the recognized accrediting body provide the director with a copy of each audit, inspection, or review report conducted before full DPS accreditation.

(2) A laboratory shall provide the director with a copy of correspondence and each report or communication between the laboratory and the recognized accrediting body. The laboratory shall submit the copy to the director no later than 30 days after the date the laboratory receives or transmits the correspondence, report, or communication.

(3) A laboratory that discontinues a specific forensic discipline, subdiscipline, or procedure shall submit written notification to the director at least 30 days before the effective date of the discontinuation.

(f) Second sample required. A laboratory with provisional DPS accreditation under this section must:

(1) preserve one or more separate samples of the physical evidence for use by the defense attorney or use under order of the convicting court; and

(2) agree to preserve, and preserve those samples until all appeals in the criminal case are final.

§28.150. Accreditation Term.

(a) Normal term. The normal term for DPS accreditation:

(1) begins on the date of issuance of the initial DPS accreditation letter; and

(2) extends until withdrawn by the recognized accrediting body or by the director under §28.164 of this title (relating to Withdrawal of DPS Accreditation).

(b) Provisional term.

(1) A laboratory or its discipline or subdiscipline that applies for accreditation from a recognized accrediting body may apply to the director for a provisional DPS accreditation in accordance with §28.139 of this title (relating to Provisional DPS Accreditation) for a term not to exceed one year from the date the director issues the accreditation unless formally extended for good cause by the director.

(2) If a currently accredited laboratory is in the process of renewing or replacing its accreditation from a recognized accrediting body, prior to the end of its term, and applies for provisional DPS accreditation, the term of that provisional accreditation may not exceed six (6) months.
(c) Limited term. A laboratory, including an out of state, federal, or private laboratory, may request DPS accreditation for a term less than the term normally available under this subchapter.


The director shall automatically withdraw:

(1) the full DPS accreditation for a laboratory, discipline, or subdiscipline at the date and time that the recognized accrediting body withdraws its relevant laboratory, discipline, or subdiscipline accreditation; or

(2) the provisional DPS accreditation for a laboratory, discipline, or subdiscipline at the date and time that the recognized accrediting body notifies the director that the laboratory has withdrawn its application for the relevant laboratory, discipline, or subdiscipline accreditation.

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

Filed with the Office of the Secretary of State on March 11, 2010.
TRD-201001257
Stuart Platt
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 424-5848

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SUBCHAPTER I. COMPLAINTS, SPECIAL REVIEW, AND ADMINISTRATIVE ACTION

37 TAC §§28.151 - 28.155

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


Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government or local economies.

Ms. MacBride also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeal as proposed. There are no anticipated economic costs to individuals who are required to comply with the repeal as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride has also determined that for each year of the first five-year period the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be current and updated rules.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this repeal. Accordingly, the department is not required to complete a takings impact assessment regarding this repeal.

Comments on the repeal may be submitted to D. Pat Johnson, Deputy Assistant Director, Crime Laboratory Service, MSC 0460, Texas Department of Public Safety, P.O. Box 4143, Austin, TX 78765-4143, (512) 424-2143.

The repeal is proposed pursuant to the director’s rule-making authority in Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d).

Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d) are affected by this proposal.


§28.152. Unscheduled Audit.


§28.155. Review by Director.

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

Filed with the Office of the Secretary of State on March 11, 2010.
TRD-201001256
Stuart Platt
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 424-5848

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SUBCHAPTER J. COMPLAINTS, SPECIAL REVIEW, AND ADMINISTRATIVE ACTION

37 TAC §§28.161 - 28.165

The Texas Department of Public Safety (the department) proposes new Subchapter J, §§28.161 - 28.165, concerning Complaints, Special Review, and Administrative Action. New Subchapter J (former §§28.151 - 28.155) sets forth the director’s rules that govern complaints, special review, and administrative action involving the integrity or trustworthiness of a laboratory with non-substantive changes made to the sections due to the reorganization of Chapter 28.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the rule is in effect,
there will be no fiscal impact for state and local government or local economies.

Ms. MacBride has determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be an increase in public safety by solving unsolved crimes and removing recidivist offenders from the public.

Ms. MacBride has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to D. Pat Johnson, Deputy Assistant Director, Crime Laboratory Service, MSC 0460, Texas Department of Public Safety, P.O. Box 4143, Austin, TX 78765-4143, (512) 424-2143.

The rules are proposed pursuant to the director's rule-making authority in Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d).

Texas Government Code, §§411.144(a), 411.146(c)(1), and 411.152(a) and (d) are affected by this proposal.


(a) Question or complaint. If the director learns of a fact, circumstance, or complaint that raises a question about the integrity or trustworthiness of a laboratory, or a procedure, examination, or test conducted by the laboratory since the date of application for DPS accreditation, the director may take any of the following actions:

1. communicate further with the source of the complaint to assess the appropriateness of further action;
2. refer the matter to the laboratory's director for evaluation, audit, correction, or other appropriate action;
3. initiate an audit under §28.162 of this title (relating to Unscheduled Audit);
4. issue a letter to the laboratory:
   A. demanding an immediate response and explanation of the matter;
   B. demanding that the laboratory permit or arrange for an immediate inspection or audit of the matter; or
   C. explaining the action to be taken by the director in the matter;
5. notify or refer the matter to a law enforcement agency or prosecutor and recommend appropriate criminal action;
6. refer the matter to a district judge and recommend appropriate action to convene a court of inquiry under Code of Criminal Procedure, Chapter 52;
7. refer the matter to the Texas Forensic Science Commission; and
8. any other actions deemed appropriate by the director.

(b) Source and scope. A question or complaint may be raised by any source, including an individual, entity, or audit. The scope of any action taken or proposed by the director under this section shall be determined by the director, based on the nature of the question or complaint.

(c) Records. The director may maintain a public record of a laboratory's accreditation or approval status.

(1) The director may maintain on the public record a notation of an action taken under this subchapter, including a question, complaint, or audit.

(2) A question, complaint, or audit is public information when in the possession of the director.

§28.162. Unscheduled Audit.

(a) If the director determines that there is reasonable cause to believe that a laboratory has failed to maintain quality assurance standards as provided under the laboratory's specific policy required by its recognized accrediting body or the FBI DNA Quality Assurance Audit Document, or has violated any rule in this chapter, the director may take appropriate action, including one or more of the following:

1. direct the laboratory to conduct an internal audit and implement appropriate corrective action;
2. order the laboratory to obtain, at its own expense, a special external audit by an auditor approved by the laboratory's recognized accrediting body and provide that report to the director within a reasonable time frame determined by the director not to exceed 60 days from the date of the order;
3. notify the laboratory that further testing is not approved by DPS;
4. initiate an evaluation of continued accreditation under Subchapter I of this chapter (relating to Accreditation); or
5. provide appropriate compliance information to the Texas Forensic Science Commission and/or any entity that may be responsible for oversight of the laboratory; or
6. any other actions deemed appropriate by the director.

(b) An audit under this subsection shall comply with minimum standards for audits or inspections as established by the director of the department's Crime Laboratory Service.

(c) The director of the department may enter an accredited laboratory at any reasonable time to conduct an inspection or audit under this chapter.


(a) If a laboratory is subject to an unscheduled audit that has resulted in a finding of non-compliance, the laboratory shall propose a corrective action plan and submit the plan to the director within 30 days from the date that the laboratory receives the audit results. If the laboratory has been notified that further testing is not approved, the plan should identify the date that the laboratory intends to reinstate approved testing.
CHAPTER 119. AGREEMENTS WITH OTHER AGENCIES

37 TAC §119.3

The Texas Youth Commission (TYC) proposes new §119.3, concerning interagency cooperation for continuity of youth care. The new section adopts by reference a memorandum of understanding (MOU) entered into by TYC and the Texas Department of Family and Protective Services (DFPS) and currently codified in 40 TAC §702.425. The new section implements House Bill 1629, enacted by the 81st Texas Legislature, which requires TYC and DFPS to share certain health and education information, coordinate case management and other services, and ensure that guardians and attorneys ad litem and other duly appointed youth representatives communicate with youth under TYC’s jurisdiction and receive notice of important youth events. DFPS proposed the MOU in the November 13, 2009, issue of the Texas Register (34 TexReg 7993) and adopted the MOU in the February 12, 2010, issue of the Texas Register (35 TexReg 1291).

Pamela Darden, Chief Financial Officer, has determined that for the first five-year period the new section is in effect, there will be no significant fiscal impact for state or local government as a result of enforcing or administering the new section.

Tracy Levins, Ph.D., Director of Collaborative Initiatives, has determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section will be the coordinated provision of medical, mental health, case management, and educational services to youth who are dual wards of DFPS and TYC.

There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to Steve Roman, Policy Coordinator, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to steve.roman@tyc.state.tx.us.

The new section is proposed under Human Resources Code §61.034, which provides TYC with the authority to adopt rules appropriate to the proper accomplishment of its functions, and Human Resources Code §61.0767, which requires TYC and DFPS to jointly adopt rules to ensure that a child for whom DFPS has been appointed managing conservator receives appropriate services while the child is committed to TYC or released under supervision by TYC.

The proposed rule implements Human Resources Code, §61.034.

§119.3. Memorandum of Understanding Concerning Interagency Cooperation for Continuity of Youth Care.

(a) The Texas Youth Commission (TYC) adopts by reference a memorandum of understanding (MOU) entered into by TYC and the Texas Department of Family and Protective Services (DFPS). The MOU contains the agreement required by Texas Human Resources Code §61.0767 to provide coordinated and appropriate services to youth who are in the conservatorship of DFPS and who are committed to TYC or released under supervision by TYC.

(b) The MOU is adopted by rule in 40 TAC §702.425.

PART 3. TEXAS YOUTH COMMISSION
This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency’s legal authority to adopt.

Filed with the Office of the Secretary of State on March 15, 2010.
TRD-201001317
Cheryl K. Townsend
Executive Director
Texas Youth Commission
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 424-6014

PART 7. TEXAS COMMISSION ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUCATION
CHAPTER 211. ADMINISTRATION
37 TAC §211.19

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §211.19, concerning Forms and Applications. Subsection (g) is deleted to eliminate redundancy and the following subsection is re-lettered. Subsection (g) is amended to reflect the effective date of the changes.

The current wording in subsection (g) is more accurately addressed in §217.3, concerning Application for License and Initial Report of Appointment.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments because of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by clarifying which documents are required for appointment and eliminating redundancy.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to public.comment@tcleose.state.tx.us or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.303, License Application; Duties of Appointing Entity.

No other code, article, or statute is affected by this proposal.

§211.19. Forms and Applications.

(a) Applications, forms, data, and documents required by the commission shall be submitted electronically if an electronic method has been established for the form, data, or document.

(b) For applications or other forms required by the commission, the applicant or the individual on whose behalf the form is being submitted is responsible for reviewing the entire document and any attachments to attest to the accuracy and truthfulness of all information on and attached to the document.

(c) A person who fails to comply with the standards set forth in these rules shall not accept the issuance of a license and shall not accept any appointment.

(d) If an application is found to be false or untrue, any license or certificate issued to the applicant by the commission will be subject to cancellation and recall.

(e) Agencies must keep on file and in a format readily accessible to the commission a copy of the documentation required by the commission. If the form or application is submitted via TCLEDDS, the agency must keep on file, and in a format readily accessible to the commission, a signed and dated printout of the electronically submitted form or application.

(f) An agency must retain required records for a minimum of five years after the licensee’s termination date with that agency.

[(g) An agency must report to the commission any failure to appoint an individual in the reported capacity within 30 days of the reported date of appointment. Such report must be made in the currently prescribed commission format for termination.]

[(h) The effective date of this section is July 15, 2010. [January 14, 2010.]

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

Filed with the Office of the Secretary of State on March 9, 2010.
TRD-201001194
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 936-7713

CHAPTER 215. TRAINING AND EDUCATIONAL PROVIDERS AND RELATED MATTERS
37 TAC §215.9

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §215.9, concerning Training Coordinator. Subsection (b)(3)(C) is amended to reflect the admission requirements of §215.15(e), concerning Enrollment Standards. Subsection (e) is amended to reflect the effective date of the changes. This amendment clarifies that the training provider, with advice from the advisory board, sets the standards for admission, attendance, retention, and other standards.
The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering the section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by clearly identifying the entity responsible for setting admission, attendance, retention, and other standards for training providers.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to public.comment@tcleose.state.tx.us or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.252, Program and School Requirements; Advisory Board.

No other code, article, or statute is affected by this proposal.

§215.9. Training Coordinator:

(a) A training coordinator must hold a valid instructor license or certificate and must be a full-time paid employee.

(b) The training coordinator must:

(1) ensure compliance with commission rules and guidelines;

(2) prepare, maintain, and submit the following reports within the time frame specified:

(A) reports of training - to be submitted prior to the issuance of any endorsement for a licensing examination for a course leading to a license and within 30 days of completion of each continuing education course;

(B) self-assessment reports as required by the commission;

(C) a copy of advisory board minutes during an on-site evaluation;

(D) training calendars - schedules must be available for review or posted on the internet no later than 30 days prior to the beginning of each calendar quarter-or academic semester;

(E) any other reports or records as requested by the commission;

(3) be responsible for the administration and conduct of each course, including those conducted at ancillary sites, and specifically:

(A) appointing and supervising qualified instructors;

(B) maintaining course schedules and course files, including lesson plans;

(C) enforcing all admission, attendance, retention, and other standards set by the commission and the training provider [advisory board];

(D) securing and maintaining all facilities necessary to meet the inspection standards of this section;

(E) controlling the discipline and demeanor of each student and instructor during class;

(F) distributing a current version of the Texas Occupations Code, Chapter 1701 and commission rules to all students at the time of admission to any course that may result in the issuance of a license;

(G) distributing learning objectives to all students at the beginning of each course;

(H) ensuring that all learning objectives are taught and evaluated;

(I) proctoring or supervising all examinations to ensure fair, honest results; and

(J) maintaining records of tests and other evaluation instruments for a period of five years.

(4) receive all commission notices on behalf of the training provider and forward each notice to the appointing authority; and

(5) attend or have a designee attend each academy coordinator’s workshop conducted by the commission.

(c) If the position of training coordinator becomes vacant, upon written request from the chief administrator of the training provider the commission may, at the discretion of the executive director, waive the requirements for a period not to exceed six months.

(d) Upon written request from the chief administrator of a training provider that does not have a full-time paid staff, the commission may, at the discretion of the executive director, waive the requirements in subsection (a) of this section.

(e) The effective date of this section is July 15, 2010. [July 6, 2009.]

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

Filed with the Office of the Secretary of State on March 9, 2010.

TRD-201001195

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Earliest possible date of adoption: April 25, 2010

For further information, please call: (512) 936-7713

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CHAPTER 217. LICENSING REQUIREMENTS

37 TAC §217.7

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §217.7, concerning Reporting the Appointment and Termination of a Licensee. Subsection (d) is deleted and the following subsections are re-lettered. Subsection (i) is amended to reflect the effective date of the changes.
These amendments clarify terminology and remove redundancy with §217.19, concerning Reactivation of a License.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments because of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by the removal of an outdated term and redundant information.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to public.comment@tceose.state.tx.us or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed complies with Texas Occupations Code, Chapter 1701, §1701.303, License Application; Duties of Appointing Entity.

No other code, article, or statute is affected by this proposal.

§217.7. Reporting the Appointment and Termination of a Licensee.

(a) Before a law enforcement agency may hire a person licensed under Chapter 1701, Texas Occupations Code, the agency head or the agency head’s designee must:

(1) make a request to the commission for any employment termination report(s) regarding the person maintained by the commission under this chapter; and

(2) submit to the commission in a manner prescribed by the commission confirmation that the agency:

(A) conducted in the manner prescribed by the commission a criminal background check regarding the person;

(B) obtained the person’s written consent on a form prescribed by the commission for the agency to view the person’s employment records;

(C) obtained from the commission any service or education records regarding the person maintained by the commission; and

(D) contacted each of the person’s previous law enforcement employers.

(b) A request submitted electronically under this section must contain identifying information, acceptable to the commission, for verification.

(c) A law enforcement agency that obtains a consent form described by subsection (a)(2)(B) of this section shall make the person’s employment records available to a hiring law enforcement agency on request.

(d) An agency that appoints an individual who already holds a valid, active license appropriate to that position must notify the commission of such appointment not later than 30 days after the date of appointment. The appointing agency must have on file documentation that a peace officer licensee is compliant with weapons qualification according to §217.21 of this chapter (relating to Firearms Proficiency Requirements) within the last 12 months.

(e) If the appointment is made after a 180-day break in service, the agency must have the following on file and readily accessible to the commission:

(1) a new criminal history check by name, sex, race and date of birth from both TCIC and NCIC;

(2) a new declaration of psychological and emotional health;

(3) a new declaration of lack of any drug dependency or illegal drug use; and

(4) one completed applicant fingerprint card or, pending receipt of such card, an original sworn, notarized affidavit by the applicant of their complete criminal history; such affidavit to be maintained by the agency while awaiting the return of completed applicant fingerprint card; and

(5) for peace officers, weapons qualification according to §217.21 of this chapter within the last 12 months.

(f) When an individual licensed under the commission or a telecommunicator separes from appointment or employment with an agency, the agency shall submit a report to the commission in the currently prescribed commission format that reports the separation. The report shall be submitted within 7 business days following the date of separation. If a licensee has filed a timely grievance or appeal within the personnel policies of the agency, the agency shall not be required to file the report until all administrative remedies have been exhausted. The agency shall provide the individual who is the subject of the report a copy of the report within 7 business days after the date of separation.

(g) An agency must retain records kept under this section for a minimum of 5 years after the licensee’s termination date with that agency. The records must be maintained in a format readily accessible to the commission.

(h) A report or statement of separation submitted under subsection (f) of this section is exempt from disclosure under the Public Information Act, Chapter 552, Texas Government Code, unless the individual resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses, and is subject to subpoena only in a judicial proceeding.

(i) The effective date of this section is July 15, 2010. This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency’s legal authority to adopt.

Filed with the Office of the Secretary of State on March 9, 2010.

TRD-201001196

Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education

Earliest possible date of adoption: April 25, 2010

For further information, please call: (512) 936-7713
CHAPTER 221. PROFICIENCY CERTIFICATES AND OTHER POST-BASIC LICENSES
37 TAC §221.5

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §221.5, concerning Jailer Proficiency. Subsection (a)(2) is amended to incorporate the course requirements for Basic Jailer certificates. Subsection (b) is amended to update the course requirements for Intermediate Jailer certificates. Subsection (e) is amended to reflect the effective date.

These amendments are to provide clarification for individuals seeking Jailer Proficiency Certificates.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there may be an effect on state or local governments as a result of administering this section. Agencies may be required to replace currently scheduled training sessions with other training courses or add additional training courses.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by eliminating the need for continual rule changes pertaining to the issuance of proficiency certificates.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there may be a positive economic impact for small businesses offering training courses.

Comments may be submitted electronically to public.comment@tcleose.state.tx.us or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed complies with Texas Occupations Code, Chapter 1701, §1701.402, Proficiency Certificates.

No other code, article, or statute is affected by this proposal.

§221.5. Jailer Proficiency:

(a) To qualify for a basic jailer proficiency certificate, an applicant must meet all proficiency requirements including:

(1) one year of experience as a jailer; and

(2) successful completion of courses currently required by Texas Occupations Code §1701.402 and the commission.

(b) To qualify for an intermediate jailer proficiency certificate, an applicant must meet all proficiency requirements including:

(1) a basic jailer certificate;

(2) training related to the management and operation of a correctional facility (including county jails); and

(2) one of the following combinations of training hours or degrees and jailer experience:

(A) 400 training hours and six years;

(B) 800 training hours and four years;

(C) 1200 training hours and two years or an associate’s degree and two years; or

(D) 2400 training hours and one year or a bachelor’s degree and one year, and

(3) successful completion of courses currently required by Texas Occupations Code §1701.402 and the commission.

(c) To qualify for an advanced jailer proficiency certificate, an applicant must meet all proficiency requirements including:

(1) an intermediate jailer certificate; and

(2) one of the following combinations of training hours or degrees and jailer experience:

(A) 800 training hours and eight years;

(B) 1200 training hours and six years or an associate’s degree and six years; or

(C) 2400 training hours and four years or a bachelor’s degree and four years.

(d) To qualify for a master jailer proficiency certificate, an applicant must meet all proficiency requirements including:

(1) an advanced jailer certificate; and

(2) one of the following combinations of training hours and jailer experience:

(A) 1200 training hours and 20 years, or an associate’s degree and 12 years;

(B) 2400 training hours and 15 years, or a bachelor’s degree and nine years;
(C) 3300 training hours and 12 years, or a master’s degree and seven years; or
(D) 4000 training hours and 10 years, or a doctoral degree and five years.
(e) The effective date of this section is July 15, 2010. [March 1, 2010]

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

Filed with the Office of the Secretary of State on March 9, 2010.
TRD-201001197
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 936-7713

37 TAC §221.21

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §221.21, concerning Firearms Proficiency for Community Supervision Officers. Subsection (a) is amended for clarification. Subsection (a)(1) is amended to correctly identify the entities that appoint community supervision and parole officers. Subsection (c) is amended to allow for renewal before expiration. Subsection (d) is amended to correctly reflect the effective date of this section.

These amendments are to clarify the requirements for the Firearms Proficiency Certificate for Community Supervision Officers.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by correctly identifying the entities that qualify for firearms proficiency certificates.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to public.comment@tcleose.state.tx.us or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.257, Firearms Training Program for Supervision Officers.

No other code, article, or statute is affected by this proposal.

§221.21. Firearms Proficiency for Community Supervision Officers.

(a) To qualify for a firearms proficiency certificate for community supervision and parole officers [certificate], an applicant must meet the following requirements including:

(1) currently employed as a community supervision officer by a Community Supervision and Corrections Department (CSCD), [probation officer] or parole officer employed by the Texas Department of Criminal Justice (TDCJ) [or a community supervision and corrections department]; and

(2) successful completion of the commission’s current firearms training program for community supervision officers.

(b) The holder of a certificate issued under this section must meet the firearms proficiency requirements at least once every 12 months.

(c) Certificates issued under this section expire two years from date of issuance. Within forty-five days of the expiration of a certificate, a supervision officer may apply for the issuance of a renewal. [Upon the expiration of a certificate, a supervision officer may apply for the issuance of a renewal.] Supervision officers must meet the requirements in subsections (a)(1) and (b) of this section in order to renew the certificate.

(d) The effective date of this section is July 15, 2010. [October 26, 2009.]

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

Filed with the Office of the Secretary of State on March 9, 2010.
TRD-201001199
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 936-7713

37 TAC §221.35

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §221.35, concerning Firearms Proficiency for Juvenile Probation Officers. Subsection (a) is amended to clarify the requirements of this certificate. Subsection (c) is amended to clarify requirements for renewal of this certificate. Subsection (d) is amended to reflect the effective date.

These amendments are needed to comply with statutory requirements of §142.006 Human Resources Code and the requirements stipulated in the Memorandum of Understanding between the Commission and the Texas Juvenile Probation Commission.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there may be an effect on state or local governments as a result of administering this section. The Texas Juvenile Probation Commission may be required to replace currently scheduled training sessions with firearms training courses and purchase ammunition. The Texas Juvenile Probation Commission may also decide to pay the application fee for all Juvenile Probation Officers.

35 TexReg 2538  March 26, 2010  Texas Register
The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by ensuring that Juvenile Probation Officers are armed to protect themselves and others they come in contact with during their duties.

The Commission has also determined that there may be a positive economic impact for small businesses. With more people eligible for certification, those businesses that offer weapons qualification may see an increase in business.

The Commission has determined that there may be a monetary cost and time investment to the individual to achieve this proficiency certificate; however, there will be a positive benefit for the individual and the public by allowing trained Juvenile Probation Officers to be armed so they may protect themselves and others they come in contact with during their duties.

Comments may be submitted electronically to public.comment@tcleose.state.tx.us or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.258, Firearms Training Program for Juvenile Probation Officers.

No other code, article, or statute is affected by this proposal.

§221.35. Firearms Proficiency for Juvenile Probation Officers.  
(a) To qualify for a firearms proficiency certificate for juvenile probation officers [certificate], an applicant must meet the following requirements, including:

1. current employment as a juvenile probation officer for at least one year by the county juvenile probation department; [Texas Juvenile Probation Commission; and]

2. active certification as a juvenile probation officer by the Texas Juvenile Probation Commission; [successful completion of the commission’s current firearms training program for juvenile probation officers.]

3. successful completion of the commission’s current firearms training program for juvenile probation officers;

4. documentation from each chief administrative officer that has authorized the applicant’s participation in the juvenile probation officer firearms proficiency training program that the applicant has been subjected to a complete search of local, state and national records to disclose any criminal record or criminal history; and

5. written documentation from each chief administrative officer that has authorized the applicant’s participation in the juvenile probation officer firearms proficiency training program that the applicant has been examined by a psychologist selected by the current appointing/employing agency, who is licensed by the Texas State Board of Examiners of Psychologists. The applicant must be declared in writing by that professional to be in satisfactory psychological and emotional health to serve as the type of juvenile probation officer for which the certificate is sought.

(b) The holder of a certificate issued under this section must meet the firearms proficiency requirements at least once every 12 months.

(c) Certificates issued under this section expire two years from the date of issuance. Within forty-five days of the expiration of a certificate, a juvenile probation officer may apply for the issuance of a renewal. [Upon the expiration of a certificate, a juvenile probation officer may apply for the issuance of a renewal.] Juvenile probation officers must meet the requirements in subsections (a)(1), (a)(2) and (b) of this section in order to renew the certificate.

(d) The effective date of this section is July 15, 2010. [January 14, 2010.]

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

Filed with the Office of the Secretary of State on March 9, 2010.

TRD-201001200
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education

Earliest possible date of adoption: April 25, 2010
For further information, please call: (512) 936-7713

CHAPTER 223. ENFORCEMENT

37 TAC §223.17

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §223.17, concerning Reinstatement of a License. Subsection (a) is amended to clarify the requirements for one whose license has been suspended for a violation of commission rules. Subsection (b) is added to specifically address reinstatement due to lack of continuing education, and the following subsections are re-lettered. Subsection (c) is amended for clarity. Subsection (d) is amended to reflect the effective date of the changes.

These amendments clarify the reinstatement requirements for suspended licensees.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments because of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by ensuring that licensees have adequate information to consider when there is a proposed action against their license.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both because of the proposed section.

Comments may be submitted electronically to public.comment@tcleose.state.tx.us or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.
The amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.502, Felony Conviction or Placement on Community Supervision.

No other code, article, or statute is affected by this proposal.

§223.17. Reinstatement of a License.

(a) In order to reinstate a suspended or probated license [or a license that has been suspended due to lack of meeting the legislative required continuing education], a licensee must complete the following requirements:

(1) make application, in the format currently prescribed by the commission;
(2) submit the reinstatement fee; and
(3) meet the current continuing education requirements.

(b) If a licensee fails to meet the legislative required continuing education, a licensee must meet the requirements of subsection (a) of this section in order to reinstate.

(c) [¶] If the suspension results in a break in service of over two years, then the reinstatement procedure also includes the following requirements for attempting the licensing exam:

(1) make application, in the format currently prescribed by the commission;
(2) submit any required fee(s); and
(3) upon approval of the application, the commission will issue the holder of a suspended license an endorsement to take the required licensing examination. If failed three times, the applicant may not be issued another endorsement until successful completion of the current licensure course.

(d) [¶] The effective date of this section is July 15, 2010. [January 1, 2009.]

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

Filed with the Office of the Secretary of State on March 9, 2010.

TRD-201001201

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Earliest possible date of adoption: April 25, 2010

For further information, please call: (512) 936-7713

CHAPTER 225. SPECIALIZED LICENSES

37 TAC §225.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §225.1, concerning Issuance of Jailer License through a Contract Jail Facility. Subsection (c) is deleted for clarification, and the following subsections are re-lettered. Subsection (f) is amended to reflect the effective date of the changes.

These amendments clarify the requirements for appointing jailers at a contract jail facility.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by clarifying the requirements for appointing jailers at a Contract Jail Facility.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to public.com ment@tcollege.state.tx.us or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.301, License Required.

No other code, article, or statute is affected by this proposal.

§225.1. Issuance of Jailer License through a Contract Jail Facility.

(a) The commission shall issue a jailer license to an individual appointed by a contract jail facility who meets all the minimum standards for jailer licensure, and submits both the current commission application and any required fees.

(b) A contract jail facility that appoints an individual who already holds a valid, active jailer license shall meet the appointment requirements of §217.7 of this title (relating to Reporting the Appointment and Termination of a Licensee), including submitting any required fee.

(c) [¶] A contract jail facility that appoints an individual with a 180-day break in service shall meet the appointment requirements of §217.7 of this title, including submitting any required fee.

(d) [¶] The commission shall issue a temporary jailer license to an individual appointed by a contract jail facility who meets all the minimum standards for licensure except for training and testing, and submits both the current commission application and any required fees. A temporary jailer license expires 12 months from the appointment date.

(e) [¶] Individuals licensed as jailers appointed by a contract jail facility shall meet the continuing education requirements in §217.11 of this title (relating to Legislatively Required Continuing Education for Licensees).

(f) [¶] The effective date of this section is July 15, 2010. [March 1, 2009.]

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

Filed with the Office of the Secretary of State on March 9, 2010.

TRD-201001202
37 TAC §225.3

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §225.3, concerning Issuance of Peace Officer License through a Medical Corporation. Subsection (c) is deleted for clarification, and the following subsections are re-lettered. Subsection (e) is amended to reflect the effective date of the changes.

These amendments clarify the requirements for appointing peace officers at a medical corporation.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by clarifying the requirements for appointing peace officers at a medical corporation.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to public.comment@tceose.state.tx.us or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.301, License Required.

No other code, article, or statute is affected by this proposal.

§225.3. Issuance of Peace Officer License through a Medical Corporation.

(a) The commission shall issue a peace officer license to an individual appointed by a medical corporation who meets all the minimum standards for peace officer licensure, and submits both the current commission application and any required fees.

(b) A medical corporation that appoints an individual who already holds a valid, active peace officer license shall meet the appointment requirements of §217.7 of this title (relating to Reporting the Appointment and Termination of a Licensee, including submitting any required fee).

(c) [Deleted] A medical corporation that appoints an individual with a 180-day break in service shall meet the appointment requirements of §217.7 of this title, including submitting any required fee.

(d) [Deleted] Individuals licensed as peace officers appointed by a medical corporation shall meet the continuing education requirements in §217.11 of this title (relating to Legislatively Required Continuing Education for Licensees).

(e) [Deleted] The effective date of this section is July 15, 2010.

[March 1, 2008.]

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

Filed with the Office of the Secretary of State on March 9, 2010.

TRD-201001204

Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education

Earliest possible date of adoption: April 25, 2010

For further information, please call: (512) 936-7713

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TITLE 4. AGRICULTURE
PART 1. TEXAS DEPARTMENT OF AGRICULTURE
CHAPTER 17. MARKETING AND PROMOTION
SUBCHAPTER I. TEXAS EQUINE INCENTIVE PROGRAM
4 TAC §17.508
The Texas Department of Agriculture withdraws the proposed new §17.508 which appeared in the October 9, 2009, issue of the Texas Register (34 TexReg 6938).

Filed with the Office of the Secretary of State on March 15, 2010.
TRD-201001330
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: March 15, 2010
For further information, please call: (512) 463-4075

TITLE 22. EXAMINING BOARDS
PART 3. TEXAS BOARD OF CHIROPRACTIC EXAMINERS
CHAPTER 75. RULES OF PRACTICE
22 TAC §75.23
The Texas Board of Chiropractic Examiners withdraws the proposed new §75.23 which appeared in the January 1, 2010, issue of the Texas Register (35 TexReg 23).

Filed with the Office of the Secretary of State on March 15, 2010.
TRD-201001320
Glenn Parker
Executive Director
Texas Board of Chiropractic Examiners
Effective date: March 15, 2010
For further information, please call: (512) 305-6716
TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 3. PHYSICIAN SERVICES

The Texas Health and Human Services Commission (HHSC) adopts the repeal of §355.8043, concerning Supplemental Payments to Certain Physicians, and adopts new §355.8043, concerning Supplemental Payments for Physician Services, without changes to the proposed text as published in the January 8, 2010, issue of the Texas Register (35 TexReg 151) and will not be republished.

The new rule establishes the methodology by which HHSC calculates supplemental Medicaid Upper Payment Limit (UPL) payments for physician services. HHSC is repealing current §355.8043 and adopting new §355.8043 because of substantive changes regarding eligibility of physicians, updates to the computation methodology for supplemental payments, and addition of new conditions of participation.

Background and Justification

Certain provisions of current §355.8043 were carried over to the proposed new rule. In addition, new language was added to: 1) reflect the current Medicaid state plan relating to supplemental payments for physicians, which expands the types of physician groups whose services are eligible for supplemental payments; 2) clarify the methodology HHSC uses to compute Medicaid supplemental payments for certain physicians; and 3) add new conditions of participation. The title of the rule has also been modified to reflect that Medicaid supplemental payments are made for physician services.

Under current §355.8043, only Medicaid-enrolled physicians employed by an eligible physician group practice that is state-owned or -operated are eligible to receive Medicaid supplemental payments.

The new rule includes two amendments to align with Texas’ current Medicaid state plan related to the supplemental payment program for physician services. The first amendment adds physician groups associated with John Peter Smith in Tarrant County. The second amendment updates language in the rule clarifying the change in the payment methodology from an Average Commercial Rate to 145% of a Medicare Fee Conversion Factor. The new rule language reflects the supplemental payment reimbursement methodology approved by the Centers for Medicare and Medicaid Services (CMS) and clarifies how the program operates.

In addition, HHSC submitted a state plan amendment to CMS to expand the types of physician groups that are eligible for supplemental payments. HHSC is adding language to the rule to reflect the proposed state plan amendment to allow HHSC to make supplemental payments for services provided by 1) physician groups employed by a governmental hospital; and 2) physicians employed by or under contract with a physician group practice organized by, under the control of, or under contract with a governmental hospital in a county that has a hospital district created under Chapter 281 of the Texas Health and Safety Code. Language was added to include the requirement that affiliated public entities and private physician groups submit program certification forms annually as a condition of participation in the physician UPL program.

The state matching funds required to draw down federal dollars will be provided through intergovernmental transfers of public funds by eligible governmental entities affiliated with each physician group.

HHSC will not make supplemental payments to any new hospital eligible under this rule on or after April 1, 2010, until the Medicaid state plan amendment has been approved by CMS.

Comments

The 30-day comment period ended February 8, 2010. During this period, HHSC received one comment regarding proposed new §355.8043.

Comment: An individual from Counsel for Ropes & Gray’s Health Care Group submitted a letter to HHSC expressing support and appreciation for the proposed rule, especially the inclusion of physicians "employed by a governmental hospital" as a category that may receive Medicaid supplemental payments. The individual also requested HHSC clarify that only private physician practice groups are required to submit certification forms (i.e., physicians employed by a state or governmental hospital are exempt from this requirement).

HHSC Response: It is clearly spelled out in subsection (e) that the physician certification is only required from private physician groups. The individual and HHSC agreed it would be sufficient to reiterate the intent to only require private physician groups to submit certifications in the preamble of the adopted rule.

1 TAC §355.8043

Statutory Authority

The repeal is adopted under the Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Texas Human Resources Code §32.021 and the Texas Government Code §531.021(a),
which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency 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 March 9, 2010.

TRD-201001160
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: March 29, 2010
Proposal publication date: January 8, 2010
For further information, please call: (512) 424-6900

1 TAC §355.8043
Statutory Authority
The new rule is adopted under the Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Texas Human Resources Code §32.021 and the Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency 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 March 9, 2010.

TRD-201001161
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: March 29, 2010
Proposal publication date: January 8, 2010
For further information, please call: (512) 424-6900

TITLE 4. AGRICULTURE
PART 1. TEXAS DEPARTMENT OF AGRICULTURE
CHAPTER 17. MARKETING AND PROMOTION
SUBCHAPTER I. TEXAS EQUINE INCENTIVE PROGRAM
4 TAC §§17.500 - 17.507, 17.509
The Texas Department of Agriculture (the department) adopts new Chapter 17, Subchapter I, §§17.500 - 17.507 and 17.509, concerning the Texas Equine Incentive Program (TEIP). The new sections are adopted to fulfill the mandate of the 81st Texas Legislature in accordance with House Bill 1881 (HB 1881), now codified at Texas Agriculture Code, §12.044, which creates the TEIP and requires the department to adopt rules to establish and administer the program.

Sections 17.501 - 17.503, 17.505 - 17.507, and 17.509 are adopted without changes to the proposed text as published in the October 9, 2009, issue of the Texas Register (34 TexReg 6938). Section 17.500 is adopted with a grammatical change and, based on comments received, §17.504, concerning breeding reports and program fees, is adopted as modified. The department has withdrawn proposed §17.508 and has filed a new proposal for §17.508, defining foals eligible for awards.

The following referenced sections are new to the Texas Administrative Code. With the exception of §17.500 and §17.504, the following sections remain unchanged from the proposal. New §17.500 and §17.501 provide the authority and purpose of the TEIP. New §17.503 establishes eligibility requirements for the program. New §17.504 provides requirements for filing of a breeding report and establishes the program fee. New §17.505 and §17.506 provide requirements and procedures for opting in and out of the program. New §17.507 provides for the establishment of incentive awards. New §17.509 provides for the department to use funds for administrative costs.

The department received approximately 50 written comments, along with approximately 600 e-mails and telephone messages, regarding adoption of the proposed rules for the TEIP. The department received general comments suggesting that associations such as the National Cutting Horse Association, National Reining Horse Association, Palomino Horse Breeders Association, American/International Buckskin Horse Association and National Barrel Horse Association should be included as eligible recipients of incentive awards through the American Quarter Horse Association (AQHA), American Paint Horse Association (APHA), and Appaloosa Horse Club (AphC) sanctioned events. According to HB 1881, the TEIP applies only to the following breeds of horses: Appaloosa horses, Paint horses, and Quarter horses that participate in events held in this state. Further, only eligible foals that are the offspring of stallions and mares identified on breeding reports filed with the applicable breed associations for Appaloosa, Paint, and Quarter horses are eligible to participate in the TEIP. Eligible members of NCHA, NRHA, PHBA, AIBHA, and NBHA would be eligible if registered with the AQHA, APHA, or APhC breed associations, but only for AQHA, APHA, or APhC events that occur in Texas. Accordingly, the department did not change or modify the proposal in response to these comments.

The department received comments that foals recorded on 2008 stallion breeding reports should be eligible for participation in the TEIP. HB 1881 became effective September 1, 2009. The department has no authority to request or accept fees prior to that date. Accordingly, the department did not change or modify the proposal in response to these comments.

Comments were received indicating that the opportunity to earn points should not be restricted to only Texas-based horse events. HB 1881 indicates that the TEIP was created to provide an incentive for owners of Texas-based horses to enter horses as participants at horse events in Texas. Accordingly, the department did not change or modify the proposal in response to these comments.
Others commented that incentives should be divided up among the owners of stallions, mares, and foals enrolled in the program. HB 1881 states that only stallion owners are eligible recipients for incentive awards. By awarding incentives to eligible stallion owners, the legislature determined that benefits should accrue to owners of eligible stallions through increased breeding activity. Accordingly, the department did not change or modify the proposal in response to these comments.

Comments were received that the department should assess a mare and/or stallion nomination fee to complete the eligibility of the competing foals. HB 1881 requires stallion owners to pay the fees for participation in the program. Accordingly, the department did not change or modify the proposal in response to these comments.

Many comments were received regarding §17.504, dealing with breeding reports and the program fee. Some suggested that fees should not be required for every mare bred and identified on the breeding report, which would allow breeders to choose which mares and foals participate in the program. HB 1881 states that participation in the program requires submission to the department of a copy of the annual breeding report filed with the applicable breed associations, and that a fee be paid for mares bred and reported therein. In the proposal, the department made an exception for mares that are bred out of state, consistent with the legislation’s stated intent to provide incentives to owners of certain Texas-based horses to enter their horses in Texas events. Accordingly, the department concluded that no changes to the proposal were required to §17.504 in response to these comments.

The TQHA, along with others, questioned the wording of §17.504(d), which required breed associations to cooperate with the department to verify stallion-breeding information. In response to these comments, the department has revised §17.504(d) to read: “The department will rely on the breed associations to cooperate with the department to verify stallion-breeding information.” Without the information required by §17.504(d), the department will not be able to effectively administer the TEIP.

Others commented that the $30.00 annual program fee set in §17.504 was too high or too low. HB 1881 states that an owner required to submit a duplicate breeding report under the act shall pay the department an equine incentive fee in an amount of not less than $30.00 per mare bred. As stated in the proposal, the department will re-evaluate the fee on an annual basis. In addition, the department is proposing new §17.510, in a separate submission, which will establish an increased fee for stallion owners who are delinquent in filing required breeding reports or paying required program fees by November 30th of each calendar year, and establish a December 31 deadline for owners of stallions to file breeding reports and pay program fees, after which no foal sired by that stallion during that breeding year will be eligible to participate in the program. The proposal is published in this issue of the Texas Register.

With respect to §17.505, relating to Opt Out procedures, comments were received that stallion owners should not be required to list the mares bred when choosing to opt out of the TEIP. However, without this information, the department will not be able to effectively administer the program. Section 17.505 is adopted without change.

In response to §17.506, relating to the Opt In procedure, the department received comments that the TEIP should be an opt-in program only. HB 1881 requires an owner of a stallion who has bred more than five mares during the 12-month period preceding the submission of annual breeding report with the applicable breeders’ association to submit a duplicate breeding report with the department and pay the equine incentive fees established by the department. HB 1881 gives the stallion owner the opportunity to opt out of the program. Unless the stallion owner opts out, the statute requires submission of the breeding report to the department and payment of the incentive fee. Accordingly, §17.506 is adopted without change.

Comments were received on §17.508, regarding the minimum age requirement for eligible horses to participate in the TEIP. Based on comments received, the department is withdrawing §17.508, and proposing a new proposal for that section reducing the minimum age requirements to one year for non-racing events and two years for racing events. The proposal is published in this issue of the Texas Register.

New Chapter 17, Subchapter I, §§17.500 - 17.507 and 17.509 are adopted pursuant to House Bill 1881, 81st Legislature, 2009 (HB 1881), codified at Texas Agriculture Code, §12.044, which creates the Texas Equine Incentive Program and requires the department to adopt rules to establish and administer the program.

§17.500. Authority.

Pursuant to §12.044 of the Texas Agriculture Code, the department has established a Texas Equine Incentive Program.

§17.504. Breeding Report; Program Fee.

(a) On the filing of an annual report with a breed association, the owner of a stallion that has bred more than five mares during the 12-month period preceding the report must submit a duplicate report to the department.

(b) At the same time as filing a breeding report as required by subsection (a) of this section, the owner of a stallion shall pay the department a program fee of not less than $30.00 for each mare bred based upon the breeding report filed by the stallion owner. The program fee will be determined by the department on a calendar-year basis. On or before December 31st of each year, the department will provide notice of the program fee for the succeeding calendar year to the breed associations, and publish notice of same in the Texas Register or on or before that date. The program fee for the initial and first full program years, from September 1, 2009, through December 31, 2010, will be $30.00 per mare bred.

(c) Breeding reports as required by subsection (a) of this section must be sent to the department for all mares bred on or before November 30th of each calendar year.

(d) The department will rely on the breed associations to cooperate with the department to verify stallion-breeding information.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency’s legal authority.

Filed with the Office of the Secretary of State on March 15, 2010.
TRD-201001332
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: April 4, 2010
Proposal publication date: October 9, 2009
For further information, please call: (512) 463-4075
The Texas State Securities Board adopts new §104.7, concerning preliminary evaluation of license eligibility, with changes to the proposed text as published in the December 4, 2009, issue of the Texas Register (34 TexReg 8598). The word "the" was added in subsection (a)(6) of the rule. Related amendments are being concurrently adopted to §115.6 and §116.6, concerning registration of persons with criminal backgrounds, to cross-reference this new procedure.

The new rule implements the provisions of House Bill 963 (HB 963) passed during the 2009 Regular Session of the Legislature. HB 963 added Subchapter D to Chapter 53 of the Texas Occupations Code, which provides a means for potential applicants to obtain preliminary information regarding their eligibility for an occupational license before they begin a training program for that occupation.

The new rule provides a means for potential applicants to obtain preliminary information regarding their eligibility for a license prior to the application process.

No comments were received regarding adoption of the new rule.

The new rule is adopted under Texas Civil Statutes, Article 581-28-1 and Texas Occupations Code, Chapter 53, Subchapter D. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Texas Occupations Code, Chapter 53, Subchapter D, authorizes a person requesting an evaluation letter to be charged a fee sufficient to cover the costs of administration. HB 963 requires an agency issuing a license to practice or engage in a particular business, profession, or occupation to adopt rules necessary to administer Texas Occupations Code, Chapter 53, Subchapter D.


§104.7. Preliminary Evaluation of License Eligibility.

(a) Request for criminal history evaluation letter.

(1) A person may request the Agency issue a criminal history evaluation letter regarding the person’s eligibility for a license issued by the Agency if the person:

(A) is enrolled or planning to enroll in an educational program that prepares a person for an initial license or is planning to take an examination for an initial license; and

(B) has reason to believe that the person is ineligible for the license due to a conviction or deferred adjudication for a felony or misdemeanor offense.

(2) The request must state the basis for the person’s potential ineligibility, provide the information set out in subsection (b) of this section, include all pertinent court documentation including certified copies of all court indictments and/or judgments, and orders, and an explanation of the circumstances and events of the criminal action that led to the conviction or sentence.

(3) The fee for a preliminary evaluation of license eligibility shall be $100.

(4) To be considered complete, the request must include the appropriate fee and state the circumstances establishing the requestor’s eligibility under paragraph (1) of this subsection.

(5) The Agency may require additional documentation including fingerprint cards before issuing a criminal history evaluation letter.

(6) If a requestor does not provide all required and requested documentation within one year of submitting the original request, the requestor must submit a new request along with the appropriate fee.

(b) Factors considered. The Agency considers the following evidence in determining the present fitness of an applicant who has been convicted of a crime. Accordingly, the requestor should provide information on the following:

(1) The extent and nature of the person’s past criminal activity.

(2) The age of the requestor at the time of the commission of the crime.

(3) The amount of time that has elapsed since the requestor’s last criminal activity.

(4) The conduct and work activity of the requestor prior to and following the criminal activity.

(5) Evidence of the requestor’s rehabilitation or rehabilitative effort while incarcerated or following release.

(6) Other evidence of the requestor’s present fitness, including letters of recommendation from prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for the requestor; the sheriff and chief of police in the community where the requestor resides; and any other persons in contact with the requestor.

(7) It shall be the responsibility of the requestor to the extent possible to secure and provide to the Agency the recommendation of the prosecution, law enforcement, and correctional authorities as required under this section. The requestor shall also furnish proof to the Agency that he or she has maintained a record of steady employment and has supported his or her dependents and has otherwise maintained a record of good conduct and has paid all outstanding court costs, supervision fees, fines, and restitution as may have been ordered in all criminal cases in which he or she has been convicted.

(c) Investigation of request. The Agency has the same authority to investigate a request submitted under this section as it has to investigate a person applying for a license.

(d) Determination of eligibility; letter.

(1) If the Agency determines that a ground for ineligibility does not exist, the Agency shall notify the requestor in writing of the Agency’s determination on each ground of potential ineligibility.

(2) If the Agency determines that the requestor is ineligible for a license, the Agency shall issue a letter setting out each basis for potential ineligibility and the Agency’s determination as to eligibility.
(3) In the absence of new evidence known to but not disclosed by the requestor or not reasonably available to the Agency at the time the letter is issued, the Agency’s ruling on the request determines the requestor’s eligibility with respect to the grounds for potential ineligibility set out in the letter.

(4) The notice under paragraph (1) of this subsection or the letter under paragraph (2) of this subsection shall be issued by the Agency within 90 days of the requestor satisfying all of the Agency’s requests for information to complete the criminal history evaluation letter request.

This agency 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 March 8, 2010.
TRD-201001155
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: March 28, 2010
Proposal publication date: December 4, 2009
For further information, please call: (512) 305-8303

CHAPTER 116. INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES

7 TAC §116.6

The Texas State Securities Board adopts an amendment to §116.6, concerning registration of persons with criminal backgrounds, without changes to the proposed text as published in the December 4, 2009, issue of the Texas Register (34 TexReg 8599).

The amendment adds a cross-reference to §104.7, concerning preliminary evaluation of license eligibility, which is being concurrently adopted.

The rule apprises persons with criminal backgrounds of the availability of a preliminary evaluation of license eligibility prior to applying for registration.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.


This agency 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 March 8, 2010.
TRD-201001157
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: March 28, 2010
Proposal publication date: December 4, 2009
For further information, please call: (512) 305-8303

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION
SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.23
The Texas Department of Housing and Community Affairs (the Department) adopts an amendment to §1.23, concerning the State of Texas Low Income Housing Plan and Annual Report (SLIHP) without changes to the proposed text as published in the January 8, 2010, issue of the Texas Register (35 TexReg 175). The section adopts by reference the 2010 State of Texas Low Income Housing Plan and Annual Report (SLIHP). The purpose of the SLIHP is to serve as a comprehensive reference on statewide housing needs, housing resources, and strategies for funding allocations. The document reviews the Department’s programs, current and future policies, resource allocation plan to meet state housing needs, and reports on 2009 performance. The Department is required to submit the SLIHP annually to its Board of Directors in accordance with §2306.072 of the Texas Government Code.

The full text of the 2010 SLIHP may be viewed at the Department’s website: www.tdhca.state.tx.us. The public may also receive a copy of the 2010 SLIHP by contacting the Department’s Housing Resource Center at (512) 475-3976.

No comments were received regarding adoption of the amended section. The TDHCA Board of Directors approved the final 2010 SLIHP at the March 11, 2010 board meeting. The 2010 SLIHP will become effective 20 days after being filed with the Office of the Secretary of State.

The amended section is adopted pursuant to the authority of the Texas Government Code, §2306.0723 which requires the Department to follow rulemaking procedures in developing the report.

No other statutes, articles, or codes are affected by the adoption of the amended section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency’s legal authority.

Filed with the Office of the Secretary of State on March 15, 2010.
TRD-201001312
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: April 4, 2010
Proposal publication date: January 8, 2010
For further information, please call: (512) 475-3916

CHAPTER 80. MANUFACTURED HOUSING
The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (the "Department") adopts amendments to §§80.3, 80.37, 80.40, 80.41, 80.90 and 80.100. Section 80.100 is adopted with non-substantive changes to the proposal as published in the February 5, 2010, issue of the Texas Register (35 TexReg 736) and will be republished. Sections 80.3, 80.37, 80.40, 80.41, and 80.90 are adopted without changes and will not be republished.

The rules are revised for clarification purposes and to include additional services relating to inspections and applying for a new or updated Statement of Ownership and Location.

The rules are effective thirty (30) days following the date of publication with the Texas Register of notice that the rules are adopted.

There were no comments received during the comment period and no requests were received for a public hearing to take comments on the rules.

Except as noted below, the rules as proposed on February 5, 2010, are adopted as final rules with the following non-substantive changes.

Figure: 10 TAC §80.100(b)(19): Removed “Proposed Form” and the revision marks indicating new text in the proposed form. The content of the form was not changed from the proposed version. The following is a restatement of the rules’ factual basis:
Section 80.3(j) is adopted (without changes) to add a new subsection to include a fee to perform an inspection to verify a home’s identity, location, identification numbers or ownership. A fee is necessary to cover the Department’s travel costs. The subsequent subsections are re-lettered (k) - (n).
Section 80.3(k)(5) is adopted (without changes) to re-letter current subsection from (j) to (k) and add paragraph (5) to include a fee for Priority Handling Service for customers needing their application processed sooner.
Section 80.37(b) is adopted (without changes) to clarify the warranty period for the manufacturer’s, retailer’s, and installer’s warranty. The current subsection does not include the installer’s warranty period, which may be confusing.
Section 80.40 is adopted (without changes) to rename rule from Security and Insurance Requirements to Security Requirements because insurance is no longer required pursuant to the September 2009 statute change.
Section 80.40(c) is adopted (without changes) to change the word “terminated” to “suspended” because the rule is currently in conflict with §1201.109(a) of the Standards Act, which requires suspension as opposed to termination if a bond is cancelled.
Section 80.41(c)(3) is adopted (without changes) to remove the requirement to have the salesperson attend the next initial licensing class and replace it with the requirement that a salesperson attend the initial licensing class within 90 days. The salesperson is no longer required to take the next initial licensing education class pursuant to the September 2009 statute change.
Section 80.90(i) is adopted (without changes) to add a new subsection to include procedures for requesting Priority Handling Service.

Figure: 10 TAC §80.100(b)(19) is adopted (with changes) to revise the Application for Statement of Ownership and Location by adding a section to select regular or priority handling service.

SUBCHAPTER A. CODES, STANDARDS, TERMS, FEES AND ADMINISTRATION

10 TAC §80.3
The amended section is adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Oc-
The amended section is adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statutes, codes, or articles are affected by adoption of the amended rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 12, 2010.
TRD-201001283
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: April 25, 2010
Proposal publication date: February 5, 2010
For further information, please call: (512) 475-2206

SUBCHAPTER H. STATEMENTS OF OWNERSHIP AND LOCATION

10 TAC §80.90

The amended section is adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statutes, codes, or articles are affected by adoption of the amended rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 12, 2010.
TRD-201001283
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: April 25, 2010
Proposal publication date: February 5, 2010
For further information, please call: (512) 475-2206

SUBCHAPTER I. FORMS

10 TAC §80.100

The amended section is adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.
No other statutes, codes, or articles are affected by adoption of the amended rule.

§80.100. List of Forms.

(a) The following list is in numerical order with the forms located in subsection (b) of this section.

1. Application for Manufacturer’s License.
2. Application for Retailer, Broker, Installer and/or Rebuilder’s License.
3. Application for Retailer with Branch Locations License.
4. Application for Salesperson’s License.
5. Licensing Surety Bond.
7. Manufacturer’s Certificate of Origin (MCO).
10. Retail Monitoring Checklist.
11. Consumer Notice of Licensed and Bonded Location.
13. Formaldehyde Notice.
15. Broker Disclosure Form.
16. Notice of Installation (Form T).
17. Installation Checklist.
20. Affidavit of Fact for Real Property.
22. Affidavit of Error.
23. Affidavit of Fact for Right of Survivorship.
24. Addendum to Application for SOL.
25. Release or Foreclosure of Lien (Form B).
26. Statement of Inheritance (Form C).
27. Taxing Entity Application for Texas Seal (Form S).
28. Multiple Application Log (Form M).
29. Instructions to Third Party Closer.
30. Notice of Tax Lien/Release Form.
31. HUD Disclosure to Consumer Regarding Dispute Resolution.
32. CTC Account Request Form.
33. Site Preparation Notice for Used Homes Form.
34. Sample of Statement of Ownership and Location.
35. Application for License Renewal (other than a salesperson).
36. Right of Recission Waiver Form.
37. List of Unlicensed Installers Form.
38. Notice of Installation (Form T) for Provisional Installer’s License.
40. Affidavit of Fact for Abandonment.
41. Disclosure to Consumer (Possible Need to Vacate Home if Financing does not Close).
42. Application for Salesperson’s License Renewal.
43. Application for Continuing Education Provider.
44. Statement from Tax Assessor-Collector.
45. Consumer Disclosure Statement (Spanish Version).
46. HUD Required Installation Program Disclosure to Consumer.

(b) Forms.

1. Application for Manufacturer’s License.
   Figure: 10 TAC §80.100(b)(1) (No change.)
2. Application for Retailer, Broker, Installer and/or Rebuilder’s License.
   Figure: 10 TAC §80.100(b)(2) (No change.)
3. Application for Retailer with Branch Locations License.
   Figure: 10 TAC §80.100(b)(3) (No change.)
4. Application for Salesperson’s License.
   Figure: 10 TAC §80.100(b)(4) (No change.)
5. Licensing Surety Bond.
   Figure: 10 TAC §80.100(b)(5) (No change.)
   Figure: 10 TAC §80.100(b)(6) (No change.)
7. Manufacturer’s Certificate of Origin (MCO).
   Figure: 10 TAC §80.100(b)(7) (No change.)
   Figure: 10 TAC §80.100(b)(8) (No change.)
   Figure: 10 TAC §80.100(b)(9) (No change.)
10. Retail Monitoring Checklist.
    Figure: 10 TAC §80.100(b)(10) (No change.)
11. Consumer Notice of Licensed and Bonded Location.
    Figure: 10 TAC §80.100(b)(11) (No change.)
    Figure: 10 TAC §80.100(b)(12) (No change.)
13. Formaldehyde Notice.
    Figure: 10 TAC §80.100(b)(13) (No change.)
    Figure: 10 TAC §80.100(b)(14) (No change.)
15. Broker Disclosure Form.
    Figure: 10 TAC §80.100(b)(15) (No change.)
16. Notice of Installation (Form T).
Figure: 10 TAC §80.100(b)(16) (No change.)
(17) Installation Checklist.
Figure: 10 TAC §80.100(b)(17) (No change.)
(18) Estimate for Reassigned Warranty Work.
Figure: 10 TAC §80.100(b)(18) (No change.)
(19) Application for Statement of Ownership and Location.
Figure: 10 TAC §80.100(b)(19)
(20) Affidavit of Fact for Real Property.
Figure: 10 TAC §80.100(b)(20) (No change.)
(21) Affidavit of Fact.
Figure: 10 TAC §80.100(b)(21) (No change.)
(22) Affidavit of Error.
Figure: 10 TAC §80.100(b)(22) (No change.)
(23) Affidavit of Fact for Right of Survivorship.
Figure: 10 TAC §80.100(b)(23) (No change.)
(24) Addendum to Application for SOL.
Figure: 10 TAC §80.100(b)(24) (No change.)
(25) Release or Foreclosure of Lien (Form B).
Figure: 10 TAC §80.100(b)(25) (No change.)
(26) Statement of Inheritance (Form C).
Figure: 10 TAC §80.100(b)(26) (No change.)
(27) Taxing Entity Application for Texas Seal (Form S).
Figure: 10 TAC §80.100(b)(27) (No change.)
(28) Multiple Application Log (Form M).
Figure: 10 TAC §80.100(b)(28) (No change.)
(29) Instructions to Third Party Closer.
Figure: 10 TAC §80.100(b)(29) (No change.)
(30) Notice of Tax Lien/Release Form.
Figure: 10 TAC §80.100(b)(30) (No change.)
(31) HUD Disclosure to Consumer Regarding Dispute Resolution.
Figure: 10 TAC §80.100(b)(31) (No change.)
(32) CTC Account Request Form.
Figure: 10 TAC §80.100(b)(32) (No change.)
(33) Site Preparation Notice for Used Homes Form.
Figure: 10 TAC §80.100(b)(33) (No change.)
(34) Sample of Statement of Ownership and Location.
Figure: 10 TAC §80.100(b)(34) (No change.)
(35) Application for License Renewal (other than a salesperson).
Figure: 10 TAC §80.100(b)(35) (No change.)
(36) Right of Rescission Waiver Form.
Figure: 10 TAC §80.100(b)(36) (No change.)
(37) List of Unlicensed Installers Form.
Figure: 10 TAC §80.100(b)(37) (No change.)
(38) Notice of Installation (Form T) for Provisional Installer’s License.
Figure: 10 TAC §80.100(b)(38) (No change.)
(39) Notice of Intent to Acquire Ownership of an Abandoned Manufactured Home.
Figure: 10 TAC §80.100(b)(39) (No change.)
(40) Affidavit of Fact for Abandonment.

Figure: 10 TAC §80.100(b)(40) (No change.)
(41) Disclosure to Consumer of Possible Need to Vacate Home if Financing does not close.
Figure: 10 TAC §80.100(b)(41) (No change.)
(42) Application for Salesperson’s License Renewal.
Figure: 10 TAC §80.100(b)(42) (No change.)
(43) Application for Continuing Education Provider.
Figure: 10 TAC §80.100(b)(43) (No change.)
(44) Statement from Tax Assessor-Collector.
Figure: 10 TAC §80.100(b)(44) (No change.)
(45) Consumer Disclosure Statement (Spanish Version).
Figure: 10 TAC §80.100(b)(45) (No change.)
(46) HUD Required Installation Program Disclosure to Consumer.
Figure: 10 TAC §80.100(b)(46) (No change.)

This agency 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 March 12, 2010.

TRD-201001284
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: April 25, 2010
Proposal publication date: February 5, 2010
For further information, please call: (512) 475-2206

TITLE 16. ECONOMIC REGULATION

PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 401. ADMINISTRATION OF STATE LOTTERY ACT

SUBCHAPTER C. PRACTICE AND PROCEDURE

16 TAC §401.201

The Texas Lottery Commission (Commission) adopts amendments to 16 TAC §401.201 (relating to Intent and Scope of Rules), without changes to the proposed text as published in the January 22, 2010, issue of the Texas Register (35 TexReg 417). The purpose of the amendments is to make the rules consistent with current practice for contested cases at the Commission and consistent with the Rules of Practice and Procedure of the State Office of Administrative Hearings. Specifically, the language, "supplement, as appropriate, the Rules of Practice and Procedure of the State Office of Administrative Hearings and" has been added to the rule.

The Commission received no comments during the public comment period.

The amendments are adopted under the authority of Texas Government Code §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery

ADOPTED RULES  March 26, 2010  35 TexReg 2553
and under Texas Occupations Code §2001.054, which provides the Commission with the authority to adopt rules governing the operation of bingo. The amendments are also adopted under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

Texas Government Code, Chapter 466, is affected by these amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 11, 2010.

TRD-201001239

Kimberly L. Kiplin General Counsel
Texas Lottery Commission
Effective date: March 31, 2010
Proposal publication date: January 22, 2010
For further information, please call: (512) 344-5012


The Texas Lottery Commission (Commission) adopts repeals of 16 TAC §401.204 (Representation and Participation); §401.206 (Extensions of Time); §401.207 (Content of Request for Hearing); §401.208 (Preliminary Conference); §401.209 (Motion to Dismiss; Request for Extended Hearing); §401.210 (Notice of Setting); §401.212 (Filing of Documents); §401.213 (Continuances (Postponement of Hearing)); §401.214 (Conduct of Hearing); §401.215 (Rules of Evidence); §401.217 (Evidence by Official Notice); §401.218 (Proposed Decision); §401.219 (Texas Lottery Commission, Executive Director, or Lottery Operations Director Decision); §401.221 (Computation of Time); §401.222 (Service); §401.223 (Discovery); §401.224 (Joint Hearings); §401.225 (Dismissal of Case); §401.226 (Burden of Proof); §401.228 (Oral Argument before the Commission); and, §401.229 (Default Hearings) without changes to the proposal as published in the January 22, 2010, issue of the Texas Register (35 TexReg 418).

The purpose of the repeals is to make the rules consistent with current practice for contested cases at the Commission and to remove rules appropriately addressed in the Rules of Practice and Procedure of the State Office of Administrative Hearings.

No comments were received regarding adoption of the repeals.

The repeals are adopted under the authority of Texas Government Code §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery and under Texas Occupations Code §2001.054, which provides the Commission with the authority to adopt rules governing the operation of bingo. The repeals are also adopted under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission’s jurisdiction.

Texas Government Code, Chapter 466, is affected by these repeals.

This agency 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 March 11, 2010.

TRD-201001244

Kimberly L. Kiplin General Counsel
Texas Lottery Commission
Effective date: March 31, 2010
Proposal publication date: January 22, 2010
For further information, please call: (512) 344-5012

16 TAC §401.205
The Texas Lottery Commission (Commission) adopts amendments to 16 TAC §401.205 (relating to Initiation of a Hearing), without changes to the proposed text as published in the January 22, 2010, issue of the Texas Register (35 TexReg 419).

The purpose of the amendments is to correct the citations to the State Lottery Act and delete portions of the rule that are not in the Commission’s current practice. Specifically, subsection (b), regarding court reporters and transcripts, has been deleted from the rule.

No public comments were received during the public comment period.

The amendments are adopted under the authority of Texas Government Code §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery and under Texas Occupations Code §2001.054, which provides the Commission with the authority to adopt rules governing the operation of bingo. The amendments are also adopted under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission’s jurisdiction.

Texas Government Code, Chapter 466, is affected by these amendments.

Texas Government Code, §401.211. Law Governing Contested Cases.

Contested case hearings, with the exception of summary suspension proceedings, will be governed by the Texas Government Code, Chapter 466, (in Lottery cases); Texas Occupations Code, Chapter 2001, (in Bingo cases); Texas Government Code, Chapter 2001; Title 1 of the Texas Administrative Code; and these Rules. Summary suspension proceedings described in 16 Texas Administrative Code §401.203(b) will be governed by the Texas Government Code, Chapter 466.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency’s legal authority.

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Kimberly L. Kiplin
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For further information, please call: (512) 344-5012

16 TAC §401.211

The Texas Lottery Commission (Commission) adopts amendments to 16 TAC §401.211 (relating to Administrative Law Judge to Hear Case), with changes to the proposed text as published in the January 22, 2010, issue of the Texas Register (35 TexReg 420).

The changes are non-substantive in nature, changing the title of 16 TAC §401.211 from "Administrative Law Judge to Hear Case" to "Law Governing Contested Cases". Adoption of the revisions noted above would not violate the standards set forth in State Board of Insurance v. Deffebach, 631 S.W.2d 794 (Texas Ct. App. 1982). Specifically, the revisions regulate no new parties and affect no new subjects of regulation. Also, the Code Construction Act, Texas Government Code §311.024 provides that "[t]he heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute." The same standard would apply to the title of a rule. This title change more accurately describes the information contained in the 16 TAC §401.211.

The purpose of the amendments is to make the rules consistent with current practice for contested cases at the Commission and consistent with the Rules of Practice and Procedure of the State Office of Administrative Hearings. Specifically, the amendments clarify the statutes and rules governing the Commission’s contested cases.

No public comments were received during the public comment period.

The amendments are adopted under the authority of Texas Government Code §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery and under Texas Occupations Code §2001.054, which provides the Commission with the authority to adopt rules governing the operation of bingo. The amendments are also adopted under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission’s jurisdiction.

Texas Government Code, Chapter 466, is affected by these amendments.

Texas Government Code, §401.216

The Texas Lottery Commission (Commission) adopts amendments to 16 TAC §401.216 (relating to Oral Evidence, Witnesses, and Penalty for False Statements), without changes to the proposed text as published in the January 22, 2010, issue of the Texas Register (35 TexReg 421).

The purpose of the amendments is to make the rules consistent with current practice for contested cases at the Commission and consistent with the Rules of Practice and Procedure of the State Office of Administrative Hearings. Specifically, the amendments outline the process for the issuance of subpoenas and commissions for depositions in accordance with the Commission’s current practice.

No public comments were received during the public comment period.

The amendments are adopted under the authority of Texas Government Code §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery and under Texas Occupations Code §2001.054, which provides...
the Commission with the authority to adopt rules governing the operation of bingo. The amendments are also adopted under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission’s jurisdiction.

Texas Government Code, Chapter 466, is affected by these amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency’s legal authority.

Filed with the Office of the Secretary of State on March 11, 2010.
TRD-201001242
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: March 31, 2010
Proposal publication date: January 22, 2010
For further information, please call: (512) 344-5012

16 TAC §401.220

The Texas Lottery Commission (Commission) adopts amendments to 16 TAC §401.220 (relating to Motion for Rehearing), without changes to the proposed text as published in the January 22, 2010, issue of the Texas Register (35 TexReg 422).

The purpose of the amendments is to make the rules consistent with current practice for contested cases at the Commission and consistent with the Rules of Practice and Procedure of the State Office of Administrative Hearings. Specifically, the amendments outline the process for motions for rehearing in accordance with the Commission’s current practice.

No public comments were received during the public comment period.

The amendments are adopted under the authority of Texas Government Code §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery and under Texas Occupations Code §2001.054, which provides the Commission with the authority to adopt rules governing the operation of bingo. The amendments are also adopted under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission’s jurisdiction.

Texas Government Code, Chapter 466, is affected by these amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency’s legal authority.

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TRD-201001243

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TITLE 22. EXAMINING BOARDS

PART 14. TEXAS OPTOMETRY BOARD

CHAPTER 271. EXAMINATIONS

22 TAC §271.3

The Texas Optometry Board adopts amendments to §271.3 without changes to the proposed text published in the December 18, 2009, issue of the Texas Register (34 TexReg 9083).

The amendments concern modification of administration requirements for the Jurisprudence Examination such that Internet technology can be utilized.

No comments were received.

The amendments are adopted under the Texas Optometry Act, Texas Occupations Code, §§351.151, 351.253, 351.255, and 351.257. No other sections are affected by the amendments.

The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession, §351.253 to require passing an examination for license, and §351.255 and §351.257 as setting out the requirements for exam administration.

This agency 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 March 9, 2010.
TRD-201001186
Chris Kloeris
Executive Director
Texas Optometry Board
Effective date: March 29, 2010
Proposal publication date: December 18, 2009
For further information, please call: (512) 305-8502

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 101. GENERAL AIR QUALITY RULES


Sections 101.390 - 101.392, 101.394, 101.396, 101.399, and 101.401 are adopted with changes to the proposed text as published in the October 9, 2009, issue of the Texas Register
than ion cap to-exceed

These amendments will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The Houston-Galveston-Brazoria (HGB) metropolitan area was designated nonattainment for the 1997 eight-hour ozone National Ambient Air Quality Standard (NAAQS) as a moderate area effective June 15, 2004. In October 2008, the HGB area was reclassified as a severe ozone nonattainment area by the EPA as requested by the governor of Texas. The HGB area is required to attain the 1997 eight-hour ozone standard of 0.08 parts per million as expeditiously as practicable, but no later than by June 15, 2019. The EPA requires submittal of the HGB Attainment Demonstration SIP Revision for the 1997 Eight-Hour Ozone Standard by April 15, 2010. This rulemaking will be submitted as part of the HGB Attainment Demonstration SIP Revision for the 1997 Eight-Hour Ozone Standard.

Photochemical modeling analysis demonstrates that a 25% reduction of the highly reactive volatile organic compound (HRVOC) cap in Harris County would contribute to attainment of the 1997 eight-hour ozone NAAQS by reducing the future 2018 ozone design values for all HGB area monitors. The largest reductions are projected at the Deer Park monitoring site, which is the area’s driving design value monitor.

In addition, some regulated entities participating in the HRVOC Emissions Cap and Trade (HECT) program have commented that the initial allocation of HRVOC allowances was not equitably distributed. The existing allocation methodology is based on the total amount, in pounds, of HRVOC produced as an intermediate, byproduct, or final product, or used by a process unit at each participating site. Subsequent analysis of the HRVOC emissions data reported under the HECT program for the 2007 and 2008 calendar-year control periods supports the assertion that some industry sectors may have been over-allocated while others may have received an insufficient allocation. Although reallocation is not required to model attainment of the 1997 eight-hour attainment demonstration HGB SIP revision, the adopted reallocation methodology is designed to result in a more equitable allocation of allowances while establishing an enforceable cap in HRVOC allowances in Harris County in support of HGB’s attainment of the NAAQS as expeditiously as practicable.

As part of the December 2004 HGB SIP revisions of the midcourse review for the one-hour ozone standard, the commission developed a dual approach to achieve the necessary HRVOC reductions: address variable short-term emissions through a no-to-exceed hourly emission limit and address steady-state and routine emissions through an annual cap. The annual HRVOC cap reduced the overall reactivity in the airshed by removing the compounds that are most prevalent and most likely to react rapidly enough to cause one-hour ozone exceedances.

For Harris County, the annual HRVOC cap was distributed and enforced through the HECT program under Chapter 101, Subchapter H, Division 6. This program established a mandatory annual HRVOC emissions cap on all sites subject to the HRVOC control requirements of 30 TAC Chapter 115, Subchapter H, Division 1 or Division 2, and having a potential to emit (PTE) greater than ten tons per year (tpy). The cap is enforced through the allocation, trading, and banking of allowances. An allowance is the equivalent of one ton of HRVOC emissions. This HRVOC cap, initially implemented on January 1, 2007, was established at a level demonstrated as necessary to allow the HGB area to attain the one-hour ozone standard along with a 5% reduction to safeguard against potential emissions variations. The HECT program also requires subject sites with new or modified HRVOC sources to obtain unused allowances from other sites already participating in the program for any increased HRVOC emissions. For sites that have a PTE of ten tpy or less of HRVOC from sources subject to the HRVOC control requirements of Chapter 115, Subchapter H, Divisions 1 or 2, the total, aggregate HRVOC emissions from those sources is limited to ten tpy. Sites exempt from the HECT program were extended an opportunity to opt-in, receive an HRVOC allocation, and thereby not be restricted to the ten tpy limit.

Revisions to the HECT program under this rulemaking will reduce the total HECT cap by 25% prior to the attainment year and revise the HRVOC allocation methodology to address inequities from the initial allocation. Photochemical modeling analysis demonstrates that a 25% reduction of the total HRVOC cap in Harris County will advance attainment of the 1997 eight-hour ozone NAAQS by reducing the future 2018 ozone design values at all HGB monitors. The largest decrease in the projected design value was at the Deer Park monitor. The average decrease for all sites was 0.13 parts per billion (ppb).

HRVOC monitoring data reported for 2006 - 2008 indicates that the total actual emissions from sources in the HECT program have been approximately 50% of the total current HRVOC cap. Because the HECT rules in Chapter 115, Subchapter H, Divisions 1 and 2, require emissions from maintenance, startup, and shutdown activities and emissions events be included in the HECT program, the total surplus observed in the two years that the program has been active cannot be removed. Therefore, a buffer in the cap is still needed to account for the inherent variability of HRVOC emissions associated with these activities.

The adopted rules will implement an initial 10% reduction of the existing available cap of 3,451.5 tons beginning with the 2014 calendar-year control period. The available cap will then be reduced in a “stepdown” fashion, similar to the existing Mass Emissions Cap and Trade Program (MECT) for nitrogen oxides (NOx), in 5% increments at the start of each calendar-year control period for 2015, 2016, and 2017. Therefore, the full 25% cap reduction will have been in effect for one full calendar-year control period by January 1, 2018. While historical data demonstrates an overall surplus in the HRVOC cap, the cap reduction and reallocation may require some individual sites to install additional controls. The commission is therefore adopting this stepdown approach to allow companies time to install controls if necessary.

Following the initial allocation of allowances, companies participating in the HECT program commented that the allocation was not equitably distributed. Emissions reported by industry based on their HRVOC monitoring data supports the assertion of an inequitable distribution of allowances. In addition, HECT program participants commented that certain HRVOC-emitting industry sectors were more adversely affected under the existing allocation methodology due to different HRVOC emission rates associated with production throughput. Facilities that use HRVOC as a raw material in the production of olefins have higher HRVOC emissions associated with their process as compared to other chemical manufactures and refineries. Therefore, under the existing HECT program, sites in the refinery and non-polymer
chemical sectors generally have the largest excess HRVOC allowances as compared to actual emissions. HECT program participants also commented on the reluctance of sites to trade due to the inclusion of emissions events in determining compliance with the program and the risk of trading away allowances that may be needed for compliance due to an emissions event later in the calendar-year control period. The commission will reallocate HRVOC allowances under the HECT program based on actual emissions data and implement significant program changes to encourage market activity through trading.

The existing HECT allocation methodology is a level of activity production-based calculation of the total amount of HRVOC, in pounds, produced or used by a process unit. This production-based methodology was developed prior to the implementation of monitoring requirements for applicable sources of HRVOC in Harris County. HECT program participants have been reporting actual monitored emissions data to the HECT program since 2006 as required under Chapter 115.

The adoption of this rulemaking creates a new allocation methodology based on actual emissions data with the goals of fairly and equitably distributing the compliance burden for HECT program participants, applying credit for controlling and reducing HRVOC emissions, and not rewarding or encouraging emissions from emissions events. Cap and trade programs aim to provide economic incentives for reducing emissions through controls by allowing excess allowances to be sold to other program participants. However, an allocation methodology based solely on actual emissions has the potential of penalizing sites that are well controlled and/or rewarding sites that are not well controlled. To allow for applicable sites to establish a representative baseline emissions period, the rules allow sites to use their two highest consecutive calendar-year control periods out of the four years from 2006 - 2009.

Allocations will be distributed based on the new allocation methodology beginning with the 2011 calendar-year control period. Baseline emissions for the purpose of calculating the site allocations would be the average of the actual emissions for the two highest consecutive calendar-year control periods as submitted in the Form ECT-6H, Highly- Reactive Volatile Organic Compound Emissions Cap and Trade Baseline Emissions Certification Form. The deadline for ECT-6H submission is July 1, 2010.

The adopted rulemaking includes a provision for HECT participants that qualify to have the ability to request from the executive director the use of an alternate baseline period from 2004 and 2005 for the purpose of establishing baseline emissions. The owner or operator of a site must submit a request to the executive director by July 1, 2010, demonstrating that they were performing speciated testing and continuous flow monitoring of HRVOC emissions during the requested alternative baseline period. This provision is available for participants with substantial HRVOC reductions. In addition, the emission reductions must be permanent, voluntary, and quantifiable of an amount equal to or greater than 25% of the site’s total annual HRVOC emissions and a site-wide reduction in HRVOC emissions subject to the HECT program of 25 tons or greater. The adopted rulemaking also provides an alternative to the use of an alternative baseline for qualifying sites that made early permitted HRVOC emissions reductions through the installation of flare gas recovery, vent gas recovery, or flare gas minimization control strategies. This alternative includes a provision in which quantified and monitored HRVOC emissions reductions from flare or vent gas recovery or flare minimization is added to the calculation of “Uncontrolled emissions” using the flare’s average control efficiency. The average actual HRVOC emissions used for quantifying reductions from flare or vent gas recovery or flare minimization control strategies must be determined through the use of continuous flow rate monitoring and HRVOC speciation testing in order to be applied towards a site’s “Uncontrolled emissions.” The emissions reductions must have been made enforceable under a permit action submitted to the executive director no later than April 1, 2010.

Additionally, qualifying sites not in operation or with HRVOC emissions that are not representative of permitted normal routine operation, due to an authorized modification that resulted in an HRVOC emission reduction during the baseline emissions period, may request from the executive director the use of any allowance stream acquired from facilities previously participating in the HECT program in lieu of reallocation until an alternative consecutive 24-month baseline emissions period can be established from normal permitted operation from 2010 - 2012. Sites approved by the executive director to use this alternative will receive an allocation in accordance with the adopted allocation methodology in the 2014 calendar-year control period.

Recent economic conditions have prompted concerns from industry that the 2006 - 2009 years adopted for establishing baseline emissions activity may not be representative of general production and emission rates due to the recent economic downturn. However, the reallocation methodology is based on the percentage of individual site emissions contributing to the total industry sector emissions and the fraction that each industry sector’s emissions make up toward the total of all HRVOC emissions in the county. Therefore, the allocation of allowances for any individual site would not be significantly affected by general changes in economic conditions. An individual site’s allocations would only be significantly altered if their uncontrolled emissions changed as a proportion of the total industry sector emissions.

The adopted reallocation methodology is based on calculating “Uncontrolled emissions” or pre-controlled emissions for facilities using reported control efficiencies based on the specifications for flares in §115.725(d). Heaters, boilers, furnaces, thermal and catalytic oxidizers, and other combustion control devices combusting HRVOC streams would calculate “Uncontrolled emissions” using control efficiencies up to 99.9% with actual monitored control efficiency data derived from stack testing. In the event that actual stack testing data is not available for combustion control devices other than flares, the commission will assign a default control efficiency of 99% due to their closed combustion design and higher flame temperatures. Dividing actual emissions by one minus the percent control efficiency calculates the amount of emissions before controls, therefore allowing sites to receive credit for these reductions in the allocation. HRVOC emissions from other facilities subject to Chapter 115, Subchapter H, Divisions 1 and 2, and the HECT program, such as vents and cooling towers, will be included in the equation for calculating uncontrolled emissions, however because they do not have combustion control efficiencies, uncontrolled emissions from these facility types will be equal to their actual emissions. Only HRVOC emissions from routine, permitted, normal activity will be counted as actual emissions in the calculation of uncontrolled emissions. Emissions from emission events subject to §101.201 will not be included in the determination of uncontrolled emissions and will not be applied towards site allocations. As discussed elsewhere in this preamble, the adopted rules contain a provision for applying
credit towards a site’s uncontrolled emissions for quantified and monitored HRVOC emission reductions from flare minimization programs and flare and vent gas recovery systems. In addition, sites that have purchased allowance streams under the existing HECT allocation will be allowed to receive allowance credit for an amount equal to the difference between each site’s allowance stream plus its current existing allocation and the amount of its two highest average actual emission years during the baseline period. The amount of the difference may be applied to a site’s "Uncontrolled emissions" as actual emissions for the calculation of allowances. Sites with emissions from their two highest average actual emission years during the baseline period that are greater than their existing allocation plus any acquired allowance stream will receive an allocation based on their "Uncontrolled emissions" without the benefit of the allowance stream.

The adopted rules define four industry-type sector pools to account for different HRVOC emission rates associated with the processes of the industry sectors with HRVOC emissions in Harris County. The industry sector definition reflects those used in existing regulations and are readily defined by process type and product. The existing application of Best Available Control Technology (BACT) and other federal standards within industry sectors would assure a comparable cost of control within the industry sector, and the division of the cap into industry sector share will therefore reflect a more equitable allocation methodology. In addition, the amount of HRVOC product that is recycled and recovered for sites within the same industry sector should be comparable due to market forces and competition within the sector. Sites within common industry sectors with HRVOC as product share the economic incentive to reduce emissions using similar recovery techniques.

The four industry sectors are petroleum refining, nonpolymer chemical producers, polymer producers, and storage/loading/other. The reallocation methodology then calculates each sector’s share of the available cap by dividing the total amount of actual average emissions over the emissions baseline period for the sector by the total available cap. The resulting fraction expressed as a percentage becomes the industry sector share. Applying this sector share to the individual site allocation equation creates a methodology in which only facilities within the individual industry sectors compete with one another for allowances. Sites containing facilities from two or more industry sectors will be included in the industry sector for which the majority of their baseline activity is generated, with emissions and allocations for the industry sector and site calculated accordingly.

The existing rules’ “opt-in” clause specifies that any site wishing to opt-in must have requested to participate by April 30, 2005. The adopted rule revision will not provide an additional opt-in provision. All sites with an HRVOC PTE that is greater than ten tons are required to participate in the HECT program. Sites with a calculated allocation of less than five tons based on the revised allocation methodology will be eligible to receive a minimum allocation of five tons. Sites with a calculated allocation greater than or equal to five but less than ten tons based on the revised allocation methodology will be eligible to receive a minimum allocation of ten tons. Sites receiving a minimum allocation under the adopted rulemaking will not have their allocations "stepped down" and will continue to receive the minimum allocation.

According to the reallocation principals above, including a methodology based on average actual emissions during the emissions baseline period and calculating "Uncontrolled emissions" or pre-controlled emissions using reported control efficiencies, the commission adopts a revised reallocation methodology for HRVOC allowances beginning with the 2011 calendar-year control period. The total modeled (future base) cap on HRVOC emissions in Harris County is currently 3,633.1 tons. After deducting the required 5% EPA environmental contribution of 181.65 tons, the total HRVOC cap is 3,451.5 tons. The first 10% cap stepdown will occur at the beginning of the 2014 calendar-year control period. The total amount of HRVOC allowances available in 2014 will therefore be 3,106.3 tons. At the request of stakeholders, the proposed rule initially included an emissions event set-aside pool, however in response to comment, the 250-ton set-aside has been returned to the available cap for allocation.

The adopted rulemaking will then continue to reduce the cap to a total of 25% in annual 5% reductions from 2015 to 2017. Therefore, the final available cap beginning with the 2017 calendar-year control period will be the 2,588.6-ton value representing the amount modeled in the 2018 future case 25% HECT Cap Reduction sensitivity run. The allocation methodology for each calendar-year control period will be identical to the adopted methodology for 2011.

Sites that have made investments on HRVOC stream trades may receive credit for the allowance stream as actual emissions in the calculation of "Uncontrolled emissions." However, in order to prevent the double counting of the stream and the emissions during the baseline emissions period that the stream allowed them to achieve, the "Uncontrolled emissions" for sites owning a stream of allowances will be considered the greater of their actual emissions during the baseline emissions period or the amount of the original allocation plus the allowance stream. Therefore, if a site’s highest emissions during the baseline period were less than its original allocation plus the allowance stream, the difference would be applied toward its "Uncontrolled emissions." Although some qualifying sites may receive credit for acquired allowance streams after reallocation, HECT allowances are not a property right and site allocations are maintained at the executive director’s discretion under §101.394(h).

**SECTION BY SECTION DISCUSSION**

In addition to the adopted amendments to §§101.1, 101.390 - 101.394, 101.396, and 101.399 - 101.401 discussed elsewhere in this preamble, the commission is also making various stylistic non-substantive changes to update rule language to current Texas Register style and format requirements, as well as establish more consistency in the rules. Such changes include appropriate and consistent use of acronyms, punctuation, section references, and certain terms, such as "must" and "shall." These changes are non-substantive and generally are not specifically discussed in this preamble.

**§101.1, Definitions**

Adopted changes to §101.1 amend the definition of reportable quantity for 1,1,1,2,3,3,3-heptfluoropropane (HFC-227ea) in §101.1(88)(A)(i)(III)(y-). The commission adopted a reportable quantity of 5,000 pounds for HFC-227ea in 2005 and the adopted rule was published in the December 30, 2005, issue of the Texas Register (30 TexReg 8886). However, the reportable quantity value of 5,000 pounds was inadvertently omitted in the version filed with the Secretary of State’s Office. The commission is only adopting the corrected omission in §101.1(88)(A)(i)(III)(y-) and no other changes to the definition
of reportable quantity will be addressed in this rulemaking. Additionally, the commission adopts the updated definition of volatile organic compound in §101.1(115) to be consistent with the current definition in the 40 Code of Federal Regulations, §57.100(s) amended on January 21, 2009 (74 Federal Register 3441).

§101.390, Definitions

The commission adopts revised §101.390(4) and adds §101.390(9) to include the definitions of “Baseline emissions period,” “Industry sectors,” and “Uncontrolled emissions.” “Baseline emissions period” is defined as consecutive calendar-year control periods designated by the site for the purpose of establishing baseline emissions for the allocation of allowances. In response to comment, “Uncontrolled emissions” is defined as taking the total emissions from each applicable facility calculated as pre-controlled using the applicable control efficiency for the purpose of determining site allocations under §101.394(a)(1)(B). In response to comment, the definition of “Industry sectors” for the purpose of generating the industry sector share for the allocation of HRVOC allowances is included in the adopted rules for clarity. The commission also adopts renumbering the subsequent paragraphs of §101.390.

§101.391, Applicability

The commission adopts deleting the term “covered” and replacing it with “applicable” in describing sites and facilities subject to the rulemaking for rule consistency and clarity.

§101.392, Exemptions

The commission adopts deleting the term “covered” and replacing it with “applicable” in describing sites and facilities subject to the rulemaking for consistency and clarity. In response to comment, the commission adopts language clarifying the applicability of subsection (b) to only Harris County.

§101.393, General Provisions

The commission adopts deleting the term “covered” and replacing it with “applicable” in describing sites and facilities subject to the rulemaking for rule consistency and clarity.

§101.394, Allocation of Allowances

In response to comment, the commission adopts the deletion of the reference to January 1, 2007, from §101.394(a). The commission also adopts the removal of the figure located at §101.394(a)(1) and adding a new figure to be located at §101.394(a)(1)(A). In addition, the commission adopts §101.394(a)(1)(B) to revise the reallocation methodology for allowances beginning in the calendar-year control period 2011. The adopted figure located at §101.394(a)(1)(B) provides the equation for calculating the new allocation methodology and for a stepped down reduction in the total cap of allowances. The first reduction is a 10% reduction of the total cap in calendar-year control period 2014, followed by successive 5% reductions per calendar-year control period until the 25% total reduction in the cap is reached in calendar-year control period 2017.

In response to comment, the commission also adopts the addition of §101.394(a)(1)(C) to allow qualifying sites not in operation or with HRVOC emissions that are not representative of permitted normal routine operation due to an authorized modification that resulted in an HRVOC emission reduction during the baseline emissions period to request from the executive director the use of any allowance stream acquired from facilities previously participating in the HECT program in lieu of realloca-

The commission also adopts the addition of §101.394(a)(1)(D) for HECT participants that implemented permanent, voluntary, and quantifiable HRVOC emission reductions and monitoring programs before the beginning of the 2006 calendar-year control period. The adopted subparagraph (D) provides the ability to request from the executive director the use of an alternative baseline period from 2004 and 2005 for the purpose of establishing baseline emissions. To qualify for this provision, owners or operators of sites must be able to demonstrate to the executive director that they were performing specified testing and continuous flow rate monitoring of HRVOC emissions during the requested alternative baseline period. In addition, the emission reductions must be permanent, voluntary, and quantifiable of an amount equal to or greater than 25 tons resulting in a site-wide reduction in HRVOC emissions of at least 25%. The emissions reductions must also have been made enforceable under an action submitted to the executive director no later than April 1, 2010. This provision will ensure that sites that made early reductions before the adopted baseline emissions period of 2006-2009 would receive adequate credit for those early reductions.

In response to comment, the commission adopts §101.394(a)(3) detailing the calculation methodology for uncontrolled emissions for various applicable facility types.

The commission adopts the deletion of §101.394(c) because it is no longer applicable. The existing §101.394(d) will be relettered as subsection (c). Adopted §101.394(d) will ensure that sites with a calculated allocation of less than five tons based on the revised allocation methodologies will be eligible to receive a minimum allocation of five tons. Sites to be allocated greater than or equal to five tons but less than ten tons of allowances would be eligible to receive a minimum allocation of ten tons of allowances per calendar-year control period.

§101.396, Allowance Deductions

In response to comment, the commission adopts the deletion of proposed subsections (c) and (d) in order to remove the emissions event set-aside and the application for the use of the emissions event set-aside allowances. The commission also adopts non-substantive changes for clarity and consistency. The commission also adopts relettering subsequent subsections in §101.396.

§101.399, Allowance Banking and Trading

In response to comment, the commission adds clarifying language to subsection (a). The commission adopts amended §101.399(i)(5) to delete the reference to §101.394(c) because it is no longer applicable. In addition, the commission adopts §101.399(e) to prohibit the transfer of allowances allocated to sites under §101.394(a)(1)(C) that have yet to establish a baseline emissions period. Therefore, sites allowed to maintain an acquired allowance stream derived from the original allocation methodology under §101.394(a)(1)(A) may not benefit from the transfer of these allowances. The commission also adopts relettering the remaining subsections in §101.399.

§101.400, Reporting
The commission adopts §101.400(a)(4) to require sites to report the total amount and respective dates of HRVOC emissions from emissions events.

§101.401, Level of Activity Certification

The commission adopts §101.401(f) and (g). Adopted §101.401(f) will require the Form ECT-6H, Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Baseline Emissions Certification Form, to be submitted no later than July 1, 2010. Adopted §101.401(g) will require sites to select two consecutive calendar-year control periods to establish a baseline emissions period.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this adopted rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rulemaking action meets the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The adopted amendments to Chapter 101 and revisions to the SIP would reduce the total cap amount of HRVOC allowances for the HECT program by 25% and revise the allocation methodology for allowances for participants of the HECT program. The HECT program was adopted as a control measure for the HGB one-hour attainment demonstration SIP revision, and it is currently only applicable in Harris County. Photochemical modeling analysis demonstrates that a 25% reduction of the cap on the total Harris County HRVOC allocation would contribute to attainment of the 1997 eight-hour ozone NAAQS by reducing future ozone design values at all HGB monitors.

Following the initial allocation of allowances, stakeholder comments indicated that the allocation was not equitably distributed. Information from the first three years of monitoring data supports the assertion of an inequitable distribution of allowances. The adopted revisions are necessary to implement a more equitable allocation methodology, while contributing to HGB's attainment of the 1997 eight-hour ozone NAAQS as expeditiously as practicable. The adopted change in allocation methodology will result in allowance reductions for certain facilities, and it is possible facilities that have made significant investments on future HRVOC stream trades may see the value of these investments reduced or nullified. Facilities that have their HRVOC allowances reduced, either through the reallocation or reduction of the total HRVOC cap, may incur costs from the installation of additional controls or having to purchase allowances from other sources if necessary to comply with their lower allowances. If the cap is reduced, the price of HRVOC allowances available in the market may increase.

This rulemaking does not meet any of the four applicability criteria of a "major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225 applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. Specifically, the proposed amendments will result in a decrease in the HECT program cap, and will adjust the allocation methodology for allowances under the program. The HECT program was adopted as a control measure for the HGB one-hour attainment demonstration SIP, and the proposed changes to the program will contribute to HGB's attainment of the 1997 eight-hour ozone NAAQS as expeditiously as practicable. The rulemaking does not exceed an express requirement of federal or state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically developed under federal law and approved by the Texas Health and Safety Code (THSC).

The rulemaking implements requirements of 42 United States Code (USC), §7410, which requires states to adopt a SIP that provides for "implementation, maintenance, and enforcement" of the NAAQS in each air quality control region of the state. While 42 USC, §7410 does not require specific programs, methods, or reductions to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means, or techniques (including economic incentives, such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control). It is true that the Federal Clean Air Act (FCAA) does require some specific measures for SIP purposes, such as the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods to attain the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that the nonattainment areas of the state would be brought into attainment on schedule. The adopted amendments will help the HBG area attain the 1997 eight-hour ozone NAAQS as expeditiously as practicable.

The requirement to provide a fiscal analysis of adopted regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that would have a material adverse impact and would exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill would have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the
rule was a major environmental rule that exceeds a federal law. As discussed previously in this preamble, 42 USC, §7410 does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area would meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Because the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board, the commission contends that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules would have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 42 USC, §7410. For these reasons, the SIP rule adopted for inclusion in this SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are specifically required by federal law.

In addition, 42 USC, §7502(a)(2) requires attainment as expeditiously as practicable, and 42 USC, §7511(a), requires states to submit ozone attainment demonstration SIPs for ozone nonattainment areas, such as the HGB eight-hour ozone nonattainment area. As discussed previously in this preamble, the adopted amendments will help the HBG area attain the 1997 eight-hour ozone NAAQS as expeditiously as practicable.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially un-amended. The commission presumes that “when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency’s interpretation.” Central Power & Light Co. v. Sharp, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); Bullock v. Marathon Oil Co., 798 S.W.2d 353, 357 (Tex. App. Austin 1990), no writ; Cef. Humble Oil & Refining Co. v. Calvert, 414 S.W.2d 172 (Tex. 1967); Sharp v. House of Lloyd, Inc., 815 S.W.2d 245 (Tex. 1991); Southwestern Life Ins. Co. v. Montemayor, 24 S.W.3d 581 (Tex. App. Austin 2000), pet. denied; and Coastal Indus. Water Auth. v. Trinity Portland Cement Div., 563 S.W.2d 916 (Tex. 1978).

As discussed, this rulemaking action implements requirements of 42 USC, §7410. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor is it adopted solely under the general powers of the agency. Finally, this rulemaking action was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382, Texas Clean Air Act (TCAA), and the Texas Water Code that are cited in the STATUTORY AUTHORITY section of this rulemaking, including THSC, §§382.002, 382.011, 382.012, 382.016, and 382.017. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Govern-
amendments are the goals to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). This rulemaking will advance these goals through updating a definition, reallocating allowances, and lowering the HRVOC cap. No new sources of air contaminants will be authorized and the revisions will maintain the same level of emissions control as previous rules. CMP policies applicable to the proposed amendments are the policy that the commission’s rules comply with federal regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal areas (31 TAC §501.32). Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas. The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding consistency with the CMP.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 101, Subchapter H is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators subject to the Federal Operating Permits Program must, consistent with the revision process in Chapter 122, upon the effective date of the rulemaking, revise their operating permit to include the new Chapter 101, Subchapter H requirements.

PUBLIC COMMENT

Public hearings for the proposed SIP revision and associated rulemakings were held on October 28, 2009, at 2:00 p.m. and 6:00 p.m., at the Houston-Galveston Area Council (H-GAC) offices in Houston, Texas; and on October 29, 2009, at 3:00 p.m., at the Texas Commission on Environmental Quality (TCEQ) headquarters in Austin, Texas. Question and answer sessions were held 30 minutes prior to the hearings. Neither the October 28, 2009, hearing scheduled for 6:00 p.m., nor the October 29, 2009, hearing was officially opened because no party indicated a desire to provide comment. Five persons presented oral comments concerning this SIP revision at the public hearing held at 2:00 p.m. on October 28, 2009, in Houston. The public comment period opened on October 9, 2009, and closed on November 9, 2009. Written comments were accepted via mail, fax, and through the eComments system. There were 26 written comments received. Oral comments were provided by Kaneka Texas Corporation (Kaneka), Bigler, L.P. (Bigler), Environmental Defense Fund (EDF), and Galveston-Houston Association for Smog Prevention (GHASP). Written comments regarding the HECT rulemaking and Reasonably Available Control Measure (RACM) were provided by the EPA, EDF, GHASP, and Kaneka. Written comments regarding the HECT rulemaking and SIP revision were provided by BCCA Appeal Group (BCCA), 8-Hour Ozone SIP Coalition (Coalition), Texas Oil and Gas Association (TxOGA), and Texas Association of Business (TAB).

Written comments regarding the HECT rulemaking were provided by Texas Chemical Council (TCC), LyondellBasell (Lyondell), Texas Petrochemicals (TPC), Coalition of Manufacturers for Air Quality (COMAQ), DuPont Packaging and Industrial Polymers (DuPont), Albemarle Corporation (Albemarle), Sunoco Chemicals Inc. (Sunoco), INEOS Olefin & Polymers USA (INEOS), PetroLogistics/PL Propylene L.L.C. (PL Propylene), Coalition, BCCA, TxOGA, TAB, Total Petrochemicals (Total), Kaneka, Bigler, AmericanAcryl, Arkema Inc. (Arkema), EPA, and the Houston Regional Group and the Lone Star Chapter of the Sierra Club (HSC). Kids for Clean Air, the Sustainable Energy and Economic Development (SEED) Coalition, Clean Air Institute of Texas, and one individual expressed support for any comments submitted by EDF and HSC.

RESPONSE TO COMMENTS

HECT RULE, HGB 1997 EIGHT-HOUR OZONE ATTAINMENT DEMONSTRATION SIP REVISION, AND RACM COMMENTS

BCCA and the Coalition commented that the reallocation of HRVOC allowances in the HECT program rulemaking included in the proposed attainment demonstration SIP revision is not required for purposes of providing ozone precursor reductions for the 1997 eight-hour ozone attainment demonstration HGB SIP revision package. TxOGA and TAB commented that the proposed attainment demonstration SIP revision does not rely on the reallocation rulemaking. PL Propylene commented that the reallocation of HECT allowances is fair and necessary to protect the integrity of the SIP.

The commission agrees with BCCA, the Coalition, TxOGA, and TAB that the reallocation of HECT allowances is not required to model attainment of the 1997 eight-hour attainment demonstration HGB SIP revision. The reallocation of HRVOC allowances does not in itself include a mandatory reduction in the HRVOC cap in Harris County. However, following the initial allocation of allowances, TCEQ received comments that the allocation was not equitably distributed. Information from the first two years of monitoring data supports the assertion of an inequitable distribution of allowances. A more equitable allocation of allowances will stimulate the market, creating incentives for further reductions by industry regulated under the program. The commission therefore agrees with PL Propylene that revisions to the rule are anticipated to result in a more equitable approach. Because the change in allowance allocation methodology will create incentives for further reductions, it will contribute to the area’s attainment of the NAAQS as expeditiously as practicable. No changes were made in response to this comment.

EPA commented that the proposed reduction and reallocation of the Harris County HRVOC cap does not require HRVOC levels to be reduced below currently reported levels. EPA stated that the current 25% reduction in the HECT cap would still be higher than reported emissions and would allow for growth and allowances for upset conditions. EPA added that the 25% cap reduction would allow HRVOC emission increases at HECT applicable facilities compared to the highest annual actual HECT emissions. EPA suggested that the commission consider as part of the RACM analysis whether reductions in actual HRVOC emissions could accelerate attainment.

EDF and GHASP stated that they see no reason to delay additional cap reductions beyond the proposed 25% at this time. The commenters stated that to ensure that the area is meeting the FCAA requirement to implement all RACM as expeditiously as practicable, the commission must lower the cap to a meaningful level that will produce actual emissions reductions in the near term, or provide a logical, reasoned explanation as to why doing so it not feasible. EDF and GHASP stated that since this HECT cap reduction is based on the fact that emissions from capped sources during the first two years of the program only averaged approximately 56% of the total allocated allowances, the commission should not claim that a 25% reduction in the cap would
result in any actual emissions reductions. They added that since the reduction is only in allowable emissions there will not be any improvement in actual air quality. EDF and GHASP commented that a HECT cap reduction closer to 50% is necessary in order to achieve any actual reductions and air quality improvement.

The commission agrees that the HECT reallocation does not require mandatory reductions of HRVOC emissions from program participants. The purpose of the reallocation is to achieve a more equitable distribution of allowances based on actual monitoring data. A more equitable allocation of allowances will stimulate the market, creating incentives for further reductions by industry regulated under the program.

The commission acknowledges that HRVOC monitoring data reported for 2006 - 2008 indicates that the total actual emissions from sources in the HECT program have been approximately 50% of the total current HRVOC cap. The HRVOC cap and trade rules require emissions from scheduled maintenance, startup, and shutdown activities and emissions events be included in determining compliance with the HECT program. Therefore, a buffer in the cap is needed to account for the variability of HRVOC emissions associated with these activities.

Photochemical modeling analysis demonstrates an average ozone decrease of 0.13 ppb for the three monitoring sites with 2018 projected eight-hour ozone design values greater than the 1997 eight-hour ozone NAAQS, Deer Park, Bayland Park, and Wallisville. The Deer Park monitor’s design value was the highest in the HECT sensitivity modeling, which showed a decrease in the Deer Park monitor design value from 86.49 ppb to 86.36 ppb ozone. The 25% reduction in the Harris County HRVOC cap allows for a sufficient buffer to protect against the inherent variability in HRVOC emissions while modeling an average 2018 future cap design value within EPA’s range for weight of evidence discussion.

During this period, HECT regulated sources have experienced the same economic downturn that other industrial sectors across the country have experienced resulting in lower than normal emissions. The commission contends that in a better economic environment HECT sources operating at normal production levels would have average emissions at levels closer to the current HRVOC cap. No changes were made in response to this comment.

EDF and GHASP expressed support for reducing the HECT cap for Harris County in stepwise fashion by 10% in 2014, followed by annual 5% reductions through 2017.

The adopted rule revisions will reallocate the program in 2011 and implement an initial 10% reduction of the existing available HECT cap of 3,451.5 tons beginning with the 2014 calendar-year control period. The available cap will then be reduced in 5% increments at the start of each calendar-year control period for 2015, 2016, and 2017. The full 25% cap reduction will have been in effect for one full calendar-year control period by January 1, 2018. While historical data demonstrate an overall surplus in the HRVOC cap, many sources were operating near their individual cap limits and thus, may see a significant change in their HRVOC emissions. The cap reduction and reallocation may require some individual sites to install additional controls or otherwise modify their operations to reduce their HRVOC emissions. The step-down approach allows companies time to install controls if necessary. No changes were made in response to this comment.

Kaneka cited a portion of the RACM analysis in Appendix E of the 1997 eight-hour ozone attainment demonstration HGB SIP revision proposed on September 23, 2009, describing the practicality issues identified with revising NOx allowances under the MECT program because allowance streams have been traded and relied upon for compliance with the program. Kaneka concluded that if it is impractical to nullify MECT trades, then it is also impractical to nullify HECT trades that have also been relied upon for compliance with the program.

The commission maintains that reducing the Harris County HECT program cap is RACM. The commission acknowledges that practicality is one of the EPA’s evaluation criterion considered during the state’s RACM analysis. In the portion of the RACM analysis referenced by the commenter, the commission also acknowledges practicality issues associated with revising MECT program NOx allocations. However, as discussed at length in Appendix E, 1997 eight-hour ozone attainment demonstration HGB SIP revision, Section 4.2.1: Mass Emission Cap and Trade (MECT) Program and 30 TAC Chapter 117 NOx RACM of this 1997 eight-hour ozone attainment demonstration HGB SIP revision, the commission concluded that further NOx reductions through the MECT program did not constitute RACM on the basis of economic and technological feasibility, rather than practicality. Therefore, the commission respectfully disagrees with the commenter’s conclusion that revising the HECT program should not be considered RACM because it is impractical.

The commission agrees that the nullification issue should be addressed, and the rules have been revised to allow sites that purchased allowance streams the potential to apply allowances from the stream to the calculation of "Uncontrolled emissions" as actual emissions. Revised §101.394(a)(1) allows sites holding stream trades to calculate their "Uncontrolled emissions" as the greater of their actual average emissions of their two highest emission years from 2006 - 2009 or the sum of their original existing HECT HRVOC allowance and the amount of the allowance stream in tons. In the event that a site’s actual two highest year emissions is less than the sum of its original existing HECT HRVOC allowance and the amount of the allowance stream in tons, the difference shall be added to the "Uncontrolled emissions" as actual emissions. The purchase of an allowance stream also allowed some sites to operate with higher emissions during the baseline emissions period. Sites that took advantage of allowance streams would therefore realize the benefit of the higher emissions through the uncontrolled emissions-based reallocation methodology.

HECT RULE COMMENTS

25% Cap Reduction

TCC, Lyondell, TPC, the Coalition, BCCA, TxOGA, and TAB expressed support for the 25% reduction in the Harris County HRVOC Cap. TCC and TPC stated their agreement with the "stepdown" approach, beginning with a 10% reduction in the cap in 2014, with 5% annual reductions to reach a total 25% cap reduction in 2017. COMAQ stated their strong support for the "stepdown" approach outlined in the definition of "AC" located in the figure in §101.394(a)(1)(B) and believes that it is critical to the rulemaking.

The commission appreciates the comments.
**Reallocation Methodology**

Lyondell and TPC expressed their opposition to the HECT program uncontrolled emissions-based reallocation methodology and their support for the alternative flat percent allocation methodology discussed in the rule proposal preamble. TPC stated that the proposed uncontrolled emissions-based reallocation methodology does not reward well-controlled facilities and may actually have the opposite effect of providing insufficient allowances for well-controlled facilities, such as TPC. Lyondell stated that some well-controlled facilities receive some of the lowest estimated allocations while some of the least controlled facilities appear to receive the largest allocations and well-controlled facilities that are under-allocated have no option than to purchase allowances, thereby potentially affecting the viability of the company. TPC commented that its Houston Plant is better controlled than most or all other HECT participating facilities as a result of a Voluntary Emissions Reduction Agreement (VERA) entered into with the commission in 2005. This agreement resulted in HRVOC emissions reductions of more than 120 tpy when comparing 2002 to 2008 HECT emissions. TPC achieved these emissions reductions through the implementation of flare gas recovery, advanced technology for fence-line monitoring, and other operational changes. TPC stated that despite these reductions, the initial estimated potential HECT allocation posted by the agency awarded TPC with an insufficient allocation to cover its high 2007/2008 HRVOC emissions. TPC further commented that although the flat allocation method does not penalize poorly controlled facilities, the proposed uncontrolled emissions-based reallocation methodology does not reward well-controlled facilities. TPC stated that the proposed methodology falls short because it does not reward flare gas recovery, one of the most effective HRVOC emissions controls and does not consider actual control efficiencies where this information is available. TPC recommended that the commission correct the proposed allocation methodology by accounting for flare gas recovery, addressing control mechanisms on vent gas streams, and using actual measured control efficiencies where available. Lyondell stated that it strongly supports the flat percent reallocation methodology as it is the most equitable for all participants, is based on actual data, and is a much simpler and transparent methodology. Lyondell commented that the estimated allocations using the proposed methodology demonstrate that significantly more sites will be under-allocated as compared to their historic highest emissions from 2007 and 2008 than the current allocation, and up to 11 sites may have allocations of more than 200% of their highest emissions. Lyondell also stated that approximately 20% of HECT sites are owned and operated by Lyondell; 30% of the highest emissions from 2007 and 2008 are from Lyondell sites, but under the initial estimated allocation derived from the proposed methodology less than 25% of the allocations go to Lyondell sites. In addition, Lyondell stated that sites that are under-allocated will be further disadvantaged when the HECT cap is further reduced during the stepdown, while over-allocated sites will benefit from an arbitrary business advantage. Alberman, COMAQ, DuPont, INEOS, PL Propylene, and Sunoco expressed their support for the proposed uncontrolled emissions-based reallocation methodology and their opposition to the flat percent reallocation. Total stated that although they believe the original allocation was fair and equitable, it supports the concept of an uncontrolled emissions-based reallocation methodology. COMAQ stated that it has maintained a consistent position that the existing HRVOC allowance allocation methodology is inequitable and is pleased that the commission has proposed an allocation methodology that will result in the equitable allocation of allowances. COMAQ and Alberman commented that for a fair and equitable HECT program, it is critical that the reallocation methodology recognize demonstrated controls through the rewarding of high levels of control and not rewarding low levels of control and that the program must be reallocated in the most immediate fashion possible.

The proposed alternative flat percent allocation methodology discussed in the proposal preamble, by allocating allowances as a direct percentage of each site’s highest actual emissions, ignores reductions from controls, such as flares, heaters, boilers, furnaces, and thermal and catalytic oxidizers, and rewards poorly controlled facilities with high actual emissions while penalizing well-controlled facilities. This results in an inherently inequitable allocation. The adopted uncontrolled emissions based reallocation provides credit for controls through the use of control efficiencies in the calculation of uncontrolled emissions. In order to account for reductions from flare and vent gas recovery and flare minimization programs, the adopted reallocation methodology will allow qualifying sites that achieved early reductions through the implementation of these controls to utilize either an alternative baseline emissions period reflecting these emissions or apply the quantified reductions toward the calculation of the site’s uncontrolled emissions. In addition, the elimination of the opt-in provision in combination with the adoption of a two-tier minimum allocation of five and ten tons addresses overallocation to sites with actual emissions substantially below ten tons. The uncontrolled emissions based allocation methodology, with the addition of these special provisions, will therefore result in an equitable, accurate, representative, and comprehensive allocation of the Harris County HRVOC cap.

Coalition and BCCA do not support reallocation as it would penalize facilities that made early and substantial HRVOC emissions reductions and the reallocation is not required for the 1997 eight-hour attainment demonstration HGB SIP revision.

The commission respectfully disagrees with the comment. As discussed previously in this response to comments, the commission has adopted an alternative baseline provision and flare and vent gas minimization credits to account for early substantial emissions reductions.

TxOGA and TAB stated their opposition to reallocation at this time. TxOGA stated that it believes additional data is necessary before reallocation because all sites did not have reliable monitoring in 2007 and 2008 control periods reflect active hurricane seasons and a slower economy. TxOGA stated that well-controlled facilities need to be defined before an equitable allocation can be implemented.

The commission respectfully disagrees with the comment. HRVOC stream monitoring under Chapter 115 was required by December 31, 2005. As discussed elsewhere in this preamble, the reallocation methodology is based on a comparison of each individual site’s HRVOC emissions relative to the total HRVOC emissions from all sites within the same industry sector. Therefore, the commission contends that the allocation of allowances for any individual site would not be significantly affected by general changes in economic conditions. An individual site’s allocations would only be changed if their uncontrolled emissions significantly increased as a proportion of the total industry sector emissions. No changes were made in response to this comment.
TCC expressed its support for the definition of "Baseline emissions period" under §101.390(4).

The commission appreciates the comment.

COMAQ requested that the commission revise §101.394(a) and (a)(1)(A) relating to the allocation methodology such that the January 1, 2007, allowance deposit date be clarified to only refer to the calendar-year control periods 2007 - 2010.

The commission agrees with the comment. As the allowance deposit date for the existing program has passed and will not be revised, the reference to January 1, 2007, has been deleted.

Lyondell commented that sites included in the chemical sector include a mix of processes that are difficult to compare with one another and therefore, the commission should reallocate the program without using industry sectors. TPC commented that the chemical sector includes widely varying operations with varying HRVOC uses and throughput. COMAQ supports including a definition of "Industry sector" in the HECT definitions. COMAQ and Albemarle commented that the use of industry sectors is important in the reallocation methodology because sites in the same industry sector use similar HRVOC recovery and recycle activities that significantly affect HRVOC emissions, and prevent sites with significantly different industrial processes from competing for the same allowance pools.

While the commission acknowledges that there will be some varying of operations within industry sectors, it contends that the use of industry sectors is important to establishing an equitable allocation. The existing application of BACT and other federal standards within industry sectors would assure a comparable cost of control within the industry sector, and the division of the cap into industry sector shares would therefore reflect a more equitable allocation methodology. In addition, the amount of HRVOC product that is recycled and recovered for sites within the same industry sector should be comparable due to market forces and competition within the sector. Sites within industry sectors that produce HRVOC as product share the economic incentive to reduce emissions using similar recovery techniques. The rules have been revised to include definitions of the industry sectors under §101.390.

COMAQ supported revising the definition of "Uncontrolled emissions" to clarify the term "average percent control efficiency" for flares.

The commission appreciates the comment. Revisions to the definition of "Uncontrolled emissions" have been made in response to comment and are discussed elsewhere in this preamble.

Lyondell and TPC expressed their concern regarding the proposed use of flare control efficiencies of 99% for ethylene and propylene while allowing only 98% for other HRVOCs for the determination of "Uncontrolled emissions." Lyondell and TPC asserted that this would result in an inadequate allocation for sites with high butadiene and butane emissions as compared to sites emitting primarily ethylene and propylene.

The commission respectfully disagrees with the comment. The control efficiencies specified in the rules for the determination of "Uncontrolled emissions" from flares are consistent with the Chapter 115 specifications for the reporting of HRVOC emissions from flares for sites subject to the HECT program. Allowing sites to use control efficiencies different from those specified for calculating actual emissions in Chapter 115 would result in an allocation methodology that is fundamentally inconsistent with HECT emissions reporting. HECT allocations under the rule are to be used to cover actual emissions reported in accordance with Chapter 115 requirements, and therefore must be calculated using consistent methodologies. No changes were made in response to this comment.

Albemarle, TCC, and TPC commented that only HRVOC emissions from normal, routine, and permitted operations be attributable to the calculation of "Uncontrolled emissions," and all emissions from emissions events subject to the requirements of §101.201 are disallowed from being used for the determination of HECT allowances.

The commission agrees and §101.394(a)(3) has been revised in response to this comment. Only emissions from routine permitted operations shall be applied to the calculation of "Uncontrolled emissions" and all emission subject to §101.201 will not be applied for the determination of allocations.

**Alternative Baseline Provisions and Early/Additional Reduction Credit**

Lyondell and TCC strongly recommended that the commission expand the definition of "Uncontrolled emissions" to include the pre-control emissions that are routed to emission control devices, such as thermal oxidizers and other generally recognized HRVOC emissions control devices. TPC and TCC also recommended that the rule allow the use of actual control efficiencies derived from performance or stack testing or from the device manufacturer’s specifications. Total stated that allowing for control efficiencies greater than 99% when actual testing data is available would provide consistency between what sites report to the HECT program and the allocation methodology and will not penalize sites that have invested in over-control of HRVOC emissions. Albemarle expressed their support for the provision in §101.390(9) applying control efficiencies for heaters, boilers, and furnaces as HRVOC control devices in the definition of uncontrolled emissions and recommends allowing control efficiencies for thermal oxidizers as well.

The commission agrees with the commenters and has revised §101.394(a)(3) to allow credit for control efficiencies for combustion devices used in HRVOC control, such as thermal, catalytic, and regenerative oxidizers. The rulemaking has also been revised to allow for control efficiencies up to 99.9% for applicable units. The commission will allow for the use of control efficiencies greater than 99% and up to 99.9% only for applicable units which stack performance testing data has been submitted by the owner or operator as part of the Form ECT-6H, Level of Activity. Allocating allowances based on uncontrolled emissions using control efficiencies greater than 99.9% is impractical as it leads to large variations in allocations on an order of magnitude larger than the highest allocations. The commission will therefore assign a 99.9% control efficiency to any combustion unit that demonstrates an actual measured control efficiency greater than 99.9%.

TPC recommended that the commission correct the proposed allocation methodology by accounting for flare gas recovery, addressing control mechanisms on vent gas streams. TPC strongly recommends allocation allocation credit for flare gas recovery and similar control strategies. Total stated that allowance credit should be included for Vapor Recovery Units (VRU) that recovers HRVOC emissions previously sent to a process flare. Total stated that quantified HRVOC emission
reductions achieved through the implementation of a VRU should be added to a site's "Uncontrolled emissions" in the equation under §101.394(a)(1)(B) for the calculation of the site's allowance allocation.

The commission actively solicited comment on accurate and effective methods for calculating allowances to site's flare recovery, vent gas recovery, flare minimization, and other recovery and recycle mechanisms. The commission agrees with the commenters and has added §101.394(a)(3) to allow sites that do not request the use of an alternative emissions baseline period to apply the actual quantified amount of HRVOC emissions reduced through the implementation of flare or vent gas recovery to the site's uncontrolled emissions for the calculation of their allowance allocation.

TCC and TPC expressed their support for the alternate baseline emissions period but recommended the deadline for the alternate baseline request be extended to 150 days after the rule effective date in order to allow regulated entities ample time to prepare and submit the request for review.

The commission agrees with the comment and has revised the alternative baseline request submittal deadline to July 1, 2010. Lyondell expressed its support for the alternative baseline provision, but requested that the potential alternative baseline period be expanded to include 2002 - 2005 and the qualifying reductions in HRVOC be revised from 50% or 50 tons to 25% or 25 tons. Total expressed support for the alternative baseline provision, but stated that the qualifications for use are too restrictive. Total requested that the commission allow for engineering calculations in lieu of continuous flow monitoring, as speciated flow monitoring was not required prior to 2006. Total also requested that the 50 tons or 50% reduction qualification provision be revised to 20 tons or 20% reductions. In addition, Total believes that reductions driven by permit conditions, regulatory requirements, or consent decrees be included in the provision.

The commission has revised the qualifying reduction amount under §101.394(a)(1)(D)(ii) to allow sites that implemented permanent, voluntary, and quantifiable HRVOC emissions reductions in an amount equal to or greater than 25 tons of site-wide HRVOC emissions resulting in at least a 25% reduction of the site's total annual HRVOC emissions for sites that used continuous speciated flow rate monitoring of HRVOC. The commission has implemented these revisions in response to comment, however it maintains that the 25-ton reduction resulting in at least a 25% site-wide reduction in HRVOC qualification is necessary to ensure that only sites implementing reductions that are significant to both the site and the total Harris County HRVOC cap be considered for the provision. In addition, the qualification of continuous speciated monitoring is critical to ensure that these reductions are quantified using monitoring techniques consistent with those used under the current HECT program. The consideration of limiting the alternative baseline emissions period to two consecutive calendar-year control periods immediately preceding 2006 - 2009 baseline emissions period is necessary to ensure that the reductions considered occurred directly before the 2006 baseline period for the 1997 eight-hour attainment demonstration HGB SIP revision.

Albemarle and COMAQ expressed their opposition to any revisions to the definition of "Baseline emissions period" and stated that it is critical that the restrictions on the qualifications for exceptions to the use of the baseline period be sufficiently restrictive to impose at least the use of continuous monitoring, volun-

tary and permanent reductions. In addition, Albemarle stated that "site-by-site" evaluations should be avoided to the extent possible to avoid inequitable allocations and the potential for unwarranted advantages to sites given special consideration.

The commission agrees with the commenters. The revisions to the alternative baseline emissions period qualifications, from a 50-ton total or 50% site-wide reduction to a 25-ton reduction that results in at least a 25% site-wide reduction, is still consistent with the commission’s goal of considering only the reductions that are significant to the site's overall emissions while having an impact in the total cap. In conjunction with this revision, the commission has retained the continuous monitoring qualifications and will only consider voluntary and permanent reductions in HRVOC emissions.

PL Propylene strongly supports the provision in §101.394(a)(1)(C) that allows the use of an alternate baseline for sites not in operation from 2006 - 2009. PL Propylene requested that §101.394(a)(1)(C)(ii) be revised to state "this allocation is less than the HRVOC permit allowable limit in effect at the time the facility commences operation." In addition, PL Propylene requested that the alternative baseline emissions period be revised from any two consecutive calendar-year control periods from 2010 - 2012 to any consecutive 24 months from 2010 - 2012.

The commission agrees with the comments and the adopted rules have been revised in accordance with the requests.

TCC, TPC, and Albemarle stated that they recommend emissions from emission events be removed from the calculation for reallocation and each site's "Uncontrolled emissions" should be based solely on actual emissions from routine operation. Albemarle stated that the inclusion of emissions from emission events in the baseline emissions calculation unduly rewards emission events.

The commission agrees with the comment and the definition of "Uncontrolled emissions" has been modified accordingly.

**Emission Event Set-Aside**

TCC recommended that proposed §101.396(c) and (d) be deleted from the rule in order to eliminate the proposed 250-ton emissions event set-aside. TCC stated that the elimination of the set-aside would maximize program flexibility and the benefits of cap-and-trade. Albemarle, COMAQ, Lyondell, TCC, Total, and TPC also requested eliminating the 250-ton set-aside for emissions events. The commenters believe that emissions from emission events can best be handled through each site's allocation or the purchase of yearly allowances and the allocation of the additional 250 tons would provide for more flexibility. Albemarle requested the commission retain the emission event reporting requirement under §101.396(c) and (d) due to the value of determining the impact of emissions events on the HECT program. AmericanAcryl expressed its support for the proposed 250-ton emissions event set-aside or the elimination of emissions events from applicability to the program.

In response to comment, the rule has been revised based on this comment to eliminate the 250-ton emissions event set-aside pool from §101.396(c). Emissions from emissions events will be treated in the same manner as they are currently addressed in the HECT program. All emissions during emissions events from HECT subject facilities up to the short-term limits under §115.722(c) and §115.761(c) must be covered by an equivalent
amount of HRVOC allowances in each site’s respective HECT account by March 1 after the end of the control period.

EPA requested clarification that emissions events that exceed the 250-ton set aside will be deducted from each site’s account.

The commission has revised the rulemaking to omit the proposed emissions event set-aside. All emissions from emissions events will be addressed in the same manner as they are addressed currently under the HECT program.

**EPA 5% Set-Aside**

TCC, Lyondell, TPC, and COMAQ expressed their positions that the 5% set-aside to safeguard against potential emission variations is no longer necessary. TCC understood that industry originally agreed to this set-aside as a provision to address new actual HRVOC emissions under the HECT program.

The reduction in the overall HRVOC cap by an initial 5% was implemented as a compliance margin and not a provision for new HRVOC emissions. This compliance margin was a negotiated agreement with EPA to address geographical emission variations, or the potential for emissions “spiking,” and will remain necessary after allowance reallocation.

No changes were made in response to this comment.

**Stream Trades and Reallocation**

TCC expressed their concern with the nullification of purchased stream trades due to reallocation of the program. TCC stated that the nullification of purchased allowance streams may adversely impact the integrity of emissions trading in Texas and may result in encouraging emissions. TCC stated the commission must therefore honor past stream trades. Albemarle, Bigler, Kaneka, Lyondell, and TPC stated their opposition to the automatic voidance of existing HECT allowance stream trades due to reallocation.

Albemarle proposed two alternatives to stream trade voidance, a set-aside pool, or incorporating stream trades into a site’s “Uncontrolled emissions” calculation. AmericanAcryl stated that any revised allocation methodology should not reduce a site’s allocation below the amount for which a site has traded an allowance stream.

The rules have been revised in response to these comments to allow sites that purchased allowance streams the potential to apply allowances from the stream to the calculation of “Uncontrolled emissions” as actual emissions. Revised §101.394(a)(3)(E) allows sites holding stream trades to calculate their “Uncontrolled emissions” as the greater of their actual average emissions of their two highest emission years from 2006 - 2009 or the sum of their original existing HECT HRVOC allowances and the amount of the allowance stream in tons. In the event that a site’s actual two highest year emissions is less than the sum of their original existing HECT HRVOC allowance and the amount of the allowance stream in tons, the difference shall be added to the “Uncontrolled emissions” as actual emissions. In addition, qualifying sites not in operation or with HRVOC emissions that are not representative of permitted normal routine operation, due to an authorized modification that resulted in an HRVOC emission reduction during the baseline emissions period, may request from the executive director the use of any allowance stream from facilities previously participating in the HECT program in lieu of reallocation until the alternate baseline emissions are established. Although the revised rule contains provisions allowing qualified sites to apply for credit for acquired allowance streams towards their allocation in 2011, HECT allowances allocated or acquired do not constitute property rights.

**Minimum Allocation and Opt-In Provision**

TCC recommended that §101.394 be modified such that only sites with a PTE greater than or equal to ten tons and required to participate in the program receive a minimum allocation of ten tons. TCC stated that the “opt-in” provision should be eliminated to allow for more allowances to be available for sites that are required to participate in the program. TPC recommended sites that opted-in to the program receive a five-ton allocation and these sites with a PTE less than ten tons should be afforded the opportunity to opt-out. Lyondell commented that the opt-in provision from the existing rule be eliminated and opposes the use of the ten ton PTE minimum. Lyondell requested that facilities that have reported less than five tons of actual emissions should not be rewarded with additional allowances. Albemarle recommended increasing the minimum allocation to ten tons and allowing sites with a PTE less than ten tons be allowed to “opt-out” of the program in a manner that allows any allowances that may have been allocated to these sites to be available to the remaining sites required to participate. AmericanAcryl expressed their support for the ten-ton minimum allocation or to “freeze” all allocations below ten tons at the current allocation amount.

The rules have been revised in response to the comments. Sites with a PTE, as defined in §116.12, less than ten tons of HRVOC are exempt from the HECT program and will not be given an allocation allowance. The existing opt-in deadline of April 30, 2005, has passed, no extension or additional opt-in provision has been adopted, and no sites took advantage of the 2005 provision. Therefore, no sites in Harris County with a PTE less than ten tons will participate in the HECT program and be assigned an HRVOC allocation. Participating sites with a calculated allocation of less than five tons based on the revised allocation methodology will be allocated a minimum of five tons. Sites with a calculated allocation of greater than or equal to five tons but less than ten tons will receive a minimum allocation of ten tons. Sites provided the minimum allocation will not be subject to the stepdown provisions of the rules and will retain the minimum allocation in 2017 and beyond.

COMAQ, Lyondell, TCC, and TPC recommended that the submittal deadline of the Level of Activity Certification, Form ECT-6H, be revised to July 1, 2010, in order to allow regulated entities sufficient time to compile and submit the necessary information.

The commission agrees with the comment and §101.401(f) has been revised accordingly.

**General Rule Comments**

TCC requested that the rule language in §101.392(b) be clarified to exclude the seven perimeter counties from the requirements of this division except for §101.401(a)(e), as the submittal of the ECT-6H form is not required from sites in these counties.

The commission agrees with the comment and §101.392(b) has been revised as requested to clarify the applicability of §101.392(b) exclusively to Harris County.

Albemarle, COMAQ, DuPont, and Sunoco expressed their support for a provision preventing HECT allowances being used in lieu of FCCA, §185 fees.

The commission appreciates the comment; however, this comment is outside the scope of this rulemaking.
COMAQ requested that §101.399(a) - (c) be revised such that vintage allowances allocated under §101.394(a)(1)(A) using the existing allocation methodology cannot be banked or traded after the 2010 calendar-year control period.

The commission respectfully disagrees with the request. The commission does not intend to restrict the banking and trading of allowances based on allocation methodology. The use of vintage 2010 allowances in the 2011 calendar-year control period will be necessary to provide compliance flexibility during the first year under the revised allocation methodology. All requests for allowance trades under Form ECT-2, Application for Transfer of Allowances, must be approved by the executive director. No change has been made in response to this comment.

Albemarle, COMAQ, DuPont, and Sunoco strongly opposed any delay to the reallocation beyond the beginning of the 2011 calendar-year control period. DuPont stated that any delay to the reallocation would exacerbate the issues of an already inequitable program and continue to provide a significant economic advantage to companies that were over-allocated under the existing program.

The commission agrees with the comment and allowances will be reallocated for the calendar-year control period 2011. No changes have been made in response to this comment.

INEOS expressed its support for the inclusion of the 2006 calendar-year control period in the baseline emissions period. INEOS pointed to the compliance requirements in Chapter 115 requiring the implementation of HRVOC stream monitoring by December 31, 2005, as justification that 2006 emissions data should be as reliable as 2007 - 2009 data.

The commission appreciates the comment. No changes were made in response to this comment. The baseline emissions period will continue to include the 2006 calendar-year control period.

Lyondell commented that errors in the 2006 Special Inventory, differentiation in facilities covered under each sector, and potential differences in reporting methodologies or assumptions will impact the allocation of allowances under the proposed methodology. Lyondell provided the example of various industry assumptions in the reporting of HRVOC concentrations in fuel streams and whether emissions should be reported when HRVOC concentrations are below the detection limit in stack gas or when the concentration in the fuel stream is less than 0.5%.

The commission appreciates the comment. HECT participants will have an opportunity to provide accurate emissions, control efficiencies, and other relevant data through the submission of the Form ECT-6H, Level of Activity Certification. HRVOC stream monitoring for all applicable HECT sources has been required since December 31, 2005. Allocations for the 2011 calendar-year control period will be calculated using the most accurate monitoring and testing data available for emissions and control efficiencies during the baseline emission period.

HSC stated its preference for command and control regulation for HRVOC emissions in Harris County, increasing the reductions in the cap to 30%, 35%, or 40%, and speeding up the implementation of the rulemaking.

Voidance of the HECT program and the implementation of command and control emission specifications were not considered during proposal and are outside the scope of this rulemaking. The commission maintains that the HECT program is the most cost effective means of achieving HRVOC emissions reductions while providing compliance flexibility and maximizing the efficiency of emission reductions through market forces. Individual sources of HRVOC emissions are subject to permit limits and any applicable limit as established by rule. The HECT program provides for additional decreases in HRVOC emissions limits above and beyond these basic requirements. This rulemaking is part of the 1997 eight-hour attainment demonstration HGB 2010 SIP revision. Reallocation of the program will take place in 2011, the first full calendar-year control period following adoption of the rules, and the 25% cap reduction will be fully realized at the beginning of the 2017 calendar-year control period, one full year before the 2018 attainment year. No changes were made in response to this comment.

**SUBCHAPTER A. GENERAL RULES**

**30 TAC §101.1**

**STATUTORY AUTHORITY**

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the Texas Water Code; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission’s purpose to safeguard the state’s air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state’s air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state’s air. The amendment is also adopted under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions. The amendment is also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, et seq., which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standard will be achieved and maintained within each air quality control region of the state.

The adopted amendment implements THSC, §§382.002, 382.011, 382.012, 382.016, and 382.017, FCAA, 42 USC, §§7401 et seq.

This agency 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 March 12, 2010.

TRD-201001268

_ADOPTED RULES_ March 26, 2010 35 TexReg 2569_
SUBCHAPTER H. EMISSIONS BANKING AND TRADING

DIVISION 6. HIGHLY-REACTIVE VOLATILE ORGANIC COMPOUND EMISSIONS CAP AND TRADE PROGRAM


STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the Texas Water Code; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission’s purpose to safeguard the state’s air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state’s air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state’s air. The amendments are also adopted under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of contaminant emissions. The amendments are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 et seq., which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standard will be achieved and maintained within each air quality control region of the state.

The adopted amendments implement THSC, §§382.002, 382.011, 382.012, 382.016, and 382.017, FCAA, 42 USC, §§7401 et seq.


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

(1) Allowance--The authorization to emit one ton of highly-reactive volatile organic compounds, expressed in tenths of a ton, during a control period.

(2) Authorized account representative--The responsible person who is authorized in writing to transfer and otherwise manage allowances for the site.

(3) Banked allowance--An allowance that is not used to reconcile emissions in the designated year of allocation, but is carried forward for up to one year and noted as banked in the compliance account or broker account.

(4) Baseline emissions period--The two consecutive calendar-year control periods from 2006 - 2009 with the highest monitored average actual HRVOC emissions for the purpose of establishing baseline emissions used for the allocation of allowances, except as allowed under §101.394(a)(1)(C) and (D) of this title (relating to Allocation of Allowances).

(5) Broker--A person that is not required to participate in the requirements of this division, but that opens an account under this division for the purpose of banking and trading allowances.

(6) Broker account--The account where allowances held by a broker are recorded. Allowances held in a broker account may not be used to satisfy compliance requirements for this division.

(7) Compliance account--The account in which allowances held by a site are recorded for the purposes of meeting the requirements of this division.

(8) Industry sector--One of the following sectors of industry in which participants of the Highly Reactive Volatile Organic carbons (HRVOC) Emissions Cap and Trade program are to be assigned, according to the process type and products from which the largest share of HRVOC emissions is associated, for the purpose of assigning an industry sector share under the allocation equation located in §101.394(a)(1)(B) of this title (relating to Allocation of Allowances): petroleum refining, non-polymer chemical producers, polymer producers, and storage/loading/other.

(9) Level of activity--The amount of highly-reactive volatile organic compounds, as defined in §115.10 of this title (relating to Definitions), in pounds produced as an intermediate, by-product, or final product or used by a process unit during a given period of time, but excluding any recycled highly-reactive volatile organic compounds internal to the process unit.

(10) Uncontrolled emissions--The total emissions during routine normal operations from each applicable facility calculated as pre-control using the applicable control efficiency for the purpose of determining site allocations under §101.394(a)(1)(B) of this title (relating to Allocation of Allowances).

§101.391. Applicability.

This division applies to each site, as defined in §122.10 of this title (relating to General Definitions), in the Houston-Galveston-Brazoria ozone nonattainment area, as defined in §115.10 of this title (relating to Definitions), that is subject to Chapter 115, Subchapter H, Division 1 of this title (relating to Vent Gas Control) or Division 2 of this title (relating to Cooling Tower Heat Exchange Systems). Applicable facilities include vent gas streams, flares, and cooling tower heat exchange systems that emit highly-reactive volatile organic compounds, as defined in §115.10 of this title, and that are located at a site subject to Chapter 115, Subchapter H of this title (relating to Highly- Reactive Volatile Organic Compounds). For the purpose of compliance with Chapter 115, Subchapter H, Division 1 or Division 2 of this title, each site that meets the applicability requirements of this section will always be subject to this division.

§101.392. Exemptions.
(a) Sites in the Houston-Galveston-Brazoria ozone nonattainment area that have the potential to emit, as defined in §116.12 of this title (relating to Nonattainment Review Definitions), ten tons per year or less of highly-reactive volatile organic compounds from all applicable facilities at the site are exempt from the requirements of this division.

(b) All sites in the Houston-Galveston-Brazoria ozone nonattainment area, excluding Harris County, are exempt from the requirements of this division except for §101.401(a) - (e) of this title (relating to Level of Activity Certification). The commission may revoke this exemption upon public notice of this revocation. If the exemption is revoked, sites subject to this division located in the Houston-Galveston-Brazoria ozone nonattainment area, excluding Harris County, will comply by January 1, 2007, or within 180 days of public notice, whichever is later.


(a) The executive director will deposit allowances into compliance accounts as follows.

(1) For sites located in Harris County, allowances for the emissions of one or more of the highly-reactive volatile organic compounds (HRVOC) as defined in §115.10 of this title (relating to Definitions), will be determined using the equations in subparagraphs (A) and (B) of this paragraph.

(A) For calendar-year control periods 2007 - 2010, the following equation will be used to determine the allocation for each site:
Figure: 30 TAC §101.394(a)(1)(A)

(B) For calendar-year control periods 2011 and later the following allocation methodology will apply:
Figure: 30 TAC §101.394(a)(1)(B)

(C) Qualifying sites not in operation or with HRVOC emissions that are not representative of permitted normal routine operation due to an authorized modification that resulted in an HRVOC emission reduction during the baseline emissions period may request from the executive director the use of any allowance stream acquired from facilities previously participating in the HRVOC Emissions Cap and Trade program in lieu of reallocation until the alternate baseline emissions are established for the site, according to the following:

(i) this allowance stream is less than the HRVOC permit allowable limit in effect at the time the facility commences operation;

(ii) the baseline emissions period for any site under this subparagraph will be any consecutive 24 months from 2010 - 2012; and

(iii) beginning with the 2014 calendar-year control period, all sites will receive an allocation in accordance with the methodology under subparagraph (B) of this paragraph.

(D) A site meeting the following conditions may request to use an alternative baseline emissions period consisting of the two consecutive calendar-year control periods immediately preceding the baseline emissions period defined under §101.390 of this title (relating to Definitions):

(i) the site used continuous flow rate monitoring and specification of HRVOC to determine HRVOC emissions during the alternative baseline period;

(ii) the site had permanent, voluntary, and quantifiable HRVOC emission reductions in an amount equal to or greater than 25 tons resulting in a site-wide reduction in HRVOC emissions of at least 25% as calculated by comparing the average HRVOC emissions from the alternate baseline period to the baseline emissions period defined under §101.390 of this title;

(iii) qualifying HRVOC emission reductions must have been made enforceable by a permit application submitted under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) or other submittal to the executive director no later than April 1, 2010; and

(iv) a request for an alternative baseline period must be received by the executive director no later than July 1, 2010.

(2) For sites located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties, allowances for emissions of ethylene and propylene for each site will be determined using the equation in the following figure.
Figure: 30 TAC §101.394(a)(2) (No change.)

(3) Uncontrolled emissions for applicable facility types for use in determining site allocations under paragraph (1)(B) of this subsection shall be calculated as follows:

(A) For flares, the uncontrolled emissions are equal to actual average HRVOC emissions from routine normal operation during the baseline emissions period for that facility divided by one minus the average percent control efficiency specifications for flares in §115.725(d) of this title (relating to Monitoring and Testing Requirements).

(B) For heaters, boilers, furnaces, thermal and catalytic oxidizers, and other combustion control devices combusting HRVOC streams, the uncontrolled emissions shall be calculated by dividing actual average emissions from routine normal operation during the baseline emissions period for each facility by one minus 99%, or by one minus the actual monitored HRVOC control efficiency for the facility, not to exceed 99.9%, if that facility has demonstrated the actual monitored HRVOC control efficiency through stack performance testing.

(C) For all other facilities without a demonstrated combustion control efficiency, the control efficiency is equal to zero; therefore, the uncontrolled emissions will be equal to the actual HRVOC emissions from routine normal operation.

(D) For sites that employ flare or vent gas recovery or flare minimization control strategies that are not requesting the use of an alternative baseline emissions period under paragraph (1)(D) of this subsection, the owner or operator may request to include the amount of any quantifiable reduction in actual HRVOC emissions attributable to the use of flare or vent gas recovery as uncontrolled emissions, subject to approval by the executive director. The amount of quantified reductions is equal to the difference of the average actual HRVOC emissions from routine normal operation during a consecutive 12-month period prior to the 2006 - 2009 baseline emissions period and the implementation of the HRVOC gas recovery or flare minimization control strategy and the enforceable allowable HRVOC permit limit for the applicable facilities after the recovery-based emissions reduction strategy implementation. The average actual HRVOC emissions used for quantifying the reductions under this subparagraph must be determined through continuous flow rate monitoring and HRVOC specification testing. This allowable emissions limit must be made enforceable through a permit application submitted under Chapter 116 of this title to the executive director no later than April 1, 2010. Credit allocated for reductions due to flare or vent gas recovery cannot also be creditable if the HRVOC stream is sent to another control device. The creditable emissions from flare gas recovery calculated in this subparagraph are then converted to uncontrolled emissions through the use of the average control efficiency specifications under §115.725(d) of this title.
(E) For sites that have purchased HRVOC allowance streams, uncontrolled emissions shall be the greater of their uncontrolled emissions calculated under subparagraphs (A) - (C) of this paragraph, or the sum of their original existing HRVOC allowance allocated according to paragraph (1) of this subsection and the amount of the allowance stream in tons. In the event that a site’s actual two-high year emissions is less than the sum of its original existing HRVOC allowance and the amount of the allowance stream in tons, the difference shall be added to the uncontrolled emissions as actual emissions.

(b) The level of activity of a site will be determined by summing the levels of activity from the chosen 12 consecutive month period for each process unit, as defined in §115.10 of this title, located at the site that produce one or more HRVOCs as an intermediate, by-product, or final product or that use one or more HRVOCs as a raw material or intermediate to produce a product.

(c) Sites subject to the requirements of this division or electing to opt-in to the requirements of this division that receive an HRVOC allocation of less than 5.0 tons based on the allocation methodologies under subsection (a)(1)(A) of this section will be eligible to receive a minimum allocation of 5.0 tons of HRVOC allowances per year.

(d) Sites subject to the requirements of this division that receive an HRVOC allocation of less than 5.0 tons based on the allocation methodology under subsection (a)(1)(B) of this section will be eligible to receive a minimum allocation of 5.0 tons of HRVOC allowances per year. Sites subject to the requirements of this division that receive an HRVOC allocation of greater than or equal to 5.0 tons but less than 10.0 tons based on the allocation methodology under subsection (a)(1)(B) of this section will be eligible to receive a minimum allocation of 10.0 tons of HRVOC allowances per year.

(e) If the total actual HRVOC emissions from the covered facilities at a site during a control period exceed the amount of allowances in the compliance account for the site on March 1 following the control period, allowances for the next control period will be reduced by an amount equal to the emissions exceeding the allowances in the compliance account plus 10% of the exceedance. This allocation reduction does not preclude the executive director from initiating an enforcement action. If a compliance account does not hold sufficient allowances to accommodate the reduction, the executive director may issue a notice of deficiency to the owner or operator. The owner or operator will purchase or transfer allowances sufficient to accommodate the reduction within 30 days of issuance of the notice of deficiency from the executive director.

(f) Allowances will be allocated by the executive director, who will deposit allowances into each compliance account:

(1) initially, by January 1, 2007; and

(2) subsequently, by January 1 of each following year.

(g) The executive director may adjust the deposits for any control period to reflect new or existing state implementation plan requirements.

(h) The executive director may add or deduct allowances from compliance accounts based on the review of reports required under §101.400 of this title (relating to Monitoring and Testing Requirements), as appropriate.

§115.725 and §115.764 of this title (relating to Monitoring and Testing Requirements), as appropriate.

(b) The amount of HRVOC emissions from applicable facilities will be calculated for each hour of the year and summed to determine the annual emissions for compliance. For emissions from scheduled maintenance, startup, or shutdown activities subject to the requirements of §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), the hourly emissions to be included in the summation shall not exceed the short-term limit of §115.722(c) and §115.761(c) of this title (relating to Site-wide Cap and Control Requirements; and Site-wide Cap).

(c) If the monitoring and testing data referenced in subsection (a) of this section does not exist or is unavailable, the site may determine its HRVOC emissions for that period of time using the following methods and in the following order: continuous monitoring data; periodic monitoring data; testing data; data from manufacturers; and engineering calculations. When determining the amount of HRVOC emissions under this subsection, the site will include a justification for using the substitute method or methods in lieu of the methods referenced in subsection (a) of this section.

(d) When deducting allowances from the compliance account of a site for a control period, the executive director will deduct the allowances beginning with the most recently allocated allowances before deducting banked vintage allowances.


(a) Allowances allocated for a control period that are not used for compliance in that control period may be banked for use in demonstrating compliance for the next control period or transferred.

(b) Allowances that have not expired or been used may be transferred at any time during a control period, except as provided in this section.

(1) The person desiring to transfer the allowances shall apply for approval of the transaction to the executive director by submitting a completed Form ECT-2, Application for Transfer of Allowances.

(2) The ECT-2 form must include the purchase price per allowance proposed to be paid, except for transactions between sites under common ownership or control.

(3) All information regarding the quantity and purchase price of the allowances will be immediately made available to the public.

(4) If the executive director approves the application, the executive director will send a letter to the seller and purchaser reflecting the transaction. The transaction is final upon issuance of the letter.

(c) A person receiving allowances on an annual basis may permanently transfer ownership of current and future allowances to any person in accordance with the following requirements.

(1) The person desiring to transfer the allowances shall apply for approval of the transaction to the executive director by submitting a completed Form ECT-4, Application for Permanent Transfer of Allowance Ownership.

(2) The ECT-4 form must include the purchase price per allowance proposed to be paid, except for transactions between sites under common ownership or control.

(3) All information regarding the quantity and purchase price of the allowances will be immediately made available to the public.
(4) If the executive director approves the application, the executive director will send a letter to the seller and purchaser reflecting the transaction. The transaction is final upon issuance of the letter.

(d) A person may transfer allowances that are scheduled to be allocated in a future control period but have not yet been deposited into an account.

(1) The person desiring to transfer the allowances shall apply for approval of the transaction to the executive director by submitting a completed Form ECT-5, Application for Transfer of Individual Future Year Allowances.

(2) The ECT-5 form must include the purchase price per allowance proposed to be paid, except for transactions between sites under common ownership or control.

(3) All information regarding the quantity and purchase price of the allowances will be immediately made available to the public.

(4) If the executive director approves the application, the executive director will send a letter to the seller and purchaser reflecting the transaction. The transaction is final upon issuance of the letter.

(e) Allowances that were provided under §101.394(a)(1)(C) of this title (relating to Allocation of Allowances) are not eligible for transfer under subsections (b), (c), or (d) of this section.

(f) Allowances generated from sites located in counties other than Harris County may not be used at sites located in Harris County. Allowances generated from sites located in Harris County may not be used at sites located in counties other than Harris County.

(g) Only authorized account representatives may transfer allowances.

(h) Allowances subject to an approved transaction will be deposited into the purchaser’s broker or compliance account within 30 days of receipt of a completed transfer application.

(i) Volatile organic compound emission reduction credits (ERC) certified in accordance with Division 1 of this subchapter (relating to Emission Credit Banking and Trading) may be converted to a yearly highly-reactive volatile organic compound (HRVOC) allocation.

(1) Qualified volatile organic compound (VOC) ERCs must be generated:

(A) from a reduction at a site located in the Houston/Galveston/Brazoria nonattainment area;

(B) from a reduction strategy implemented after December 31, 2004; and

(C) from a reduction in VOC species other than those defined as HRVOCs under §115.10 of this title (relating to Definitions).

(2) VOC reductions due to the installation of best available control technology do not qualify for conversion under this subsection.

(3) In addition to the requirements of Division 1 of this subchapter, a qualified VOC ERC must meet the following requirements:

(A) the ERC must be quantifiable, real, surplus, enforceable, and permanent as required in §101.302 of this title (relating to General Provisions) at the time the ERC is converted;

(B) the baseline emissions to which the VOC reduction is compared must consist of the average actual emissions for any two consecutive calendar years preceding the emission reduction strategy and that include or follow the most recent year of emission inventory used in the state implementation plan;

(C) the quantification of VOC reductions must be performed using the monitoring and testing methods required under §115.725 or §115.764 of this title (relating to Monitoring and Testing Requirements) and subject to the recordkeeping and reporting requirements under §115.726 and §115.766 of this title (relating to Recordkeeping and Reporting Requirements);

(D) the ERC must not have expired; and

(E) the owner of the ERC shall have prior approval from the executive director to convert the ERC to an HRVOC allocation.

(4) VOC ERCs must be converted to HRVOC allowances at a ratio calculated using the equation in the following figure.

Figure: 30 TAC §101.399(i)(4)

(5) For each site eligible to receive allowances under §101.394(a) of this title, additional HRVOC allowances received from the conversion of VOC ERCs under this subsection must be limited to a quantity not to exceed more than 5% of the site’s initial HRVOC allocation.

(6) In addition to paragraph (5) of this subsection, sites subject to this division may receive an HRVOC allocation from the conversion of VOC ERCs under this subsection equivalent to any HRVOC emissions increases from new or modified covered facilities not in operation prior to January 2, 2004, and that were included in an application for a permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) that was deemed administratively complete by the executive director within one year of the effective date of this rule.

§101.401. Level of Activity Certification.

(a) No later than April 30, 2005, the owner or operator of each site subject to this division will submit to the executive director a completed Form ECT-3H, Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Level of Activity Certification Form.

(b) For each process unit subject to this division, the owner or operator will certify in the ECT-3H form the level of activity for the selected 12 consecutive months during the period of 2000 through 2004.

(c) The owner or operator will attach to the ECT-3H form information and documentation necessary to support the proposed level of activity baseline.

(d) The owner or operator of the site may mark any portion of the ECT-3H form, or supporting information and documentation, as confidential under Texas Health and Safety Code, §382.041.

(e) In conjunction with submission of the ECT-3H form, the owner or operator of the site subject to this division will provide enforceable documentation of the maximum allowable emission rate of highly-reactive volatile organic compounds from facilities located at that site.

(f) No later than July 1, 2010, the owner or operator of each site subject to this division will submit to the executive director a completed Form ECT-6H, Highly Reactive Volatile Organic Compound Emissions Cap and Trade Baseline Emissions Certification Form.

(g) For each site subject to this division, the owner or operator will certify in the ECT-6H form the two highest consecutive calendar-year control periods selected from the period of 2006 - 2009 to establish the baseline emissions period.
This agency 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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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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SUBCHAPTER H. EMISSIONS BANKING AND TRADING
DIVISION 3. MASS EMISSIONS CAP AND TRADE PROGRAM

The Texas Commission on Environmental Quality (commission or agency) adopts the amendments to §§101.350, 101.351, and 101.353.

Section 101.353 is adopted with changes to the proposed text as published in the October 9, 2009, issue of the Texas Register (34 TexReg 7009). Section 101.350 and §101.351 are adopted without changes to the proposed text and will not be republished.

The commission will submit the amendments to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the adopted amendments to Subchapter H, Division 3, Mass Emissions Cap and Trade Program, is to maintain the integrity of the nitrogen oxides (NOx) cap in the Houston-Galveston-Brazoria (HGB) ozone nonattainment area and minimize increases in the NOx cap. The adopted rulemaking will discontinue the acceptance of late ECT-3 forms, Level of Activity Certification, submitted in accordance with §101.360(a) after March 30, 2010, from sites defined on or before December 31, 2000, as major sources of NOx, as defined in 30 TAC §117.10. Also, the adopted rulemaking will amend the definition of "Uncontrolled design capacity" to provide additional flexibility for certain stationary diesel engines and clarify both site and facility applicability.

The Mass Emissions Cap and Trade (MECT) program is a market-based component of the SIP that provides stationary sources of NOx compliance flexibility for the emission specifications under 30 TAC Chapter 117, while establishing a mandatory cap for total NOx emissions from affected source categories in the HGB ozone nonattainment area. The MECT program was adopted as a primary control measure of the HGB attainment demonstration for the one-hour ozone National Ambient Air Quality Standard (NAAQS). The MECT program NOx cap is a product of the emission specifications of Chapter 117 and the submitted levels of activity from applicable facilities. The adopted rulemaking will not affect the submittal of ECT-3 forms from minor sources of NOx.

In accordance with §101.360(a), to receive an allocation of allowances (one allowance equals one ton of NOx), sites were required to submit an ECT-3 form with the levels of activity from their applicable facilities by June 30, 2001. Applicable facilities with historical actual emission data were allocated allowances based on actual levels of activity while other applicable facilities without historical actual emission data were allocated allowances based on permitted allowable emissions. Representatives of facilities with allocations based on permitted emissions are required to submit a second ECT-3 form once a historical emissions baseline is established to convert their permit-based allocation to a historical level of activity based allocation in accordance with §101.360(b)(1). The rule did not address late submittals of ECT-3 forms. Therefore, a site that has never complied with the MECT program could submit a late ECT-3 form in accordance with §101.360(a) and receive an allocation of allowances, thus, potentially increasing the NOx cap. To maintain the integrity and minimize increases in the NOx cap, the adopted rulemaking will discontinue the acceptance of late ECT-3 forms from sites defined on or before December 31, 2000, as major sources of NOx if submitted in accordance with §101.360(a) after March 30, 2010. These applicable facilities will have to obtain allowances from the market instead of receiving an allocation of allowances.

Informal comments from industry were received regarding clarification on "air pollution control equipment" in the definition of "Uncontrolled design capacity." Therefore, the adopted rulemaking will clarify the definition of "Uncontrolled design capacity" by amending this definition to "Uncontrolled design capacity to emit" as the maximum capacity of a facility to emit NOx, without consideration for post-combustion control equipment, enforceable limitations, or operational limitations. The addition of "post-combustion control equipment" to the adopted definition will account for any equipment that can be removed without preventing the facility from operating. NOx control equipment that is not considered post-combustion control equipment, such as low-NOx burners, will be considered when calculating the uncontrolled design capacity to emit.

In 2008, Hurricane Ike increased awareness of the need for backup generators during extended power outages for activities such as maintaining water pressure at water treatment plants. To provide additional flexibility to sites that would potentially become subject to the MECT program because of a backup generator, the adopted new sentence to §101.350(14) will provide a new option for calculating the uncontrolled design capacity to emit from applicable diesel engines operating less than 100 hours per year in non-emergency situations and not meeting the applicable EPA Tier standards. The adopted rulemaking will allow a minor source of NOx with an applicable diesel engine, depending on the site's collective uncontrolled design capacity to emit, to meet the emission specification listed in §117.2010 either by participating in the MECT program and acquiring allowances or not participating in the MECT program and acquiring emission credits or discrete emission credits.

To clarify site and facility applicability, the adopted rulemaking will restructure §101.351 to explain that sites must determine their status as a minor or major source of NOx in Chapter 117 before determining applicability of their facilities in the MECT program. Along with the restructuring of §101.351, adopted subsection (c) will clarify a site's duration in the MECT program.

SECTION BY SECTION DISCUSSION

SUBCHAPTER H: EMISSIONS BANKING AND TRADING
DIVISION 3: MASS EMISSIONS CAP AND TRADE PROGRAM

In addition to the adopted amendments to §§101.350, 101.351, and 101.353 discussed elsewhere in this preamble, the commission also adopts various stylistic non-substantive changes updating rule language to current Texas Register style and format requirements, as well as establishing more consistency in the rules. Such changes include appropriate and consistent use of acronyms, punctuation, section references, and certain terms such as "must" and "shall." These changes are non-substantive and generally are not specifically discussed in this preamble.

§101.350, Definitions

The adopted amendment to §101.350(14) will revise the definition of "Uncontrolled design capacity" to "Uncontrolled design capacity to emit" as the maximum capacity of a facility to emit NOx without consideration for post-combustion control equipment (e.g., a selective catalytic reduction system), enforceable limitations (e.g., permit restrictions, such as a restriction on operating hours per year), or operational limitations (e.g., using a number lower than the maximum rated capacity). The addition of "post-combustion control equipment" to the adopted definition will account for any equipment that can be removed without preventing the facility from operating. NOx control equipment that is not considered post-combustion control equipment, such as low-NOx burners, will be considered when calculating the uncontrolled design capacity to emit.

The adopted amendment to §101.350(14) will allow flexibility for calculating the uncontrolled design capacity to emit for stationary diesel engines that are modified, reconstructed, or relocated, operate less than 100 hours per year (based on a rolling 12-month average) in non-emergency situations, and do not meet the applicable EPA Tier standards. In conjunction with the adoption of §101.351(c), adopted §101.350(14) will allow minor sources of NOx not subject to the MECT program the option to calculate the uncontrolled design capacity to emit for an applicable stationary diesel engine using the lower of 876 hours or a federally enforceable limitation on total hours of operation. From the adopted new language, an applicable site with an applicable stationary diesel engine will meet the emission specification in §117.2010 either by participating in the MECT program and obtaining allowances or not participating in the MECT program and obtaining emission credits or discrete emission credits, depending on the site's collective uncontrolled design capacity to emit.

For example, on July 21, 2010, a municipal utility district (MUD) installs a stationary diesel engine for use as a backup generator to maintain water pressure during power outages. In this example, the MUD does not have any other applicable facilities subject to §117.2010 and is not subject to the MECT program prior to the installation of this engine. The diesel engine is rated at 150 horsepower, has an emission factor of 7.0 grams of NOx per horsepower-hour, and is permitted to operate at most 876 hours per year. The engine must comply with the emission specifications listed in §117.2010 since this engine does not meet the criteria necessary to be considered exempt under §117.2003. Therefore, the installation of the backup generator requires recalculation of the site's collective uncontrolled design capacity to emit to determine applicability in the MECT program. Adopted §101.350(14) will allow using 876 hours when calculating the uncontrolled design capacity to emit for the diesel engine, therefore equaling 1.01 tons of NOx per year. The MUD in this example can also use the conventional method for calculating the uncontrolled design capacity to emit using 8,760 hours, therefore equaling 10.14 tons per year. The MUD is subject to the MECT program if the collective uncontrolled design capacity to emit is ten tons or more per year of NOx. Since the MUD has the option of having a collective uncontrolled design capacity to emit above or below ten tons per year, the MUD can either participate in the MECT program and obtain allowances to cover the actual emissions of NOx from the diesel engine or obtain emission credits or discrete emission credits for the diesel engine to meet the emission specifications listed in §117.2010. Under adopted §101.351(c), if this MUD participates in the MECT program, then this site will remain subject to the MECT program until permanently shut down.

§101.351, Applicability

The adopted amendment to §101.351(a) will require a site first to determine its status as a major or minor source of NOx, in Chapter 117. If the site is a major source of NOx, the facilities with emission specifications listed in §117.310 or §117.1210 are applicable to the MECT program. If the site is a minor source of NOx, the collective uncontrolled design capacity to emit is calculated from the facilities with emission specifications in §117.2010. If the collective uncontrolled design capacity to emit is ten tons or more per year of NOx, then the site is subject to the MECT program.

Adopted §101.351(c) states that once a site becomes subject to the MECT program, the site will remain subject to the MECT program until permanently shut down. Adopted subsection (c) will clarify that a site's collective uncontrolled design capacity to emit will not affect the site's applicability once subject to the MECT program. In addition, adopted subsection (c) will also clarify that once a minor source of NOx is subject to the MECT program, any of the facilities at the site subject to the emission specifications in §117.2010 are subject to the MECT program until the site is permanently shut down.

§101.353, Allocation of Allowances

The commission adopts the amendment to §101.353(b) with changes from the proposal to correct non-substantive typographical errors and to comply with Texas Register formatting requirements. Adopted §101.353(b) will require sites defined on or before December 31, 2000, as major sources of NOx, with facilities that meet the requirements to receive allowances in accordance with §101.360(a), but have not submitted an ECT-3 form by March 30, 2010, to obtain allowance for these facilities from the market. Under the current rule, ECT-3 forms were considered late if submitted in accordance with §101.360(a) after June 30, 2001; however, the forms were accepted. Under the adopted amendment, an ECT-3 form submitted in accordance with §101.360(a) that is received after March 30, 2010, from a site defined on or before December 31, 2000, as a major source of NOx, will not be accepted and the facilities listed on the ECT-3 form will be required to obtain allowances from the market instead of receiving an allocation of allowances based on historical actual emission data or an allocation of allowances based on permitted allowable emissions.

The existing rule language regarding the 90-day submittal deadline for an ECT-3 form from newly applicable sites or facilities will not be affected by the adopted rulemaking. Also, the adopted rulemaking will not affect ECT-3 forms submitted in accordance with §101.360(a) after March 30, 2010, from minor sources of NOx.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code,
§2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The amendments to Chapter 101 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants; although, the underlying emissions banking and trading program is intended to achieve these goals. The primary purpose of this rulemaking action is to maintain the integrity of the NOx cap in the HGB ozone nonattainment area by minimizing potential increases in the cap, to amend the definition of "Uncontrolled design capacity to emit" to "Uncontrolled design capacity to emit" for additional clarity and to provide additional flexibility for certain diesel engines, and to clarify site and facility applicability.

None of these amendments place additional financial burdens on the regulated community. The first purpose of this adopted rulemaking is to maintain the integrity of the NOx cap and minimize cap increases, by discontinuing the acceptance of late ECT-3 forms submitted in accordance with §101.360(a) after March 30, 2010, from sites defined on or before December 31, 2000, as major sources of NOx. Although a major source of NOx that has not submitted its ECT-3 form by March 30, 2010, will have to purchase MECT allowances, the commission has not received any late ECT-3 forms since before 2003 from a major source of NOx; therefore, it is unlikely that anyone who needs to submit ECT-3 forms has not done so. The other purpose of this adopted rulemaking is to provide additional flexibility to sites that would enter the MECT program because of a backup generator, by proposing a new option for calculating the uncontrolled design capacity to emit from applicable diesel engines that operate less than 100 hours per year in non-emergency situations and do not meet the applicable EPA Tier standards. This adopted change will offer additional flexibility for potential applicability of the MECT program to a wider range of sources and will give potentially affected sources additional options, instead of requiring them to participate in the MECT program. Thus, the rulemaking action does not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the adopted amendments to the MECT program in this rulemaking action were developed to provide flexibility in meeting the ozone NAAQS set by the EPA under 42 United States Code (USC), §7409, and therefore, meet a federal requirement. This rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Health and Safety Code (THSC), §§382.011, 382.012, and 382.017, as well as under 42 USC, §7410(a)(2)(A).

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The adopted amendments to the MECT program will provide additional flexibility for certain sites in meeting the ozone NAAQS set by the EPA under 42 USC, §7409, and also limit increases in the NOx cap. Promulgation and enforcement of the amendments will not burden private real property. The adopted amendments do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the credits and allowances that will be affected by these adopted amendments are not property rights. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). Although the adopted amendments do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emission limitations and control requirements within these rules were developed in order to meet the one-hour ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible to ensure attainment and maintenance of the NAAQS once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of this adopted rulemaking action is to minimize increases in the NOx cap and to provide additional flexibility for certain sites to meet the ozone NAAQS set by the EPA under 42 USC, §7409. Consequently, the exemption that applies to these adopted amendments is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resources.
The adopted amendments will update a definition and maintain the integrity of the NO\textsubscript{X} cap. No new sources of air contaminants will be authorized, and the revisions will maintain the same level of emissions control as previous rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding consistency with the CMP.

**EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM**

These amendments will not require any changes to outstanding federal operating permits.

**PUBLIC COMMENT**

Public hearings were held in Houston on October 28, 2009, and in Austin on October 29, 2009. The comment period opened on October 9, 2009, and closed on November 9, 2009. No oral comments regarding the MECT program were received.

Written comments regarding the MECT program were provided by the EPA, National Aeronautics and Space Administration (NASA), and the Houston Regional Group and the Lone Star Chapter of the Sierra Club (HSC). In addition, the Kids for Clean Air, the Sustainable Energy and Economic Development Coalition, the Clean Air Institute of Texas, and one individual expressed support for the comments received from the HSC.

**RESPONSE TO COMMENTS**

The EPA requested clarification on the amendment to §101.353(b) and why it does not require minor sources of NO\textsubscript{X} submitting late ECT-3 forms to obtain allowances from the market. The EPA expressed that these minor sources of NO\textsubscript{X} could increase the overall cap and jeopardize the attainment demonstration modeling for the HGB ozone nonattainment area.

The MECT NO\textsubscript{X} cap is a product of the emission specifications of Chapter 117 and the submitted levels of activity from applicable existing facilities, about an 80% reduction from each existing facility's baseline. A new facility (e.g., a new or modified facility that is part of an administratively complete permit application received on or after January 2, 2001) that is subject to the MECT program cannot receive an allocation of allowances, and the site must obtain allowances to cover the new facility's total emission of NO\textsubscript{X}.

Minor sources of NO\textsubscript{X} with applicable facilities that are not in the MECT program must meet the emission specifications of Chapter 117 on a unit-by-unit basis. A minor source of NO\textsubscript{X} with facilities subject to the emission specifications of Chapter 117 must comply by installing controls, the use of emission credits, or the use of discrete emission credits. A minor source of NO\textsubscript{X} is subject to the MECT program once the site has a collective uncontrollable design capacity to emit greater than or equal to ten tons per year of NO\textsubscript{X}. If an existing facility at a minor source of NO\textsubscript{X} transitions from being a non-MECT facility to a MECT facility, it may receive allowance allocations based on the emission specifications of Chapter 117. If a minor source of NO\textsubscript{X} submits a late ECT-3 form but installed controls on an existing facility to comply with Chapter 117 prior to entering the MECT program, the site would undergo both the cost of installing the controls and the cost of purchasing the entire amount of allowances needed to comply with the MECT program for each control period if the late ECT-3 form was not accepted. This would penalize sites that choose to install controls on an existing facility and then become subject to the MECT program. Therefore, the commission is continuing to grant allowances for the portion of an existing facility's emissions at a minor source of NO\textsubscript{X} that were previously controlled through compliance with the Chapter 117 emission specifications. If an existing facility required additional allowances for compliance, the allowances would have to be purchased from the market. Although the existing facility's compliance mechanism transitions from direct compliance with the emission specifications to compliance with the MECT program, there is no actual growth in real emissions because the allowance is based on actual level of activity and the emission specification the existing facility was already required to meet.

Although granting these allowances to minor sources does slightly increase the MECT NO\textsubscript{X} cap, it does not interfere with the attainment demonstration modeling for the HGB area. When analyzing future growth in the attainment demonstration model, it is assumed that there is no trading because trading is highly unpredictable from fluctuations in needs and market conditions. Existing facilities subject to the MECT program are modeled at their allowance allocation amount and not allowed any growth. New facilities subject to the MECT program are modeled at zero (i.e., allocated zero allowances), because these facilities are required to obtain allowances from existing facilities through trading. With respect to the model, the sum of the MECT existing facilities and the MECT new facilities is the MECT NO\textsubscript{X} cap. With respect to actual emissions, the sum of the MECT existing facilities and the MECT new facilities actual emission of NO\textsubscript{X} is less than or equal to the MECT NO\textsubscript{X} cap.

New and existing facilities not in the MECT program are allowed growth using modeling values based on EPA-approved growth methodologies. For example, a facility entering late into the MECT program will switch in the model to the allowance allocation amount with zero growth, and the modeling value based on an EPA-approved growth methodology will be discarded. If the modeled MECT NO\textsubscript{X} cap were to increase, then that would result in decreases of the non-MECT modeled NO\textsubscript{X} emissions that have this growth applied. This would actually result in a net decrease in the total point source NO\textsubscript{X} emissions inventory in the model, if the model were to be run with the new numbers.

If an existing facility at a minor source of NO\textsubscript{X} is in the area source inventory, the allowances provided to that facility would still be applied to the total point source inventory modeled MECT NO\textsubscript{X} cap. However, the commission has decided not to decrease the area source inventory correspondingly at this time because the change would be so insignificant. Historically, the increase in the MECT NO\textsubscript{X} cap due to approved late ECT-3 forms submitted by minor sources of NO\textsubscript{X} has been insignificant. Since January 1, 2004, the commission approved 13 late ECT-3 forms that were due by June 30, 2001. These sites were allocated an average of 3.64 tons of allowances per site, or 0.01 tons of NO\textsubscript{X} per day (tpd). The collective total from the 13 sites is about 0.13 tpd. The total 2018 modeled baseline area source inventory and point source inventory NO\textsubscript{X} emissions are 42.04 tpd and 154.36 tpd, respectively. Adjusting the modeled area source inventory for
such an inconsequential decrease is impractical and provides no benefit. Therefore, the commission has chosen to model such changes conservatively and only include the increase in the point source MECT NO\textsubscript{x} cap.

Thus, the continued acceptance of late ECT-3 forms from existing facilities at minor sources of NO\textsubscript{x} while slightly increasing the NO\textsubscript{x} cap, will not interfere with attainment demonstration modeling for the HGB area. No changes were made in response to this comment.

NASA requested clarification whether the proposed rule would continue to allow major sources of NO\textsubscript{x} with eligible facilities that have lost their exemption status under Chapter 117 to submit ECT-3 forms requesting an allocation of allowances.

The commission will continue to accept ECT-3 forms from major sources of NO\textsubscript{x} for facilities eligible under §101.360(c) to receive an allocation of allowances that lose their exemption status under Chapter 117 if their exemption status was lost on or after April 1, 2001. No changes were made in response to this comment.

The HSC commented that the commission should discontinue the MECT program and set command and control emission limits for each emission point.

The commission did not propose discontinuation of the MECT program. This comment is beyond the scope of this rulemaking. The commission adopted the MECT program having determined the MECT program as the most efficient means to achieve cost-effective reductions of NO\textsubscript{x}. The MECT program was approved by the EPA and provides compliance flexibility while maximizing the efficiency of emission reductions through market forces. The commission maintains that the MECT program is the most cost-effective means of achieving emissions reductions of NO\textsubscript{x}. Individual sources of NO\textsubscript{x} emissions also must meet permit limits and any applicable limit as established by rule. The MECT program provides for additional decreases in NO\textsubscript{x} emissions limits above and beyond these basic requirements. No changes were made in response to this comment.

The HSC supports the adoption of §101.353(b)(3) - (5). The HSC commented that the commission should change the deadline for an applicable major source of NO\textsubscript{x} to submit an ECT-3 form submitted in accordance with §101.360(a) from March 30, 2010, to January 1, 2010, as the ozone standard should be attained as expeditiously as practical.

The commission appreciates the support. The amendments to the MECT program cannot be enforced until April 1, 2010, the effective date of the adopted rulemaking. Therefore, the March 30, 2010, deadline corresponds with the effective date of the adopted rulemaking. No changes were made in response to this comment.

The HSC is concerned that the definition "Uncontrolled design capacity to emit" is too broad regarding facilities with NO\textsubscript{x} control equipment not considered post-combustion control equipment.

The adoption of the definition "Uncontrolled design capacity to emit" will not affect the requirements of the facilities referenced in this comment to meet the emission specifications of Chapter 117, but will clarify how to calculate the uncontrolled design capacity to emit from these facilities. No changes were made in response to this comment.

The HSC is concerned that the definition "Uncontrolled design capacity to emit" allows increased operation of applicable stationary diesel engines. Instead of adopting the proposed new sentence to the definition "Uncontrolled design capacity to emit," the HSC commented that the commission should adopt specific rules covering emergency stationary diesel engines located at MUDs and other water treatment plants.

The definition "Uncontrolled design capacity to emit" does not grant an increase in operation for applicable stationary diesel engines operating less than 100 hours per year in non-emergency situations that do not meet the applicable EPA Tier standard. No changes were made in response to this comment.

The definition "Uncontrolled design capacity to emit" is only used to determine if a minor source of NO\textsubscript{x} is applicable to the MECT program. The commission did not propose rules specifically to exempt or limit the emissions from emergency stationary diesel engines at water treatment plants, so this comment is beyond the scope of this rulemaking.

**STATUTORY AUTHORITY**

The amendments are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amendments are also adopted under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions. The amendments are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §7401 et seq., which requires states to submit State Implementation Plan revisions that specify the manner the National Ambient Air Quality Standard will be achieved and maintained within each air quality control region of the state.

The amended sections implement THSC, §§382.002, 382.011, 382.012, 382.016, and 382.017, and FCAA, 42 USC, §7401 et seq.


(a) Allowances will be deposited into compliance accounts according to the following equation except as provided in subsection (b) or (h) of this section.

Figure: 30 TAC §101.353(a) (No change.)

(b) The owner or operator of the following facilities shall acquire allowances for each control period or the annual allocation rights from facilities already participating under this division in accordance with §101.356 of this title (relating to Allowance Banking and Trading):
(1) new and/or modified facilities that have submitted, under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification), an application that the executive director has not determined to be administratively complete before January 2, 2001;

(2) new and/or modified facilities that qualified for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) and have not commenced construction before January 2, 2001;

(3) facilities in operation prior to January 1, 1997, located at a site defined on or before December 31, 2000, as a major source of nitrogen oxides (NOX), as defined in §117.10 of this title (relating to Definitions), that have not submitted an ECT-3 Form, Level of Activity Certification, in accordance with §101.360(a)(1) of this title (relating to Level of Activity Certification) by March 30, 2010;

(4) new and/or modified facilities located at a site defined on or before December 31, 2000, as a major source of NOX, as defined in §117.10 of this title, that submitted a permit application that was determined administratively complete before January 2, 2001, but have not submitted an ECT-3 Form in accordance with §101.360(a)(2) of this title by March 30, 2010; and

(5) new and/or modified facilities located at a site defined on or before December 31, 2000, as a major source of NOX, as defined in §117.10 of this title, that qualified for a permit by rule and commenced construction before January 2, 2001, but have not submitted an ECT-3 Form in accordance with §101.360(a)(2) of this title by March 30, 2010.

(c) If actual emissions of NOX during a control period exceed the amount of allowances held in a compliance account on March 1 following the control period, allowances for the next control period will be reduced by an amount equal to the emissions exceeding the allowances in the compliance account plus an additional 10%. This does not preclude additional enforcement action by the executive director.

(d) Allowances will be allocated by the executive director, who will deposit allowances into each compliance account:

(1) initially, by January 1, 2002; and

(2) subsequently, by January 1 of each following year.

(e) The annual deposit for any control period may be adjusted by the executive director to reflect new or existing state implementation plan requirements.

(f) Allowances may be added or deducted by the executive director from compliance accounts following the review of reports required under §101.359 of this title (relating to Reporting).

(g) The owner or operator of a facility may, due to extenuating circumstances, request a baseline period more representative of normal operation as determined by the executive director. Applications for extenuating circumstances must be submitted by the owner or operator of the facility to the executive director:

(1) no later than June 30, 2001, to request an alternative three consecutive calendar year period for facilities in operation prior to January 1, 1997;

(2) no later than 90 days after completion of the baseline period to request up to two additional calendar years to establish a baseline period for facilities whose baseline as described by variable (2)(C) listed in the figure contained in subsection (a) of this section is not complete by June 30, 2001; or

(3) at any time as authorized by the executive director.

(h) Allowances calculated under subsection (a) of this section will continue to be based on historical activity levels, despite subsequent reductions in activity levels. If allowances are being allocated based on allowables and the facility does not achieve two complete consecutive calendar years of actual level of activity data, then allowances will not continue to be allocated if the facility ceases operation or is not built.

This agency 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 March 12, 2010.

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Texas Commission on Environmental Quality

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CHAPTER 115. CONTROL OF AIR POLLUTION FROM VOLATILE ORGANIC COMPOUNDS

SUBCHAPTER E. SOLVENT-USING PROCESSES

DIVISION 4. OFFSET LITHOGRAPHIC PRINTING

30 TAC §§115.440 - 115.443, 115.445, 115.446, 115.449

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §§115.440, 115.442, 115.443, 115.445, 115.446, and 115.449; and adopts new §§115.441 with changes to the proposed text as published in the October 9, 2009, issue of the Texas Register (34 TexReg 7015).

The amendments and new section will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The 1990 Federal Clean Air Act (FCAA) Amendments (42 United States Code (USC), §§7401 et seq.) require the EPA to establish primary National Ambient Air Quality Standards (NAAQS) that protect public health and to designate areas exceeding the NAAQS as nonattainment areas. For each designated nonattainment area, the state is required to submit a SIP revision to the EPA that provides for attainment and maintenance of the NAAQS.

FCAA, §172(c)(1) requires that the SIP incorporate all reasonably available control measures, including reasonably available control technology (RACT), for sources of relevant pollutants. The EPA defines RACT as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility (44 Federal Register 53761, September 17, 1979). For nonattainment areas classified as moderate and above, FCAA, §182(b)(2) requires the state to
submit a SIP revision that implements RACT for volatile organic compound (VOC) emission sources addressed in a control techniques guidelines (CTG) document issued between November 15, 1990, and the area’s attainment date.

The CTG documents provide information to assist states and local air pollution control authorities in determining RACT for specific emission sources. The CTG documents describe the EPA's evaluation of available information, including emission control options and associated costs, and provide the EPA's RACT recommendations for controlling emissions from these sources. The CTG documents do not impose any legally binding regulations or change any applicable regulations. The EPA's guidance on RACT indicates that states can choose to implement the CTG recommendations, implement an alternative approach, or demonstrate that additional control for the CTG emission source category is not technologically or not economically feasible in the area.

FCAA, §183(e) directs the EPA to regulate VOC emissions from certain consumer and commercial product categories by issuing national regulations or by issuing CTG documents in lieu of regulations. On October 5, 2006, the EPA published a CTG document in lieu of national regulations for VOC emissions from Offset Lithographic Printing and Letterpress Printing (71 Federal Register 58745).

Lithography is a plane-o-graphic printing process where both the image and non-image areas are on the same surface plane of the lithographic plate. The image and non-image areas of the plate are chemically differentiated by rendering the non-image area receptive to water and the image area receptive to oil. The offset lithographic printing process indirectly transfers, or offsets, the inked image from the lithographic plate to a rubber blanket and then to the printing substrate. Products typically printed using offset lithography include books, newspapers, periodicals, advertising flyers, brochures, greeting cards, packaging, and reproductions.

Offset lithographic printing is often characterized by the type of press and the type of ink used in the printing process. Offset lithographic printing presses can be either sheet-fed or web. Sheet-fed presses feed individual sheets of substrate to the press and are typically used for shorter printing runs. Web presses feed continuous rolls of substrate to the press and are typically used for longer printing runs. Offset lithographic printing can use either heatset inks, which require heat to set the ink, or non-heatset inks, which dry by absorption, evaporation, or oxidative polymerization. Web presses can use heatset or non-heatset inks, but sheet-fed presses can only use non-heatset ink.

In offset lithographic printing, VOC emissions result from the evaporation of components of the ink, fountain solution, and cleaning solution. Offset lithographic printing processes use paste inks that contain pigments for color, binders to fix the pigment to the substrate, and oils to carry the pigment and binders. Heatset inks have higher emissions because heatset inks typically have 20% ink oil retention so the remaining 80% of the ink oil is volatilized in and exhausted from the dryer. Non-heatset inks have much lower emissions because these inks typically have 95% ink oil retention so only 5% of the ink oil evaporates.

Water-based fountain solution adheres to the hydrophilic non-image areas of the lithographic plate and helps keep the oil-based ink in the image areas of the plate. Fountain solutions contain water, nonvolatile printing chemicals, and a dampening agent that reduces the surface tension of the water so the fountain solution easily spreads across the lithographic printing plate. The most common dampening agent is isopropyl alcohol, but nonalcohol dampening agents, like glycol ether or ethylene glycol, are also used.

Cleaning solutions containing organic solvents are used to remove excess printing ink oils or unwanted debris from the offset lithographic press equipment. Cleaning can be performed manually by hand-wiping the press surface with a solvent-coated cloth or mechanically using an automatic blanket wash system to clean the internal parts of the press.

Under the 1997 eight-hour ozone NAAQS, the Dallas-Fort Worth eight-hour ozone nonattainment area (DFW area) is currently classified as a moderate nonattainment area and the Houston-Galveston-Brazoria eight-hour ozone nonattainment area (HGB area) is currently classified as a severe nonattainment area. The adopted rules implement RACT for offset lithographic printing lines in the DFW and HGB areas as required by FCAA, §172(c)(1) and §182(b)(2).

Prior to the adoption of this rulemaking, the offset lithographic printing rules in Chapter 115, Subchapter E, Division 4 only applied to offset lithographic printing lines located on a property in the DFW area with combined VOC emissions of at least 50 tons per calendar year (tpy) when uncontrolled and offset lithographic printing lines located on a property in the HGB area with combined VOC emissions of at least 25 tpy when uncontrolled. The adopted rules will further reduce the VOC content limits for fountain solutions used at these printing sources in the DFW and HGB areas beginning March 1, 2011. Additionally, the adopted rules expand the requirements in the DFW and HGB areas beginning March 1, 2012, to limit the content of fountain and cleaning solutions used by offset lithographic printing lines located on a property with combined VOC emissions of at least 3.0 tpy when uncontrolled.

The adopted rules implement the EPA's RACT recommendations in the 2006 Offset Lithographic and Letterpress Printing CTG except as specifically discussed in this preamble.

**Letterpresses**

In the 2006 CTG, the EPA recommends controlling VOC emissions from letterpress printing. No rules are being adopted for letterpress printing sources because review of the point source emissions inventory, Title V permits, and central registry databases did not identify any letterpresses that would be subject to the CTG-recommended controls.

**Heatset Offset Lithographic Presses**

In the 2006 CTG, the EPA recommends requiring an add-on air pollution control device on each individual heatset web offset lithographic press with the uncontrolled potential to emit at least 25 tpy of VOC from ink oils volatilized in the dryer. The EPA recommends different control efficiencies for devices installed before and after the effective date of the rule implementing these CTG recommendations; the EPA recommends requiring a 90% overall control efficiency for control devices installed before the rule effective date and a 95% overall control efficiency for control devices installed after the rule effective date. The commission is not adopting new rules to implement these EPA recommendations for heatset web offset lithographic presses.

The Chapter 115 rules require control devices with an efficiency of at least 90% to be installed on all heatset offset lithographic...
presses located on a property in the DFW area with combined VOC emissions of at least 50 tpy when uncontrolled and on all heatset offset lithographic presses located on a property in the HGB area with combined VOC emissions of at least 25 tpy when uncontrolled. Unlike the EPA's CTG recommendations that are based only on the uncontrolled VOC emissions of ink oils from the press dryer, the Chapter 115 rules include the uncontrolled VOC emissions of ink oils from the dryer, cleaning solvents, and fountain solutions. In the 1993 draft Offset Lithographic Printing CTG (Table 5-1: Model Plant Product Use and Baseline (Uncontrolled) Volatile Organic Compound Emissions (Average Tons per Year)), the EPA estimates that 26% of the total uncontrolled VOC emissions from heatset offset lithographic printing operations are emitted from the press dryer. Based on EPA's assumption, an individual heatset press located on a property with total uncontrolled VOC emissions of 50 tpy would emit less than 14 tpy of VOC from the press dryer, and an individual heatset press located on a property with total uncontrolled VOC emissions of 25 tpy would emit less than 7 tpy of VOC from the press dryer. Additionally, the EPA's 2006 CTG recommends exempting heatset presses used for book printing and heatset presses with a maximum web width of 22 inches or less from the add-on control device requirements. Therefore, Chapter 115 regulations do not exempt these sources from the control requirements. Therefore, the Chapter 115 offset lithographic printing rules are effectively more stringent than the EPA's 2006 CTG recommendations with regard to the applicability threshold for this control requirement.

Regardless of the first installation date of the device, the EPA recommends providing the alternative option to reduce the control device outlet concentration to 20 parts per million by volume (ppmv) as hexane on a dry basis to accommodate situations where the inlet VOC concentration is too low to demonstrate the 90% or 95% control efficiency. The Chapter 115 rules provide affected owners or operators of a heatset offset lithographic printing press the option to operate a control device to reduce VOC emissions from the press dryer exhaust vent by 90% by weight or maintain a maximum dryer exhaust outlet VOC concentration of 20 ppmv. The Chapter 115 alternative concentration limit is preferable because it encourages VOC emission reductions without requiring add-on controls and implementing the EPA's recommended approach would penalize operations that were able to achieve the 20 ppmv limit without the installation of expensive add-on control devices.

Fountain Solution

The EPA's 2006 CTG recommends an option to limit the fountain solution content to 5.0% alcohol substitutes or less by weight and no alcohol in the fountain solution for printing operations located on a property in the DFW area with combined VOC emissions of at least 50 tpy when uncontrolled and in the HGB area with combined VOC emissions of at least 25 tpy when uncontrolled. Because these Chapter 115 rules were incorporated into the EPA-approved SIP, implementing the less stringent CTG-recommended 5.0% limit for sources currently complying with the Chapter 115 rules would be backsliding; therefore, the adopted rules retain the 3.0% limit for these major printing sources that are currently subject to the rule. Federally approved state rules and rule approval dates can be found in 40 Code of Federal Regulations §52.2270(c), EPA Approved Regulations in the Texas SIP.

However, in response to comments received on this rulemaking, the commission is adopting rules that include an option to limit the fountain solution content to 5.0% alcohol substitutes or less by weight and no alcohol in the fountain solution for minor printing sources in the DFW and HGB areas that were not previously subject to the more stringent 3.0% fountain solution content limit. Imposing the more stringent 3.0% fountain solution content limit on minor printing sources is not necessary to satisfy RACT requirements for this CTG emission source category.

Cleaning Solution

The EPA's 2006 Offset Lithographic and Letterpress Printing CTG recommends an option limiting the VOC content of cleaning solutions used in offset lithographic printing operations to less than 70.0% VOC by weight in conjunction with work practice standards. However, the adopted rules retain the more stringent existing Chapter 115 cleaning solution content limit of 70.0% VOC or less by volume in conjunction with work practice standards. Assuming the VOC in the cleaning solvent used is kerosene, which is the VOC referenced in the EPA's 2006 CTG, the adopted Chapter 115 content limit of 70.0% VOC or less by volume for cleaning solutions is equivalent to 66.0% VOC or less by weight.

The EPA's 2006 Offset Lithographic and Letterpress Printing CTG also recommends mandating a towel handling program in conjunction with reduced VOC cleaning solution limits for offset lithographic printing lines with the uncontrolled potential to emit at least 3.0 tpy of VOC. Existing Chapter 115 rules include these work practice requirements for facilities choosing the option to limit the cleaning solution content to 70.0% VOC or less by volume; however, these work practice requirements were not originally proposed for cleaning solutions containing a VOC composite partial vapor pressure less than or equal to 10.0 millimeters of mercury at 68 degrees Fahrenheit (20 degrees Celsius). In response to comments received on this rulemaking, the adopted rules include the CTG-recommended work practice requirements for offset lithographic printing operations using cleaning solutions with a VOC composite partial vapor pressure less than or equal to 10.0 millimeters of mercury at 68 degrees Fahrenheit (20 degrees Celsius) if there is a towel handling program in place that ensures all waste ink, solvents, and cleanup rags are stored in closed containers until removed from the site by a licensed disposal or cleaning service.
SECTION BY SECTION DISCUSSION

In addition to the adopted amendments implementing RACT for offset lithographic printing presses, the commission adopts grammatical, stylistic, and various other non-substantive changes to update the rules in accordance with current Texas Register style and format requirements, improve readability, establish consistency in the rules, and conform to the standards in the Texas Legislative Council Drafting Manual, August 2008. Such changes include appropriate and consistent use of acronyms, punctuation, section references, and certain terminology like that, which, shall, and must. References to the Dallas/Fort Worth area and the Houston/Galveston area have been updated to the Dallas-Fort Worth area and the Houston-Galveston-Brazoria area, respectively, to be consistent with current terminology for the region. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

Section 115.440, Applicability and Definitions

The adopted §115.440 changes the section title from Offset Printing Definitions to Applicability and Definitions to reflect the adopted changes to the content of this section to include the rule applicability.

The commission adopts §115.440(a) to specify that the provisions in this division apply to offset lithographic printing lines located in the DFW, El Paso, and HGB areas. Adopted subsection (a) establishes consistency and improves the readability of the rule by first describing the units affected by the subsequent requirements. The El Paso area is included in the adopted applicability provision because these Chapter 115 rule requirements affect offset lithographic printing operations in this area; however, no new rule requirements are being adopted for sources in the El Paso area.

To accommodate subsection (a), the offset lithographic definitions previously located in §115.440(1) - (7) are adopted as §115.440(b)(1) - (7), respectively, and the offset lithographic definitions previously located in §115.440(8) - (10) are adopted as §115.440(b)(10) - (12), respectively. Except as specifically discussed in this preamble, adopted §115.440(b)(1) - (12) re-letters the definitions with only non-substantive changes necessary to comply with current rule formatting standards.

Adopted subsection (b) indicates that unless the context clearly indicates otherwise or unless specifically defined in the Texas Clean Air Act (Texas Health and Safety Code, Chapter 382), in 30 TAC §§3.2, 101.1, 115.10, or 115.440(b)(1) - (12), the terms used in this division have the meanings commonly used in the field of air pollution control.

Adopted §115.440(b)(3) amends the definition of Batch previously located in §115.440(3) to apply to cleaning solution as well as fountain solution. Adopted §115.440(b)(3) defines Batch as a supply of fountain solution or cleaning solution that is prepared and used without alteration until completely used or removed from the printing process. The adopted change is necessary to clarify new requirements and is not expected or intended to alter any existing requirements that use this term.

Adopted §115.440(b)(5) amends the definition of Fountain Solution previously in §115.440(5) to remove the statement that isopropyl alcohol is the most common additive used to reduce the surface tension of the fountain solution. The adopted change removes superfluous information and is not intended to alter any existing requirements.

Adopted §115.440(b)(6) amends the definition of Heatset in existing §115.440(6) to remove the statement that hot air dryers are used to deliver the heat. The adopted change removes superfluous information and is not intended to alter any existing requirements.

Adopted §115.440(b)(7) replaces the definition of Lithography in existing §115.440(7) to appropriately describe this printing process. The adopted change clarifies the definition but is not intended to alter any existing requirements that use this term. Adopted §115.440(b)(7) defines Lithography as a plane-o-graphic printing process where the image and non-image areas are on the same plane of the printing plate. Adopted §115.440(b)(7) also states that the image and non-image areas are chemically differentiated so the image area is oil receptive and the non-image area is water receptive. At proposal, the word Lithography was inaccurately published as new language when the term was actually part of the existing rule.

In response to comments received, the commission is adopting rules that provide additional options and more flexibility for smaller printing sources that were previously exempt from these Chapter 115 requirements. In order to simplify the rule application and compliance schedules for these newly affected facilities, the commission is adopting two new offset lithographic printing definitions in §115.440(b)(8) and (9). Adopted §115.440(b)(8) defines a Major printing source as all offset lithographic printing lines located on a property with combined uncontrolled VOC emissions greater than or equal to 50 tpy in the DFW area or greater than or equal to 25 tpy in the HGB area. Adopted §115.440(b)(9) defines a Minor printing source as all offset printing lines located on a property with combined uncontrolled VOC emissions less than 50 tpy in the DFW area or less than 25 tpy in the HGB area.

The definition of Volatile organic compound composite partial pressure in existing §115.440(10) is adopted as §115.440(b)(12) with non-substantive technical corrections necessary to comply with current rule formatting standards. Adopted §115.440(b)(12) re-letters the associated figure with non-substantive technical corrections necessary to comply with current rule formatting standards.

Section 115.441, Exemptions

The commission adopts new §115.441, Exemptions, to establish consistency with other Chapter 115 rules and make the rule easier to read by clearly identifying the offset lithographic printing lines that are exempt from the rule requirements.

Adopted new §115.441(a) exempts the owner or operator of all offset lithographic printing lines located on a property in the DFW or HGB area with combined VOC emissions less than 3.0 tpy when uncontrolled from all requirements in this division except the monitoring and recordkeeping requirements in §115.446. In the 2006 CTG document, the EPA recommended a similar exemption threshold because controlling such small sources is not cost-effective. The commission agrees with the EPA’s determination that requiring these small sources to comply with the control requirements in §115.442(c) is not economically feasible and does not constitute RACT. When determining if a source qualifies for this exemption, or any other exemption that refers to uncontrolled VOC emissions, the combined VOC emissions are calculated without considering the emission reductions achieved through the use of any add-on controls or other operational changes.
The commission is adopting §115.441(b) with changes to the proposed text. Although all of the adopted exemptions in §115.441(b) were included in the proposed text, the commission has restructured the rule language to simplify the exemption criteria for newly affected minor printing sources. Additionally, the commission is not adopting the control requirement exemptions in proposed §115.441(b)(2) and (c)(2) because subsequent revisions to the corresponding control requirements rendered the proposed exemption unnecessary.

Adopted new §115.441(b)(1) - (4) lists the exemptions for the owner or operator of a minor printing source located in the DFW and HGB areas. Adopted new §115.441(b)(1) exempts the owner or operator of these sources from all requirements in this division until March 1, 2012, to clarify that these currently exempt sources will remain exempt from this division until the compliance date specified for these rules. Proposed §115.441(b)(1) and (c)(1) exempted these same sources until March 1, 2011. However, in response to comments received, the commission is adopting the March 1, 2012, compliance date to provide affected owners and operators of these minor sources additional time to make any necessary changes. Adopted new §115.441(b)(2), proposed as §115.441(b)(5) and (c)(5), allows the owner or operator of these sources to exempt up to 110 gallons of cleaning solution from the content limits in §115.442(c)(1) because there are some cleaning tasks that cannot be carried out using solutions that meet the adopted new content limits. Adopted new §115.441(b)(3), proposed as §115.441(b)(4) and (c)(4), allows the owner or operator of these sources to exempt any press with a total fountain solution reservoir of less than 1.0 gallons from the fountain solution content limits in §115.442(c)(2) - (4) because controlling emissions from these small presses is not economically feasible and therefore not considered RACT. Adopted new §115.441(b)(4), proposed as §115.441(b)(3) and (c)(3), allows the owner or operator to exempt any sheet-fed press with a maximum sheet size of 11.0 inches by 17.0 inches or less from the fountain solution content limits in new §115.442(c)(2) because controlling emissions from these small presses is not economically feasible and therefore not considered RACT. The exemptions adopted in §115.441(b)(2) - (4) are recommended by the EPA in the 2006 Offset Lithographic and Letterpress Printing CTG.

Adopted new §115.441(c), proposed as §115.441(d), exempts all offset lithographic printing lines in the DFW and HGB areas from the control requirements of §115.442(a) and the monitoring and recordkeeping requirements in §115.446(a) beginning March 1, 2011, to clarify that affected sources will only be required to comply with the existing rule requirements until the compliance date for the adopted new rule requirements.

Section 115.442, Control Requirements

To accommodate new control requirements, the control requirements previously located in existing §115.444(1) and (2) are adopted as §115.442(a)(1) and (2), respectively. Except as specifically discussed in this preamble, adopted §115.442(a)(1) and (2) re-letters the existing control requirements with only non-substantive changes necessary to comply with current rule formatting standards and the formatting change is not intended to alter any existing rule requirements.

The control requirements in existing §115.442 are adopted as §115.442(a) with non-substantive changes necessary to comply with current rule formatting standards. In addition, adopted §115.442(a) indicates that beginning March 1, 2011, affected sources in the DFW and HGB areas will no longer be required to comply with the requirements in this subsection. The adopted addition is necessary to clarify that affected sources will only be required to comply with the existing rule requirements until the compliance date for the adopted new rule requirements.

Adopted §115.442(a)(2) re-letters existing §115.442(2) with non-substantive technical corrections necessary to comply with current rule formatting standards. In addition, adopted §115.442(a)(2) requires the owner or operator of a heatset offset lithographic printing press to maintain the dryer pressure lower than the press room air pressure such that air flows into the dryer at all times when the press is operating. This adopted requirement is currently included in existing §115.446(3), and the adopted change is not expected nor intended to impose any new requirements on units currently subject to this division. The commission adopts only to add the requirement in existing §115.446(3) to the adopted §115.442(a)(2) to more appropriately indicate that this is a control requirement and not a monitoring or recordkeeping requirement.

Except as specifically discussed elsewhere in this preamble, adopted subsections (b) and (c) implement the EPA’s RACT recommendations in the 2006 Offset Lithographic and Letterpress Printing CTG. As noted above, in this preamble, the commission is adopting rules to provide additional options for newly affected minor printing sources. The adopted §115.442(b) and (c) provide separate control requirements for major and minor printing sources to clearly distinguish the different requirements for these sources. Although many of the control requirements proposed in §115.442(b) are being adopted verbatim, the rule structure has been re-formatted to improve readability.

The commission adopts §115.442(b) with changes to the proposed text. The commission adopts §115.442(b) to incorporate RACT requirements for affected offset lithographic printing lines located at major printing sources in the DFW and HGB areas in accordance with the appropriate compliance date specified in §115.449(e) and (g).

Adopted §115.442(b)(1), proposed as §115.442(b)(4), requires the owner or operator of an offset lithographic printing press to limit the VOC content of the as-applied cleaning solution by complying with one of the options in subparagraphs (A), (B), or (C). These options are provided to give affected owners or operators the flexibility to choose the appropriate option for their facility. Adopted subparagraph (A) limits the cleaning solution content to 50.0% VOC or less by volume. Adopted subparagraph (A) is based on existing §115.442(1)(F) and was not included in EPA’s 2006 CTG recommendations. The commission adopts this option to retain the flexibility afforded to affected owners and operators in the current rules. Adopted subparagraph (B) limits the cleaning solution content to 70.0% VOC or less by volume and requires incorporating a towel handling program that ensures all waste ink, solvents, and cleanup rags are stored in closed containers until removed from the site by a licensed disposal or cleaning service. The 2006 CTG recommends limiting the VOC content of cleaning solutions to less than 70.0% VOC by weight in conjunction with work practice standards. However, the adopted rules retain the more stringent existing Chapter 115 cleaning solution content limit of 70.0% VOC or less by volume in conjunction with work practice standards. Proposed subparagraph (C) limited the cleaning solution VOC composite partial vapor pressure to 10.0 millimeters of mercury or less at 68 degrees Fahrenheit (20 degrees Celsius). In response to comments received, the adopted subparagraph (C) limits the cleaning solution VOC composite partial vapor pressure to 10.0 millimeters of
mercury or less at 68 degrees Fahrenheit (20 degrees Celsius) and also requires incorporating a towel handling program that ensures all waste ink, solvents, and cleanup rags are stored in closed containers until removed from the site by a licensed disposal or cleaning service.

Adopted §115.442(b)(2), proposed as §115.442(b)(3), requires the owner or operator of a sheet-fed offset lithographic printing press to limit the VOC content of the as-applied fountain solution by complying with one of the options in subparagraphs (A), (B), or (C). These options are provided to give affected owners or operators the flexibility to choose the appropriate option for their facility. Adopted subparagraph (A) limits the fountain solution content to 5.0% alcohol or less by weight. Adopted subparagraph (B) limits the fountain solution content to 8.5% alcohol or less by weight if the fountain solution is refrigerated below 60 degrees Fahrenheit (15.5 degrees Celsius). Adopted subparagraph (C) limits the fountain solution content to 3.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. For reasons discussed elsewhere in this preamble, adopted subparagraph (C) requires the more stringent 3.0% limit in existing Chapter 115 rules instead of the 5.0% limit recommended by EPA in the 2006 CTG.

Adopted §115.442(b)(3), proposed as §115.442(b)(1), requires the owner or operator of an affected non-heatset web offset lithographic printing press to limit the VOC content of the as-applied fountain solution to 3.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. The adopted requirement is based on the existing Chapter 115 rules instead of the EPA’s 2006 CTG recommendations. The EPA recommended limiting the fountain solution content to 5.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. However, the existing Chapter 115 rules limit the fountain solution content to 3.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. Because the existing rules are incorporated into the EPA-approved SIP, adopting the CTG-recommended 5.0% limit for sources currently complying with the Chapter 115 rules would be backsliding; therefore, the adopted rules retain the 3.0% limit for these sources.

Adopted §115.442(b)(4), proposed as §115.442(b)(2), requires the owner or operator of a heatset web offset lithographic printing press to limit the VOC content of the as-applied fountain solution by complying with one of the options in subparagraphs (A), (B), or (C). These options are provided to give affected owners or operators the flexibility to choose the appropriate option for their facility. Adopted subparagraph (A) limits the fountain solution content to 1.6% alcohol or less by weight. Adopted subparagraph (B) limits the fountain solution content to 3.0% alcohol or less by weight if the fountain solution is refrigerated below 60 degrees Fahrenheit (15.5 degrees Celsius). Adopted subparagraph (C) limits the fountain solution content to 3.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. For reasons discussed elsewhere in this preamble, adopted subparagraph (C) requires the more stringent 3.0% limit in existing Chapter 115 rules instead of the 5.0% limit recommended by EPA in the 2006 CTG.

Adopted §115.442(b)(5), proposed as §115.442(a)(2), incorporates the requirements from the existing §115.442(2) with non-substantive technical corrections necessary to comply with current rule formatting standards and to retain this existing control requirement for major printing sources in DFW and HGB areas after the March 1, 2011, compliance date. In addition, adopted §115.442(b)(5) requires the owner or operator of a heatset offset lithographic printing press to maintain the dryer pressure lower than the press room air pressure such that air flows into the dryer at all times when the press is operating. This adopted requirement was previously included in §115.446(3), and the adopted change is not expected nor intended to impose any new requirements on units currently subject to this division. The commission adopts this change only to add the requirement in existing §115.446(3) to the adopted §115.442(b)(5) to more appropriately indicate that this is a control requirement and not a monitoring or recordkeeping requirement.

The commission adopts §115.442(c) to incorporate RACT requirements for affected offset lithographic printing lines located at minor printing sources in the DFW and HGB areas in accordance with the appropriate compliance date specified in §115.449(f) and (g).

Adopted §115.442(c)(1), proposed as §115.442(b)(4), requires the owner or operator of an offset lithographic printing press to limit the VOC content of the as-applied cleaning solution by complying with one of the options in subparagraphs (A), (B), or (C). These options are provided to give affected owners or operators the flexibility to choose the appropriate option for their facility. Adopted subparagraph (A) limits the cleaning solution content to 50.0% VOC or less by volume. Adopted subparagraph (A) is based on existing §115.442(1)(F) and was not included in EPA’s 2006 CTG recommendations. The commission adopts this option to retain the flexibility afforded to affected owners and operators in the current rules. Adopted subparagraph (B) limits the cleaning solution content to 70.0% VOC or less by volume and requires incorporating a towel handling program that ensures all waste ink, solvents, and cleanup rags are stored in closed containers until removed from the site by a licensed disposal or cleaning service. The 2006 CTG recommends limiting the VOC content of cleaning solutions to less than 70.0% VOC by weight in conjunction with work practice standards. However, the adopted rules retain the more stringent existing Chapter 115 cleaning solution content limit of 70.0% VOC or less by volume in conjunction with work practice standards. Proposed subparagraph (C) limited the cleaning solution VOC composite partial vapor pressure to 10.0 millimeters of mercury or less at 68 degrees Fahrenheit (20 degrees Celsius). In response to comments received, the adopted subparagraph (C) limits the cleaning solution VOC composite partial vapor pressure to 10.0 millimeters of mercury or less at 68 degrees Fahrenheit (20 degrees Celsius) and also requires incorporating a towel handling program that ensures all waste ink, solvents, and cleanup rags are stored in closed containers until removed from the site by a licensed disposal or cleaning service.

Adopted §115.442(c)(2), proposed as §115.442(b)(3), requires the owner or operator of a sheet-fed offset lithographic printing press to limit the VOC content of the as-applied fountain solution by complying with one of the options in subparagraphs (A), (B), or (C). These options are provided to give affected owners or operators the flexibility to choose the appropriate option for their facility. Adopted subparagraph (A) limits the fountain solution content to 5.0% alcohol or less by weight. Adopted subparagraph (B) limits the fountain solution content to 8.5% alcohol or less by weight if the fountain solution is refrigerated below 60 degrees Fahrenheit (15.5 degrees Celsius). Adopted subparagraph (C) limits the fountain solution content to 5.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. As discussed elsewhere in this preamble, adopted subparagraph (C) requires the 5.0% limit recommended in the EPA’s 2006 CTG instead of the proposed 3.0% limit because imposing the more
stringent limit on minor printing sources is not necessary to satisfy RACT requirements for this CTG emission source category. Adopted §115.442(c)(3), proposed as §115.442(b)(1), requires the owner or operator of an affected non-heatset web offset lithographic printing press to limit the VOC content of the as-applied fountain solution to 5.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. As discussed elsewhere in this preamble, adopted paragraph (5) requires the 5.0% limit recommended in the EPA's 2006 CTG instead of the proposed 3.0% limit because imposing the more stringent limit on minor printing sources is not necessary to satisfy RACT requirements for this CTG emission source category.

Adopted §115.442(c)(4), proposed as §115.442(b)(2), requires the owner or operator of a heatset web offset lithographic printing press to limit the VOC content of the as-applied fountain solution by complying with one of the options in subparagraphs (A), (B), or (C). These options are provided to give affected owners or operators the flexibility to choose the appropriate option for their facility. Adopted subparagraph (A) limits the fountain solution content to 1.6% alcohol or less by weight. Adopted subparagraph (B) limits the fountain solution content to 3.0% alcohol or less by weight if the fountain solution is refrigerated below 60 degrees Fahrenheit (15.5 degrees Celsius). Adopted subparagraph (C) limits the fountain solution content to 5.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. As discussed elsewhere in this preamble, adopted subparagraph (C) requires the 5.0% limit recommended in the EPA's 2006 CTG instead of the proposed 3.0% limit because imposing the more stringent limit on minor printing sources is not necessary to satisfy RACT requirements for this CTG emission source category.

Section 115.443, Alternative Control Requirements
The commission adopts non-substantive changes to §115.443 necessary to comply with current rule formatting standards.

Section 115.445, Approved Test Methods
The commission adopts non-substantive changes to §115.445(1) - (6) necessary to comply with current rule formatting standards.

The commission also adopts §115.445(7) allowing minor modifications to the test methods listed in this section if the modifications are approved by the executive director. Adopted paragraph (7) establishes consistency in the rules by providing the owner or operator of an affected offset lithographic printing line with the same flexibility afforded to the owner or operator of other units regulated in Chapter 115.

The commission adopts §115.445(8) with changes to the proposed text. The commission adopts §115.445(8) allowing the use of test methods not listed in this section if the methods are validated by 40 Code of Federal Regulations Part 63, Appendix A, Test Method 301 (effective December 29, 1992) and are approved by the executive director. The proposed text inadvertently omitted that the use of test methods not listed in §115.445 were also contingent on approval from the executive director. Adopted paragraph (8) establishes consistency in the rules by providing the owner or operator of an affected offset lithographic printing line with the same flexibility afforded to the owner or operator of other units regulated in Chapter 115.

Section 115.446, Monitoring and Recordkeeping Requirements
To accommodate adopted subsection (b), the commission adopts the requirements currently located in §115.446(1) - (8) as re-lettered §115.446(a)(1) - (8), respectively, with non-substantive technical corrections necessary to comply with current rule formatting standards. This adopted formatting change is not intended to alter any existing rule requirements. In addition, adopted §115.446(a) clarifies that the requirements in this subsection will not apply to sources in the DFW and HGB areas beginning on the March 1, 2011, compliance date of the adopted rule requirements.

The commission adopts §115.446(b) to list the monitoring and recordkeeping requirements for affected offset lithographic printing presses in the DFW and HGB areas in accordance with the appropriate compliance date specified in §115.449(e) - (g). Adopted subsection (b) improves the readability of the rule by locating all of the monitoring and recordkeeping requirements for the DFW and HGB areas in the same subsection. Although many of the monitoring and recordkeeping requirements proposed in §115.446(b) are being adopted verbatim, the rule structure has been re-formatted to improve readability.

Adopted §115.446(b)(1) requires an owner or operator claiming an exemption in §115.441 to maintain records sufficient to demonstrate continuous compliance with the applicable exemption criteria. In response to comments received, the commission has added as an example that maintaining records of ink, cleaning solvent, and fountain solution usage may be sufficient to demonstrate compliance with the exemption provided in §115.441(a) for sources located on a property with combined VOC emissions less than 3.0 tpy when uncontrolled.

Adopted §115.446(b)(2), as proposed §115.446(b)(5), requires the owner or operator of an offset lithographic printing press to use one of the options in subparagraphs (A) or (B) to demonstrate compliance with the cleaning solution content limits in §115.442(b)(1) and (c)(1). These options are provided to give affected owners or operators the flexibility to choose the appropriate option for their facility.

Adopted §115.446(b)(2)(A) requires the VOC concentration of each batch of cleaning solution to be monitored using flow meters to monitor the water and cleaning solution flow rates on a press with automatic cleaning equipment. Adopted §115.446(b)(2)(A) requires the flow meters to be installed, maintained, and operated according to the manufacturer's instructions and requires the flow meters to be calibrated so that the VOC concentration of the cleaning solution complies with the content limits in §115.442(b)(1) and (c)(1). Adopted §115.446(b)(2)(A) requires records to be sufficient to demonstrate continuous compliance with the cleaning solution content limits in §115.442(b)(1) and (c)(1). Adopted §115.446(b)(2)(A) imposes the same requirements in existing §115.446(6) with non-substantive changes necessary to comply with current rule formatting standards.

Adopted §115.446(b)(2)(B) requires the VOC concentration of each batch of cleaning solution to be determined using analytical data from the material safety data sheet (MSDS) or equivalent information from the supplier that was derived using the approved test methods in §115.445. Adopted §115.446(b)(2)(B) requires the concentration of all VOC used to prepare the batch and, if diluted prior to use, the proportions that each of these materials is used to be recorded for each batch of cleaning solution. Adopted §115.446(b)(2)(B) also requires records to be sufficient to demonstrate continuous compliance with the cleaning solution content limits in §115.442(b)(1) and (c)(1). This option is expected to be sufficient to ensure continuous compliance with
the applicable control requirements and reduce the compliance burden for affected sources.

Adopted §115.446(b)(3) requires the owner or operator of an offset lithographic printing press to use one of the options in subparagraphs (A) or (B) to demonstrate compliance with the fountain solution content limits in §115.442(b)(2) - (4) and (c)(2) - (4). These options are provided to give affected owners or operators the flexibility to choose the appropriate option for their facility.

Adopted §115.446(b)(3)(A) requires the alcohol concentration of each batch of fountain solution to be monitored using a refractometer or a hydrometer that is corrected for temperature; requires the refractometer or hydrometer to have a visual, analog, or digital readout with an accuracy of 0.5% VOC; and requires standard solution to be used to calibrate the refractometer for the type of alcohol used in the fountain solution. Adopted §115.446(b)(3)(A) provides an option for the VOC content of the fountain solution to be monitored with a conductivity meter if a refractometer or hydrometer cannot be used for the type of VOC in the fountain solution and requires the conductivity meter reading to be referenced to the conductivity of the incoming water. Adopted §115.446(b)(3)(A) requires records to be sufficient to demonstrate continuous compliance with the fountain solution content limits in §115.442(b)(2) - (4) and (c)(2) - (4). Adopted §115.446(b)(3)(A) imposes the same requirements in existing §115.446(b)(4) except that adopted §115.446(b)(3)(A) eliminated the option to monitor the fountain solution alcohol concentration once per eight-hour shift instead of once per batch because this option could allow the use of fountain solution with an unknown concentration and prevent the continuous demonstration of compliance with content limits in §115.442(b)(2) - (4) and (c)(2) - (4).

Adopted §115.446(b)(3)(B) requires the VOC concentration of each batch fountain solution to be determined using analytical data from the MSDS or equivalent information from the supplier that was derived using the approved test methods in §115.445. Adopted §115.446(b)(3)(B) requires the concentration of all alcohols or alcohol substitutes used to prepare the batch and, if diluted prior to use, the proportions that each of these materials is used to be recorded for each batch of fountain solution. Adopted §115.446(b)(3)(B) also requires records to be sufficient to demonstrate continuous compliance with the fountain solution content limits in §115.442(b)(2) - (4) and (c)(2) - (4). This option is expected to be sufficient to ensure continuous compliance with the applicable control requirements and reduce the compliance burden for affected sources.

Adopted §115.446(b)(4) requires the owner or operator of an offset lithographic printing press using refrigeration equipment on the fountain solution reservoir to monitor and record the fountain solution temperature at least once per hour. Adopted §115.446(b)(4) requires temperature monitoring devices to be installed, maintained, and operated according to the manufacturer's specifications. Adopted §115.446(b)(4) requires records to be sufficient to demonstrate continuous compliance with the fountain solution content limits in §115.442(b)(2) and (4) and (c)(2) and (4).

Adopted §115.446(b)(5), proposed as §115.446(b)(2), provides the monitoring and recordkeeping requirements for the owner or operator of heatset web offset lithographic presses with add-on control devices. Adopted subsection (b)(5) imposes the same requirements as in existing §115.446(b)(1) - (3) with non-substantive changes necessary to comply with current rule formatting standards. Adopted §115.446(b)(5) is not intended to alter any existing rule requirements or impose any new requirements; the adopted new paragraph is only provided to improve the readability of the rule by locating all of the monitoring and recordkeeping requirements for the DFW and HGB areas in the same subsection. In response to comments, the commission clarified adopted §115.446(b)(5)(A) to indicate that measuring and recording the operational parameters of the control device at least once every 15 minutes is sufficient to demonstrate compliance with this subparagraph.

The commission adopts §115.446(b)(6) to require an affected owner or operator to maintain records of any tests conducted using the approved test methods in §115.445. Adopted §115.446(b)(6) imposes the same requirements in existing §115.446(7) with non-substantive technical corrections necessary to comply with current rule formatting standards.

The commission adopts §115.446(b)(7) to require all records to be maintained for at least two years and to make those records available upon request. Adopted §115.446(b)(7) imposes the same requirements in existing §115.446(8) except that adopted §115.446(b)(7) does not require the records to be maintained on site. The commission is adopting this change to reduce the compliance burden for affected sources.

Section 115.449, Compliance Schedules

The commission adopts changing the title of §115.449 from Counties and Compliance Schedules to Compliance Schedules to establish consistency in the rules by listing the compliance schedule for affected units by nonattainment areas instead of by individual counties within each nonattainment area.

The commission adopts amended §115.449(b) to indicate that requirements in existing §115.442 are re-lettered as §115.442(a) and to indicate that requirements in existing §115.446 are re-lettered as §115.446(a).

The commission is deleting §115.449(c) because the new rule requirements affect the sources currently exempted in this subsection.

Existing §115.449(d) is re-lettered as §115.449(c) and amended to indicate that requirements in existing §115.442 are re-lettered as §115.442(a) and to indicate that requirements in existing §115.446 are re-lettered as §115.446(a).

The commission is deleting §115.449(e) because the new rule requirements affect the sources currently exempted in this subsection.

The commission is re-lettering the existing §115.449(f) as §115.449(d) with amendments to clarify §115.442(a) contains the control requirements in existing §115.442 and §115.446(a) contains the monitoring and recordkeeping requirements in existing §115.446.

The commission adopts subsection (e) requiring the owner or operator of a major printing source in the DFW or HGB areas to comply with the requirements in this division no later than March 1, 2011, except as specified in subsection (b) and adopted subsections (c) and (d). The March 1, 2011, compliance date provides affected owners and operators approximately one year to make any necessary changes and ensure that any VOC reductions achieved by the adopted rules will occur prior to the ozone season in the DFW area.

The commission adopts subsection (f) requiring the owner or operator of a minor printing source in the DFW or HGB areas to comply with the requirements in this division no later than March 1, 2012. In response to comments received, the commission is
adoption the March 1, 2012, compliance date to provide affected
owners and operators of these minor sources additional time to
make any necessary changes.

The commission also adopts subsection (g) to require the owner
or operator of an offset lithographic printing line in the DFW or
HGB areas that becomes subject to the requirements of this di-
vision on or after the compliance date specified in subsection (e)
and (f), to comply with the requirements of this division no later
than 60 days after becoming subject.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the
regulatory impact analysis requirements of Texas Government
Code, §2001.0225, and determined that the adopted rulemak-
ing meets the definition of a "major environmental rule" as de-
 fined in that statute. A "major environmental rule" means a rule,
the specific intent of which is to protect the environment or re-
duce risks to human health from environmental exposure, and
that may adversely affect in a material way the economy, a sec-
tor of the economy, productivity, competition, jobs, the environ-
ment, or the public health and safety of the state or a sector of
the state. The adopted rulemaking does not, however, meet
any of the four applicability criteria for requiring a regulatory im-
 pact analysis for a major environmental rule, which are listed in
Code, §2001.0225, applies only to a major environmental rule,
the result of which is to: 1) exceed a standard set by federal law,
unless the rule is specifically required by state law; 2) exceed an
express requirement of state law, unless the rule is specifically
required by federal law; 3) exceed a requirement of a delega-
tion agreement or contract between the state and an agency or
representative of the federal government to implement a state
and federal program; or 4) adopt a rule solely under the general
powers of the agency instead of under a specific state law.

The adopted rules implement the EPA's RACT recommenda-
tions in the 2006 Offset Lithographic and Letterpress Printing
CTG (71 Federal Register 58745, October 5, 2006) that the com-
mission has determined to represent RACT for the DFW and
HGB areas. FCAA, §172(c)(1) requires the SIP for nonattain-
ment areas to include reasonably available control measures,
including RACT, for sources of pollutants identified by the EPA
as required by FCAA, §183(e). FCAA, §182(b)(2) provides that
for certain nonattainment areas, states must revise their SIP to
include RACT for sources of VOC emissions covered by a
CTG document issued after November 15, 1990, and prior to
the area's date of attainment. The adopted rule revisions imple-
ment RACT for offset lithographic printing lines in the DFW and
HGB areas, as required by the FCAA, §172(c)(1). Specifically,
the adopted rules limit the VOC content of solvents used by af-
fected offset lithographic printing facilities in the DFW and HGB
areas.

The adopted rulemaking implements requirements of 42 USC,
§7410, which requires states to adopt a SIP that provides for the
implementation, maintenance, and enforcement of the NAAQS
in each air quality control region of the state. While 42 USC,
§7410 generally does not require specific programs, methods,
or reductions in order to meet the standard, the SIP must include
enforceable emission limitations and other control measures,
means, or techniques (including economic incentives such as
fees, marketable permits, and auctions of emissions rights), as
well as schedules and timetables for compliance as may be
necessary or appropriate to meet the applicable requirements of
this chapter (42 USC, Chapter 85, Air Pollution Prevention and
Control). The provisions of the FCAA recognize that states are
in the best position to determine what programs and controls are
necessary or appropriate in order to meet the NAAQS. This
flexibility allows states, affected industry, and the public to
cooperate on the best methods for attaining the NAAQS for
the specific regions in the state. Even though the FCAA allows
states to develop their own programs, this flexibility does not
relieve a state from developing a program that meets the re-
quirements of 42 USC, §7410. States are not free to ignore the
requirements of 42 USC, §7410, and must develop programs
to assure that their contributions to nonattainment areas are
reduced so that these areas can be brought into attainment
on schedule. Additionally, states have further obligations un-
der FCAA, §172(c)(1) and §182(b)(2) to provide for RACT in
nonattainment areas, such as HGB and DFW. The adopted
rulemaking will implement RACT for offset lithographic printing
facilities in the DFW and HGB areas. Implementation of RACT
is a necessary and required component of developing the SIP
for nonattainment areas as required by 42 USC, §7410.

The requirement to provide a fiscal analysis of regulations in the
Texas Government Code was amended by Senate Bill (SB) 633
during the 75th Legislature, 1997. The intent of SB 633 was to re-
quire agencies to conduct a regulatory impact analysis of extra-
orinary rules. These are identified in the statutory language as
major environmental rules that will have a material adverse im-
 pact and will exceed a requirement of state law, federal law, or a
delated federal program, or are adopted solely under the gen-
eral powers of the agency. With the understanding that this re-
quirement would seldom apply, the commission provided a cost
estimate for SB 633 concluding that "based on an assessment of
rules adopted by the agency in the past, it is not anticipated
that the bill will have significant fiscal implications for the agency
due to its limited application." The commission also noted that
the number of rules that would require assessment under the
provisions of the bill was not large. This conclusion was based,
in part, on the criteria set forth in the bill that exempted adopted
rules from the full analysis unless the rule was a major environ-
mental rule that exceeds a federal law.

As discussed elsewhere in this preamble, the FCAA does not
always require specific programs, methods, or reductions in or-
der to meet the NAAQS; thus, states must develop programs
for each area contributing to nonattainment to help ensure that
those areas will meet the attainment deadlines. Because of the
ongoing need to address nonattainment issues, and to meet the
requirements of 42 USC, §7410, the commission routinely pro-
poses and adopts SIP rules. The legislature is presumed to un-
erstand this federal scheme. If each rule adopted for inclusion
in the SIP was considered to be a major environmental rule that
exceeds federal law, then every SIP rule would require the full
regulatory impact analysis contemplated by SB 633. This con-
clusion is inconsistent with the conclusions reached by the com-
mission in its cost estimate and by the Legislative Budget Board
(LBB) in its fiscal notes. Since the legislature is presumed to
understand the fiscal impacts of the bills it passes, and that pre-
sumption is based on information provided by state agencies
and the LBB, the commission believes that the intent of SB 633 was
only to require the full regulatory impact analysis for rules that are
extraordinary in nature. While the SIP rules will have a broad
impact, the impact is no greater than is necessary or appropriate
to meet the requirements of the FCAA. For these reasons, rules
adopted for inclusion in the SIP fall under the exception in Texas
Government Code, §2001.0225(a), because they are required by
federal law.
The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." Central Power & Light Co. v. Sharp, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); Bullock v. Marathon Oil Co., 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). Cf. Humble Oil & Refining Co. v. Calvert, 414 S.W.2d 172 (Tex. 1967); Dudney v. State Farm Mut. Auto Ins. Co., 89 S.W.3d 884, 893 (Tex. App. Austin 2000); Southwestern Life Ins. Co. v. Montemayor, 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and Coastal Indus. Water Auth. v. Trinity Portland Cement Div., 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of the adopted rulemaking is to protect the environment and to reduce risks to human health by requiring control measures for offset lithographic printing presses that have been determined by the commission to be RACT for the DFW and HGB areas. The adopted rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this adopted rulemaking. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because although the adopted rulemaking meets the definition of a "major environmental rule", it does not meet any of the four applicability criteria for a major environmental rule.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the adopted rulemaking is to implement RACT for the offset lithographic printing lines in the DFW and HGB areas. FCAA, §182(b)(2) provides that for certain nonattainment areas, states must revise their SIP to include RACT for sources of VOC emissions covered by a CTG document issued after November 15, 1990, and prior to the area's date of attainment. In 2006, the EPA published a CTG for Offset Lithographic and Letterpress Printing. Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this adopted rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these adopted rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). The adopted rules fulfill the FCAA requirement to implement RACT in nonattainment areas. These revisions will result in VOC emission reductions in ozone nonattainment areas that may contribute to the timely attainment of the ozone standard and reduced public exposure to VOC. Consequently, the adopted rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined the rulemaking is identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Texas Coastal Management Program (CMP) and will, therefore require that goals and policies of the CMP be considered during the rulemaking process. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that because the rulemaking will only require reductions in the amount of potential air pollutants from offset lithographic facilities, no coastal natural resource areas will be adversely affected by the adopted rules although sources within counties included in the CMP will be required to comply with the amended rule. Therefore, the adopted rulemaking is consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the consistency with the CMP.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 115 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, upon the effective date of the rulemaking, revise their operating permit to include the new Chapter 115 requirements.

PUBLIC COMMENT

The commission held public hearings on October 28, 2009, at 2:00 p.m. and 6:00 p.m. at the Houston-Galveston Area Council offices in Houston; October 29, 2009, at 1:00 p.m. and 3:00 p.m. at the Texas Commission on Environmental Quality headquarters in Austin; and November 2, 2009, at 2:00 p.m. at the Texas Commission on Environmental Quality Region 4 Office in Fort Worth. Question and answer sessions were held 30 minutes prior to the hearings. The October 28, 2009, hearing scheduled for 6:00 p.m. and the October 29, 2009, hearings were not officially opened because no party indicated a desire to provide comment. Two persons presented oral comments at the 2:00 p.m. hearing in Houston regarding the Chapter 115 rulemaking, and one person presented oral comments at the hearing in Fort Worth regarding the Chapter 115 rulemaking.
The public comment period opened on October 9, 2009, and closed on November 9, 2009. Written comments were accepted via mail, fax, and through the eComments system.

Oral comments regarding the Chapter 115 rulemaking were presented by Printing Industries of the Gulf Coast (PIGC), Printer’s Service (PS), and Printing and Imaging Association of MidAmerica (PIAM). Written comments regarding the Chapter 115 rulemaking were provided by EPA, Houston Sierra Club (HSC), and Printing and Imaging Association of MidAmerica (PIAM). In addition, KIDS for Clean Air, the Sustainable Energy and Economic Development Coalition, the Clean Air Institute of Texas, and one individual submitted written comments supporting the comments made by HSC.

RESPONSE TO COMMENTS

Section 115.441, Exemptions

PIAM suggested simplifying the threshold in §115.441 because calculating the 3.0 tpy threshold can be time-consuming and difficult especially for smaller businesses with limited manpower. PIAM suggested basing the rule applicability on quantity of materials purchased. Specifically, PIAM suggested revising the rule to apply to the owner or operator of: a sheet-fed or non-heatset web press who purchased at least 768 gallons of cleaning solvents and fountain solution additives in a 12-month rolling period; or a heatset web press who purchased 5,600 pounds of ink, cleaning solvents, and fountain solutions in a 12-month rolling period.

Basing the exemption criteria for the rule applicability threshold in §115.441 on annual VOC emissions is consistent with other Chapter 115 rule applicability thresholds and is generally consistent with the EPA’s 2006 CTG-recommended applicability threshold. Although the commission acknowledges this method will require additional calculations, this method also provides affected facilities with the flexibility to determine the most appropriate combination of VOC content for inks, fountain solution, and cleaning solvents. The commission’s Small Business and Environmental Assistance Division will work with the regulated community and the Air Quality Division to develop guidance to assist in the proper calculation and demonstration of compliance for these affected sources. Therefore, no changes have been made in response to this comment.

HSC commented that no exemption should be provided for companies to use 110 gallons of cleaning solution. HSC requested the cleaning solution control requirement exemptions in §115.441(b)(5) and (c)(5) be revised to exempt no more than 500 pounds of VOC emissions from cleaning solutions.

The EPA’s 2006 Offset Lithographic and Letterpress Printing CTG recommends exempting up to 110 gallons of cleaning solutions per year from the VOC content limits because there are a small number of cleaning tasks that cannot be carried out using low-VOC cleaning solutions. The commission agrees with the EPA that providing this exemption is appropriate. Additionally, the commenter provided no justification for imposing the more stringent limit. Therefore, no changes were made in response to this comment.

Section 115.442, Control Requirements

EPA commented that work practice requirements for cleaning solutions used in offset lithographic printing operations provide reasonable, cost-effective controls and are an important way to reduce emissions. EPA stated that in order to meet RACT requirements, the commission should either adopt rules implementing the work practice requirements or provide analysis demonstrating that the requirements are satisfied by existing rules. HSC commented that the rule preamble did not provide an adequate explanation of the general housekeeping requirements for cleaning solutions used in offset lithographic printing operations for the public to review and comment on. PIAM suggested that mandating the use of towel handling procedures would have a substantial impact on reducing emissions. PIAM suggested incorporating best management practices, such as towel handling procedures, as a viable low-cost alternative to low-VOC cleaning solutions.

The EPA’s 2006 Offset Lithographic and Letterpress Printing CTG recommends mandating a towel handling program in conjunction with reduced VOC cleaning solution limits. Existing Chapter 115 rules include these work practice requirements for facilities choosing the option to limit the cleaning solution to 70.0% VOC or less; however, these work practice requirements were not proposed in conjunction with the option to use cleaning solution with a VOC vapor pressure of less than 10.0 millimeters of mercury at 68 degrees Fahrenheit (20 degrees Celsius) since the commission expected most facilities were probably voluntarily following similar practices for safety reasons or have required work practices as part of their permit authorization. However, in response to comments received, the commission is revising the rule to include the CTG-recommended work practice requirements for offset lithographic printing operations using cleaning solutions with VOC vapor pressure less than 10.0 millimeters of mercury at 68 degrees Fahrenheit (20 degrees Celsius).

HSC supported requiring pressroom air pressure to be greater than the dryer air pressure to ensure 100.0% VOC capture efficiency in the printing process.

The commission appreciates the support. As noted in the preamble, this requirement is not a new requirement; the rule language was only moved to more appropriately indicate that this is a control requirement and not a monitoring or recordkeeping requirement.

PIGC commented that reducing the amount of alcohol substitutes to 3.0% by weight and no alcohol in the fountain solution would be a significant operational change that could require equipment modifications to accommodate the chemistry change and additional operator training on new procedures. PIAM requested §115.442(b)(1), (2)(C), and (3)(C) be revised to require the EPA’s CTG-recommended fountain solution content limit of 5.0% alcohol substitutes by weight and no alcohol in the fountain solution instead of the commission’s proposed limit of 3.0% alcohol substitutes by weight and no alcohol in the fountain solution.

The EPA’s 2006 CTG recommends limiting the fountain solution content to 5.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. However, the existing Chapter 115 rules limit the fountain solution content to 3.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. Because the existing Chapter 115 rules are incorporated into the EPA-approved SIP, implementing the less stringent CTG-recommended 5.0% limit for sources currently complying with these rules would be backsliding; therefore, the rules must retain the 3.0% limit for sources currently subject to the rule.

However, in response to these comments, the commission has revised the fountain solution content limits as requested for minor printing sources that are not currently subject to these rules.
The commission agrees that imposing the more stringent 3.0% requirement on minor printing sources that are not currently subject to these rules is not necessary to satisfy RACT requirements for this CTG emission source category.

**Section 115.446, Monitoring and Recordkeeping Requirements**

HSC requested the commission revise the recordkeeping requirements in §115.446 to clearly indicate the content and the format of the records maintained to demonstrate continuous compliance with the rule.

The commission generally prefers not to specify the recordkeeping format unless it is necessary for rule compliance. The monitoring and recordkeeping requirements in adopted §115.446(b) require affected owners or operators to maintain sufficient records to demonstrate compliance with all applicable rule requirements; the rules in §115.446(b) ensure rule enforceability while providing affected owners or operators the flexibility to choose the appropriate option for their facility. No changes were made to the rule in response to this comment.

HSC requested the commission revise the recordkeeping requirements in §115.446 to require all records be maintained for at least five years. HSC suggested this change would assist investigators in determining company compliance over a longer period of time.

The commission contends that the two-year record retention time in §115.446 is sufficient to ensure records are adequate for an investigator to determine rule continuous compliance and is consistent with other recordkeeping requirements for various operations using VOC solvents in Chapter 115. Therefore, no changes were made in response to this comment.

PIAM requested the term "continuous" as used in §115.446(b)(2)(A) be defined as at least once every 15 minutes.

The commission agrees with the commenter’s suggestion to clarify the term "continuous" as used in §115.446(b)(5)(A) as monitoring at least once every 15 minutes. The clarification is consistent with the commission’s normal expectations for continuous monitoring and is sufficient for demonstrating compliance with this monitoring requirement. The adopted §115.446(b)(5)(A) has been revised to clarify that operational parameter monitoring systems capable of measuring and recording data at least once every 15 minutes are sufficient to demonstrate compliance with this rule requirement.

PIAM suggested deleting the reference to carbon adsorption and solvent recovery systems in §115.446(b)(2)(A)(ii) and (iii) since this technology cannot be used to control emissions from heatset offset lithographic printing presses.

The commission did not solicit public comment on revising these control requirements for heatset presses and therefore the commenter’s suggested revision is outside of the scope of this rulemaking. The commission appreciates the comment and may take the suggestion into consideration during any future rulemaking. No change was made in response to this comment.

PIAM suggested revising §115.446(b)(3)(B) and (5)(B) to require the use of batch logs to record the calculations used to determine the VOC concentration of each batch of fountain solution and cleaning solution prepared. PIAM suggested that using standardized batch logs would simplify the recordkeeping requirements for affected owners or operators and facilitate compliance investigations for state and local investigators.

The recordkeeping requirements are intended to provide affected owners or operators the flexibility to choose the most appropriate approach for their individual facility. The commission prefers to specify the content instead of the format of the records. No changes were made to the rule based on this comment. However, the commission does agree that the use of a standardized batch log could facilitate compliance with the recordkeeping requirements for some affected sources, and sample batch logs may be included should the executive director decide to produce any guidance documents associated with this rule.

HSC opposed eliminating the requirement in §115.446(b)(3)(A) to monitor fountain solution alcohol concentration once every eight-hour shift. HSC favored requiring both monitoring and recordkeeping, as opposed to just recordkeeping.

The adopted §115.446(b)(3)(A) requires an affected owner or operator to determine the VOC concentration of each batch of fountain solution. Adopted §115.446(b)(3)(A) imposes the same requirements previously included in §115.446(4) except that adopted §115.446(b)(3)(A) eliminated the option to monitor the fountain solution alcohol concentration once per eight-hour shift because this option could allow the use of fountain solution with an unknown concentration and prevent the continuous demonstration of compliance with applicable content limits in §115.442.

The commission is providing an alternative option to the monitoring requirement in §115.446(b)(3)(B) that allows the use of analytical data to determine the VOC concentration of each batch of fountain solution. The rule requires the VOC concentration of each batch of fountain solution to be determined using analytical data that was derived using the approved test methods in §115.445 along with the concentration and the proportion of each material used in the fountain solution. The information provided in these records is equivalent to the measurement data that would be generated using the alternative monitoring device. Additionally, in the 1993 draft Offset Lithographic CTG recommendations, the EPA suggested that recordkeeping requirements may be sufficient to demonstrate compliance with the content limits.

**Section 115.449, Compliance Schedules**

HSC supported revising the rule compliance date to December 1, 2010, because the rules are relatively simple and FCAA requires the HGB area to meet federal clean air standards as soon as possible to protect human health and welfare.

The March 1, 2011, compliance date marks the beginning of the subsequent ozone season for the DFW area following the rule effective date. Additionally, the March 1, 2011, compliance date provides adequate time for owners or operators of affected facilities to determine the most appropriate compliance strategies and implement any necessary changes. No changes have been made in response to this comment.

However, in response to other comments, the commission is adopting a March 1, 2012, compliance date for minor printing sources to provide additional time for these smaller sources to determine the most cost-effective compliance strategies and implement any necessary changes.

**Miscellaneous**
EPA commented that RACT for heatset offset lithographic printing presses should be federally enforceable. EPA requested additional explanation as to why it is reasonable to use permit conditions to implement RACT and requested a copy of the final permit(s) used in this RACT analysis. EPA requested copies of the documentation used to determine that all heatset offset lithographic presses in the DFW area meet RACT including copies of facility-specific information for each heatset press identified with uncontrolled emissions greater than 25 tpy located on a site with total emissions less than 50 tpy when uncontrolled, copies of the final permit(s) used in this analysis, and copies of any other applicable documentation.

The commission maintains that the overall VOC control level in the adopted Chapter 115, Subchapter E, Division 4 rules is equivalent to or more stringent than the EPA's 2006 Offset Lithographic and Letterpress Printing CTG recommendations and sufficient to fulfill RACT for offset lithographic printing operations in the DFW area. The commission must balance arbitrarily implementing the 2006 CTG recommendations with the potential for backsliding, enforceability considerations, and the possible impacts to sources that have already complied with the existing rules.

The commission also notes that in several instances the adopted Chapter 115 content limits are more stringent than EPA's 2006 CTG recommendations. The 2006 CTG recommends limiting the VOC content of cleaning solutions used in offset lithographic printing operations to less than 70.0% VOC by weight in conjunction with work practice standards. The adopted Chapter 115 rules retain the more stringent cleaning solution content limit of 70.0% VOC or less by volume in conjunction with work practice standards. Assuming the VOC in the cleaning solvent used is kerosene, which is the VOC referenced in the 2006 CTG, the adopted Chapter 115 content limit of 70.0% VOC or less by volume for cleaning solutions is equivalent to 66.0% VOC by weight. EPA's 2006 CTG also recommends limiting the fountain solution content to 5.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. To prevent potential backsliding for sources already required to comply with these state regulations, the adopted Chapter 115 rules retain the more stringent fountain solution content limit of 3.0% alcohol substitutes or less by weight and no alcohol in the fountain solution.

The commission maintains that the adopted Chapter 115 rules for heatset offset lithographic presses are at least as stringent as the EPA's 2006 CTG-recommended controls. The EPA's CTG recommends an add-on air pollution control device be required on each individual heatset offset lithographic press with the uncontrolled potential to emit 25 tpy of VOC or more from ink oil evaporated by the dryer. The rules in Chapter 115, Subchapter E, Division 4, require control devices, with a control efficiency of at least 90%, to be installed on heatset offset lithographic presses on a property in the DFW area with total uncontrolled VOC emissions of at least 50 tpy, which includes VOC emissions from ink oils evaporated by the press dryer and VOC in fountain and cleaning solutions. In Table 5-1 of the 1993 draft Offset Lithographic Printing CTG, the EPA estimates that 26% of the total uncontrolled VOC emissions from heatset offset lithographic printing operations are ink oils evaporated by the press dryer. Based on EPA's assumption, an individual heatset press located on a property with total uncontrolled VOC emissions of 50 tpy would emit less than 13 tpy of ink oil VOC from the press dryer. Therefore, the Chapter 115 rules are effectively more stringent than the EPA's 2006 CTG RACT recommendations with regard to the applicability threshold for this control requirement. Additionally, the EPA's 2006 CTG-recommended exempting heatset presses used for book printing and heatset presses with a maximum web width of 22 inches or less from the add-on control device requirements. The existing Chapter 115 regulations do not exempt these sources from the control requirements, and the commission has not adopted these exemptions into the revised rules.

The EPA's CTG recommends requiring control equipment first installed before the effective date of rules implementing the CTG to have an overall control efficiency of 90% and control equipment first installed after the effective date of rules implementing the CTG to have an overall control efficiency of 95%. The commission disagrees with the EPA's CTG recommendation to correlate control device efficiency requirements with the first installation date of the control device regardless of where the equipment was installed. The commission contends imposing this policy may encourage the installation of older, less efficient equipment and may create potential backsliding issues. The policy may also create significant practical enforceability issues for commission investigators with regard to verifying the first installation date of the control equipment.

Regardless of the first installation date of the device, the EPA recommends providing the alternative option to reduce the control device outlet concentration to 20 ppmv as hexane on a dry basis to accommodate situations where the inlet VOC concentration is too low to demonstrate the 90% or 95% control efficiency. The Chapter 115 rules provide affected owners or operators of a heatset offset lithographic printing press the option to operate a control device to reduce VOC emissions from the press dryer exhaust vent by 90% by weight or maintain a maximum dryer exhaust outlet VOC concentration of 20 ppmv. The Chapter 115 alternative concentration limit is substantially preferable because it encourages VOC emission reductions without requiring add-on controls and implementing the EPA's recommended approach would penalize operations that were able to achieve the 20 ppmv limit without the installation of expensive add-on control devices.

Based on this analysis, the commission determined that the adopted Chapter 115 rules for offset lithographic printing operations provide an overall VOC control level that is at least equivalent to the 2006 CTG recommendations and are more effective and enforceable. Therefore, the revised Chapter 115, Subchapter E, Division 4 rules are sufficient to fulfill RACT for offset lithographic printing operations in the DFW and HGB areas. The commission is not relying on permit conditions to satisfy RACT requirements for this CTG emission source category and therefore has not provided the requested permit information.

EPA disagreed with the statement in the preamble to the offset lithographic printing rule revision that "the commission does not agree that applying RACT standards to future equipment installations is necessary to meet the mandates of the FCAA under §172(c)(1), §182(b)(2), and §182(f)." EPA stated that RACT should apply to both existing and new sources. EPA added that such statements may have implications for RACT approbability and requested the commission remove this language as well as any similar statements included elsewhere in the revisions.

The commission did not propose an exemption for new offset lithographic printing sources as part of this rulemaking. The statement referenced by the commenter was included in the preamble to the proposed rules as part of the justification for not implementing the EPA's 2006 CTG recommendation to require...
heatset presses installed after the effective date of the rule-making to meet a more stringent control efficiency than required for those heatset presses installed prior to the rule effective date. However, as requested, the commission has removed this statement from the rule preamble.

HSC commented on the statement in the preamble to the offset lithographic printing rule revision that "the commission does not agree that applying RACT standards to future equipment installations is necessary to meet the mandates of the FCAA under §172(c)(1), §182(b)(2), and §182(f)." HSC commented that the commission has stated publicly that additional reductions are necessary to achieve the ozone standard. HSC suggested the commission implement RACT in order to reduce risks to human health and welfare and advance attainment of the ozone standard in the HGB area.

In response to comments received from the EPA, the statement referenced by HSC was removed from the rule preamble. The statement referenced by the commenter was included at proposal as part of a discussion about the EPA's 2006 Offset Lithographic and Letterpress Printing CTG recommendations. Specifically, the EPA's CTG recommends requiring control equipment first installed before the effective date of rules implementing the CTG to have an overall control efficiency of 90% and control equipment first installed after the effective date of rules implementing the CTG to have an overall control efficiency of 95%. The commission disagrees with the EPA's CTG recommendation to correlate control device efficiency requirements with the first installation date of the control device regardless of where the equipment was installed. The commission contends imposing this policy may encourage the installation of older, less efficient equipment and may create potential backsliding issues. The policy may also create significant practical enforceability issues for commission investigators with regard to verifying the first installation date of the control equipment. However, in response to comments received on the offset lithographic printing rule revision, the commission has removed this statement from the rule preamble.

Additionally, as described in Appendix D: Reasonably Available Control Technology Analysis of the HGB Attainment Demonstration SIP revision for the 1997 Eight-Hour Ozone Standard being adopted concurrently with this revision, the commission determined that all technologically and economically feasible RACT controls are implemented. The commission's analysis demonstrates that the RACT requirements are being fulfilled in the HGB area by: 1) identifying all CTG source categories of nitrogen oxides (NOx) and VOC emissions and submitting negative declarations for categories where there are no emission sources within the HGB area; 2) identifying all non-CTG major sources of NOx and VOC emissions; 3) identifying the state regulation that implements or exceeds RACT for each applicable CTG source category or non-CTG major emission source; and 4) describing the basis for concluding that these regulations fulfill RACT.

PIGC noted that the 1990 FCAA states that air quality standards will be established and these standards must be attained and maintained to protect public health. PIGC commented that the printing industry is not a significant contributor to the overall air emissions in the DFW and HGB areas, especially considering the intense industrial nature of the petrochemical and energy industries in the HGB area. PIGC commented there are five to seven offset lithographic facilities in the HGB area that are permitted and already meeting best available control technology standards. PIGC estimated there are 80 companies in the HGB area that emit more than 3.0 tpy of VOC and 70% of these companies emit less than 10 tpy of VOC. PIGC commented that given the relatively low number of HGB area businesses that would be affected in the HGB area, the overall health benefit to the general public is negligible, and the minor environmental benefit does not outweigh the high cost to small businesses.

PIAM commented there are less than 140 printing companies in the DFW area that emit more than 3.0 tpy of VOC, estimated that 60% of these companies emit less than 10 tpy of VOC, and a good portion of the companies with more than 10 tpy are presently permitted and using BACT. PIAM concluded that the actual reductions achieved through this rulemaking will be minuscule in terms of the entire emissions inventory.

PS commented that the changes necessary to comply with the rules will cause considerable cost and disruption to the affected printing companies for a very small impact to the local environment.

The commission is aware that printing sources do not constitute a large proportion of the emissions in the DFW and HGB areas. However, revisions to the Chapter 115 offset lithographic printing rules are necessary to fulfill FCAA RACT requirements. In accordance with FCAA, §172(c)(1) and §182(b)(2), the state is required to revise the DFW and HGB SIP to include RACT for VOC emission sources addressed in a CTG document issued between November 15, 1990, and the area's attainment date. On October 5, 2006, the EPA published a CTG document in lieu of national regulations for VOC emissions from Offset Lithographic Printing and Letterpress Printing (71 Federal Register 58745). The purpose of the offset lithographic printing rule revision is to implement RACT for this CTG emission source category.

PIAM commented that although it was supportive of most of the rules, it questioned the overall cost benefit of some of the changes. PIAM commented that many companies may find it difficult to absorb these additional compliance costs because the offset lithographic printing industry is currently undergoing massive restructuring from the digital media impact and economic duress because of the recession. PIAM commented the commission significantly underestimated the compliance costs associated with the cleaning solution content limits in §115.442(b)(4) and suggested using compliant solvents would likely cost 40% to 60% more than the cleaning solvents currently used by the printing industry. PIAM commented that changing from using alcohol in the fountain to an alcohol substitute increases the material costs for solvents by 40% to 60%, requires ink rollers to be re-configured or re-milled to meet different standards, requires additional training for press crews, and increases material wastes. PIAM estimated the cost of compliance with the rule requirements at $10,000 per ton of VOC reduction, estimated the average annual cost per facility would be $25,000, and provided additional details on how the cost estimate was derived.

PIGC commented that although it supports the portions of the rules that follow the EPA's 2006 Offset Lithographic and Letterpress Printing CTG recommendations, it is concerned with the requirements for the low-VOC cleaning solvents because the higher cost and reduced effectiveness will significantly increase production costs. PIGC commented the additional costs incurred from complying with these new requirements will be passed on to the consumer and given the economic situation these additional costs could drive more printers out of business thus eliminating jobs, sales tax revenue, and property tax revenue. PIGC commented that requiring the use of low-VOC fountain solutions and
cleaning solutions will increase product costs by approximately 40% over the traditional high-VOC solutions and estimated an average company could spend an additional $4,600 per year more for the same amount of low-VOC solution. PIGC commented that since low-VOC cleaning solution is generally less effective than traditional higher VOC products, more cleaning solution and time are necessary to adequately clean the press equipment and stated that given the average number of jobs run per day and the average number of presses most companies have, using low-VOC cleaning solution could increase labor cost by $14,400 to $19,200 per year. PIGC commented that while low vapor pressure cleaning solvents cost more than traditional cleaning solvents, they are a more effective alternative and cost less than the low-VOC cleaning solutions.

PS commented that low-VOC cleaning solutions take longer to clean and evaporate from the surface and an additional 20% to 40% more solvent is needed in order to effectively clean the printing blankets and cylinders. PS commented that low-VOC cleaning solutions leave residue on the press rollers and an additional 20% to 30% more solution is needed to remove the residue. PS commented that an additional rinsing agent was required to remove the residue left on the press system by some of the low-VOC cleaning solutions, which increase the overall time and expense associated with the cleaning process. PS commented that cleaning solutions used on presses with automatic wash systems have typically been specified or approved for use by the press equipment manufacturer. PS stated the press equipment manufacturer will need to evaluate and approve the low-VOC cleaning solutions to ensure compatibility with the existing automatic wash systems. PS commented that low-VOC cleaning solutions cost $825 to $900 per 55 gallon drum of solvent while the traditional high-VOC cleaning solutions only cost $500 per 55 gallon drum of solvent.

The commission agrees that the cost estimates provided in the EPA’s 2006 CTG and the estimates provided in the preamble to the proposed Chapter 115 rulemaking may underestimate the actual cost to affected sources in some situations. However, the commission has also reviewed other regulatory impact studies that identified feasible compliance options that are estimated to cost substantially less per ton of VOC emission reductions than the estimates provided in these comments. Although the exact fiscal impact associated with the adopted rules is expected to vary depending on the compliance options chosen and other site-specific variables, the commission maintains that the adopted rules are economically feasible and necessary to satisfy RACT requirements for this CTG emission source category.

To mitigate the financial impact of these environmental regulations, the adopted rules provide flexible compliance options for controlling and monitoring VOC emissions. The adopted rules provide several options for complying with the cleaning solution content limits including: reducing the VOC content of the cleaning solution; reducing the VOC content of the cleaning solution in conjunction with work practice standards; and using low vapor pressure cleaning solutions in conjunction with work practice standards. The adopted rules also provide several options for compliance with fountain solution content limits including: reducing the alcohol content of the solution; reducing the alcohol content of the solution in combination with add-on refrigeration equipment; and using reformulated materials to eliminate alcohol in the solution. The adopted rules also provide options for monitoring the concentration of the fountain and cleaning solutions. The exact fiscal impacts of these rules will vary depending on the compliance and monitoring options chosen and other site-specific variables like types of solution used and methods of operation. The commission expects affected owners or operators will choose the options that are the most cost-effective for their operation.

In addition, the commission is extending the compliance date to provide an additional year for minor printing sources to comply with the rule requirements. The commission is adopting the March 1, 2012, compliance date for minor printing sources to provide additional time for these facilities to determine the most cost-effective compliance strategies and implement any necessary changes.

PIGC commented that 95% of commercial printers are small businesses with fewer than 100 employees and 65% have fewer than 10 employees. PIGC added that in the Texas Gulf Coast region, there are less than 20 printers that employ more than 100 people. PIGC commented that given the current economic situation, more flexibility and options must be offered to small businesses with limited financial and technological resources.

The commission agrees that it is important to provide small businesses with flexible compliance options to mitigate the financial impact of these environmental regulations. For reasons discussed elsewhere in this preamble, the commission has revised the offset lithographic printing rules to include additional flexibility for small sources.

For the purpose of providing more flexibility to small sources, the commission examined the proposed fountain solution content limits. The EPA’s 2006 CTG recommends limiting the fountain solution content to 5.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. However, the existing Chapter 115 rules limit the fountain solution content to 3.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. Since the existing Chapter 115 rules are incorporated into the EPA-approved SIP, implementing the less stringent CTG-recommended 5.0% limit for sources currently complying with these rules would be backsliding; therefore, the rules must retain the 3.0% limit for sources currently subject to the rules. However, the commission has revised the fountain solution content limits to 5.0% alcohol substitutes or less by weight and no alcohol in the fountain solution for minor printing sources that are not currently subject to these rules.

Additionally, the commission is extending the rule compliance date for smaller sources to March 1, 2012, to provide adequate time for compliance planning and preparation.

HSC commented that the 1999 study “Emissions Inventory for Texas Graphic Arts Area Sources” is too old to use to identify small or micro-businesses that would potentially be affected by this rulemaking. HSC added that the printing industry has changed considerably in the past decade, and small sheet-fed and traditional presses have been replaced by Xerox™ style printing operations that rely on dry ink cartridges.

The commission agrees that the printing industry has changed considerably in recent years. However, the 1999 study “Emissions Inventory for Texas Graphic Arts Area Sources” is the most recent available analysis of area source offset lithographic printing facilities in Texas. The commission agrees that many printing companies may be using more advanced technology. However, the commission maintains that there are offset lithographic printing operations in the DFW and HGB areas and the adopted rules are necessary to fulfill RACT requirements for these sources. In addition, comments received on this rulemaking and discussed
elsewhere in this preamble support the commission’s conclusion that the majority of the offset lithographic printing operations in the state are small businesses.

STATUTORY AUTHORITY

The new and amended sections are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new and amended sections are also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission’s purpose to safeguard the state’s air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state’s air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state’s air. The new and amended sections are also adopted under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe the sampling methods and procedures to determine compliance with its rules. The new and amended sections are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, et seq., which requires states to submit state implementation plan revisions that specify the manner in which the NAAQS will be achieved and maintained within each air quality control region of the state.

The new and amended sections implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021, and FCAA, 42 USC, §§7401 et seq.

§115.440. Applicability and Definitions.

(a) Applicability. The provisions in this division (relating to Offset Lithographic Printing) apply to offset lithographic printing lines located in the Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions).

(b) Definitions. Unless specifically defined in the Texas Clean Air Act (Texas Health and Safety Code, Chapter 382) or in §§3.2, 101.1, and 115.10 of this title (relating to Definitions), the terms in this division have the meanings commonly used in the field of air pollution control. In addition, the following meanings apply unless the context clearly indicates otherwise:

(1) Alcohol—Any of the hydroxyl-containing organic compounds with a molecular weight equal to or less than 74.12, which includes methanol, ethanol, propanol, and butanol.

(2) Alcohol substitutes—Nonalcohol additives that contain volatile organic compounds and are used in the fountain solution to reduce the surface tension of water or prevent ink piling.

(3) Batch—A supply of fountain solution or cleaning solution that is prepared and used without alteration until completely used or removed from the printing process.

(4) Cleaning solution—Liquids used to remove ink and debris from the operating surfaces of the printing press and its parts.

(5) Fountain solution—A mixture of water, nonvolatile printing chemicals, and a liquid additive that reduces the surface tension of the water so that it spreads easily across the printing plate surface. The fountain solution wets the non-image areas so that the ink is maintained within the image areas.

(6) Heatset—Any operation where heat is required to evaporate ink oil from the printing ink.

(7) Lithography—A plane-o-graphic printing process where the image and non-image areas are on the same plane of the printing plate. The image and non-image areas are chemically differentiated so the image area is oil receptive and the non-image area is water receptive.

(8) Major printing source—All offset lithographic printing lines located on a property with combined uncontrolled emissions of volatile organic compounds (VOC) greater than or equal to:

(A) 50 tons of VOC per calendar year in the Dallas-Fort Worth area, as defined in §115.10 of this title (relating to Definitions); or

(B) 25 tons of VOC per calendar year in the Houston-Galveston-Brazoria area, as defined in §115.10 of this title.

(9) Minor printing source—All offset lithographic printing lines located on a property with combined uncontrolled emissions of volatile organic compounds (VOC) less than:

(A) 50 tons of VOC per calendar year in the Dallas-Fort Worth area, defined in §115.10 of this title (relating to Definitions); or

(B) 25 tons of VOC per calendar year in the Houston-Galveston-Brazoria area, as defined in §115.10 of this title.

(10) Non-heatset—Any operation where the printing inks are set without the use of heat. For the purposes of this division, ultraviolet-cured and electron beam-cured inks are considered non-heatset.

(11) Offset lithography—A printing process that transfers the ink film from the lithographic plate to an intermediary surface (blanket) that, in turn, transfers the ink film to the substrate.

(12) Volatile organic compound (VOC) composite partial pressure—The sum of the partial pressures of the compounds that meet the definition of VOC in §101.1 of this title (relating to Definitions). The VOC composite partial pressure is calculated as follows. Figure: 30 TAC §115.440(b)(12)

§115.441. Exemptions.

(a) In the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions), the owner or operator of all offset lithographic printing lines located on a property with combined emissions of volatile organic compounds (VOC) less than 3.0 tons per calendar year (tpy) when uncontrolled, is exempt from the requirements in this division (relating to Offset Lithographic Printing) except as specified in §115.446 of this title (relating to Monitoring and Recordkeeping Requirements).

(b) In the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, the owner or operator of a minor printing source, as defined in §115.440 of this title (relating to Applicability and Definitions):

(1) is exempt from the requirements in this division until March 1, 2012;
(2) may exempt up to 110 gallons of cleaning solution per calendar year from the content limits in §115.442(c)(1) of this title (relating to Control Requirements);

(3) may exempt any press with a total fountain solution reservoir less than 1.0 gallons from the fountain solution content limits in §115.442(c)(2) - (4) of this title; and

(4) may exempt any sheet-fed press with a maximum sheet size of 11.0 inches by 17.0 inches or less from the fountain solution content limits in §115.442(c)(2) of this title.

(c) Beginning March 1, 2011, the requirements in §115.442(a) of this title and §115.446(a) of this title no longer apply in the Dallas-Fort Worth and Houston-Galveston-Brazoria areas.

§115.442. Control Requirements.

(a) In the Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions), the following control requirements apply. Beginning March 1, 2011, this subsection no longer applies in the Dallas-Fort Worth and Houston-Galveston-Brazoria areas.

(1) The owner or operator of an offset lithographic printing line that uses solvent-containing ink shall limit emissions of volatile organic compounds (VOC) as follows.

(A) The owner or operator of a heatset web offset lithographic printing press that uses alcohol in the fountain solution shall maintain total fountain solution alcohol to 5.0% or less (by volume). Alternatively, a standard of 10.0% or less (by volume) alcohol may be used if the fountain solution containing alcohol is refrigerated to less than 60 degrees Fahrenheit (15.5 degrees Celsius).

(B) The owner or operator of a non-heatset web offset lithographic printing press that prints newspaper and that uses alcohol in the fountain solution shall eliminate the use of alcohol in the fountain solution. Nonalcohol additives or alcohol substitutes can be used to accomplish the total elimination of alcohol use.

(C) The owner or operator of a non-heatset web offset lithographic printing press that does not print newspaper and that uses alcohol in the fountain solution shall maintain the use of alcohol at 5.0% or less (by volume). Alternatively, a standard of 10.0% or less (by volume) alcohol may be used if the fountain solution is refrigerated to less than 60 degrees Fahrenheit (15.5 degrees Celsius).

(D) The owner or operator of a sheet-fed offset lithographic printing press shall maintain the use of alcohol at 10.0% or less (by volume). Additionally, a standard of 12.0% or less (by volume) alcohol may be used if the fountain solution is refrigerated to less than 60 degrees Fahrenheit (15.5 degrees Celsius).

(E) The owner or operator of any type of offset lithographic printing press shall be considered in compliance with the fountain solution limitations of this paragraph if the only VOC in the fountain solution are nonalcohol additives or alcohol substitutes, so that the concentration of VOC in the fountain solution is 3.0% or less (by weight). The fountain solution must not contain any isopropyl alcohol.

(F) The owner or operator of an offset lithographic printing press shall reduce VOC emissions from cleaning solutions by one of the following methods:

(i) using cleaning solutions with a VOC content of 50% or less (by volume, as used);

(ii) using cleaning solutions with a VOC content of 70% or less (by volume, as used) and incorporating a towel handling program that ensures that all waste ink, solvents, and cleanup rags are stored in closed containers until removed from the site by a licensed disposal/cleaning service; or

(iii) using cleaning solutions with a VOC composite partial vapor pressure less than or equal to 10.0 millimeters of mercury at 68 degrees Fahrenheit (20 degrees Celsius).

(2) The owner or operator of a heatset offset lithographic printing press shall operate a control device to reduce VOC emissions from the press dryer exhaust vent by 90% by weight or maintain a maximum dryer exhaust outlet VOC concentration of 20 parts per million by volume (ppmv), whichever is less stringent when the press is in operation. The dryer air pressure must be lower than the pressroom air pressure at all times when the press is operating to ensure the dryer has a capture efficiency of 100%.

(b) In the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, the following control requirements apply to the owner or operator of a major printing source, as defined in §115.440 of this title (relating to Applicability and Definitions), in accordance with the appropriate compliance date specified in §115.449(c) and (g) of this title (relating to Compliance Schedules).

(1) The owner or operator of an offset lithographic printing press shall limit the VOC content of the cleaning solution, as applied, to:

(A) 50.0% VOC or less by volume;

(B) 70.0% VOC or less by volume if the facility has a towel handling program in place that ensures all waste ink, solvents, and cleanup rags are stored in closed containers until removed from the site by a licensed disposal or cleaning service;

(C) a VOC composite partial vapor pressure less than or equal to 10.0 millimeters of mercury at 68 degrees Fahrenheit (20 degrees Celsius) if the facility has a towel handling program in place that ensures all waste ink, solvents, and cleanup rags are stored in closed containers until removed from the site by a licensed disposal or cleaning service.

(2) The owner or operator of a sheet-fed offset lithographic printing press shall limit the VOC content of the fountain solution, as applied, to:

(A) 5.0% alcohol or less by weight;

(B) 8.5% alcohol or less by weight if the fountain solution is refrigerated below 60 degrees Fahrenheit (15.5 degrees Celsius); or

(C) 3.0% alcohol substitutes or less by weight and no alcohol in the fountain solution.

(3) The owner or operator of a non-heatset web offset lithographic printing press shall limit the VOC content of the fountain solution, as applied, to 3.0% alcohol substitutes or less by weight and no alcohol in the fountain solution.

(4) The owner or operator of a heatset web offset lithographic printing press shall limit the VOC content of the fountain solution, as applied, to:

(A) 1.6% alcohol or less by weight;

(B) 3.0% alcohol or less by weight if the fountain solution is refrigerated below 60 degrees Fahrenheit (15.5 degrees Celsius); or

(C) 3.0% alcohol substitutes or less by weight and no alcohol in the fountain solution.
(5) The owner or operator of a heatset offset lithographic printing press shall operate a control device to reduce VOC emissions from the press dryer exhaust vent by at least 90% by weight or maintain a maximum dryer exhaust outlet VOC concentration of 20 ppmv or less, whichever is less stringent when the press is in operation. The dryer air pressure must be lower than the pressroom air pressure at all times when the press is operating to ensure the dryer has a capture efficiency of 100%.

c) In the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, the following control requirements apply to the owner or operator of a minor printing source, as defined in §115.440 of this title, in accordance with the appropriate compliance date specified in §115.449(f) and (g) of this title.

(1) The owner or operator of an offset lithographic printing press shall limit the VOC content of the cleaning solution, as applied, to:

(A) 50.0% VOC or less by volume;

(B) 70.0% VOC or less by volume if the facility has a towel handling program in place that ensures all waste ink, solvents, and cleanup rags are stored in closed containers until removed from the site by a licensed disposal or cleaning service; or

(C) a VOC composite partial vapor pressure less than or equal to 10.0 millimeters of mercury at 68 degrees Fahrenheit (20 degrees Celsius) if the facility has a towel handling program in place that ensures all waste ink, solvents, and cleanup rags are stored in closed containers until removed from the site by a licensed disposal or cleaning service.

(2) The owner or operator of a sheet-fed offset lithographic printing press shall limit the VOC content of the solution, as applied, to:

(A) 5.0% alcohol or less by weight;

(B) 8.5% alcohol or less by weight if the fountain solution is refrigerated below 60 degrees Fahrenheit (15.5 degrees Celsius); or

(C) 5.0% alcohol substitutes or less by weight and no alcohol in the fountain solution.

(3) The owner or operator of a non-heatset web offset lithographic printing press shall limit the VOC content of the fountain solution, as applied, to 5.0% alcohol substitutes or less by weight and no alcohol in the fountain solution.

(4) The owner or operator of a heatset web offset lithographic printing press shall limit the VOC content of the fountain solution, as applied, to:

(A) 1.6% alcohol or less by weight;

(B) 3.0% alcohol or less by weight if the fountain solution is refrigerated below 60 degrees Fahrenheit (15.5 degrees Celsius); or

(C) 5.0% alcohol substitutes or less by weight and no alcohol in the fountain solution.

§115.443. Alternate Control Requirements.

In the Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions), alternate methods of demonstrating and documenting continuous compliance with the applicable control requirements or exemption criteria in this division (relating to Offset Lithographic Printing) may be approved by the executive director in accordance with §115.910 of this title (relating to Availability of Alternate Means of Control) if emission reductions are demonstrated to be substantially equivalent.


In the Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions), compliance with the requirements in this division (relating to Offset Lithographic Printing) must be determined by applying the following test methods, as appropriate:

(1) Test Methods 1-4 (40 Code of Federal Regulations (CFR) Part 60, Appendix A) for determining flow rates;

(2) Test Method 24 (40 CFR Part 60, Appendix A) for determining the volatile organic compound content and density of printing inks and related coatings;

(3) Test Method 25 (40 CFR Part 60, Appendix A) for determining total gaseous organic emissions as carbon with the modification that the probe and filter shall be heated to the gas stream temperature, typically closer to 350 degrees Fahrenheit (177 degrees Celsius) to prevent condensation;

(4) Test Methods 25A or 25B (40 CFR Part 60, Appendix A) for determining total gaseous organic concentrations using flame ionization or nondispersive infrared analysis;

(5) the United States Environmental Protection Agency guidelines series document "Procedures for Certifying Quantity of Volatile Organic Compounds Emitted by Paint, Ink, and Other Coatings" (EPA-450/3-84-019, effective December 1984);

(6) additional performance test procedures described in 40 CFR §60.444 (effective October 18, 1983);

(7) minor modifications to these test methods if approved by the executive director; and

(8) test methods other than those specified in this section if validated by 40 CFR Part 63, Appendix A, Test Method 301 (effective December 29, 1992) and approved by the executive director.

§115.446. Monitoring and Recordkeeping Requirements.

(a) In the Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions), the following monitoring and recordkeeping requirements apply. Beginning March 1, 2011, this subsection no longer applies in the Dallas-Fort Worth and Houston-Galveston-Brazoria areas.

(1) The owner or operator of a heatset offset lithographic printing press shall install, calibrate, maintain, and operate a temperature monitoring device, according to the manufacturer’s instructions, at the outlet of the control device. The temperature monitoring device must be equipped with a continuous recorder and must have an accuracy of ±0.5 degrees Fahrenheit, or alternatively ±1.0% of the temperature being monitored.

(2) The owner or operator of any offset lithographic printing press shall install and maintain monitors to continuously measure and record operational parameters of any emission control device installed to meet applicable control requirements on a regular basis. Such records must be sufficient to demonstrate proper functioning of those devices to design specifications, including:

(A) the exhaust gas temperature of direct-flame incinerators or the gas temperature immediately upstream and downstream of any catalyst bed;

(B) the total amount of volatile organic compounds (VOC) recovered by a carbon adsorption or other solvent recovery system during a calendar month; and
(C) the exhaust gas VOC concentration of any carbon adsorption system, as defined in §115.10 of this title, to determine if breakthrough has occurred.

(3) The dryer pressure must be maintained lower than the press room air pressure such that air flows into the dryer at all times when the offset lithographic printing press is operating. A 100% emissions capture efficiency for the dryer must be demonstrated using an air flow direction measuring device.

(4) The owner or operator of any offset lithographic printing press shall monitor fountain solution alcohol concentration with a refractometer or a hydrometer that is corrected for temperature at least once per eight-hour shift or once per batch, whichever is longer. The refractometer or hydrometer must have a visual, analog, or digital readout with an accuracy of 0.5% VOC. A standard solution must be used to calibrate the refractometer for the type of alcohol used in the fountain. The VOC content of the fountain solution may be monitored with a conductivity meter if it is determined that a refractometer or hydrometer cannot be used for the type of VOC in the fountain solution. The conductivity meter reading for the fountain solution must be referenced to the conductivity of the incoming water.

(5) The owner or operator of any offset lithographic printing press using refrigeration equipment on the fountain solution in order to comply with §115.442(a)(1)(A), (C), or (D) of this title (relating to Control Requirements) shall monitor the temperature of the fountain solution reservoir at least once per hour. Alternatively, the owner or operator of any offset lithographic printing press using refrigeration equipment on the fountain solution shall install, maintain, and continuously operate a temperature monitor of the fountain solution reservoir. The temperature monitor must be attached to a continuous recording device such as a strip chart, recorder, or computer.

(6) For any offset lithographic printing press with automatic cleaning equipment, flow meters are required to monitor water and cleaning solution flow rates. The flow meters must be calibrated so that the VOC content of the mixed solution complies with the requirements of §115.442(a)(1) of this title.

(7) The owner or operator of any offset lithographic printing press shall maintain the results of any testing conducted at an affected facility in accordance with the provisions specified in §115.445 of this title (relating to Approved Test Methods).

(8) The owner or operator of any offset lithographic printing press shall maintain all records at the affected facility for at least two years and make such records available upon request to authorized representatives of the executive director, the United States Environmental Protection Agency, or any local air pollution agency with jurisdiction.

(b) In the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, the following monitoring and recordkeeping requirements apply in accordance with the appropriate compliance date specified in §115.449(e) - (g) of this title (relating to Compliance Schedules).

(1) The owner or operator of an offset lithographic printing press claiming an exemption in §115.441 of this title (relating to Exemptions) shall maintain records sufficient to demonstrate continuous compliance with the applicable exemption criteria. For example, maintaining records of ink, cleaning solvent, and fountain solution usage may be sufficient to demonstrate compliance with the exemption provided in §115.441(a) of this title for sources located on a property with combined VOC emissions less than 3.0 tpy when uncontrolled.

(2) The owner or operator of an offset lithographic printing press shall use one of the following options to demonstrate compliance with the cleaning solution content limits in §115.442(b)(1) or (c)(1) of this title.

(A) Flow meters must be used to monitor the water and cleaning solution flow rates on a press with automatic cleaning equipment. The flow meters must be installed, maintained, and operated according to the manufacturer’s instructions. The flow meters must be calibrated so that the VOC concentration of the cleaning solution complies with the requirements of §115.442(b)(1) or (c)(1) of this title. Records must be sufficient to demonstrate continuous compliance with the cleaning solution content limits in §115.442(b)(1) or (c)(1) of this title.

(B) The VOC concentration of each batch of cleaning solution must be determined using analytical data derived from the material safety data sheet (MSDS) or equivalent information from the supplier that was derived using the approved test methods in §115.445 of this title. The concentration of all VOC used to prepare the batch and, if diluted prior to use, the proportions that each of these materials is used must be recorded for each batch of cleaning solution. Records must be sufficient to demonstrate continuous compliance with the cleaning solution content limits in §115.442(b)(1) or (c)(1) of this title.

(3) The owner or operator of an offset lithographic printing press shall use one of the following options to demonstrate compliance with the fountain solution content limits in §115.442(b)(2) - (4) or (c)(2) - (4) of this title.

(A) The VOC concentration of each batch of fountain solution must be monitored using a refractometer or a hydrometer that is corrected for temperature. The refractometer or hydrometer must have a visual, analog, or digital readout with an accuracy of 0.5% VOC. A standard solution must be used to calibrate the refractometer for the type of alcohol used in the fountain solution. The VOC content of the fountain solution may be monitored with a conductivity meter if it is determined that a refractometer or hydrometer cannot be used for the type of VOC in the fountain solution. The conductivity meter reading for the fountain solution must be referenced to the conductivity of the incoming water. Records must be sufficient to demonstrate continuous compliance with the fountain solution content limits in §115.442(b)(2) - (4) or (c)(2) - (4) of this title.

(B) The VOC concentration of each batch fountain solution must be determined using analytical data from the MSDS or equivalent information from the supplier that was derived using the approved test methods in §115.445 of this title. The concentration of all alcohols or alcohol substitutes used to prepare the batch and, if diluted prior to use, the proportions that each of these materials is used must be recorded for each batch of fountain solution. Records must be sufficient to demonstrate continuous compliance with the fountain solution content limits in §115.442(b)(2) - (4) or (c)(2) - (4) of this title.

(4) The owner or operator of an offset lithographic printing press using refrigeration equipment on the fountain solution reservoir shall monitor and record the fountain solution temperature at least once per hour. Temperature monitoring devices must be installed, maintained, and operated according to the manufacturer’s specifications. Records must be sufficient to demonstrate continuous compliance with the fountain solution content limits in §115.442(b)(2) and (4) or (c)(2) and (4) of this title.

(5) The owner or operator of a headset web offset lithographic printing press shall comply with the following monitoring and recordkeeping requirements to demonstrate continuous compliance with the control requirements in §115.442(b)(5) of this title.

(A) Operational parameters of any emission control device installed to comply with the requirements in §115.442(b)(5) of this
title must be continuously measured and recorded. Monitors must be installed, calibrated, maintained, and operated according to the manufacturer’s instructions. Temperature monitors must be equipped with a continuous recorder and have an accuracy of ±0.5 degrees Fahrenheit or ±1.0% of the temperature being monitored, whichever is less stringent. Measuring and recording the operational parameters of the control device at least once every 15 minutes is sufficient to demonstrate compliance with this subparagraph. Records must be sufficient to demonstrate proper functioning of the device to design specifications and must include:

(i) the exhaust gas temperature of direct-flame incinerators and/or the gas temperature immediately upstream and downstream of any catalyst bed;

(ii) the total amount of VOC recovered by a carbon adsorption system or other solvent recovery system per calendar month; and

(iii) the exhaust gas VOC concentration of any carbon adsorption system to determine if breakthrough has occurred.

(B) An air flow direction measuring device must be used to demonstrate the dryer meets the 100% capture efficiency required in §115.442(b)(5) of this title.

(6) The owner or operator of an offset lithographic printing press shall maintain the results of any tests conducted using the approved test methods in §115.445 of this title.

(7) The owner or operator of an offset lithographic printing press shall maintain all records for at least two years and make such records available upon request to authorized representatives of the executive director, the United States Environmental Protection Agency, or any local air pollution agency with jurisdiction.

§115.449. Compliance Schedules.

(a) In El Paso County, all offset lithographic printing presses must be in compliance with §§115.442, 115.443, 115.445, and 115.446 of this title (relating to Control Requirements; Alternate Control Requirements; Approved Test Methods; and Monitoring and Recordkeeping Requirements) as soon as practicable, but no later than November 15, 1996.

(b) In Collin, Dallas, Denton, and Tarrant Counties, all offset lithographic printing presses on a property that, when uncontrolled, emit a combined weight of volatile organic compounds (VOC) equal to or greater than 50 tons per calendar year, must be in compliance with §§115.442(a), 115.443, 115.445, and 115.446(a) of this title as soon as practicable, but no later than December 31, 2000.

(c) In Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, all offset lithographic printing presses on a property that, when uncontrolled, emit a combined weight of VOC equal to or greater than 25 tons per calendar year, must be in compliance with §§115.442(a), 115.443, 115.445, and 115.446(a) of this title as soon as practicable, but no later than December 31, 2002.

(d) In Ellis, Johnson, Kaufman, Parker, and Rockwall Counties, the owner or operator of all offset lithographic printing presses on a property that, when uncontrolled, emit a combined weight of VOC equal to or greater than 50 tons per calendar year, shall comply with §§115.442(a), 115.443, 115.445, and 115.446(a) of this title as soon as practicable, but no later than March 1, 2009.

(e) The owner or operator of a major printing source, as defined in §115.440 of this title (relating to Applicability and Definitions), in the Dallas-Fort Worth or Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions), shall comply with the requirements in this division no later than March 1, 2011, except as specified in subsections (b), (c), and (d) of this section.

(f) The owner or operator of a minor printing source, as defined in §115.440 of this title, in the Dallas-Fort Worth or Houston-Galveston-Brazoria areas, shall comply with the requirements in this division no later than March 1, 2012.

(g) The owner or operator of an offset lithographic printing line in the Dallas-Fort Worth or Houston-Galveston-Brazoria areas that becomes subject to this division on or after the date specified in subsections (e) or (f) of this section, shall comply with the requirements in this division no later than 60 days after becoming subject.

This agency 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 March 12, 2010.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 363. FINANCIAL ASSISTANCE PROGRAMS

SUBCHAPTER E. ECONOMICALLY DISTRESSED AREAS

DIVISION 2. COLONIA SELF-HELP PROGRAM

31 TAC §§363.521 - 363.524

The Texas Water Development Board (Board) adopts amendments to §§363.521 - 363.524 in Chapter 363, Division 2, relating to the Colonia Self-Help Program. The amendments are adopted without changes to the proposed text as published in the February 5, 2010, issue of the Texas Register (35 TexReg 853) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE AMENDMENTS.

The Board adopts amendments to §§363.521 - 363.524 in response to SB 1371, passed by the 81st Texas Legislature. Senate Bill 1371 amends Water Code §§15.951, 15.953 - 15.956, and 15.959, relating to the Colonia Self-Help Program. Prior to SB 1371, very few entities could qualify as a sponsor for projects through the colonia self-help program established by the Board. The law allowed only nonprofit organizations specifically organized under §501(c)(3), Internal Revenue Code, that have a demonstrated record of experience in self-help projects as of January 1, 2001, to participate in the colonia self-help pro-
gram. Also under the prior law, a "colonia" was required to be composed of at least 11 dwellings, which limited the number of communities that the program may serve.

Changes made by SB 1371 allow a larger pool of nonprofit sponsors to be eligible for the program and allow political subdivisions to act as sponsors. The statutory changes removed the requirement that a "colonia" consist of at least 11 dwellings, provided the Board determines the project will be beneficial and cost-effective. Senate Bill 1371 also allows advance financing, not to exceed 10 percent of the total grant, upon a determination by the Board that participating utilities are sufficiently committed to actually providing service upon completion of the project.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS.

Section 363.521.

The adopted amendments to §363.521 redefine "applicant" to conform to statutory changes. Additionally, the definitions of "colonia" and "eligible nonprofit organization" are deleted as they are defined in Water Code §15.951.

Section 363.522.

Section 363.522(a) has been revised to be consistent with changes made to Water Code §15.953(a), which authorizes the Board to use funds in the colonia self-help account to reimburse a political subdivision or nonprofit organization for eligible expenses incurred in a self-help project that results in the provision of adequate water or wastewater services to a colonia. These amendments also set forth the eligible expenses under this subsection to be consistent with Water Code §15.953(a).

Section 363.522(b) was amended to be consistent with statutory changes to Water Code §15.953(b), which authorizes the Board to award a grant under the colonia self-help program directly to a political subdivision or organization for expenses incurred in a self-help project described in adopted §363.522(a).

The adopted amendment provides that the Board may make an advance of grant funds if the Board determines that a retail public utility has made a commitment to the self-help project sufficient to ensure that retail water or wastewater service will be extended to the colonia.

A conforming amendment was made to §363.522(c) to provide that an advance under this subsection is subject to the terms determined by the Board and is prohibited from exceeding 10 percent of the total amount of the grant, consistent with Water Code §15.953(b).

Section 363.523.

Section 363.523 has been amended consistent with the Water Code to remove "reimbursable" project expenses and replace the term with "eligible" project expenses, to conform to Water Code §15.954. Subsections 363.523(10) and (11) have been added in order to conform to Water Code §15.954, requiring a political subdivision or nonprofit organization to be eligible to receive a grant under the program, to demonstrate work experience relevant to extending retail water or wastewater utility service to colonias in coordination with retail public utilities and develop a plan that requires self-help project beneficiaries to actively participate in the implementation of the project, in coordination with a retail public utility described by Water Code §15.955(b).

Non-substantive, editorial amendments have been made to §363.523 for purposes of clarity of application requirements, consistent with Water Code §15.955.

Section 363.524.

Section 363.524 has been amended for clarity and conciseness, and made consistent with existing Board rules in §363.503, relating to Determination of Economically Distressed Area.

PUBLIC COMMENTS.

No comments were received on the proposed amendments.

STATUTORY AUTHORITY.

The amendments are adopted under the authority of Water Code §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board.

Cross reference to statute: Texas Water Code Chapters 15, 16, and 17.

This agency 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 March 11, 2010.

TRD-201001260
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Effective date: March 31, 2010
Proposal publication date: February 5, 2010
For further information, please call: (512) 463-7686

SUBCHAPTER L  WATER INFRASTRUCTURE FUND

31 TAC §363.1202

The Texas Water Development Board (Board) adopts amendments to §363.1202 in Chapter 363, Subchapter L, relating to Water Infrastructure Fund. The amendments are adopted without changes to the proposed text as published in the February 5, 2010, issue of the Texas Register (35 TexReg 856) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED AMENDMENT.

The Board adopts the amendment to §363.1202 (relating to Definitions). The amendment was proposed in response to SB 2312, passed by the 81st Texas Legislature. Senate Bill 2312 amends Water Code §15.971, relating to eligibility for funds from the Water Infrastructure Fund administered by the Board. Adopted amended §363.1202 clarifies that entities eligible for other funding programs administered by the Board are also eligible to apply for financial assistance through the Water Infrastructure Fund. The adopted amendment redefines "eligible political subdivision" to include any interstate compact commission to which the state is a party, any nonprofit water supply corporation created and operating under Chapter 67 of the Water Code, and other districts that had been excluded under the prior law.

PUBLIC COMMENTS.

No comments were received on the proposed amendment.
STATUTORY AUTHORITY.

This rulemaking is adopted under the authority of §6.101, Water Code, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board; and §15.977, which authorizes the Board to adopt rules necessary to administer Texas Water Code, Chapter 15, Subchapter Q.

Cross reference to statute: Texas Water Code Chapters 6 and 15.

This agency 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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Kenneth L. Petersen
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-7686

PART 16. COASTAL COORDINATION COUNCIL

CHAPTER 501. COASTAL MANAGEMENT PROGRAM

SUBCHAPTER A. GENERAL PROVISIONS

31 TAC §501.4

The Coastal Coordination Council (Council) adopts amendments to 31 TAC §501.4, relating to General Procedures, in order to improve the Texas Coastal Management Program (CMP) and to increase the effectiveness of the Council. The amendments are adopted with changes to the proposed text as published in the October 16, 2009, issue of the Texas Register (34 TexReg 7183) in order to incorporate an amendment to the Coastal Coordination Act made by the 81st Legislature and will be republished.

BACKGROUND AND REASONED JUSTIFICATION

The Council’s Executive Committee (EC) has provided important program guidance and support to the Council for more than ten years, and has been a critical part of the CMP, especially during the early years of the program, when the Council, the EC, General Land Office (GLO) staff, and the public were just beginning to understand its processes. In 2008, the CMP underwent a self-assessment study whereby Council members, EC members, Council staff, and representatives from the National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management met to discuss the effectiveness of the CMP and make suggestions for streamlining the program. The study included an examination of the role of the EC, a group of program experts appointed by Council members to advise the Council on coastal management issues pursuant to Chapter 33 of the Texas Natural Resources Code.

The self assessment study concluded that the EC’s role should be to serve as an advisory group to the Council, respond to Council inquiries, coordinate implementation of Council directives, and review policies, issues and matters as requested by the Council. It further concluded that the EC should be able to meet on an ad hoc basis as directed by the Council to deal with coastal matters before the Council. Toward that end, and in an attempt to improve effectiveness of the CMP, the Council is adopting amendments to its rule that restructure the EC as an advisory workgroup of program experts appointed by Council members that can offer assistance with respect to coastal management issues and support the Council as needed.

The restructured workgroup is an advisory body established by the Council, without authority to control public business or public policy. It will provide better opportunities for its members to offer program guidance to the Council, in accordance with the Coastal Coordination Act. The Council’s amendments to these rules update the CMP and achieve efficiency and consistency in Council procedures. Because the workgroup members will still be appointed and directed by the Council, the public will continue to have access to the workgroup through the Council and GLO staff. In addition, Council staff intends to notify the public of various workgroup meetings through updates on the Council website and allow the public to participate in workgroup meetings to the extent practicable. The workgroup will improve the Council, reduce the layers of government, and improve communication among all governmental entities that deal with coastal issues.

The newly added amendment to §501.4(b) incorporates the changes made to Texas Natural Resources Code §§33.204(b) by Senate Bill 803, effective September 1, 2009. Instead of meeting quarterly, the Council is now required to meet twice each calendar year and as necessary to conduct the business of the council. These amendments mirror the statute and achieve consistency.

The adopted amendment to §501.4(c) deletes references to “executive committee” and uses the term “workgroup” instead, in order to better convey the intent of the Council’s advisory body. In addition, the adopted amendment no longer requires each Council member to appoint a member to the workgroup, although all members continue to have the option. The adopted amendment to this section also deletes the requirements for quarterly workgroup meetings, instead requiring the workgroup to meet at the direction of the Council or the Council Secretary, who can help organize meetings when desired by workgroup members. Finally, the adopted amendments delete the last sentence of §501.4(c) because the workgroup acts at the discretion of the Council and because the restructured workgroup is not subject to the Texas Open Meetings Act, as described below.

The adopted amendment to §501.4(e) clarifies that the Council Secretary must notify the public of Council meetings in accordance with the Texas Open Meetings Act. The workgroup, an advisory body established by the Council, is not a governmental body and does not have authority to control public business or public policy. It is able to meet on an ad hoc basis at the request of the Council or the Council Secretary, and will assist the Council in making determinations related to Texas coastal matters.

ENVIRONMENTAL REGULATORY ANALYSIS

The Council has evaluated the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not exceed express requirements of state law and does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the en-
vironment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The adopted rulemaking is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

PUBLIC COMMENT

The Council did not receive any comments on the adopted rulemaking.

STATUTORY AUTHORITY

The adopted rulemaking is made pursuant to Texas Natural Resources Code §33.052(c), which authorizes the Council to appoint an advisory committee to advise the Council and the General Land Office (GLO) on coastal management issues.

Texas Natural Resources Code §33.052(c) is affected by the adopted rulemaking.

§501.4. General Procedures.

(a) The commissioner of the GLO chairs the council and conducts all meetings. The council may select a vice chair who shall serve in the chair’s absence.

(b) The council shall meet twice each calendar year and as necessary to conduct the business of the council. The council shall set aside time at each meeting for public comment on any issue under the jurisdiction of the council. The chair or any three members of the council who are eligible to vote may convene meetings at such times and places as they may determine necessary and appropriate by sending a written request to the council secretary to post notice in accordance with the Texas Open Meetings Act, Texas Government Code, Title 5, Subtitle A, Chapter 551, and sending a copy of the request to all council members.

(c) Each council member may appoint a person to represent the member on a council workgroup. The workgroup shall meet as directed by the council or the council secretary to coordinate implementation of council directives and review of policies, issues, or other matters that will or may be subject to council deliberation. The representative of the commissioner chairs the workgroup.

(d) The chair shall appoint a council secretary. The secretary shall record the minutes of the meetings and perform other duties required by the council or this chapter.

(e) Any council member may set items for the agenda by submitting them in writing to the secretary at least 21 calendar days before a meeting except that proposed actions that are the subject of a significant unresolved consistency dispute shall be placed on the agenda as provided in §505.34 and §505.66 of this title (relating to Referral of a Proposed Agency Action to the Council for Consistency Review and Referral of Subdivision Actions to the Council for Consistency Review). The secretary shall notify all council members of the agenda by certified or overnight mail, hand-delivery, electronic mail, or telefax at least ten calendar days before each meeting. The secretary shall notify the public of council meetings as required by the Texas Open Meetings Act, Texas Government Code, Title 5, Subtitle A, Chapter 551.

(f) A majority of the council members eligible to vote shall constitute a quorum and must be present for council action. To protest the consistency of a proposed state action listed in §505.11(a) of this title (relating to Actions Subject to the Coastal Management Program), a federal action listed in §506.12 of this title (relating to Federal Agency Actions, Federal Agency Activities and Development Projects, and Outer Continental Self Plans Subject to the Coastal Management Program), or a subdivision action listed in §505.60 of this title (relating to Subdivision Actions Subject to the Coastal Management Program) shall require an affirmative vote of two-thirds of all council members who are eligible to vote. For all other actions, the council may act if a majority of a quorum agrees to the action.

(g) Time periods in this chapter do not include the day of the act or event that activates the time period. If the last day of the time period is a Saturday, Sunday, or legal holiday, the time period is considered to end the next day subsequent that is not a Saturday, Sunday, or legal holiday.

(h) The council shall implement a grants program to award funds to coastal local governments and other qualified entities for the planning and implementation of projects that address environmental problems affecting the coastal area, to promote sustainable economic development, and otherwise further the CMP goals and policies. For each year or for each grant cycle, the council shall promulgate guidance for the grants program describing the deadlines, schedule, eligibility requirements, funding policies, and approval process.

This agency 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 March 9, 2010.

TRD-201001169

Trace Finley

Deputy Commissioner, Policy and Governmental Affairs, General Land Office

Coastal Coordination Council

Effective date: March 29, 2010

Proposal publication date: October 16, 2009

For further information, please call: (512) 475-1859

CHAPTER 504. COASTAL MANAGEMENT PROGRAM

The Coastal Coordination Council (Council) adopts amendments to 31 TAC §504.11, relating to Permitting Assistance Coordinator, and §504.22, relating to Preliminary Findings, in order to improve the Texas Coastal Management Program (CMP) and to increase the effectiveness of the Council. The amendments are adopted without changes to the proposed text as published in the October 16, 2009, issue of the Texas Register (34 TexReg 7185) and will not be republished.

BACKGROUND AND REASONED JUSTIFICATION

The Council’s Executive Committee (EC) has provided important program guidance and support to the Council for more than ten years, and has been a critical part of the CMP, especially during the early years of the program, when the Council, the EC, General Land Office (GLO) staff, and the public were just beginning to understand its processes. In 2008, the CMP underwent a self-assessment study whereby Council members, EC members, Council staff, and representatives from the National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management met to discuss the effectiveness of the CMP and make suggestions for streamlining the program. The study included an examination of the role of the EC, a group of program experts appointed by Council members to advise the
Council on coastal management issues pursuant to Chapter 33 of the Texas Natural Resources Code.

The self assessment study concluded that the EC’s role should be to serve as an advisory group to the Council, respond to Council inquiries, coordinate implementation of Council directives, and review policies, issues and matters as requested by the Council. It further concluded that the EC should be able to meet on an ad hoc basis as directed by the Council to deal with coastal matters before the Council. Toward that end, and in an attempt to improve effectiveness of the CMP, the Council is adopting amendments to its rules that restructure the EC as an advisory workgroup of program experts appointed by Council members that can offer assistance with respect to coastal management issues and support the Council as needed.

The restructured workgroup is an advisory body established by the Council, without authority to control public business or public policy. It will provide better opportunities for its members to offer program guidance to the Council, in accordance with the Coastal Coordination Act. The Council’s amendments to these rules update the CMP and achieve efficiency and consistency in Council procedures. Because the workgroup members will still be appointed and directed by the Council, the public will continue to have access to the workgroup through the Council and GLO staff. In addition, Council staff intends to notify the public of various workgroup meetings through updates on the Council website and allow the public to participate in workgroup meetings to the extent practicable. The workgroup will improve the Council, reduce the layers of government, and improve communication among all governmental entities that deal with coastal issues.

The adopted amendment to §504.11 removes two references to the executive committee because the Council has proposed to restructure and rename the executive committee pursuant to amendments to 31 TAC §501.4. The adopted amendment to §501.22 removes a reference in subsection (a) to 31 TAC §504.23 because the Council has repealed that section due to the proposed restructuring of the executive committee.

ENVIRONMENTAL REGULATORY ANALYSIS

The Council has evaluated the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not exceed express requirements of state law and does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The adopted rulemaking is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

PUBLIC COMMENT

The Council did not receive any comments on the adopted rulemaking.

SUBCHAPTER B. SMALL BUSINESS PERMITTING ASSISTANCE

31 TAC §504.11

STATUTORY AUTHORITY

The adopted rulemaking is made pursuant to Texas Natural Resources Code §33.052(c), which authorizes the Council to appoint an advisory committee to advise the Council and the General Land Office (GLO) on coastal management issues.

Texas Natural Resources Code §33.052(c) is affected by the adopted rulemaking.

This agency 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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Trace Finley
Deputy Commissioner, Policy and Governmental Affairs, General Land Office
Coastal Coordination Council
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For further information, please call: (512) 475-1859

SUBCHAPTER C. PRELIMINARY CONSISTENCY REVIEW

31 TAC §504.22

STATUTORY AUTHORITY

The adopted rulemaking is made pursuant to Texas Natural Resources Code §33.052(c), which authorizes the Council to appoint an advisory committee to advise the Council and the General Land Office (GLO) on coastal management issues.

Texas Natural Resources Code §33.052(c) is affected by the adopted rulemaking.

This agency 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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Trace Finley
Deputy Commissioner, Policy and Governmental Affairs, General Land Office
Coastal Coordination Council
Effective date: March 29, 2010
Proposal publication date: October 16, 2009
For further information, please call: (512) 475-1859

31 TAC §504.23, §504.24

The Coastal Coordination Council (Council) adopts the repeal of 31 TAC §504.23, relating to Executive Committee Action, and §504.24, relating to Effect of Executive Committee Action, in order to improve the Texas Coastal Management Program (CMP) and to increase the effectiveness of the Council. The repeal is adopted without changes to the proposal as published in the October 16, 2008, issue of the Texas Register (34 TexReg 7187) and will not be republished.
BACKGROUND AND REASONED JUSTIFICATION

The Council's Executive Committee (EC) has provided important program guidance and support to the Council for more than ten years, and has been a critical part of the CMP, especially during the early years of the program, when the Council, the General Land Office (GLO) staff, and the public were just beginning to understand its processes. In 2008, the CMP underwent a self-assessment study whereby Council members, EC members, Council staff, and representatives from the National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management met to discuss the effectiveness of the CMP and make suggestions for streamlining the program. The study included an examination of the role of the EC, a group of program experts appointed by Council members to advise the Council on coastal management issues pursuant to Chapter 33 of the Texas Natural Resources Code.

The self-assessment study concluded that the EC's role should be to serve as an advisory group to the Council, respond to Council inquiries, coordinate implementation of Council directives, and review policies, issues and matters as requested by the Council. It further concluded that the EC should be able to meet any time and place directed by the Council to deal with coastal matters before the Council. Toward that end, and in an attempt to improve effectiveness of the CMP, the Council is adopting amendments to its rules that restructure the EC as an advisory workgroup of program experts appointed by Council members that can offer assistance with respect to coastal management issues and support the Council as needed.

The restructured workgroup is an advisory body established by the Council, without authority to control public business or public policy. It will provide better opportunities for its members to offer program guidance to the Council, in accordance with the Coastal Coordination Act. The Council's repeal of these rules update the CMP and achieve efficiency and consistency in Council procedures. Because the workgroup members will still be appointed and directed by the Council, the public will continue to have access to the workgroup through the Council and GLO staff. In addition, Council staff intends to notify the public of various workgroup meetings through updates on the Council website and allow the public to participate in workgroup meetings to the extent practicable. The workgroup will improve the Council, reduce the layers of government, and improve communication among all governmental entities that deal with coastal issues.

The repeal of §504.23 and §504.24 is adopted in conjunction with the Council's adopted amendments to 31 TAC §501.4. The newly restructured Council workgroup is no longer charged with issuing preliminary consistency determinations. Individual Permitting Assistance Group members and their agencies can still issue these determinations in accordance with §33.205, Texas Natural Resources Code and 31 TAC §504.21.

ENVIRONMENTAL REGULATORY ANALYSIS

The Council has evaluated the adopted repeal action in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not exceed express requirements of state law and does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The repeal of these sections is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

PUBLIC COMMENT

The Council did not receive any comments on the adopted repeal.

STATUTORY AUTHORITY

The adopted repeal action is made pursuant to Texas Natural Resources Code §33.052(c), which authorizes the Council to appoint an advisory committee to amend the Council and the GLO on coastal management issues.

Texas Natural Resources Code §33.052(c) is affected by the adopted repeal action.

This agency 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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Trace Finley
Deputy Commissioner, Policy and Governmental Affairs, General Land Office
Coastal Coordination Council

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Proposal publication date: October 16, 2009
For further information, please call: (512) 475-1859

CHAPTER 505. COUNCIL PROCEDURES FOR STATE CONSISTENCY WITH COASTAL MANAGEMENT PROGRAM GOALS AND POLICIES

The Coastal Coordination Council (Council) adopts amendments to 31 TAC §505.22, relating to Consistency Required for New Rules and Rule Amendments Subject to the Coastal Management Program; §505.23, relating to Council Certification of Rules and Rule Amendments; §505.24, relating to Pre-Certification Review of Draft Rules and Draft Rule Amendments; §505.51, relating to Request for a Non-Binding Advisory Opinion and Council Action; and §505.52, relating to Request for Council Participation in the Development of General Plans, in order to improve the Texas Coastal Management Program (CMP) and to increase the effectiveness of the Council. The amendments are adopted without changes to the proposed text as published in the October 16, 2009 issue of the Texas Register (34 TexReg 7188) and will not be republished.

BACKGROUND AND REASONED JUSTIFICATION

The Council’s Executive Committee (EC) has provided important program guidance and support to the Council for more than ten years, and has been a critical part of the CMP, especially during the early years of the program, when the Council, the EC, General Land Office (GLO) staff, and the public were just beginning to understand its processes. In 2008, the CMP underwent a self-assessment study whereby Council members, EC members, Council staff, and representatives from the National
Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management met to discuss the effectiveness of the CMP and make suggestions for streamlining the program. The study included an examination of the role of the EC, a group of program experts appointed by Council members to advise the Council on coastal management issues pursuant to Chapter 33 of the Texas Natural Resources Code.

The self assessment study concluded that the EC’s role should be to serve as an advisory group to the Council, respond to Council inquiries, coordinate implementation of Council directives, and review policies, issues and matters as requested by the Council. It further concluded that the EC should be able to meet on an ad hoc basis as directed by the Council to deal with coastal matters before the Council. Toward that end, and in an attempt to improve effectiveness of the CMP, the Council is adopting amendments to its rules that restructure the EC as an advisory workgroup of program experts appointed by Council members that can offer assistance with respect to coastal management issues and support the Council as needed.

The restructured workgroup is an advisory body established by the Council, without authority to control public business or public policy. It will provide better opportunities for its members to offer program guidance to the Council, in accordance with the Coastal Coordination Act. The Council’s amendments to these rules update the CMP and achieve efficiency and consistency in Council procedures. Because the workgroup members will still be appointed and directed by the Council, the public will continue to have access to the workgroup through the Council and GLO staff. In addition, Council staff intends to notify the public of various workgroup meetings through updates on the Council website and allow the public to participate in workgroup meetings to the extent practicable. The workgroup will improve the Council, reduce the layers of government, and improve communication among all governmental entities that deal with coastal issues.

The adopted amendments to §505.22(d) and §505.23(d)(1) remove unnecessary references to the executive committee because the Council has restructured and renamed the executive committee pursuant to adopted amendments to 31 TAC §501.4.

The adopted amendment to §505.24 deletes subsection (c) because the Council workgroup is no longer charged with making preliminary consistency determinations, pursuant to the adopted repeal of 31 TAC §504.23.

The adopted amendments to §505.51 and §505.52 replace references to the executive committee with the term "workgroup" in accordance with the adopted amendments to 31 TAC §501.4.

ENVIRONMENTAL REGULATORY ANALYSIS

The Council has evaluated the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not exceed express requirements of state law and does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state.

The adopted rulemaking is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

PUBLIC COMMENT

The Council did not receive any comments on the adopted rulemaking.

SUBCHAPTER B. COUNCIL REVIEW AND CERTIFICATION OF AGENCY RULES

31 TAC §§505.22 - 505.24

STATUTORY AUTHORITY

The adopted rulemaking is made pursuant to Texas Natural Resources Code §33.052(c), which authorizes the Council to appoint an advisory committee to advise the Council and the GLO on coastal management issues.

Texas Natural Resources Code §33.052(c) is affected by the adopted rulemaking.

This agency 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 March 9, 2010.

TRD-201001173

Trace Finley

Deputy Commissioner, Policy and Governmental Affairs, General Land Office

Coastal Coordination Council

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For further information, please call: (512) 475-1859

SUBCHAPTER D. COUNCIL ADVISORY OPINIONS ON GENERAL PLANS

31 TAC §505.51, §505.52

STATUTORY AUTHORITY

The adopted rulemaking is made pursuant to Texas Natural Resources Code §33.052(c), which authorizes the Council to appoint an advisory committee to advise the Council and the GLO on coastal management issues.

Texas Natural Resources Code §33.052(c) is affected by the adopted rulemaking.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency’s legal authority.

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TRD-201001176

Trace Finley

Deputy Commissioner, Policy and Governmental Affairs, General Land Office

Coastal Coordination Council

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For further information, please call: (512) 475-1859
The Comptroller of Public Accounts adopts an amendment to §3.121, concerning definitions, imposition of tax, permits, and reports, with changes to the proposed text as published in the January 15, 2010, issue of the Texas Register (35 TexReg 360). This section is being amended to implement changes to Tax Code, Chapter 155 and the new worksheet to be used by distributors to report tobacco products received other than cigars pursuant to House Bill 2154, 81st Legislature, 2009, to clarify a reference to a form by providing the form name and number, and to correct a punctuation error.

Subsection (a)(12) is amended by adding a definition for manufacturer’s net weight and by renumbering the existing and subsequent definitions. Subsection (a)(16) is amended to update and clarify the types of tobacco products by: separating pipe tobacco from smoking tobacco and defining pipe tobacco; clarifying the definition of chewing tobacco; including new types of snuff products and their intended use; defining roll-your-own tobacco; and adding "other tobacco products" and by renumbering subsequent subsections. Subsection (b)(1)(B) is amended by adding tables containing the tax rates for up to two ounces of tobacco products other than cigars for Fiscal Years 2010, 2011, 2012, 2013, 2014 and thereafter. Subsection (b)(1)(C) is added to explain how to calculate the tax due on a unit consisting of multiple individual cans or packages of tobacco products. Subsection (b)(2) is amended to clarify that free or promotional tobacco products other than cigars are taxed using the manufacturer’s listed net weight for a product and the applicable tax rates according to the state’s fiscal year. Subsection (c)(4) is amended to correct a punctuation error. Subsection (e)(6) is amended to delete the specific date of the retailer permit issued or renewed. Subsection (g)(2) is amended to clarify the name of the form used to document tax-free sales to the federal government.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002 and §111.0022, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2, and taxes, fees, or other charges which the comptroller administers under other law.

The amendment implements Tax Code, §155.0211(b).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency’s legal authority.

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Ashley Harden
General Counsel
Comptroller of Public Accounts
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Proposal publication date: January 15, 2010
For further information, please call: (512) 475-0387

CHAPTER 9. PROPERTY TAX ADMINISTRATION
SUBCHAPTER A. PRACTICE AND PROCEDURE
34 TAC §9.101

The Comptroller of Public Accounts adopts an amendment to §9.101, concerning conduct of the property value study, with changes to the proposed text as published in the January 22, 2010, issue of the Texas Register (35 TexReg 444). This section is being amended to implement House Bill 8, 81st Legislature, 2009, effective January 1, 2010, which changes the frequency of the property value study from every year to every other year, changes the definition of an eligible school district, establishes a uniform record system for appraisal districts, and establishes administrative and procedural guidelines for reviews of appraisal districts’ governance, taxpayer assistance, operating standards, appraisal standards, appraisal procedures and appraisal methodology at least once every two years.

The agency received a comment from an individual expressing concern relating to the amendment to §9.101(g)(6)(C), regarding re-categorization of sample properties by the comptroller upon a determination that property is categorized incorrectly by an appraisal district, in the absence of a provision in the rule regarding "how" determinations regarding "correct/incorrect" categorization of sample properties will be made. For the following reasons, the agency disagrees with the comment. Government Code, §403.302(a) directs the comptroller to study each category of property in each school district. Government Code, §403.302(b) requires that, in conducting the study of each school district, the comptroller determine the taxable value of property according to generally accepted standard valuation, statistical compilation, and analysis techniques. Tax Code, §5.10(a) directs the comptroller to conduct a study in each appraisal district to determine the degree of uniformity of and the median value of appraisals by the appraisal district within each major category of property. Tax Code, §5.10(a) requires that, in conducting the study, the comptroller apply appropriate standard statistical analysis techniques to data collected as part of the school district study under Government Code, §403.302. Section 9.101 provides that, except where inconsistent with §9.101, the International Association of Assessing Officers’ Standard on Ratio Studies is adopted by reference as a standard for the conduct of the property value study. Additionally, the amendment to §9.101 provides that the comptroller’s decision to re-categorize property may be the subject of a protest provided by Government Code, §403.303. The amendment is consistent with legislative direction with regard to both the conduct of the study and the right to protest.

The amendment is adopted with the following grammatical correction: the word “their” has been deleted from the second to last sentence of subsection (h).
This amendment is adopted under House Bill 8’s addition of Government Code, §403.302(o) which directs the comptroller to adopt rules governing the conduct of the study after consultation with the Comptroller’s Property Value Study Advisory Committee.

This amendment implements House Bill 8’s amendments to Government Code, §§403.3011(1), (2), and (4), 403.302, and 403.304 and Tax Code, §§5.102, 5.07(c), and 5.10(a).


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

(1) Appraisal--A statement that estimates the market value or other legally required value of property.

(2) Appraisal ratio--The ratio of a property’s appraised value as determined by the appraisal office or appraisal review board (the County Appraisal District (CAD)) value, as applicable to:

(A) the sale price of the property; or

(B) an independent appraisal of the property, as applicable.

(3) Appraiser--A comptroller employee or contractor who conducts appraisals for the property value study.

(4) Assigned value--The value of property determined in the property value study.

(5) Coefficient of dispersion--The absolute average deviation of appraisal ratios in a sample from the median appraisal ratio for the sample, expressed as a percentage of the median.

(6) Comptroller--The Comptroller of Public Accounts or the Comptroller of Public Accounts’ designee.

(7) Confirm--A sale is confirmed when the comptroller has documented that the sale price for a property is correct.

(8) Documentary evidence--Writings such as letters, memoranda, appraisal records, or deeds.

(9) Local property--Property other than utility, industrial, mineral, or 1-d or 1-d-1 qualified agricultural property.

(10) Median appraisal ratio--The median level of appraisal is the median appraisal ratio of a sample of properties collected as part of the school district taxable value study in an appraisal district. The median appraisal ratio for a sample of properties is, in a numerically ordered list of the appraisal ratios for the properties:

(A) if the sample contains an odd number of properties, the appraisal ratio above and below which there is an equal number of appraisal ratios in the list; or

(B) if the sample contains an even number of properties, the average of the two consecutive appraisal ratios above and below which there is an equal number of appraisal ratios in the list.

(11) Price related differential--The price related differential is the mean of a property sample divided by the weighted mean of that sample.

(12) Property value study--The studies conducted by the comptroller in alternating or consecutive years pursuant to Government Code, §403.302 and Tax Code, §5.10, according to a coordinated schedule that ensures that CAD reviews required by Tax Code, §5.102 are conducted in years in which the studies of school districts within the CAD are not performed, except when consecutive year studies are mandated. The schedule of alternating studies and CAD reviews shall be determined by the comptroller.

(13) Random sample--A sample in which each item of the population has an equal chance of being included.

(14) Representative sample--Representative means composed of individual properties that collectively reflect the individual characteristics of the population from which they were drawn. A representative sample meets the requirements for operational representativeness set forth in the International Association of Assessing Officers’ Standard on Ratio Studies.

(15) Sale--A transfer of property for consideration.

(16) Sale date--The date on which a deed or other document transferring title to real property by sale is executed.

(17) Sample--A group of properties analyzed to determine characteristics of property in a school or appraisal district.

(18) School district split--Each portion of a school district located in different counties where properties are appraised by different appraisal districts.

(19) Stratification--Stratification divides the range of information for property in a district or property category into intervals and lists the number and CAD value of properties falling into each interval.

(20) Stratified weighted mean appraisal ratio--A stratified weighted mean appraisal ratio is calculated by separating the properties in a category sample into subcategories by value range or other property characteristics (strata) and determining the weighted mean appraisal ratio for each of the strata. The value of property in each of the strata is calculated by dividing the total CAD value by the weighted mean appraisal ratio. These individual market value estimates are then added to produce a market value estimate for the total category sample. The total CAD value of property in the category is then divided by the total category market value estimate to produce the stratified weighted mean ratio.

(21) Verify--A sale is verified when the comptroller has documented that a sale is a market value transaction as defined by Tax Code, §1.04(7).

(22) Weighted mean appraisal ratio--The weighted mean appraisal ratio is a number calculated by dividing the total CAD value of property in a sample by the total of corresponding sale prices or appraised values of property in that sample.

(b) General statement of policy. The study constitutes a limited audit of the taxable value of property in the districts. The purpose of this section is to ensure that sufficient competent and relevant evidence affords a reasonable basis for the comptroller’s judgments and conclusions regarding the taxable value of property in a school district and the appropriate measures of appraisal level and uniformity in an appraisal district.

(c) General standard. Except where inconsistent with these sections, the Standard on Ratio Studies, International Association of Assessing Officers, is adopted by reference as a standard for the conduct of the property value study. For the purposes of ratio study design, including but not limited to stratification and sampling design, the requirements to apply appropriate standard statistical analysis techniques set out in Tax Code, §5.10(a) and to use generally accepted auditing and sampling techniques set out in Government Code, §403.302(a) and (b) are met by complying with the Standard on Ratio Studies.

(d) Changing appraisal methods. The comptroller will consult regularly with representatives of property owners, industries, appraisal

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firms, and other interested parties to keep abreast of changing appraisal methods.

(e) Selection of property studied. The accuracy of the estimate of taxable property value for each school district in this state shall be the primary consideration in determining the amount and category of property included in the study sample.

(1) The comptroller may determine whether a category or class of property in a school district is a major category or class of property to be included in the study on a case-by-case basis. To maximize accuracy or efficient use of resources, the comptroller may decline to sample or estimate category values or measures. If a category or class of property except land qualified for appraisal based on its productive capacity has an appraised value as determined by the CAD of 5.0% or less of the total appraised value of property in categories sampled in the study, the comptroller may decline to sample or estimate the value of that category or class of property.

(2) The comptroller may determine that a school district split does not have enough value to necessitate that a study be conducted in that portion of the school district. Except in cases where the school district has values split among multiple counties, the comptroller will study at least 85% of the total value for the school district in categories deemed to have enough value to sample.

(3) If the comptroller does not sample a school district split, a category of property in a school district, or a subcategory of property in a school district, the comptroller may calculate the district's taxable value by using the district's locally reported value to represent the value of the school district split, category, or subcategory not included in the sample.

(f) Taxpayer data. Owners of large unique or complex properties should be advised if these properties are included in the property value study. Taxpayers shall have the option of presenting data to the comptroller to verify the CAD value as representative of market value for inclusion in the study. The comptroller shall have the option of accepting the indicated market value for inclusion in the property value study.

(g) Determining taxable value. The taxable value of certain classes of property shall be determined according to the following appraisal methods:

(1) Agricultural land qualified for productivity appraisal. The comptroller may determine the productivity value of land qualified for productivity appraisal in a school district through direct appraisal. The staff shall estimate an average value per acre for each land class in each school district using information provided by published sources and by individuals knowledgeable concerning local agricultural conditions. The estimated average productivity value per acre shall be developed using the same methods applicable to appraisal districts under §9.4011 of this title (relating to Valuation of Open-Space and Agricultural Lands). The estimated value per acre shall be applied to the total number of acres in each land class reported in the school district report of property value to determine the total value of property in each class. The sum of the values of each class is the total value of agricultural property receiving productivity appraisal in the school district.

(2) Timber land qualified for productivity appraisal. The comptroller may determine the productivity value of land qualified for timber appraisal in a school district through direct appraisal. The staff shall estimate an average value per acre for each soil class and type of timber in each school district using information provided by published sources and by individuals knowledgeable concerning local timber production. The estimated average productivity value per acre shall be developed using the same methods applicable to appraisal districts under §9.4011 of this title (relating to Appraisal of Timberlands). The estimated value per acre shall be applied to the total number of acres in each soil class for each type of timber reported in the school district report of property value to determine the total value of property in each class. The sum of the values of each class is the total value of timber property receiving productivity appraisal in the school district.

(3) Utility property. Utility samples in a school district are chosen using a method that ensures sampling dominant properties and other properties as appropriate. Utilities shall be valued using recognized unitary valuation methods, that may include one or more of the cost, income, and market (sales comparison or stock and debt) approaches. Utility unit values will be allocated using generally accepted allocation methods based on the best information available. Appraisers shall consider the effects of regulation, if applicable.

(4) Industrial property. If the comptroller appraises an industrial property, the property shall be valued using generally accepted appraisal methods. If staff selects an industrial property sample, the property sample shall be selected without regard to whether the appraisal district performs its own industrial property appraisals.

(5) Mineral property. Mineral samples in a school district shall be chosen using a method that ensures sampling dominant leases and a sample of other leases as appropriate. Minerals shall be appraised using generally accepted appraisal methods, emphasizing the income approach to value.

(6) Local property. The comptroller shall make its determination of local property values on the basis of representative samples of property selected within school districts. Except as provided in this section, the comptroller shall select samples of properties based on the comptroller's judgment of the number and kind of properties required to be sampled to reasonably reflect the taxable value of property in each school district. The comptroller staff is not required to but may employ random sampling or other sampling procedures where feasible and appropriate.

(A) Estimated sample sizes shall initially be assigned by supervisory staff. The overall goal in setting the sample size is to obtain school district taxable values that are accurately and reliably. The sample size assigned for a particular category of property in a particular school district is based on the available comptroller time, the availability of current sales, variability of ratios, and the relative value of the category. A sample may be larger or smaller than the assigned sample if the school district's resulting taxable value is determined by supervisory staff to be accurately and reliable.

(B) Samples may include a combination of sales and appraisals that satisfies both size and representativeness requirements. However, a sample may consist of sales only or appraisals only. All meaningful property characteristics shall be considered in selecting non-random samples. The following guidelines should be followed in non-random selection:

(i) the sample should not be weighted in favor of sold properties that are appraised at a different level from unsold properties;

(ii) a sample should include properties from each primary geographic area, if the geographic area contains a significant number of the kind of property being tested and the property has significant value;

(iii) a sample should include improvements of varying ages;
(iv) sample selection should consider other property characteristics such as construction type, size, use, and business type, as required;

(v) stratification information should be used to ensure that samples are representative. If stratification data are unavailable, an appraiser should use informed judgment and knowledge of the area in a reasonable effort to ensure that samples are representative.

(C) Appraisers shall categorize sample properties as they are categorized by appraisal districts (Category A, B, C, etc.), unless the comptroller determines that a property or portion of property is categorized incorrectly, in which case the comptroller may move the value of the property into the correct category. The comptroller’s decision to re-categorize property may be the subject of a protest provided by Government Code, §403.303.

(D) Appraisers should develop a sales population to maintain a thorough knowledge of local markets and appraisal practices; and to provide a population of sales from which to select property samples. Appraisers should gather sales that occurred over as broad a time period as practicable and should gather sales from a variety of sources, such as appraisal districts, real estate professionals, title companies, financial institutions, courthouse records, and other reliable sources.

(i) As a general rule, if an appraiser’s sample size is less than all the sales within a relevant time period, the sales sample will be selected randomly. However, other sample selection methods may be used.

(ii) The appraiser must document the source of each sale included in the property value study. The appraiser must use codes to identify the source of each sale entered into the comptroller sale/appraisal system. The appraiser must maintain sufficient written documentation to permit source verification upon request.

(iii) The appraiser must confirm and verify at least 20% of the sales included in each category sample for each school district or school district split from sources other than the appraisal district.

(iv) Sales included in a sample must be market transactions. Market transactions are consistent with the definition of market value found in Tax Code, §1.04(7). For the purposes of that section, the term "price" means the most probable price. As provided in the Standard on Ratio Studies, International Association of Assessing Officers, transactions that may be non-arm’s-length sales should be clearly identified and used only if it can be established that they are consistent with the definition of market value.

(v) If an appraiser questions whether a transaction selected for use in the study is a market sale, the appraiser should obtain sales agreements, closing statements, statements from parties to the transaction, deed records that disclose full consideration, or other evidence sufficient to determine whether or not the transaction is a market transaction.

(vi) The appraiser must exclude sales of properties that change category or significant physical characteristics after the sale but before the assessment date.

(vii) The appraiser may not exclude a sale solely because it appears to be inconsistent with other sales in the sample. Such sales should be verified. The inconsistencies may indicate that a sale is not a market transaction, but they also may indicate that information regarding the sale was recorded incorrectly. If further investigation reveals that the sale was indeed a legitimate market transaction, the appraiser may include it in the sample, despite its apparent inconsistency.

If the investigation, however, reveals that the sale was not a legitimate market transaction, the sale should be excluded.

(viii) Generally, when financing reflects prevailing market practices and interest rates, sales prices require no adjustment. Adjustments should be considered if:

(I) the seller and lender are the same party and financing is not at prevailing market rates;

(II) the buyer assumes an existing mortgage at a non-market rate of interest; or

(III) lenders charge the seller "points" (a percentage of the loan amount) for making money available to the purchaser/borrower.

(ix) Some forms of mortgage terms also may require adjustment. If these adjustments alter the sales price significantly, the use of the sale as a good indicator of market value may be questionable.

(x) The appraiser shall adjust sales samples for the effect of time if there is evidence of a significant value increase or decrease during the period from which sales are drawn. The appraiser must document how the time adjustments were determined. As an alternative to time adjustment, the appraiser may randomly select samples so that the value of properties sold during a specified period before the assessment date roughly approximates the value of properties sold during a similar period after the assessment date. A sample balanced in this manner will negate the effect of changes in the level of market values if those changes occurred uniformly over the study time frame.

(xi) The comptroller may use a method of adjusting for financing, time, personal property, or other matters affecting the sales price, that includes an overall adjustment affecting all or any relevant portion of the sales in the sample.

(xii) If the comptroller determines that recently sold properties are appraised by the appraisal district at a different level of value than unsold properties, the comptroller may take actions to ensure that the unsold properties are fairly represented in the sample. These actions may include using appraisals in the sample, using sales that occurred after the appraisal district certified the school district tax rolls in the sample, deleting sales from the sample, or other adjustments the comptroller deems necessary to maintain the integrity of the property value study.

(E) Appraisals of local property are performed if the comptroller determines they are necessary to ensure the study develops competent evidence of the value of all property in the school district. Appraisals are used to ensure a representative sample of sufficient size and to test whether sold and unsold properties are assessed at the same level. The following guidelines govern the use of appraisals:

(i) appraisal samples shall be selected randomly if practicable;

(ii) appraisals shall be conducted using generally accepted appraisal practices. The comptroller shall prepare written procedures as needed to conduct appraisals. The written procedures are open records. Supervisory staff shall selectively test appraisals to ensure the consistency and accuracy of data throughout the state;

(iii) appraisers should physically inspect each property appraised. If acreage or lots cannot be physically inspected, the appraiser may use appraisal cards, aerial photographs, soil maps, and other relevant information in performing appraisals;

(iv) in appraising a particular property, the appraiser may not consider the value placed on that property by the appraisal district. However, the appraiser may consult with appraisal district staff.
and review appraisal district records to gather information relevant to the appraisal;

(v) the market value estimate for a particular property account must include the value of all property associated with that account, e.g., multiple improvements, paving, outbuildings, signs, business vehicles, additional lots, etc. The appraiser may use the appraisal district’s value for any item(s) that the appraiser is unable to appraise if the item(s) in question represent an insignificant portion of the appraisal district’s total appraised value for the account.

(h) Local reports of taxable value. Local reports of taxable value are essential parts of the property value study. Appraisal districts shall submit their annual appraisal roll using the comptroller’s Electronic Appraisal Roll Submission record layout according to §9.3059 of this title (relating to Certification of Appraisal Roll). This submission results in a local report of taxable value which the comptroller shall thoroughly review as needed to ensure reliability. The comptroller must document the date of and reasons for each revision.

(i) Protest or request for audit. A protest or request for an audit of the Property Value Study findings shall be submitted in accordance with §§9.4301 - 9.4313 of this title (relating to Procedures for Protest of Preliminary Findings of Total Taxable Value) or §9.103 of this title (relating to Audits of School District Taxable Property Values), as applicable.

(j) Determination of school district value. School district taxable values shall be determined in a manner that maximizes the accuracy and reliability of the taxable values in each school district.

(1) The taxable value of a category of property in a school district shall be determined by dividing the total locally appraised value of property in that category by the weighted mean or stratified weighted mean ratio for the sample of property selected from that category. However, the taxable value of property in a category may be determined by other methods if it is determined that sufficient competent evidence requires their use.

(2) The taxable value of property in a school district shall be determined by adding together the taxable value of property in each category of property in the school district and subtracting from the total the items listed in Government Code, §403.302(d). However, the taxable value of property in a school district may be determined by other methods if it is determined that sufficient competent evidence requires their use.

(k) Determination of appraisal district measures. Appraisal district measures shall be determined from the sales and appraisals gathered as a part of the school district taxable value study.

(1) The median level of appraisal for each category of property in the appraisal district and for the appraisal district as a whole is determined as provided by Tax Code, §5.10.

(2) The coefficient of dispersion for each category of property in the appraisal district and for the appraisal district as a whole is determined as provided by Tax Code, §5.10.

(3) The comptroller may determine and report other measures of appraisal accuracy and uniformity it deems useful and informative.

This agency 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 March 11, 2010.

TRD-201001235

Ashley Harden
General Counsel
Comptroller of Public Accounts
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Proposal publication date: January 22, 2010
For further information, please call: (512) 475-0387

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 7. TEXAS COMMISSION ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUCATION

CHAPTER 211. ADMINISTRATION

37 TAC §211.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts the repeal of §211.1, concerning Definitions, without changes to the proposal as published in the December 25, 2009, issue of the Texas Register (34 TexReg 9384) and will not be republished.

The section is adopted for repeal and a new section is adopted that incorporates additional definitions and changes to Texas Occupations Code, §1701.051 from House Bill 3389, Section 35.

No comments were received regarding adoption of the repeal.

The repeal is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The repeal as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.051, Commission Membership.

This agency 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 March 8, 2010.

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Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: April 15, 2010
Proposal publication date: December 25, 2009
For further information, please call: (512) 936-7713

37 TAC §211.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §211.1, concerning Definitions, with changes to the proposed text as published in the December 25, 2009, issue of the Texas Register (34 TexReg 9384).

The new rule incorporates additional definitions and changes to Texas Occupations Code §1701.051 from House Bill 3389, Section 35.

Filed with the Office of the Secretary of State on March 11, 2010.

TRD-201001235
No comments were received regarding adoption of the new rule. The new rule is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The new rule as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.051, Commission Membership.

§211.1. Definitions.

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

(1) Academic provider—A school, accredited by the Southern Association of Colleges and Schools and the Texas Higher Education Coordinating Board, which has been approved by the commission to provide basic licensing courses.

(2) Academic alternative program—A program for college credit offered by a training provider recognized by the Southern Association of Colleges and Schools and the Higher Education Board, authorized by the commission to conduct preparatory law enforcement training as part of a degree plan program, and consisting of commission-approved curricula.

(3) Accredited college or university—An institution of higher education that is accredited or authorized by the Southern Association of Colleges and Schools, the Middle States Association of Colleges and Schools, the New England Association of Schools and Colleges, the North Central Association of Colleges and Schools, the Northwest Commission on Colleges and Universities, the Western Association of Schools and Colleges, or an international college or university evaluated and accepted by a United States accredited college or university.

(4) Active—A license issued by the commission that meets the current requirements of licensure and training as determined by the commission.

(5) Agency—A law enforcement unit or other entity, whether public or private, authorized by Texas law to appoint a person licensed or certified by the commission.

(6) Administrative Law Judge (ALJ)—An administrative law judge appointed by the chief administrative law judge of the State Office of Administrative Hearings.

(7) Alternative delivery—A learning event characterized by a separation of place or time between the instructor and student, the students, and/or the student and learning resources; and in which the interaction between these is conducted through one or more media.

(8) Appointed—Elected or commissioned by an agency as a peace officer, reserve or otherwise selected or assigned to a position governed by the Occupations Code, Chapter 1701, without regard to pay or employment status.

(9) Background investigation—A pre-employment background investigation that is designed to satisfy:

(A) that an applicant is in compliance with all minimum standards for employment; and

(B) that an applicant is screened out, who, based on their past history or other relevant information, is found to be unsuitable for the position in question.

(C) The background investigation consists of a report that documents, but is not limited to the following:

(i) A review of all previous law enforcement employment, including contacting all former law enforcement employers;

(ii) An investigation looking specifically at a person’s dependability; integrity; initiative; situational reasoning ability; self-control; writing skills; reading skills; oral communications skills; interpersonal skills; and physical ability; and

(iii) A report that documents an investigation into an applicant’s suitability for licensing and appointment which includes: biographical data; scholastic data; employment data; criminal history data; interviews with references, supervisors, and other people who have knowledge of the person’s abilities, skills, and character; and a summary of the investigator’s findings and conclusions regarding the applicant’s moral character and suitability.

(10) Basic licensing course—Any current commission developed course that is required before an individual may be licensed by the commission.

(11) Basic peace officer course—The current commission developed course(s) required for licensing as a peace officer, taught at a licensed law enforcement academy in accordance with commission requirements.

(12) Certified copy—A true and correct copy of a document or record certified by the custodian of records of the submitting entity.

(13) Chief administrator—The head or designee of a law enforcement agency.

(14) Commission—The Texas Commission on Law Enforcement Officer Standards and Education.

(15) Commissioned—Has been given the legal power to act as a peace officer or reserve, whether elected, employed, or appointed.

(16) Commissioners—The nine commission members appointed by the governor.

(17) Contract jail—A correctional facility, operated by a county, municipality or private vendor, operating under a contract with a county or municipality, to house inmates convicted of offenses committed against the laws of another state of the United States, as provided by Texas Government Code, §511.0092.

(18) Contractual training provider—A law enforcement agency, a law enforcement association, alternative delivery trainer, or proprietary training contractor that conducts specific education and training under a contract with the commission.

(19) Convicted—Has been adjudged guilty of or has had a judgment of guilt entered in a criminal case that has not been set aside on appeal, regardless of whether:

(A) the sentence is subsequently probated and the person is discharged from probation;

(B) the charging instrument is dismissed and the person is released from all penalties and disabilities resulting from the offense; or

(C) the person is pardoned, unless the pardon is expressly granted for subsequent proof of innocence.

(20) Court-ordered community supervision—Any court-ordered community supervision or probation resulting from a deferred adjudication or conviction by a court of competent jurisdiction. However, this does not include supervision resulting from a pretrial diversion.
(21) Distance education--The enrollment and study with an educational institution, which provides lesson materials prepared in a sequential and logical order for study by students on their own.

(22) Duty ammunition--Ammunition required or permitted by the agency to be carried on duty.

(23) Endorsement--An official document stating that an individual has met the minimum training standards appropriate to the type of examination sought as determined by the commission.

(24) Executive director--The executive director of the commission or any individual authorized to act on behalf of the executive director.

(25) Experience--Includes each month, or part thereof, served as a peace officer, reserve, jailer, telecommunicator, or federal officer. Credit may, at the discretion of the executive director, be awarded for relevant experience from an out-of-state agency.

(26) Firearms--Any handgun, shotgun, precision rifle, patrol rifle, or fully automatic weapon that is carried by the individual officer in an official capacity.

(27) Firearms proficiency--Successful completion of the annual firearms proficiency requirements.

(28) Field training program--A program intended to facilitate a transition from the academic setting to the performance of the general duties of the appointing agency.

(29) Governing body resolution--A formal expression or action by a governing body authorizing a particular act, transaction, appointment, intention, or decision.

(30) High School Diploma--An earned high school diploma from a United States high school, an accredited secondary school equivalent to that of United States high school, or a passing score on the general education development test indicating a high school graduation level. Attainment of an associate or baccalaureate degree from an accredited college or university shall be evidence of having met this standard.

(31) Home School Diploma--An earned diploma from a student who predominately receives instruction in a general elementary or secondary education program that is provided by the parent, or a person in parental authority, in or through the child’s home. (Education Code §29.916)

(32) Individual--A human being who has been born and is or was alive.

(33) Jailer--A person employed or appointed as a jailer under the provisions of the Local Government Code, §85.005, or Government Code §511.0092.

(34) Killed in the line of duty--A death that is the directly attributed result of a personal injury sustained in the line of duty.

(35) Law--Including, but not limited to, the constitution or a statute of this state, or the United States; a written opinion of a court of record; a municipal ordinance; an order of a county commissioners’ court; or a rule authorized by and lawfully adopted under a statute.

(36) Law enforcement academy--A school operated by a governmental entity that has been licensed by the commission, which may provide basic licensing courses and continuing education.

(37) Law enforcement automobile for training--A vehicle equipped to meet the requirements of an authorized emergency vehicle as identified by Transportation Code §546.003 and §547.702.

(38) Lesson plan--Detailed guides from which an instructor teaches. The plan includes the goals, specific content and subject matter, performance or learning objectives, references, resources, and method of evaluating or testing students.

(39) License--A license required by law or a state agency rule that must be obtained by an individual to engage in a particular business.

(40) Licensee--An individual holding a license issued by the commission.

(41) Line of duty--Any lawful and reasonable action, which a Texas peace officer is required or authorized by rule, condition of employment, or law to perform. The term includes an action by the individual at a social, ceremonial, athletic, or other function to which the individual is assigned by the individual’s employer.

(42) Moral character--The propensity on the part of a person to serve the public of the state in a fair, honest, and open manner.

(43) Officer--A peace officer or reserve identified under the provisions of the Occupations Code, §1701.001.

(44) Patrol rifle--Any magazine-fed repeating rifle with iron/open sights or with a frame mounted optical enhancing sighting device greater power or less than that carried by the individual officer in an official capacity.

(45) Peace officer--A person elected, employed, or appointed as a peace officer under the provisions of the Occupations Code, §1701.001.

(46) Personal Identification Number (PID)--A unique computer-generated number assigned to individuals for identification in the commission’s electronic database.

(47) Placed on probation--Has received an adjudicated or deferred adjudication probation for a criminal offense.

(48) POST--State or federal agency with jurisdiction similar to that of the commission, such as a peace officer standards and training agency.

(49) Precision rifle--Any rifle with a frame mounted optical sighting device greater than 3 power that is carried by the individual officer in an official capacity.

(50) Proprietary training contractor--An approved training contractor who has a proprietary interest in the intellectual property delivered.

(51) Public security officer--A person employed or appointed as an armed security officer by this state or a political subdivision of this state. The term does not include a security officer employed by a private security company that contracts with this state or a political subdivision of this state to provide security services for the entity.

(52) Reactivate--To make a license issued by the commission active after at least a two-year break in service and the licensee’s failure to complete legislatively required training.

(53) Reinstatement--To make a license issued by the commission active after disciplinary action or failure to obtain required continuing education.

(54) Renewed--Continued as an active license issued by the commission.

(55) Reserve--A person appointed as a reserve law enforcement officer under the provisions of the Occupations Code, §1701.001.
(56) Restore--To make a license issued by the commission active after surrender of license.

(57) Self-assessment--Completion of the commission created process, which gathers information about a training or education program.

(58) Separation--An explanation of the circumstances under which the person resigned, retired, or was terminated, reported on the form currently prescribed by the commission, in accordance with Occupations Code, §1701.452.

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

(60) Successful completion--A minimum of:
   (A) 70 percent or better; or
   (B) C or better; or
   (C) pass, if offered as pass/fail.

(61) TCLEDDS--Texas Commission on Law Enforcement Data Distribution System.

(62) Telecommunicator--A dispatcher or other emergency communications specialist appointed under or governed by the provisions of the Occupations Code, Chapter 1701.

(63) Training coordinator--An individual, appointed by a commission-recognized training provider, who meets the requirements of §215.9 of this title (relating to Training Coordinator).

(64) Training cycle--A 48-month period as established by the commission. Each training cycle is composed of two contiguous 24-month units.

(65) Training hours--Classroom or distance education hours reported in one-hour increments.

(66) Training program--An organized collection of various resources recognized by the commission for providing preparatory or continuing training. This program includes, but is not limited to, learning goals and objectives, academic activities and exercises, lesson plans, exams, skills training, skill assessments, instructional and learning tools, and training requirements.

(67) Training provider--A governmental body, law enforcement association, alternative delivery trainer, or proprietary entity credentialed by the commission to provide preparatory or continuing training for licensees or potential licensees.

(68) Verification (verified)--The confirmation of the correctness, truth, or authenticity of a document, report, or information by sworn affidavit, oath, or deposition.

(b) The effective date of this section is April 15, 2010.

This agency 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 March 8, 2010.

TRD-201001152
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: April 15, 2010
Proposal publication date: December 25, 2009
For further information, please call: (512) 936-7713

37 TAC §217.20
The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §217.20, concerning Retired Peace Officer Reactivation, without changes to the proposed text as published in the December 25, 2009, issue of the Texas Register (34 TexReg 9388) and will not be republished.

The new rule is added to cover the requirements for reactivating a retired peace officer license.

No comments were received regarding adoption of the new rule.

The new rule is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The new rule as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.316, Reactivation of Peace Officer License: Retired Peace Officers.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

35 TexReg 2612  March 26, 2010  Texas Register
CHAPTER 219. PRELICENSING AND REACTIVATION COURSES, TESTS, AND ENDORSEMENTS

37 TAC §219.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §219.1, concerning Eligibility to Take State Examinations, without changes to the proposed text as published in the December 25, 2009, issue of the Texas Register (34 TexReg 9388) and will not be republished.

Subsection (i) is amended to clarify a basic licensing course after three failures. Subsection (j) is amended to a basic licensing course after three failures.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.304, Examination.

This agency 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 March 8, 2010.

TRD-201001154
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: April 15, 2010
Proposal publication date: December 25, 2009
For further information, please call: (512) 936-7713

CHAPTER 223. ENFORCEMENT

37 TAC §223.13

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §223.13, concerning Voluntary Surrender of License, without changes to the proposed text as published in the December 25, 2009, issue of the Texas Register (34 TexReg 9389) and will not be republished.

The title is amended for clarity from "Voluntary Surrender of License" to "Surrender of License". Subsections (a), (d), and (f)(2) clarify language. Subsection (h) reflects the effective date of the changes.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.501, Disciplinary Action.

This agency 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 March 8, 2010.

TRD-201001158
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: April 15, 2010
Proposal publication date: December 25, 2009
For further information, please call: (512) 936-7713

ADOPTED RULES  March 26, 2010   35 TexReg 2613
Texas completes Through These §§71.1, (Vernon Code, Title 13, Part 5, §2001.039, regarding Agency Review of Existing Rules. The proposed review was published in the December 25, 2009, issue of the Texas Register (34 TexReg 9489).

No comments were received.

The agency finds the reason for adopting the rule continues to exist.

TRD-201001278
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: March 12, 2010

Texas State Board of Pharmacy adopts the review of Chapter 305 (§305.1 and §305.2), concerning Educational Requirements, pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules. The proposed review was published in the December 25, 2009, issue of the Texas Register (34 TexReg 9489).

No comments were received.

The agency finds the reason for adopting the rule continues to exist.

TRD-201001278
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: March 12, 2010

Texas State Board of Pharmacy adopts the review of Chapter 309 (§309.1 - 309.8), concerning Substitution of Drug Products, pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules. The proposed review was published in the December 25, 2009, issue of the Texas Register (34 TexReg 9489).
No comments were received.

The agency finds the reason for adopting the rule continues to exist.

TRD-2010001279
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: March 12, 2010
TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word “Figure” followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.
Figure: 10 TAC §54.3(3)

Appendix 1

Texas Department of Housing and Community Affairs

Affidavit of Ownership
(Sworn Statement)

Block 1: Owner/Co-Owner Information

Owner: ___________________________  Co-Owner: ___________________________

Owner/Co-Owner Address: ___________________________________________________

Block 2: Statement of Facts

I/We ___________________________, being first duly sworn, do affirm the facts presented herein are true and complete:

☐ (A) There is no other person entitled to claim any ownership interest in the property;

OR

☐ (B) Each person who may be entitled to claim an ownership interest in the property has given consent to the application or was not located after a reasonable effort.

Block 3: Signatures
(Notarization is REQUIRED)

Under penalties of perjury, I/We certify that the information presented in this Affidavit is true and accurate to the best of my/our knowledge and belief. I/We further understand that providing false representations herein constitutes an act of fraud. False, misleading or incomplete information may result in my/our ineligibility to participate in Programs that will accept this affidavit in accordance with Title 10 of the Government Code, Chapter 2306.

________________________________  ___________________________
Owner Signature                     Co-Owner Signature

Before me personally appeared the person(s) whose signature(s) appear above, who by being sworn, upon oath say that the statements set forth hereinabove are true and correct. Subscribed and sworn before me this ___ day of ______________________ 20__.

________________________________
(Name of Notary)

__________________________________
(Notary Public)                      SEAL

__________________________________ (Commission Expires)
Notary Public State of Texas
<table>
<thead>
<tr>
<th>Type of Transaction</th>
<th>Regular or Priority Handling</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal Property Transaction</td>
<td>Real Property Transaction</td>
</tr>
<tr>
<td>□ New</td>
<td>□ New</td>
</tr>
<tr>
<td>□ Used</td>
<td>□ Used</td>
</tr>
<tr>
<td>□ Lien Assignment</td>
<td></td>
</tr>
<tr>
<td>□ Other</td>
<td></td>
</tr>
<tr>
<td>□ Priority Handling Requested</td>
<td>An additional $35 is included with payment to review application within 5 working days from date received.</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**BLOCK 2(a): Home Information (required)**

<table>
<thead>
<tr>
<th>Manufacturer Name:</th>
<th>Model:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Address:</td>
<td>Date of Manufacture:</td>
</tr>
<tr>
<td>City, State, Zip:</td>
<td>Total Square Feet:</td>
</tr>
<tr>
<td>License Number:</td>
<td>Wind Zone:</td>
</tr>
</tbody>
</table>

**Label/Seal Number**

<table>
<thead>
<tr>
<th>Complete Serial Number</th>
<th>Weight</th>
<th>Size*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 1:</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Section 2:</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Section 3:</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Section 4:</td>
<td>X</td>
<td></td>
</tr>
</tbody>
</table>

2(b) Is home being sold? □ No □ Yes
If yes, and if there is/are no HUD Label(s) or Texas Seal(s) on your home, a Texas Seal will need to be purchased and will be issued to each section of your home at an additional cost of $35.00 per section.

Indicate which section(s) needs a Texas Seal(s):
(Single - $35  Double - $70  Triple - $105)

**BLOCK 3: Home Location (required)**

<table>
<thead>
<tr>
<th>Physical Location of Home:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(or 911 address)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Physical Address (cannot be a Rte. or P. O. Box)</th>
<th>City</th>
<th>State</th>
<th>ZIP</th>
<th>County</th>
</tr>
</thead>
</table>

Was home moved for this sale? □ No □ Yes If yes, include a copy of moving permit.
Was Home Installed for this sale? □ No □ Yes If yes, provide installer information below, if known

**INSTALLER NAME, ADDRESS AND PHONE:**

**BLOCK 4: Ownership Information (required)**

<table>
<thead>
<tr>
<th>4(a) Seller(s) or Transferor(s)</th>
<th>4(b) Purchaser(s), Transferee(s), or Owner(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name</td>
<td>License #</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Name</td>
<td></td>
</tr>
<tr>
<td>Mailing Address</td>
<td>Mailing Address</td>
</tr>
<tr>
<td>Daytime Phone Number</td>
<td>Daytime Phone Number</td>
</tr>
<tr>
<td>( )</td>
<td>( )</td>
</tr>
</tbody>
</table>

4(c) Date of sale, transfer or ownership change:

4(d) Did the buyer trade-in a home to purchase this home? □ No □ Yes If yes, the application transferring the ownership to the Retailer must be attached to this application. Provide the following information on the home traded in:

<table>
<thead>
<tr>
<th>HUD Label</th>
<th>Serial No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>HUD Label #:</td>
<td>Serial #:</td>
</tr>
<tr>
<td>-------------</td>
<td>-----------</td>
</tr>
</tbody>
</table>

**BLOCK 5: Right of Survivorship**<br>(If no box is checked, joint owners will NOT have right of survivorship)<br>
- ☐ Husband and wife will be the only owners and agree that the ownership of the above described manufactured home shall, from this day forward, be held jointly and in the event of death, shall pass to the surviving owner.<br>
- ☐ Joint owners are other than husband and wife, desire right of survivorship, and have attached a completed Affidavit of Fact for Right of Survivorship or other affidavits as necessary to meet the requirements of §1201.213 of the Standards Act.

**BLOCK 6: Personal/Real Property Election**<br>Check one election type<br>
- ☐ Personal Property - Applicant elects to treat this home as personal property. All documents affecting title to the home will be recorded in the records of the Department.<br>
- ☐ Real Property - I (we) elect to treat this home as real property and certify that I am (we are) entitled to make this election in accordance with Section 1201.203 of the Occupations Code because (one box must be checked):<br>  - ☐ I (we) own the real property that the home is attached to.<br>  - ☐ I (we) have a qualifying long-term lease for the land that the home is attached to.<br>  - ☐ The applicant or their authorized representative is the holder or servicer of the loan.<br>  - ☐ I (we) understand that the home will not be considered to be real property until a certified copy of the SOL has been filed in the real property records of the county in which the home is located AND a copy stamped "Filed" has been submitted to the Department.<br>Legal description must be provided for real property:

☐ Inventory - (FOR RETAILER USE ONLY) Retailer number must be provided in Block 4 if this election is checked.

**BLOCK 7: Designated Use** - to be designated by purchaser(s), transferee(s), or owner(s)<br>
- ☐ Residential Use (as a dwelling) OR<br>  - ☐ Non-Residential - Check one of the following: ☐ Business Use ☐ Salvage

**BLOCK 8: Liens** - Will there be any liens on the home (other than a tax lien)? ☐ No ☐ Yes. If yes, complete the below lien information:<br>
- Date of First Lien: <br>- Name of First Lienholder: <br>- Mailing Address: <br>- City/State/Zip: <br>- Daytime Phone: <br>- Date of Second Lien: <br>- Name of Second Lienholder: <br>- Mailing Address: <br>- City/State/Zip: <br>- Daytime Phone:

**BLOCK 9: Special Mailing Instructions**<br>
- IF a copy of an SOL is to be mailed to anyone other than the owner or lienholder of record (such as a closing agent), please provide that mailing address here.

**BLOCK 10: Signatures** (Notarization is Optional)<br>10(a) Signatures of each seller/transferor<br>
- Signature of owner or authorized seller<br>  - Sworn and subscribed before me this ___ day of ________, 20___<br>  - Signature of Notary <br>  - SEAL<br>

10(b) Signatures of each purchaser/transfer or owner<br>
- Signature of purchaser/transfer or owner<br>  - Sworn and subscribed before me this ___ day of ________, 20___<br>  - Signature of Notary <br>  - SEAL<br>

10(e) For Lien Assignments Only<br>
- Signature of authorized representative for previous lienholder

- Signature of authorized representative for new lender
NOTICE OF PERMIT APPLICATION
FOR A MAN-MADE CARBON DIOXIDE GEOLOGIC STORAGE FACILITY

[Company name and address] is applying to the Railroad Commission of Texas for a permit to create, operate, or maintain an anthropogenic carbon dioxide geologic storage facility. The applicant proposes to geologically store man-made carbon dioxide in the [formation name]; [lease name]; [well number(s)]. The proposed facility will be located at [address]; approximately [direction and number of miles from nearest town] in the [field name] in [County or Counties]. The legal description of the property is as follows: [legal description, including section/survey/abstract]. The geologic storage reservoir will be located in the subsurface depth interval from _____ to _____ feet.

The following map shows the location of the proposed facility. [Include a United States Geological Survey 7.5-minute quadrangle map or maps showing towns; rivers, streams, or other bodies of water; local landmarks; and any other information, including routes, streets, or roads and accurate distance measurements necessary to allow local residents to readily identify the proposed location of the facility; showing the exact location and boundaries of the proposed facility; stating the name of the United States Geological Survey 7.5-minute quadrangle map(s) that contains the area shown or described; and indicating the north direction.]

A copy of the application is available for public inspection in the clerk's office in the [name of each county] County courthouse [address of each courthouse] and online at [website address].

LEGAL AUTHORITY: Texas Natural Resources Code, Title 3, and the Railroad Commission's Oil and Gas Division Rules (Statewide Rules) at 16 Tex. Admin. Code, Chapters 3 and 5.

Requests for more information about the application may be made to: Technical Permitting Section, Oil and Gas Division, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711, (512) 463-6760. Persons who can show they may be adversely affected by the proposed storage facility may request a public hearing on the application. Such a request must be in writing and received within 30 days of the last date of publication of this notice. Requests for hearing should be sent to the Technical Permitting Section at the address above.
NOTICE OF APPLICATION TO AMEND A PERMIT
FOR A MAN-MADE CARBON DIOXIDE GEOLOGIC STORAGE FACILITY

[Company name and address] is applying to the Railroad Commission of Texas for a amendment to an existing man-made carbon dioxide geologic storage facility permit. The applicant is storing man-made carbon dioxide in the [formation name]; [lease name]; [well number(s)]. The facility is located at [address]; approximately [direction and number of miles from nearest town] in the [field name] in [County or Counties]. The legal description of the property is as follows: [legal description, including section/survey/abstract]. The geologic storage reservoir is located in the subsurface depth interval from _____ to _____ feet.

The following map shows the location of the proposed facility. [Include a United States Geological Survey (USGS)7.5-minute quadrangle map or maps showing towns; rivers, streams, or other bodies of water; local landmarks; and any other information, including routes, streets, or roads and accurate distance measurements necessary to allow local residents to readily identify the proposed location of the facility; showing the exact location and boundaries of the proposed facility; stating the name of the USGS 7.5-minute quadrangle map(s) that contains the area shown or described; and indicating the north direction.]

The purpose of the requested permit amendment is to [state the purpose of amendment].

A copy of the application is available for public inspection in the clerk's office in the [name of each county] County courthouse [address of each courthouse] and online at [website address].

LEGAL AUTHORITY: Texas Natural Resources Code, Title 3, and the Railroad Commission's Oil and Gas Division Rules (Statewide Rules) at 16 Tex. Admin. Code, Chapters 3 and 5.

Requests for more information about the application may be made to: Technical Permitting Section, Oil and Gas Division, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711, (512) 463-6760. Persons who can show they may be adversely affected by the proposed storage facility may request a public hearing on the application. Such a request must be in writing and received within 30 days of the last date of publication of this notice. Requests for hearing should be sent to the Technical Permitting Section at the address above.
Figure: 16 TAC §5.204(b)(1)(C)

Affidavit of Publication
STATE OF TEXAS
COUNTY OF ________________

Before me, the undersigned authority, on this day personally appeared [name of person], the [title of person] of the [name of newspaper], a newspaper having general circulation in [name(s) of county(ies)] County(ies), Texas, who being by me duly sworn, deposes and says that the foregoing attached notice was published in said newspaper on the following date(s), to wit: [list all dates of publication].

[signature of person]
[typed or printed name of person]

Subscribed and sworn to before me this the [day] of [month], [year], to certify which witness my hand and seal of office.

[signature of notary]
[typed or printed name of notary]

Notary Public in and for [name of county] County, Texas.

Figure: 16 TAC §402.451(h)

<table>
<thead>
<tr>
<th>Excess Funds as a Percentage of the Operating Capital Limit</th>
<th>Last Day to Disburse Excess Funds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 200%</td>
<td>September 30, 2010</td>
</tr>
<tr>
<td>200% - 299%</td>
<td>September 30, 2011</td>
</tr>
<tr>
<td>Greater than or equal to 300%</td>
<td>September 30, 2012</td>
</tr>
</tbody>
</table>
### Critical Indicators

<table>
<thead>
<tr>
<th>Description</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Was the total fund balance less than zero?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Was the unrestricted net asset balance (net of appreciation of interest on capital appreciation bonds) in the governmental activities column in the statement of net assets greater than zero? (If the district's five-year percent change in students was a 10% increase or more than average)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Was there no disclosure in the annual financial report and/or other sources of information concerning default on bonded indebtedness obligations?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. Was the annual financial report filed within one month after February 28th or January 28th deadline depending upon the district's fiscal year end date (June 30th or August 31st)?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5. Was there an unqualified opinion in the annual financial report?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6. Did the annual financial report not disclose any instance(s) of material weaknesses in internal controls?</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Fiscal Efficiency and Academic Performance

<table>
<thead>
<tr>
<th>Points</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td>Determination Points</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Description</th>
<th>Points</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td>7. Did the district's academic rating exceed the district's average?</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8. Was the three-year average percent of total tax collections (including delinquent) greater than 98%?</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9. Did the comparison of REIMS data to the information in the annual financial report result in an aggregate variance of less than 3 percent of expenditures per fund group (data quality measure)?</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10. Were debt-related expenditures (net of IFA and/or EDA allotments) less than $50,000 per student? (If the district's five-year percent change in students was a 1% increase or more, or if property taxes collected per square foot were more than $200,000, then the district receives 5 points)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>11. Was there no disclosure in the annual audit report of material noncompliance?</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>12. Did the district have full accreditation status in relation to financial management practices? (e.g., no conservator or monitor assigned)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Budgeting

<table>
<thead>
<tr>
<th>Description</th>
<th>Points</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td>13. Was the aggregate of budgeted expenditures and other losses less than the aggregate of total revenues, other resources, and fund balance in general fund?</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>14. If the district's aggregate fund balance in the general fund and capital projects fund was less than zero, were construction projects adequately financed? (Were construction projects adequately financed or adjusted by change orders or other legal means to avoid creating or adding to the fund balance deficit situation)?</td>
<td></td>
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</tr>
</tbody>
</table>

### Financial

<table>
<thead>
<tr>
<th>Description</th>
<th>Points</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td>15. Was the ratio of cash and investments to deferred revenues (excluding amounts equal to net delinquent taxes receivable) in the general fund greater than or equal to 1:1? (If deferred revenues are less than net delinquent taxes receivable, then the district receives 5 points)</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>16. Was the administrative cost ratio less than the threshold ratio? (See range below)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Cash Management

<table>
<thead>
<tr>
<th>Description</th>
<th>Points</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td>17. Was the ratio of students to teachers within the range shown below according to district size?</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>18. Was the ratio of students to total staff within the range shown below according to district size?</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Description</th>
<th>Points</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td>19. Was the total fund balance in the general fund more than 50% and less than 100% of optimum according to the fund balance and cash flow calculation worksheet in the annual financial report?</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>20. Was the decrease in undesignated unreserved fund balance less than 20% over two fiscal years? (If 1.5 times optimum fund balance is less than total fund balance in general fund or if total revenues exceeded operating expenditures in the general fund, then the district receives 5 points)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>21. Was the aggregate total of cash and investments in the general fund more than $5?</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>22. Were investment earnings in all funds (excluding debt service fund and capital projects fund) more than $20 per student?</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Total Points**

<table>
<thead>
<tr>
<th>Points</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
# Determination Of Rating

<table>
<thead>
<tr>
<th>A. Did The District Answer No To Indicators 1, 2, 3 Or 4, OR Both 5 And 6</th>
<th>Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>If The District Answered No To Either, The District's Rating Is Substandard</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>B. Determine Rating By Applicable Number Of Points</th>
<th>Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>Superior Achievement</td>
<td>&gt;=72 AND Yes To Indicator 7</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Above Standard Achievement</th>
<th>&gt;=64 &lt;72</th>
</tr>
</thead>
<tbody>
<tr>
<td>Standard Achievement</td>
<td>OR &gt;=72 AND No To Indicator 7</td>
</tr>
</tbody>
</table>

| Substandard Achievement (IF Less Than 55 Points OR If The District Answered No To Indicators 1, 2, 3 Or 4, OR Both 5 And 6) | <56 OR Answered No To One Default Indicator |

---

* UL - Upper limit  
** LL - Lower limit

For Questions Call The Division Of Financial Audits At (512) 463-9095.

## Administrative Cost Ratio Indicator 18

<table>
<thead>
<tr>
<th>ADA Group</th>
<th>Standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>10,000 and Above</td>
<td>0.1105</td>
</tr>
<tr>
<td>5,000 to 9,999</td>
<td>0.106</td>
</tr>
<tr>
<td>1,000 to 4,999</td>
<td>0.092</td>
</tr>
<tr>
<td>100 to 999</td>
<td>0.081</td>
</tr>
<tr>
<td>Less than 100</td>
<td>0.064</td>
</tr>
</tbody>
</table>

## Student To Teacher Ratio Indicator 17

<table>
<thead>
<tr>
<th>District Size - Number of Students Between</th>
<th>Ranges for Ratios</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low High</td>
<td>&lt;500 7.0 22</td>
</tr>
<tr>
<td>500 - 999 10.0 32</td>
<td></td>
</tr>
<tr>
<td>1,000 - 4,999 11.5 32</td>
<td></td>
</tr>
<tr>
<td>5,000 - 9,999 13.0 27</td>
<td></td>
</tr>
<tr>
<td>&gt;=10,000 13.5 22</td>
<td></td>
</tr>
</tbody>
</table>

## Student To Staff Ratio Indicator 18

<table>
<thead>
<tr>
<th>District Size - Number of Students Between</th>
<th>Ranges for Ratios</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low High</td>
<td>&lt;500 5.0 14</td>
</tr>
<tr>
<td>500 - 999 6.3 14</td>
<td></td>
</tr>
<tr>
<td>1,000 - 4,999 6.0 14</td>
<td></td>
</tr>
<tr>
<td>5,000 - 9,999 6.8 14</td>
<td></td>
</tr>
<tr>
<td>&gt;=10,000 7.0 14</td>
<td></td>
</tr>
</tbody>
</table>

Completed By: ___________________________  Date: _______________

Notes: ___________________________
<table>
<thead>
<tr>
<th>Indicator</th>
<th>Calculation Defined</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Was Total Fund Balance Less Reserved Fund Balance Greater Than Zero In The General Fund?</td>
</tr>
<tr>
<td>2</td>
<td>Was the Total Unrestricted Net Asset Balance (Net of the Accretion of Interest for Capital Appreciation Bonds) in the Governmental Activities Column in the Statement of Net Assets Greater Than Zero? (If The District’s Five-Year Percent Change In Students Was A 10% Increase Or More Then The District Answers Yes)</td>
</tr>
<tr>
<td>3</td>
<td>Were There No Disclosures In The Annual Financial Report And/Or Other Sources Of Information Concerning Default On Bonded Indebtedness Obligations?</td>
</tr>
<tr>
<td>4</td>
<td>Was The Annual Financial Report Filed Within One Month After November 27th or January 28th Deadline Depending Upon The District’s Fiscal Year End Date (June 30th or August 31st)?</td>
</tr>
<tr>
<td>5</td>
<td>Was There An Unqualified Opinion In Annual Financial Report?</td>
</tr>
<tr>
<td>6</td>
<td>Did The Annual Financial Report Not Disclose Any Instance(s) Of Material Weaknesses In Internal Controls?</td>
</tr>
<tr>
<td>Indicator</td>
<td>Calculation Defined</td>
</tr>
<tr>
<td>-----------</td>
<td>---------------------</td>
</tr>
<tr>
<td>7 Did The District's Academic Rating Exceed Academically Unacceptable?</td>
<td>No Calculation Involved</td>
</tr>
<tr>
<td>8 Was The Three-Year Average Percent Of Total Tax Collections (Including Delinquent) Greater Than 98%?</td>
<td>$A = \frac{\text{Tax Collections For Three Years}}{\text{Tax Levy For Three Years}} \times 100$; $B = \text{Tax Levy For Three Years}$; Reported In Exhibit J-1 Schedule of Delinquent Taxes Receivable In The Annual Financial Report</td>
</tr>
<tr>
<td>9 Did The Comparison Of PEIMS Data To Like Information In Annual Financial Report Result In An Aggregate Variance Of Less Than 3 Percent Of Expenditures Per Fund Type (Data Quality Measure)?</td>
<td>$C = \text{Expenditure In PEIMS Per Fund Type Presented In Exhibit C-2}$; $D = \text{Fund Class}$</td>
</tr>
<tr>
<td>10 Were Debt Related Expenditures (Net Of IFA And/Or EDA Allotment) Less Than $350.00 Per Student? (If The District's Five-Year Percent Change In Students Was A 7% Increase Or More, Or If Property Taxes Collected Per Penny Of Tax Effort Were More Than $200,000 Per Student, Then The District Receives 5 Points)</td>
<td>If $E / (\text{Fund Rate In Pennies}) &lt; 200,000$, Then Continue Calculation ($A = \frac{\text{Expenditures Report In The Debt Service And General Funds (Excluding Expenditure Object Codes 6524 and 6525)}}{\text{Number Of Students In Year 5 From Base Year}} = \frac{\text{IFD + EDA Allotments}}{\text{Number Of Students In Base Year}}$, $F = \text{Total Tax Collections}$, $D = \text{Number Of Students In Base Year}$, $E = \text{Total Tax Collections}$, $F = \text{Total Tax Rate In Pennies}$</td>
</tr>
<tr>
<td>11 Was There No Disclosure In The Annual Audit Report Of Material Noncompliance?</td>
<td>No Calculation Involved</td>
</tr>
<tr>
<td>12 Did The District Have Full Accreditation Status In Relation To Financial Management Practices? (e.g., Conservator Assigned)</td>
<td>No Calculation Involved</td>
</tr>
<tr>
<td>Indicator</td>
<td>Calculation Defined</td>
</tr>
<tr>
<td>-----------</td>
<td>---------------------</td>
</tr>
<tr>
<td>13</td>
<td>Was The Aggregate Of Budgeted Expenditures And Other Uses Less Than The Aggregate Of Total Revenues, Other Resources and Fund Balance in General Fund?</td>
</tr>
<tr>
<td></td>
<td>((A + B) - (C + D + E) &lt; 0 ) Where ( A = [\text{Budgeted Appropriations In General Fund}] ); ( B = [\text{Budgeted Other Uses In The General Fund}] ); ( C = [\text{Budgeted Revenues In General Fund}] ); ( D = [\text{Budgeted Other Resources In The General Fund}] ); ( E = [\text{Fund Balance In General Fund At July 1 or September 1 Depending On Fiscal Year End}] )</td>
</tr>
<tr>
<td>14</td>
<td>If The District's Aggregate Fund Balance In The General Fund And Capital Projects Fund Was Less Than Zero, Were Construction Projects Adequately Financed? (Were Construction Projects Adequately FINANCED Or Adjusted By Change Orders Or Other Legal Means To Avoid Creating Or Adding To The Fund Balance Deficit Situation?)</td>
</tr>
<tr>
<td></td>
<td>If ((C + D) &lt; 0) Then Continue Calculation As ((A - B - (C + D)) &lt; 0) Where ( A = [\text{Expenditures Function 81 In General Fund and Capital Projects Fund}] ); ( B = [\text{Other Resources For Real Property Financing In General Fund and Capital Projects Fund}] ); ( C = [\text{Fund Balance In General Fund At July 1 or September 1 Depending On Fiscal Year End}] ); ( D = [\text{Fund Balance In Capital Projects Fund At July 1 or September 1 Depending On Fiscal Year End}] )</td>
</tr>
<tr>
<td>15</td>
<td>Was The Ratio Of Cash And Investments To Deferred Revenues (Excluding Amount Equal To Net Delinquent Taxes Receivable) In The General Fund Greater Than Or Equal To 1:1? (If Deferred Revenues Are Less Than Net Delinquent Taxes Receivable, Then The District Receives 5 Points)</td>
</tr>
<tr>
<td></td>
<td>If ( B &gt; 0) Then Continue Calculation As ((A / B)) Where ( A = [\text{Cash And Investments In General Fund}] ); ( B = [\text{Deferred Revenue In General Fund} - \text{Property Tax Receivable Net Of Uncollectible}] )</td>
</tr>
<tr>
<td>Indicator</td>
<td>Calculation Defined</td>
</tr>
<tr>
<td>--------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>(See Ranges Below)</td>
<td></td>
</tr>
<tr>
<td>17  Was The Ratio Of Students To Teachers Within The Ranges Shown Below</td>
<td>(A / B) Where A = [Number Of Students]; B = [Number Of Teachers FTEs]</td>
</tr>
<tr>
<td>According To District Size? (See Ranges Below)</td>
<td></td>
</tr>
<tr>
<td>18  Was The Ratio Of Students To Total Staff Within The Ranges Shown</td>
<td>(A / B) Where A = [Number Of Students]; B = [Total Staff FTEs]</td>
</tr>
<tr>
<td>Below According To District Size? (See Ranges Below)</td>
<td></td>
</tr>
<tr>
<td>19  Was The Total Fund Balance In The General Fund More Than 50% And</td>
<td>Deficient Fund Balance Amount In General Fund Is Defined As A &lt; ((B X .5) And Excess Is Defined As A &gt;</td>
</tr>
<tr>
<td>Calculation Worksheet in the Annual Financial Report?</td>
<td></td>
</tr>
<tr>
<td>20  Was The Decrease In Undesignated Unreserved Fund Balance Less Than</td>
<td>If (A – B) &gt; 0 And Optimum Fund Balance X 1.5 Is Less Than Total Fund Balance In General Fund And [C] X .80 &gt; [D], Then Continue Calculation [A] - [B] Where A = [Expenditures In General Fund In Functions 11 Through 61 And Expenditure Object Codes 6100 Through 6400]; B = [Total Revenues In General Fund]; C = [Undesignated, Unreserved Fund Balance In General Fund At June 30 or August 31, Depending On Fiscal Year End, Two Fiscal Years Prior]; D = [Undesignated, Unreserved Fund Balance In General Fund For The Last Fiscal Year]</td>
</tr>
<tr>
<td>20% Over Two Fiscal Years? (If 1.5 Times Optimum Fund Balance Is Less</td>
<td></td>
</tr>
<tr>
<td>Than Total Fund Balance In General Fund Or If Total Revenues Exceeded</td>
<td></td>
</tr>
<tr>
<td>Operating Expenditures In The General Fund, Then The District Receives</td>
<td></td>
</tr>
<tr>
<td>5 Points).</td>
<td></td>
</tr>
<tr>
<td>21  Was The Aggregate Total Of Cash And Investments In The General Fund</td>
<td>A &gt; 0 Where A = [Cash and Investments In General Fund]</td>
</tr>
<tr>
<td>More Than $0?</td>
<td></td>
</tr>
<tr>
<td>22  Were Investment Earnings In All Funds (Excluding Debt Service Fund</td>
<td>(A / B) Where A = [Investment Earnings In All Funds Except Debt Service Fund And Capital Projects Fund]; B = [Number Of Students]</td>
</tr>
<tr>
<td>And Capital Projects Fund) More Than $20 Per Student?</td>
<td></td>
</tr>
</tbody>
</table>
### Indicator 16

<table>
<thead>
<tr>
<th>ADA Group</th>
<th>Standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>10,000 and Above</td>
<td>0.1105</td>
</tr>
<tr>
<td>5,000 to 9,999</td>
<td>0.1250</td>
</tr>
<tr>
<td>1,000 to 4,999</td>
<td>0.1401</td>
</tr>
<tr>
<td>500 to 999</td>
<td>0.1561</td>
</tr>
<tr>
<td>Less than 500</td>
<td>0.2654</td>
</tr>
<tr>
<td>Sparse</td>
<td>0.3614</td>
</tr>
</tbody>
</table>

### Indicator 17

<table>
<thead>
<tr>
<th>District Size - Number of Students Between</th>
<th>Ranges for Ratios</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Low</td>
</tr>
<tr>
<td>&lt;500</td>
<td>7.0</td>
</tr>
<tr>
<td>500 to 999</td>
<td>10.0</td>
</tr>
<tr>
<td>1,000 to 4,999</td>
<td>11.5</td>
</tr>
<tr>
<td>5,000 to 9,999</td>
<td>13.0</td>
</tr>
<tr>
<td>&gt;=10,000</td>
<td>13.5</td>
</tr>
</tbody>
</table>

### Indicator 18

<table>
<thead>
<tr>
<th>District Size - Number of Students Between</th>
<th>Ranges for Ratios</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Low</td>
</tr>
<tr>
<td>&lt;500</td>
<td>5.0</td>
</tr>
<tr>
<td>500 to 999</td>
<td>5.8</td>
</tr>
<tr>
<td>1,000 to 4,999</td>
<td>6.3</td>
</tr>
<tr>
<td>5,000 to 9,999</td>
<td>6.8</td>
</tr>
<tr>
<td>&gt;=10,000</td>
<td>7.0</td>
</tr>
</tbody>
</table>

For Questions Call The Division Of School Financial Audits At (512) 463-9095
Figure: 19 TAC §109.1002(e)  
Charter School – School FIRST – Rating Worksheet Dated March 2010  

CDNumber  xxxxxx  Charter School: ____________________________
Charter Holder: ____________________________

(A) The annual financial audit report was received within 180 days after
   close of fiscal year.  
   Yes / No

Fiscal Year  _____  Date Due:  mm/dd/yyyy  Date Received:  mm/dd/yyyy

(B) The annual financial audit report indicates assets ≥ 80% of
   liabilities.
   Total Assets:    $xxxxxxx
   Total Liabilities:    $xxxxxxx
   80 percent of Total Liabilities:    $xxxxxxx
   Excess Assets over Liabilities:    $xxxxxxx

(C) The annual financial audit report did not indicate a qualified or
   adverse opinion or an opinion disclaimed because of a scope limitation.  
   Yes/ No

Assessment Issued

MEETS STANDARD or SUBSTANDARD or SUSPENDED-DATA QUALITY

* In order to achieve a "Meets Standard", the charter school must receive a "Yes" on all of the above indicators. The rating is "Substandard" if the charter school receives a "No" on any of the above indicators. If no audit report is received, the rating is "Suspended-Data Quality".
Financial Accountability Indicators

(A) The annual financial audit report was received within 180 days after close of fiscal year.

The annual financial audit report is reviewed to determine whether the fiscal year end is June 30 or August 31. For June 30 fiscal year end reports, the report must be received within 180 days after June 30, or December 27. For August 31 fiscal year end reports, the report must be received within 180 days after August 31, or February 27.

The date received is stamped on the physical copy of the audit report. The date the electronic copy of the audit report is uploaded is recorded on the TEA web site. If either date is equal or prior to the 180th day after the fiscal year end, the indicator is answered “Yes.”

(B) The annual financial audit report indicates assets >= 80% of liabilities.

The Statement of Financial Position for the charter district is the source of the Total Assets figure and the Total Liabilities figure. The Total Liabilities are multiplied by 80% and compared to the Total Assets. If Total Assets are greater than or equal to 80% of Total Liabilities, the indicator is answered “Yes.”

(C) The annual financial audit report did not indicate a qualified or adverse opinion or an opinion disclaimed because of a scope limitation.

The Independent Auditor’s Report is reviewed to determine if the auditor issued an opinion other than ‘unqualified.’ If the auditor issued an unqualified opinion, the indicator is answered “Yes.”

Financial Accountability Determinations

Meets Standard

Each of the three indicators above must be answered “Yes.”

Substandard Achievement

Any of the three indicators above is answered “No.”

Suspended--Data Quality

A Suspended--Data Quality result will be determined if: 1) an audit report is received that doesn’t include information on the total assets and total liabilities of the charter or the auditor’s opinion; 2) PEIMS data are not accurate or the charter did not submit required PEIMS data; and/or 3) the agency has not received a financial audit for the charter.
Figure: 30 TAC §101.394(a)(1)(A)

\[ S = \frac{\sum_{i=1}^{n} L_{A_i}}{n} \times A C^1 \]

Where:

S = the allocation for the site.

i = each site located in Harris County and subject to this division.

n = the total number of sites subject to this division.

LA = the level of activity baseline for a site, calculated as the annual level of activity for any 12 consecutive months during the period of 2000 - 2004 for the site, as certified by the executive director.

AC\(^1\) = 3,106.3 tons per year of highly-reactive volatile organic compounds less the total amount allocated to those sites receiving a minimum allocation.
Figure: 30 TAC §101.394(a)(1)(B)

\[ S = AC^1 \times \text{(Industry Sector Share)} \times \text{(Site Share)} \]

Where:

\( S \) = the allocation for the site.

Industry Sector Share = Total actual average emissions for the industry sector during the baseline emissions period divided by the total actual average emissions for all participating sites during the baseline emissions period.

Site Share = The sum of the total average actual emissions for vents, cooling towers, and other facilities and uncontrolled emissions for flares, heaters, boilers, furnaces, thermal and catalytic oxidizers, and other combustion control devices combusting highly-reactive volatile organic compound (HRVOC) streams, during the baseline emissions period divided by the total uncontrolled actual average emissions for the industry sector during the baseline emission period.

\( AC^1 \) = the amount of HRVOC tons defined in (1) - (5) of this figure less the total amount allocated to those sites receiving a minimum allocation under §101.394(a)(1)(E) of this title.

(1) For 2011 - 2013, \( AC^1 = 3,451.5 \) tons;

(2) For 2014, \( AC^1 = 3,105.9 \) tons;

(3) For 2015, \( AC^1 = 2,932.9 \) tons;

(4) For 2016, \( AC^1 = 2,761.2 \) tons; and

(5) For 2017 and all subsequent calendar-year control periods, \( AC^1 = 2,588.6 \) tons.
Figure: 30 TAC §101.399(i)(4)

\[
A = \frac{1}{11.57} \sum (R_i \times E_i)
\]

Where:

\(A\) = yearly allocation of highly-reactive volatile organic compound allowances.

\(R_i\) = the reactivity of each speciated volatile organic compound reduced as specified in California Code of Regulations, Title 17, Chapter 1, §94700, concerning MIR Values for Compounds, as amended.

\(E_i\) = the actual emissions reduced, in tons per year, of each speciated volatile organic compound.

Figure: 30 TAC §115.440(b)(12)

\[
PP_c = \sum_{i=1}^{n} \left( \frac{W_i}{MW_{W_i}} \times VP_i \right)
\]

\[
= \frac{\sum_{i=1}^{n} \frac{W_i}{MW_{W_i}} \times VP_i}{\sum_{e=1}^{n} \frac{W_e}{MW_{W_e}} + \sum_{i=1}^{n} \frac{W_i}{MW_{W_i}}}
\]

Where:

\(PP_c\) = the VOC composite partial pressure of a solution at 20 degrees Celsius, millimeters of mercury (mm Hg);

\(W_i\) = the weight of VOC i, grams (g);

\(MW_i\) = the molecular weight of VOC i, g/g-mole;

\(VP_i\) = the vapor pressure of VOC i at 20 degrees Celsius, mm Hg;

\(W_w\) = the weight of water, g;

\(MW_w\) = the molecular weight of water, g/g-mole;

\(W_e\) = the weight of non-water exempt compound e, g; and

\(MW_e\) = the molecular weight of non-water exempt compound e, g/g-mole.
### TEXAS DEPARTMENT OF PUBLIC SAFETY

**AMBER ALERT REQUEST FORM**

Fax (512) 424-2281 or (512) 461-2291 AND Call (512) 424-2277 or 2208

**MAXIMUM ACTIVATION - 24 HOURS**

<table>
<thead>
<tr>
<th>Reporting Agency Information:</th>
<th>Yes</th>
<th>No</th>
<th>Activation Criteria:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date of Request</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Name of Reporting Agency</td>
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**IMPORTANT:** DO NOT SEND THIS FORM TO DPS UNLESS YOU MEET ALL FOUR CRITERIA ABOVE. If activated, your request is only valid for a 24 hour period. All extension requests must be made by contacting (512) 424-2277 or 2208 before the last 23 hour State Operations Center reminder.

- **Abduction Date:**
- **Time:**
- **Last known location:**

**VICTIM DATA:**

- **Name:**
- **Age:**
- **Sex:**
- **Race:**
- **DOB:**
- **Height:**
- **Weight:**
- **Eyes:**
- **Hair:**
- **Clothing:**
- **Unique Physical Characteristics:**

**SUSPECT DATA:**

- **Name:**
- **Age:**
- **Sex:**
- **Race:**
- **DOB:**
- **Height:**
- **Weight:**
- **Eyes:**
- **Hair:**
- **Clothing:**
- **Unique Physical Characteristics:**

**VEHICLE DATA:**

- **Make:**
- **Model:**
- **Year:**
- **Color:**
- **LP-State:**
- **Number:**
- **Any other descriptors:**

MP-24 (Rev. 01/2010)
Department of Assistive and Rehabilitative Services

Strategic Plan/Legislative Appropriation Request Public Meeting Scheduled

The Department of Assistive and Rehabilitative Services (DARS) is seeking stakeholder input for the agency’s 2012-2013 Strategic Plan and Legislative Appropriations Request (LAR).

April 8, 2010

Criss Cole Rehabilitation Center Auditorium

4:00 p.m. - 7:00 p.m.

4800 North Lamar

Austin, Texas 78756

Stakeholder input is essential to assist with developing the Strategic Plan and LAR. Your contribution is valued and appreciated; if you are unable to attend the public meeting written comments may be forwarded to dars.inquiries@dars.state.tx.us by 5:00 p.m. April 22, 2010.

For persons with disabilities requesting accommodations, please contact DARS Inquiries at 1-800-628-5115 preferably five business days prior to the scheduled meeting.

TRD-201001349
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Filed: March 17, 2010

Office of the Attorney General

Texas Health and Safety Code, Texas Water Code, and Texas Clean Air Act Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Health and Safety Code, Texas Water Code, and Texas Clean Air Act. 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: State of Texas v. The Goodyear Tire & Rubber Company, Cause No. ___________ in the _____ Judicial District Court, Travis County, Texas.

Nature of Defendant’s Operations: Defendant owns and operates a chemical manufacturing plant in Houston, Texas. Defendant’s operations discharged air contaminants in excess of permit levels.

Proposed Agreed Judgment: The Agreed Final Judgment orders the Defendant to pay a cash penalty of $44,500. Defendant will pay the State $5,000 in attorneys fees.

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 Laura E. Miles-Valdez, Assistant Attorney General, Environmental Protection and Administrative Law Division, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0052. Written comments must be received within 30 days of publication of this notice to be considered.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201001231
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: March 10, 2010

Texas Board of Chiropractic Examiners

Notice of Public Hearing

The Texas Board of Chiropractic Examiners (Board) will conduct a public hearing on Tuesday, April 6, 2010. The hearing will begin at 1:30 p.m. in Room 102A of the William P. Hobby, Jr. Building, located at 333 Guadalupe (3rd and Guadalupe), in Austin, Texas. The Board will hear public comment on a proposed rule amendment at 22 Texas Administrative Code (TAC) § 75.17 (concerning the addition of vestibular diagnostic testing to the scope of practice authorized for properly qualified chiropractors in Texas). The proposed rule amendment was published in the January 22, 2010, issue of the Texas Register (35 TexReg 437); see also http://www.sos.state.tx.us/texreg/pdf/back-view/0122/0122prop.pdf. The comment period for the rule amendment closed as of February 21, 2010; however, additional comments will be accepted at the public hearing. The Board offers reasonable accommodations for persons attending meetings, hearings, or educational events, as required by the Americans with Disabilities Act. If you require special accommodations, please contact Yvette Yarbrough at (512) 305-6716, or Mary Feyes at (512) 305-6901, a minimum of two days prior to the hearing date. For further information regarding this notice, you may contact H. A. ten Brink, General Counsel, at (512) 305-6715.

TRD-201001319
Glenn Parker
Executive Director
Texas Board of Chiropractic Examiners
Filed: March 15, 2010

Comptroller of Public Accounts
Certification of the Average Taxable Price of Gas and Oil

The Comptroller of Public Accounts, administering agency for the collection of the Crude Oil Production Tax, has determined that the average taxable price of crude oil for reporting period February 2010, as required by Tax Code, §202.058, is $62.60 per barrel for the three-month period beginning on November 1, 2009, and ending January 31, 2010. Therefore, pursuant to Tax Code, §202.058, crude oil produced during the month of February 2010, from a qualified Low-Producing Oil Lease, is not eligible for exemption from the crude oil production tax imposed by Tax Code, Chapter 202.

The Comptroller of Public Accounts, administering agency for the collection of the Natural Gas Production Tax, has determined that the average taxable price of gas for reporting period February 2010, as required by Tax Code, §201.059, is $4.12 per mcf for the three-month period beginning on November 1, 2009, and ending January 31, 2010. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of February 2010, from a qualified Low-Producing Well, is not eligible for exemption from the natural gas production tax imposed by Tax Code, Chapter 201.

Inquiries should be directed to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

TRD-201001333
Ashley Harden
General Counsel
Comptroller of Public Accounts
Filed: March 16, 2010

Notice of Request for Applications

Pursuant to Chapters 403, 447 and 2305, Texas Government Code; and the State Energy Plan (SEP) and related legal authority and regulations, the Comptroller of Public Accounts (Comptroller), State Energy Conservation Office (SECO), announces this Request for Applications (RFA #ISD-G1-2010) and Notice of Funding Availability up to $885,269.00 in grant funding and invites applications from eligible interested Independent School Districts (ISDs) for grant funds for the ISD Grants Program of the State Energy Conservation Office (SECO). Eligible entities must be an Independent School District (ISD) and applications must include a minimum of a twenty percent (20%) match of total project costs. The Comptroller reserves the right to award more than one grant under the terms of this RFA. If a grant award is made under the terms of the RFA, Grantee will be expected to begin performance of the grant agreement on or about May 28, 2010, or as soon thereafter as practical.

Contact: For general questions about these instructions or the application form, please submit your question in writing to William Clay Harris, Assistant General Counsel, Contracts, via facsimile to: (512) 463-3669. This notice is the RFA and will be published after 10:00 am Central Zone Time (CZT) on Friday, March 26, 2010 and posted on the Electronic State Business Daily (ESBD) at: http://esbd.cpa.state.tx.us after 10:00 a.m. CZT on Friday, March 26, 2010. The application and sample grant agreement will be posted shortly thereafter on the following website shortly thereafter: http://www.seco.cpa.state.tx.us/funding/.

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and Non-Mandatory Letters of Intent must be received at the above-referenced address, also called Issuing Office, not later than 2:00 p.m. (CZT) on Monday, April 5, 2010. Prospective applicants are encouraged to fax Non-Mandatory Letters of Intent and Questions to (512) 463-3669 to ensure timely receipt. Non-Mandatory Letters of Intent must be addressed to the attention of Mr. Harris and must be signed by an official of the entity. On or about Friday, April 9, 2010, the Comptroller expects to post responses to questions on the ESBD. Late Non-Mandatory Letters of Intent and Questions will not be considered under any circumstances. Applicants shall be solely responsible for verifying timely receipt of Non-Mandatory Letters of Intent and Questions in the Issuing Office.

Closing Date: Applications must be delivered to the Issuing Office of the Assistant General Counsel, Contracts, no later than 2:00 p.m. (CZT), on Friday, April 23, 2010. Late Applications will not be considered under any circumstances; Applicants shall be solely responsible for verifying timely receipt of applications in the Issuing Office.

Evaluation Criteria: Applications will be evaluated under the criteria outlined in the grant application and instructions for this RFA. The Comptroller reserves the right to accept or reject any or all applications submitted. The Comptroller is not obligated to execute a grant agreement on the basis of this notice or the distribution of any RFA. The Comptroller shall not pay for any costs incurred by any entity in responding to this Notice or to the RFA.

The anticipated schedule of events pertaining to this RFA is as follows:
Issuance of RFA - March 26, 2010, after 10:00 a.m. CZT; Non-Mandatory Letters of Intent and Questions Due - April 5, 2010, 2:00 p.m. CZT; Official Responses to Questions Posted - April 9, 2010; Applications Due - April 23, 2010, 2:00 p.m. CZT; Grant Agreement Execution - May 28, 2010, or as soon thereafter as practical; Commencement of Project - May 28, 2010, or as soon thereafter as practical.

TRD-201001376
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: March 17, 2010

Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.009, and 304.003, Texas Finance Code.

The weekly ceiling as prescribed by §§303.003 and 303.009 for the period of 03/22/10 - 03/28/10 is 18% for Consumerl/Agricultural/Commercial/credit through $250,000.

The weekly ceiling as prescribed by §§303.003 and 303.009 for the period of 03/22/10 - 03/28/10 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by §§304.003 for the period of 04/01/10 - 04/30/10 is 5.00% for Consumer/Agricultural/Commercial/credit through $250,000.

The judgment ceiling as prescribed by §§304.003 for the period of 04/01/10 - 04/30/10 is 5.00% for Commercial over $250,000.

1Credit for personal, family or household use.

2Credit for business, commercial, investment or other similar purpose.

TRD-201001334
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: March 16, 2010
Credit Union Department

Application to Expand Field of Membership

Notice is given that the following application has been filed with the Credit Union Department (Department) and is under consideration:

An application was received from Qualtrust Credit Union, Irving, Texas to expand its field of membership. The proposal would permit persons who live, work, worship or attend school in, businesses and other legal entities located within a 10-mile radius of the Qualtrust Credit Union member service facility located at 2150 Flower Mound Road, Flower Mound, Texas 75038, to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236 or downloading the form at http://www.tcuud.state.tx.us/applications.html. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-201001355
Harold E. Feeney
Commissioner
Credit Union Department
Filed: March 17, 2010

Applications for a Merger or Consolidation

Notice is given that the following applications have been filed with the Credit Union Department (Department) and are under consideration:

An application was received from EECU (Fort Worth) seeking approval to merge with Fort Worth Star Telegram Employees Federal Credit Union (Fort Worth). EECU will be the surviving credit union.

An application was received from America’s Credit Union (Garland) seeking approval to merge with CAM Federal Credit Union (Dallas). America’s Credit Union will be the surviving credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-201001356
Harold E. Feeney
Commissioner
Credit Union Department
Filed: March 17, 2010

Notice of Final Action Taken

In accordance with the provisions of 7 TAC §91.103, the Credit Union Department provides notice of the final action taken on the following applications:

Application for a Merger or Consolidation - Approved

Graphic Arts Credit Union (Houston) and SPCO Federal Credit Union (Houston)- See Texas Register issue, dated December 25, 2009.

Articles of Incorporation - 50 Years to perpetuity - Approved

Grand Prairie Credit Union, Grand Prairie, Texas
TRD-201001357
Harold E. Feeney
Commissioner
Credit Union Department
Filed: March 17, 2010

Texas Education Agency

Request for Applications Concerning Texas Science, Technology, Engineering, and Mathematics (T-STEM) Centers, Cycle 2

Filing Authority. The availability of grant funds under Request for Applications (RFA) #701-10-111 is authorized by the Elementary and Secondary Education Act, as amended by No Child Left Behind Act of 2001, Title II, Part B.

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-10-111 from eligible partnerships. In accordance with No Child Left Behind Act of 2001 (NCLB), Title II, Part B, and with TEA requirements, eligible partnerships shall include an engineering, mathematics, or science department of an institution of higher education (IHE) and one or more high-need local educational agencies (LEAs), with "high need" signifying an LEA in which at least 40 percent of students qualify for free or reduced-price lunch. An education service center (ESC) can apply as fiscal agent with a partnership that includes both an IHE and a high-need LEA. An IHE can apply as fiscal agent with a partnership that includes both an ESC and a high-need LEA. A high-need LEA can apply as fiscal agent with a partnership that includes an IHE and an ESC.

Additionally, the eligible partnership shall create an advisory team with formal partnerships to advise, support, and implement the Texas Science, Technology, Engineering, and Mathematics (T-STEM) Center activities. This advisory team shall include the following: (1) a T-STEM Academy (if none of the partnering high-need LEAs is a T-STEM Academy); (2) an informal science, technology, engineering, and mathematics institution (i.e., a museum, zoo, etc.); (3) a national, state, or local business; and (4) a state or local nonprofit or for-profit organization working with workforce and demonstrated effectiveness in improving the quality of mathematics and science teachers. Additional eligibility requirements apply, as described in the RFA. Eligible partnerships may not apply for multiple grants, but they may apply on behalf of as many campuses as they wish in a single application.

Description. The purpose of the T-STEM Centers, Cycle 2, grant program is to support the T-STEM Academies and other LEAs by delivering educator professional development, providing technical assistance, and creating strategic partnerships among businesses, higher education entities, and school districts. T-STEM Centers ensure best practices are utilized in Texas and identify and document best practices at the local and state level. T-STEM Centers, in conjunction with the Texas High School Project, broadly disseminate best practices information.
to teachers, schools, ESCs, district/campus leadership, and other key partners across Texas and the nation.

Dates of Project. The T-STEM Centers, Cycle 2, grant will be implemented during the 2010-2011 school year. Applicants should plan for a starting date of no earlier than September 1, 2010, and an ending date of no later than August 31, 2011.

Project Amount. Funding will be provided for approximately seven projects. Each project will receive a maximum of $500,000 for the 2010-2011 project period. This project is funded 100 percent with federal funds.

Selection Criteria. Applications will be selected based on the ability of each applicant 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. TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

Applicants’ Conference. An applicants’ conference will be held by webinar on Wednesday, April 7, 2010, from 10:00 a.m. to 12:00 p.m. To reserve a webinar seat, go to https://www2.gotomeeting.com/register/237513794. The system requirements for PC-based attendees are Windows 2000, XP Home, XP Pro, 2003 Server, or Vista. The requirements for Macintosh-based attendees are Mac OS X 10.4 (Tiger) or later. Each person attending will be required to sign a register setting out the representative’s name and the name, address, and telephone number of the applicant organization.

Questions relevant to the RFA may be emailed to Stacy Avery at Stacy.Avery@tea.state.tx.us or faxed to (512) 463-4246 prior to Tuesday, March 30, 2010. These questions, along with other information, will be addressed in the presentation. The conference will be open to all potential applicants and will provide general and clarifying information about the program and RFA.

Selection Criteria. Applications will be selected based on the ability of each applicant 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. TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

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. RFAs are no longer available in print. The announcement letter and complete RFA will be posted on the TEA website at http://burleson.tea.state.tx.us/GrantOpportunities/forms for viewing and downloading. In the “Select Search Options” box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Further Information. For clarifying information about the RFA, contact Carlos Garza, Division of Discretionary Grants, Texas Education Agency, (512) 463-9269. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any and all questions must be submitted in writing to the TEA contact persons identified in Part 2: Program Guidelines of the RFA. All questions and the written answers thereto will be posted on the TEA website in the format of Frequently Asked Questions (FAQs) at http://burleson.tea.state.tx.us/GrantOpportunities/forms. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Deadline for Receipt of Applications. Applications must be received in the TEA Document Control Center by 5:00 p.m. (Central Time), Tuesday, May 4, 2010, to be eligible to be considered for funding.

TRD-201001359
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: March 17, 2010

City of El Paso

Request for Proposals: ARRA Weatherization Assistance Program

The City of El Paso is soliciting bids from experienced contractors for the energy assessment and installation of eligible weatherization energy conservation measures for residential properties within the City of El Paso. The program is operated under the rules, regulations, and requirements promulgated by the Department of Energy (DOE) (10 C.F.R. 440) and by the state-funding agency, Texas Department of Housing and Community Affairs (TDHCA), for the ARRA Weatherization Program. Work performed and measures installed must meet all DOE and TDHCA standards and be in full compliance with applicable program guidelines.

Under this solicitation the City of El Paso anticipates approximately 800 single family homes and/or apartment units will be assessed and weatherized between March 26, 2010 and August 31, 2011. Weatherization services, which remain the core program pursuant to this solicitation, are designed to reduce energy costs for low-income households through proven, cost-effective Weatherization techniques as presented in the Description of Work (which follows).

DESCRIPTION OF WORK:

Each home will be assessed using the Texas Department of Housing and Community Affairs Priority List for Single and Small, Multi-Family Buildings (Zone 3) or the National Energy Audit Tool (NEAT) to determine which Weatherization measures will be installed. A blower door test will be used (by the City) to run an initial assessment on each home. After the assessment, the successful bidder will install measures designed to reduce air exchange, to preserve the integrity of the home’s thermal envelope, to reduce energy consumption, and to ensure the residents’ health and safety. Some of the types of measures are listed below:

- Infiltration Reduction
- Duct Sealing
- Attic Insulation
- Smart Thermostat
- Compact Fluorescent Bulbs
- Sidewall Insulation
- Refrigerator Replacement
Applicable

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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) 239-2545 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 April 26, 2010. 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 shall be submitted to the commission in writing.

1. COMPANY: Applied Materials, Inc.; DOCKET NUMBER: 2009-1849-WR-E; IDENTIFIER: RN105147995; LOCATION: Austin, Travis County; TYPE OF FACILITY: research, development, and manufacturing; RULE VIOLATED: 30 Texas Administrative Code (TAC) §297.59(c) and Water Rights Permit Number 5268A, Special Condition (SC) Number 4.a., by failing to comply with all terms, provisions, conditions, limitations, and restrictions embodied in a water right permit; PENALTY: $500; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

2. COMPANY: City of Austwell; DOCKET NUMBER: 2009-1146-MWD-E; IDENTIFIER: RN101608347; LOCATION: Austwell, Refugio County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1) and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ001117001, Operational Requirements Number 4, by failing to install prior to plant start-up, adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failures; 30 TAC §305.125(1) and (11)(B) and §319.7(a) and (c) and TPDES Permit Number WQ001117001, Monitoring and Reporting Requirements Number 3.b. and 3.c., by failing to have all required monitoring and reporting records available for review upon request; 30 TAC §305.125(1) and TPDES Permit Number WQ-001117001, Monitoring and Reporting Requirements Number 2, by failing to ensure measurements, tests, and calculations are accurately accomplished in a representative manner; and 30 TAC §319.11(c), by failing to analyze effluent according to test methods specified in 40 Code of Federal Regulations (CFR) Part 136 or more recent editions of standard methods for the examination of water and wastewater than those cited in Part 136; PENALTY: $4,440; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

3. COMPANY: Jimmy Gaylon Beyer and ERATH COUNTY DAIRY SALES, INC.; DOCKET NUMBER: 2010-0033-AGR-E; IDENTIFIER: RN102743267; LOCATION: Erath County; TYPE OF FACILITY: concentrated animal feeding operation; RULE VIOLATED:

Texas Commission on Environmental Quality

Agreed 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. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an op-

IN ADDITION March 26, 2010 35 TexReg 2641
(4) COMPANY: City of Celina; DOCKET NUMBER: 2009-1889-MWD-E; IDENTIFIER: RN102336567; LOCATION: Collin County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0014246001, Interim I Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a)(1), by failing to comply with permitted effluent limits for ammonia-nitrogen (NH N), total suspended solids (TSS), and flow; 30 TAC §305.125(17) and TPDES Permit Number WQ0014246001, Sludge Provisions, by failing to submit the annual sludge report; and 30 TAC §305.125(17) and TPDES Permit Number WQ0014246001, Monitoring and Reporting Requirements Number 1, by failing to timely submit monitoring results at the intervals specified in the permit; PENALTY: $8,670; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: C.T.S GROUP Number 1, L.L.C. dba Buffalo Creek Grocery; DOCKET NUMBER: 2009-1014-PST-E; IDENTIFIER: RN101844231; LOCATION: Lake Jackson, Brazoria County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(ii) and (5)(B)(ii), by failing to timely renew a previously issued underground storage tank (UST) delivery certificate by submitting a properly completed UST registration and self-certification form; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate; and 30 TAC §115.246(7)(A) and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain Stage II records at the station and make them immediately available for review; PENALTY: $2,910; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(6) COMPANY: DCP Midstream, LP; DOCKET NUMBER: 2009-1833-AIR-E; IDENTIFIER: RN100210822; LOCATION: near Falfurrias, Jim Wells County; TYPE OF FACILITY: gas plant; RULE VIOLATED: 30 TAC §116.615(2) and §122.143(4), Federal Operating Permit (FOP) Number O-02556, Special Terms and Conditions (STC) Number 2F, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(a)(1) and THSC, §382.085(b), by failing to submit the initial notification for Incident Number 127340 within 24 hours after the discovery; PENALTY: $10,127; Supplemental Environmental Project (SEP) offset amount of $5,063 applied to Texas Association of Resource Conservation and Development Areas, Inc. - Abandoned Tire Clean-Up; ENFORCEMENT COORDINATOR: John Muennk, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(7) COMPANY: Equistar Chemicals, LP; DOCKET NUMBER: 2009-1976-AIR-E; IDENTIFIER: RN102926920; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §115.722(c)(1) and §116.115(c), Air Permit Number 6257E, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $0; ENFORCEMENT COORDINATOR: Rebecca Johnson, (361) 825-3100; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(8) COMPANY: GALAN ENTERPRISES, INC. dba M&F Food Mart; DOCKET NUMBER: 2009-1710-PST-E; IDENTIFIER: RN105604060; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor USTs for releases; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records; 30 TAC §334.50(d)(1)(B)(ii)(I) and the Code, §26.3475(c)(1), by failing to record inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; 30 TAC §115.2423(3)(G) and (L) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system (VRS) in proper operating condition; and 30 TAC §115.246(1) and THSC, §382.085(b), by failing to maintain Stage II records at the station and make them immediately available for review; PENALTY: $14,625; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(9) COMPANY: Haas-Anderson Construction, Limited; DOCKET NUMBER: 2010-0349-WQ-E; IDENTIFIER: RN105873285; LOCATION: Kingsville, Kleburg County; TYPE OF FACILITY: construction; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(10) COMPANY: Harris County Municipal Utility District Number 238; DOCKET NUMBER: 2009-1831-MWD-E; IDENTIFIER: RN102359981; LOCATION: Houston, Harris County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number W00012802001, Permit Conditions Number 2.d., and Interim Effluent Limitations and Monitoring Requirements Number 4, and the Code, §26.121(a), by failing to prevent the unauthorized discharge of wastewater sludge; and 30 TAC §305.125(1), TPDES Permit Number W00012802001, Interim Effluent Limitations and Monitoring Requirements Number 2, and the Code, §26.121(a), by failing to comply with permit effluent limits for chlorine residual; PENALTY: $3,900; ENFORCEMENT COORDINATOR: Jeremy Escobar, (361) 825-3100; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(11) COMPANY: City of Hempstead; DOCKET NUMBER: 2009-1924-MWD-E; IDENTIFIER: RN101920692; LOCATION: Waller County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ00010948001, Effluent Limitations and Monitoring Requirements Numbers 1, 3, and 6, and the Code, §26.121(a)(1), by failing to comply with permitted effluent limits for NH N, dissolved oxygen, and pH; PENALTY: $24,750; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(12) COMPANY: Hilco United Services, Inc.; DOCKET NUMBER: 2010-0009-PWS-E; IDENTIFIER: RN101451094; LOCATION: Bosque County; TYPE OF FACILITY: public water supply (PWS); RULE VIOLATED: 30 TAC §290.43(c)(9), by failing to use pressure...
DOCKET NUMBER: 2010-0065-AIR-E; IDENTIFIER: RN100210806; LOCATION: La Porte, Harris County; TYPE OF FACILITY: bulk liquid storage terminal; RULE VIOLATED: 30 TAC §116.115(c), Permit Number 1078, SC Number 5, and THSC, §382.085(b), by failing to prevent the overloading of a railcar; PENALTY: $10,000; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(14) COMPANY: City of Lewisville; DOCKET NUMBER: 2009-1890-MWD-E; IDENTIFIER: RN102075298; LOCATION: Lewisville, Denton County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010662001, Permit Conditions Number 2.g., and the Code, §26.121(a)(1), by failing to comply with permitted effluent limits for biochemical oxygen demand and TSS; and 30 TAC §305.125(1), TPDES Permit Number WQ001895000, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a)(1), by failing to comply with permitted effluent requirements for facility two for total copper; PENALTY: $66,665; ENVIRONMENTAL ENFORCEMENT COORDINATOR: Lanée Foard, (512) 239-2554; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(15) COMPANY: Martin Sanchez dba Martins Paint and Body Shop; DOCKET NUMBER: 2010-0091-AIR-E; IDENTIFIER: RN105387864; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: automobile paint and body shop; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to obtain authorization prior to constructing and operating an automobile paint and body shop; PENALTY: $1,050; ENFORCEMENT COORDINATOR: Trina Griceo, (210) 490-3096; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(16) COMPANY: Midway Petroleum, L.P.; DOCKET NUMBER: 2009-1939-PWS-E; IDENTIFIER: RN101245520; LOCATION: Cleveland, Montgomery County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.39(e), by failing to submit "as built" plans and specifications that are prepared by a registered professional engineer; 30 TAC §290.41(c)(1)(F), by failing to provide a sanitary control easement; 30 TAC §290.41(c)(3)(J), by failing to provide a concrete sealing block extending at least three feet from the well casing in all directions, with a minimum thickness of six inches and sloped to drain away and not less than 0.25 inches per foot around the well head; 30 TAC §290.41(c)(3)(M), by failing to provide a suitable sampling cock on the discharge pipe; 30 TAC §290.41(c)(3)(N), by failing to provide the well with a PTFE sampling device; 30 TAC §290.43(3), by failing to provide a proper cover for the hypochlorination solution container; 30 TAC §290.42(l), by failing to compile and maintain a thorough plant operations manual for operator review and reference; 30 TAC §290.43(c)(1) - (5), by failing to provide a ground storage tank (GST) that is designed, fabricated, and erected in strict accordance with American Water Works Association standards; 30 TAC §290.43(d)(2), by failing to provide all pressure tanks with an easily readable pressure gauge; 30 TAC §290.43(e), by failing to provide an intruder-resistant fence for all potable water storage tanks and pressure maintenance facilities; 30 TAC §290.46(f)(3)(A)(i)(III), (ii)(III), (v), and (vi), by failing to compile, maintain onsite, and make available for commission review an up-to-date record of water work operations and maintenance activities for operator review and reference; 30 TAC §290.46(m), by failing to initiate maintenance and housekeeping practices to ensure the grounds and facilities are maintained in a manner to minimize the possibility of the harboring of rodents, insects, and other disease vectors; 30 TAC §290.46(m)(1)(A), by failing to perform an annual inspection of the facility's GST; 30 TAC §290.46(m)(1)(B), by failing to perform annual inspections on the facility's three pressure tanks; 30 TAC §290.46(m)(4), by failing to maintain all distribution system lines, storage and pressure maintenance facilities, water treatment units, and all related appurtenances in a watertight condition; 30 TAC §290.46(n)(2), by failing to provide an accurate and up-to-date map of the distribution system; 30 TAC §290.46(v), by failing to ensure that all electrical wiring is securely installed in compliance with a local or national electrical code; and 30 TAC §290.121(a) and (b), by failing to develop and maintain an up-to-date chemical and microbiological monitoring plan that identified all sampling locations; PENALTY: $4,603; ENFORCEMENT COORDINATOR: Andrea Linson-Mgsbeuduru, (512) 293-1482; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(18) COMPANY: MILLER OF DENTON, LIMITED dba Miller of Denton; DOCKET NUMBER: 2010-0084-PST-E; IDENTIFIER: RN103017576; LOCATION: Denton, Denton County; TYPE OF FACILITY: beer distribution with one UST; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(D)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate; and 30 TAC §334.49(a)(4) and the Code, §26.3475(d), by failing to ensure that a corrosion protection system is provided to all underground metal components of an UST system; PENALTY: $5,028; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(19) COMPANY: Moore Station Water Supply Corporation; DOCKET NUMBER: 2009-2061-PWS-E; IDENTIFIER: RN101231256; LOCATION: Henderson County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.45(b)(1)(D)(iv) and THSC, §341.0315(c), by failing to provide an elevated storage capacity of 100 gallons per connection; and 30 TAC §290.121(a) and (b), by failing to provide a complete up-to-date chemical and microbiological monitoring plan; PENALTY: $715; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3100; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(20) COMPANY: Mountain Valley Country Club, Inc.; DOCKET NUMBER: 2009-1955-WR-E; IDENTIFIER: RN102494473; LOCATION: Johnson County; TYPE OF FACILITY: golf course; RULE VIOLATED: 30 TAC §297.11 and the Code, §11.121, by failing to obtain the required permit prior to impounding, diverting, or using state water; PENALTY: $500; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3100; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

IN ADDITION March 26, 2010 35 TexReg 2643
(21) COMPANY: MTV GROUP, LLC dba Dickinson Express Mart; DOCKET NUMBER: 2009-1950-PST-E; IDENTIFIER: RN104891965; LOCATION: Dickinson, Galveston County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; 30 TAC §115.246(6) and THSC, §382.085(b), by failing to maintain Stage II records at the station and make them immediately available for review; 30 TAC §115.242(3) and THSC, §382.085(b), by failing to maintain the Stage II VRS in proper operating condition; and 30 TAC §115.245(6) and THSC, §382.085(b), by failing to submit the Stage II VRS test results to the appropriate regional office or the local air pollution control program with jurisdiction; PENALTY: $9,910; ENFORCEMENT COORDINATOR: Keith Frank, (512) 239-1203; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(22) COMPANY: P. L. LAM CORPORATION dba Elgin Food Mart; DOCKET NUMBER: 2009-1868-PST-E; IDENTIFIER: RN1014980498; LOCATION: Elgin, Bastrop County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the UST system; and 30 TAC §334.49(e), by failing to maintain all corrosion protection records demonstrating compliance with corrosion protection requirements; PENALTY: $2,875; ENFORCEMENT COORDINATOR: Tom Greime, (512) 239-5690; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(23) COMPANY: Preston Club Utility Corporation; DOCKET NUMBER: 2009-0772-MWD-E; IDENTIFIER: RN102340486; LOCATION: Grayson County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(5), TPDES Permit Number WQ0013309001, Operational Requirements Number 1, and TCEQ Agreed Order, Docket Number 2006-0594-MWD-E, Ordering Provisions Number 3.d, by failing to properly operate and maintain systems of collection, treatment, and disposal; 30 TAC §305.125(1) and TPDES Permit Number WQ0013309001, Permit Conditions 2.g, by failing to prevent the unauthorized discharge of wastewater and sludge; 30 TAC §305.125(1), TPDES Permit Number WQ0013309001, Effluent Limitations and Monitoring Requirement Number 1, TCEQ Agreed Order Docket Number 2006-0594-MWD-E, Ordering Provision Number 3.e, and the Code, §26.121(a), by failing to comply with the permitted effluent limits; 30 TAC §305.125(1) and §319.7(a) and TPDES Permit Number WQ0013309001, Monitoring and Reporting Requirements Number 3.c, by failing to maintain complete records of monitoring activities; 30 TAC §305.125(1) and §319.11(c) and TPDES Permit Number WQ0013309001, Monitoring and Reporting Requirements Number 2, by failing to analyze effluent samples according to test methods specified in 40 CFR Part 136 or more recent editions of Standard Methods for the Examination of Water and Wastewater; 30 TAC §305.125(17), TPDES Permit Number WQ0013309001, Sludge Provisions, and TCEQ Agreed Order, Docket Number 2006-0594-MWD-E, Ordering Provisions Number 3.c, by failing to submit the annual sludge reports; 30 TAC §305.125(17) and §319.7(d), TPDES Permit Number WQ0013309001, Monitoring and Reporting Requirements Number One, and TCEQ Agreed Order, Docket Number 2006-0594-MWD-E, Ordering Provision Number 3.b, by failing to timely submit discharge monitoring reports; 30 TAC §305.125(1), TPDES Permit Number WQ0013309001, Monitoring and Reporting Requirements Number 7.c, and TCEQ Agreed Order, Docket Number 2006-0594-MWD-E, Ordering Provision Number 3.a, by failing to report in writing within five working days of becoming aware of any effluent violation that exceeded the permitted limit by more than 40%; and 30 TAC §305.125(5) and TPDES Permit Number WQ0013309001, Monitoring and Reporting Requirements Number 7.a and b, by failing to report orally within 24 hours and in writing within five working days of becoming aware of an unauthorized discharge; PENALTY: $59,080; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(24) COMPANY: ROAD MASTERS I G, LLC; DOCKET NUMBER: 2009-0247-MLM-E; IDENTIFIER: RN105679336 and RN102158689; LOCATION: El Paso, El Paso County; TYPE OF FACILITY: wastewater treatment and processing; RULE VIOLATED: 30 TAC §328.6(a) and §328.63(c), by failing to obtain a scrap tire storage site registration for the facility; 30 TAC §328.56(c) and (d)(3) and §328.58(a) and (f), by failing to use manifests, work orders, invoices, or other records to document the removal and management of all scrap tires generated on-site and by failing to properly sort, mark, classify, and arrange good used tires; 30 TAC §111.149(a) and THSC, §382.085(b), by failing to control dust by the appropriate application of asphalt, water, or suitable oil or chemicals on any vehicle parking surface with more than five parking spaces; 30 TAC §328.56(b) and (c) and §328.57(c)(3), by failing as a generator and tire transporter to ensure that all scrap tires or scrap tire pieces are transported by a registered transporter to an authorized facility and by failing to use manifests, work orders, invoices, or other records to document the removal and management of all scrap tires generated on-site; and 30 TAC §328.58(a) and (f) and §328.57(c)(2) and (d), by failing as a generator to obtain a five-part manifest from the registered transporter for the scrap tires or scrap tire pieces hauled off from the place of business and by failing to maintain original manifests or other documentation used to support activities related to the accumulation, and shipment of used or scrap tires or scrap tire pieces for a period of three years; PENALTY: $18,350; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(25) COMPANY: Shel-Jenn, Inc.; DOCKET NUMBER: 2010-0067-EAQ-E; IDENTIFIER: RN103952651; LOCATION: Georgetown, Williamson County; TYPE OF FACILITY: single-family residential construction site; RULE VIOLATED: 30 TAC §213.4(j) and Water Pollution Abatement Plan (WPAP) Number 11-03090501, Standard Conditions Number 4, by failing to obtain approval of a modification to a WPAP prior to constructing the modification; and 30 TAC §213.4(k) and WPAP Number 11-03090501, Standard Conditions Number 6, by failing to maintain temporary erosion and sedimentation best management practices; PENALTY: $3,445; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(26) COMPANY: Shell Chemical, LP; DOCKET NUMBER: 2009-1789-AIR-E; IDENTIFIER: RN100211879; LOCATION: Deer Park, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 9334, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $10,000; SEP offset amount of $4,000 applied to Houston Regional Monitoring Corporation - Houston Area Monitoring; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(27) COMPANY: Spring Independent School District; DOCKET NUMBER: 2009-1895-MWD-E; IDENTIFIER: RN101246585; LOCATION: Harris County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0014526001, Effluent Limitations and Monitoring Re-
requirements Numbers 1 and 3, and the Code, §26.121(a)(1), by failing to comply with permitted effluent limits for NHN, pH, and TSS; PENALTY: $4,560; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(28) COMPANY: Sunoco Pipeline, L.P.; DOCKET NUMBER: 2009-1990-AIR-E; IDENTIFIER: RN100215128; LOCATION: Hermleigh, Scurry County; TYPE OF FACILITY: crude oil pipeline breakout station; RULE VIOLATED: 30 TAC §116.715(a) and (o)(7) and §122.143(A). New Source Review Permit Number 72661, SC Number 1, FOP Number O-02691, STC Number 5, and THSC, §382.085(b), by failing to prevent the release of 1,845 barrels of crude oil. PENALTY: $5,900; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(29) COMPANY: TOWN & COUNTRY MARKET, LLC; DOCKET NUMBER: 2009-1968-PST-E; IDENTIFIER: RN104092606; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.242(3) and THSC, §382.085(b), by failing to maintain the Stage II VRS; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $3,330; ENFORCEMENT COORDINATOR: Andrea Linson-Mgboduru, (512) 239-1482; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(30) COMPANY: Daniel Viss; DOCKET NUMBER: 2009-2016-AGR-E; IDENTIFIER: RN102065463; LOCATION: Erath County; TYPE OF FACILITY: dairy operation; RULE VIOLATED: 30 TAC §321.31(a) and the Code, §26.121(a)(1), by failing to prevent the discharge of wastewater from an animal feeding operation into or adjacent to water in the state; PENALTY: $3,100; ENFORCEMENT COORDINATOR: Evette Alvarado, (512) 239-2573; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-201001338
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: March 16, 2010

Enforcement Order
An order was entered regarding Kenneth Blevins, Docket No. 2008-1237-PST-E on March 15, 2010 assessing $1,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Michael Pace, Enforcement Coordinator at (817) 588-5933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-201001379
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: March 17, 2010

Notice of Opportunity to Comment on Agreed 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 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 April 26, 2010. 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 indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission’s jurisdiction or 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. Written 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 April 26, 2010. 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 shall be submitted to the commission in writing.

(1) COMPANY: City of Austwell; DOCKET NUMBER: 2009-1683-PWS-E; TCEQ ID NUMBER: RN102693439; LOCATION: 601 Main Street, Austwell, Refugio County; TYPE OF FACILITY: municipal public water facility; RULES VIOLATED: 30 TAC §290.41(c)(1)(B), by failing to locate Well Number 2 at least 300 feet away from a sewage pumping station; PENALTY: $267; STAFF ATTORNEY: Marshall Coover, Litigation Division, MC 175, (512) 239-0620; REGIONAL OFFICE: Corpus Christi Regional Office, NRC Building, Suite 1200, 6300 Ocean Drive, Unit 5839, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(2) COMPANY: D. Lakhani Inc. dba Kwik Stop Center; DOCKET NUMBER: 2009-0689-PST-E; TCEQ ID NUMBER: RN102834009; LOCATION: 339 South Industrial Boulevard, Dallas, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued underground storage tank (UST) delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; 30 TAC §334.8(c)(5)(A)(i) and TWRC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; 30 TAC §334.49(c)(2)(C) and TWRC, §26.3475(d), by failing to inspect the impressed current cathodic protection system at least once every 60 days to ensure that the rectifier and other system components are functioning as designed; 30 TAC §334.49(c)(4) and TWRC, §26.3475(d), by failing to have the cathodic protection system inspected and tested for operability and adequacy of protection at a frequency of at least once every three years; 30 TAC §334.50(b)(1)(A)
and TWC, §26.3475(c)(1), by failing to ensure that all USTs are monitored in a manner which will detect a release at a frequency of at least once every month (not to exceed 35 days between each monitoring); 30 TAC §334.50(b)(2)(A) and TWC, §26.3475(a), by failing to provide release detection for the piping associated with the USTs; 30 TAC §334.50(b)(2)(A)(ii)(III) and TWC, §26.3475(a), by failing to test the line leak detectors at least once per year for performance and operability; 30 TAC §334.50(d)(1)(A)(i)(II) and TWC, §26.3475(c)(1), by failing to have an accurate means of measuring the level of stored substance over the full range of the tank’s height to the nearest one-eighth of an inch; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube for each regulated UST according to the UST registration and self-certification form; 30 TAC §334.51(b)(2)(B) and TWC, §26.3475(c)(2), by failing to ensure that a spill containment device is designed to prevent the release of regulated substances to the environment when the transfer hose or line is detached from the spill pipe; 30 TAC §334.51(b)(2)(C) and TWC, §26.3475(c)(2), by failing to equip each tank with a valve or other device designed to automatically shut off the flow of regulated substances into the tank when the liquid level in the tank reaches no higher than 95% capacity; 30 TAC §334.45(c)(3)(A), by failing to install an emergency shut-off valve (also known as shear or impact valve) on each pressurized delivery or product line and ensure that it is securely anchored at the base of the dispenser; PENALTY: $16,086; STAFF ATTORNEY: Pepey Tang, Litigation Division, MC 175, (512) 239-0654; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Felix Nance dba Felix Gas and Auto; DOCKET NUMBER: 2009-1431-PST-E; TCEQ ID NUMBER: RN102025103; LOCATION: 820 United States Highway 80 East, Abilene, Taylor County; TYPE OF FACILITY: four inactive USTs; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system unit is not brought into timely compliance with the upgrade requirements; and 30 TAC §334.22(a) and TWC, §5.702, by failing to pay outstanding UST fees and associated late fees for TCEQ Financial Account Number 0059410U for Fiscal Years 2002 - 2007; PENALTY: $2,625; STAFF ATTORNEY: Sharesa Y. Alexander, Litigation Division, MC 175, (512) 239-3503; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(4) COMPANY: Gagan Holdings, L.L.C. dba Bay Area Chevron; DOCKET NUMBER: 2009-1351-PST-E; TCEQ ID NUMBER: RN101727709; LOCATION: 2747 Bay Area Boulevard, Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.245(2) and Texas Health and Safety Code (THSC), §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every 36 months; PENALTY: $5,321; STAFF ATTORNEY: Phillip Goodwin, P.G., Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(5) COMPANY: Javeria Enterprises, Inc. dba Best Food Market; DOCKET NUMBER: 2009-1285-PST-E; TCEQ ID NUMBER: RN102446721; LOCATION: 5402 Nordling Road, Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.242(2) and THSC, §382.085(b), by failing to verify proper operation of Stage II equipment at least once every 12 months; PENALTY: $2,560; STAFF ATTORNEY: Stephanie J. Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(6) COMPANY: Leemak 529 LLC dba 529 Shell Churches; DOCKET NUMBER: 2008-0865-PST-E; TCEQ ID NUMBER: RN102906633; LOCATION: 13111 Farm-to-Market (FM) Road 529, Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.242(3) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition and free of defects that would impair the effectiveness of the system; 30 TAC §115.246(1) and THSC, §382.085(b), by failing to maintain a copy of the California Air Resources Board Executive Order or third-party certification for the Stage II vapor recovery system at the station; 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one station representative received training in the operation and maintenance of the Stage II vapor recovery system and that each current employee received in-house Stage II vapor recovery training regarding the purpose and operation of the vapor recovery system; 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form to the TCEQ at least 30 days before the expiration date; 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; 30 TAC §334.10(b), by failing to maintain the required UST records and make them immediately available for inspection upon request by agency personnel; and 30 TAC §334.50(b)(2) and (2)(A)(ii)(III) and TWC, §26.3475(a), by failing to provide proper release detection for the pressurized piping associated with the USTs and by failing to test the line leak detectors at least once per year for performance and operational reliability; PENALTY: $62,316; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(7) COMPANY: NIPA Enterprises Inc. dba Dickinson Grocery; DOCKET NUMBER: 2009-1073-PST-E; TCEQ ID NUMBER: RN101811685; LOCATION: 2221 FM Road 517 East, Dickinson, Galveston County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of the petroleum USTs; 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); 30 TAC §334.50(d)(1)(B)(ii) and TWC, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records at least once a month sufficiently accurate to detect a release as small as 1.0% of the total substance flow through the month plus 130 gallons; 30 TAC §334.50(d)(1)(B)(iii) and TWC, §26.3475(c)(1), by failing to record volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the UST system; 30 TAC §334.7(d)(3), by failing to provide an amended registration for any change or additional information regarding the USTs within 30 days from the date of the occurrence of the change or addition; 30 TAC §334.8(c)(4)(C), by failing to obtain a delivery certificate by submitting a properly completed UST registration and self-certification form to the agency within 30 days of ownership change; 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3475(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into...
the UST; and 30 TAC §334.73 and §334.74 and TWC, §26.356(c), by failing to conduct a release investigation to determine if the facility’s UST system is the source of off-site impacts or releases; PENALTY: $15,695; STAFF ATTORNEY: Phillip Goodwin, P.G., Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(8) COMPANY: Nora Ghani dba Airline Square and Naji Ahmad dba Airline Square; DOCKET NUMBER: 2009-1033-PWS-E; TCEQ ID NUMBER: RN102436250; LOCATION: 9000 Airline Drive, Houston, Harris County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and THSC §341.033(b), by failing to collect routine distribution water samples for coliform analysis and failing to provide public notification of the failure to sample; PENALTY: $8,663; STAFF ATTORNEY: Phillip Goodwin, P.G., Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(9) COMPANY: Robert C. Nichols; DOCKET NUMBER: 2008-1400-MSW-E; TCEQ ID NUMBER: RN101983989; LOCATION: approximately 160 acres located at the end of North Walker Road off of Highway 105, Montgomery County and San Jacinto County (site 1) and approximately 80 acres located at the end of North Walker Road off of Highway 105, San Jacinto County (site 2); TYPE OF FACILITY: unauthorized disposal sites; RULES VIOLATED: 30 TAC §330.15(c) and TCEQ AO Docket Number 2003-0287-MSW-E, Ordering Provision Number 2.b., by failing to deed record the properties related to both sites as disposal areas in county records or remove and properly dispose of all remaining tires and municipal solid waste at the sites; PENALTY: $3,600; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(10) COMPANY: Robert McAdams; DOCKET NUMBER: 2008-1490-PST-E; TCEQ ID NUMBER: RN102488780; LOCATION: 14758 FM Road 59, Athens, Henderson County; TYPE OF FACILITY: UST; RULES VIOLATED: TWC, §26.3475(d), 30 TAC §334.49(a), and TCEQ AO Docket Number 2005-1850-PST-E, Ordering Provision Number 2.b.i., by failing to provide proper corrosion protection for the UST system; 30 TAC §37.815(a) and (b) and TCEQ AO Docket Number 2005-1850-PST-E, Ordering Provision Number 2.b.ii., by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of the petroleum USTs; and TWC, §26.3475(c)(1), 30 TAC §334.50(b)(1)(A), and TCEQ AO Docket Number 2005-1850-PST-E Ordering Provision Number 2.b.ii., by failing to provide release detection for the UST system; TWC, §5.702, 30 TAC §334.22(a), and TCEQ AO Docket No. 2005-1850-PST-E, Ordering Provision Number 2.a., by failing to pay UST fees for TCEQ Financial Account Number 0055137U and associated late fees for Fiscal Years 2003 - 2007; and 30 TAC §334.7(d)(3), by failing to provide written notice of any change or additional information to the agency within 30 days from the date of the occurrence of the change or addition; PENALTY: $46,145; STAFF ATTORNEY: Stephanie J. Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(11) COMPANY: Wafia Hanif and WASMA, Inc.; DOCKET NUMBER: 2007-2009-PST-E; TCEQ ID NUMBER: RN104661384; LOCATION: 401 West Lennon Drive, Emory, Rains County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.49(c)(2)(C) and (4) and TWC, §26.3475(d), by failing to have the corrosion protection equipment tested for operability and adequacy of protection at least once every three years to ensure adequate protection of the UST system; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum used as motor fuel; 30 TAC §334.45(c)(3)(A), by failing to properly install and maintain a secure anchor at the base of each Underwriter’s Laboratories-listed emergency shutoff valve in a piping system in which regulated substances are conveyed under pressure to an aboveground dispensing unit; PENALTY: $9,271; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0674; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

TRD-201001340
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: March 16, 2010

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 or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director 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 April 26, 2010. 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 that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission’s jurisdiction, or the commission’s 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) 239-3434 and at the applicable regional office listed as follows. Written 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 April 26, 2010. 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, §7.075 provides that comments on the DOs shall be submitted to the commission in writing.

(1) COMPANY: Adan Marquez and Melinda Marquez; DOCKET NUMBER: 2009-1664-PST-E; TCEQ ID NUMBER: RN101687309; LOCATION: Farm-to-Market (FM) Roads 755 and 1017, La Gloria,
Starr County; TYPE OF FACILITY: two underground storage tanks (USTs); RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system is not brought into timely compliance; and 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the USTs within 30 days from the date of occurrence of the change or addition; PENALTY: $6,600; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3383.

(5) COMPANY: Heracleo E. Gracia; DOCKET NUMBER: 2009-1369-PST-E; TCEQ ID NUMBER: RN101568277; LOCATION: 1630 East Lamar Street, Sherman, Grayson County; TYPE OF FACILITY: three inactive USTs; RULES VIOLATED: 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the USTs within 30 days of the occurrence of the change; and 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; PENALTY: $6,300; STAFF ATTORNEY: Mike Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Joe F. Slater; DOCKET NUMBER: 2009-1884-LII-E; TCEQ ID NUMBER: RN104805023; LOCATION: 4519 Cimmaron Trail, Granbury, Hood County; TYPE OF FACILITY: landscaping company; RULES VIOLATED: 30 TAC §30.5(b) and §344.30(a)(2), TWC, §37.003, Texas Occupations Code, §1903.251, and TCEQ DO Docket Number 2008-0634-LII-E, Ordering Provision Numbers 2.a. and 2.b., by failing to refrain from advertising or representing himself to the public as a person who can perform services for which a license is required when not possessing a current license or registration; 30 TAC §30.5(a) and §344.30(a)(1), TWC, §37.003, Texas Occupations Code, §1903.251, by failing to hold an irrigator license prior to selling, designing, consulting, installing, maintaining, altering, repairing, or servicing an irrigation system; and TCEQ DO Docket Number 2008-0634-LII-E, Ordering Provision Number 1, by failing to pay the outstanding administrative penalty associated with the previous DO for TCEQ Financial Account Number 23604343; PENALTY: $1,093; STAFF ATTORNEY: Stephanie J. Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(7) COMPANY: Shane Harkin; DOCKET NUMBER: 2009-1674-LII-E; TCEQ ID NUMBER: RN105713853; LOCATION: Austin, Travis County; TYPE OF FACILITY: landscaping business; RULES VIOLATED: 30 TAC §30.5(b) and §344.30(a)(2), TWC, §37.003, and Texas Occupations Code, §1903.251, by failing to refrain from advertising or representing himself to the public as a person who can perform services for which a license or registration is required when not possessing a current license or registration; PENALTY: $250; STAFF ATTORNEY: Mike Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(8) COMPANY: USA Developers LLC; DOCKET NUMBER: 2008-0992-PST-E; TCEQ ID NUMBER: RN102374212; LOCATION: 1200 East Main Street, Eagle Pass, Maverick County; TYPE OF FACILITY: retail gas service facility; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed implementation date, a UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; 30 TAC §334.7(d)(3), by failing to notify the agency of any change or addition within 30 days from the
Notice of a Public Hearing on Proposed Revisions to 30 TAC Chapter 106

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions and repeals to 30 Texas Administrative Code (TAC) Chapter 106, Permits by Rule. These revisions and repeals are proposed under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would repeal §106.302 in its entirety, and revise §106.283 to exclude the authorization of commercial grain handling facilities.

A public hearing on this proposal will be held in Austin on April 19, 2010, at 10:00 a.m., in Building E, Room 201S, at the commission’s central office located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments. Registration begins 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. A time limit may be established to assure enough time is allowed for every interested person to speak. There will be no open discussion during the hearing; however, commission staff members will be available for discussion 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons planning to attend the hearing, who have special communication or other accommodation needs, should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

Comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at http://www.tceq.state.tx.us/rules/ecomments. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2009-025-106-PR. The comment period closes April 26, 2010. To view rules, please visit http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information or questions concerning this proposal, please contact Michael Wilhoit, Air Permits Division, at (512) 239-1222.

TRD-201001272
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: March 12, 2010

Notice of Receipt of Application and Intent to Obtain a Municipal Solid Waste Permit

APPLICATION Southwaste Disposal, LLC-Austin Liquid Waste Processing Facility, 9575 Katy Freeway, Suite 130, Houston, Harris County, Texas 77024, has applied to the Texas Commission on Environmental Quality (TCEQ) for a new Type V-GG permit. The applicant is requesting a permit for a liquid waste processing facility. The facility is located on Linger Lane, approximately one quarter mile south of the US 183 and Bolm Road intersection, adjacent to the Govalle Wastewater Treatment Plant, Austin, Travis County, Texas 78725. The TCEQ received the application on February 8, 2010. The
permit application is available for viewing and copying at the Austin Public Library, Cepeda Branch, 651 N. Pleasant Valley Road, Austin, Travis County, Texas 78702.

ADDITIONAL NOTICE. TCEQ’s Executive Director has determined the application is administratively complete and will conduct a technical review of the application. After technical review of the application is complete, the Executive Director may prepare a draft permit and will issue a preliminary decision on the application. Notice of the Application and Preliminary Decision will be published and mailed to those who are on the county-wide mailing list and to those who are on the mailing list for this application. That notice will contain the deadline for submitting public comments.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting on this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. TCEQ will hold a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments. Unless the application is directly referred for a contested case hearing, the response to comments, and the Executive Director’s decision on the application, will be mailed to everyone who submitted public comments and to those persons who are on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting reconsideration of the Executive Director’s decision and for requesting a contested case hearing. A person who may be affected by the facility is entitled to request a contested case hearing from the commission. A contested case hearing is a legal proceeding similar to a civil trial in state district court.

TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST: your name, address, phone number; applicant’s name and permit number; the location and distance of your property/activities relative to the facility; a specific description of how you would be adversely affected by the facility in a way not common to the general public; and, the statement “I/We request a contested case hearing.” If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group’s representative for receiving future correspondence; identify an individual member of the group who would be adversely affected by the facility or activity; provide the information discussed above regarding the affected member’s location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group’s purpose.

Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

The Commission will only grant a contested case hearing on disputed issues of fact that are relevant and material to the Commission’s decision on the application. Further, the Commission will only grant a hearing on issues that were raised in timely filed comments that were not subsequently withdrawn.

MAILING LIST. If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director’s decision, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk.

In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

AGENCY CONTACTS AND INFORMATION. All written public comments and requests must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 or electronically at www.tceq.state.tx.us/about/comments.html. If you need more information about this permit application or the permitting process, please call TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. Si desea información en Español, puede llamar al 1-800-687-4040. General information about TCEQ can be found at our web site at www.tceq.state.tx.us. Further information may also be obtained from Southwaste Disposal, LLC-Austin Liquid Waste Processing Facility at the address stated above or by calling Mr. Tim Cox, at (512) 339-6591.

TRD-201001378
LaDonna Castafiuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: March 17, 2010

Notice of Water Quality Applications
The following notice was issued on March 4, 2010 through March 12, 2010.

The following require the applicants to publish notice in a newspaper. Public comments, 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 THE NOTICE.

INFORMATION SECTION
LUMINANT GENERATION COMPANY LLC, which operates the Monticello Steam Electric Station, has applied for a renewal of TPDES Permit No. WQ0001528000, which authorizes the discharge of once-through cooling water and previously monitored effluent (low volume wastewater, storm water runoff from the plant and lignite storage areas, ash transport water commingled with metal cleaning waste, flue gas desulfurization system waste, storm water runoff from solid waste disposal areas "B" and "G" and/or from the Wastewater Recycle Plant, and treated sanitary sewage) at a daily average flow not to exceed 1,785,000,000 gallons per day via Outfall 001. The facility is located on the east shore of Monticello Reservoir along Farm-to-Market Road 127, approximately eight miles southwest of the City of Mount Pleasant, Titus County, Texas 75456.

BASF CORPORATION, which operates the BASF Freeport Site, has applied for a major amendment to TPDES Permit No. WQ0003977000 to add a new contact storm water and treated effluent holding pond with a capacity of approximately 5 million gallons; modify language of the "Other Requirements" Item No. 8 to allow discharge via Outfall 003; reduce the frequency of monitoring requirements for carbonaceous biochemical oxygen demand, total suspended solids, ammonia nitrogen, and nitrate-nitrogen at Outfall 001; remove effluent limits for total zinc at Outfall 003 based on hydrology report; add recently new constructed super absorbent polymer (SAP) plant to the permit as a new source of wastewater; add recently constructed line 8 (nylon) plant expansion to the permit as a new source of wastewater to the facility; change the
location of Outfall 003 and sampling point; activate Outfall 007 and correct its location; add language to authorize the discharge of process and non-process storm water via Outfall 002, 003, 004, 005, 006, and 007; clarify the sampling locations for Outfalls 005, 006, and 007. The current permit authorizes the discharge of process wastewater, treated domestic wastewater, utility wastewater (boiler blowdown and cooling tower blowdown), and storm water at a daily average flow not to exceed 5,964,000 gallons per day via Outfall 001; and storm water, boiler blowdown, cooling tower blowdown, and fire protection water on an intermittent and flow variable basis via Outfalls 002, 003, 004, 005, 006, and 007. The facility is located at 602 Copper Road, southwest of the intersection of State Highway 288/332 and State Highway 288B, northwest of the City of Freeport, Brazoria County, Texas 77541-3001. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

NORTH ALAMO WATER SUPPLY CORPORATION, which operates Doolittle Reverse Osmosis Water Plant 1, has applied for a major amendment to TPDES Permit No. WQ0004782000 to reduce the frequency of monitoring requirements for total dissolved solids from once per week to once per every two weeks. The current permit authorizes the discharge of water treatment wastes at a daily average flow not to exceed 2,000,000 gallons per day via Outfall 001. The facility is located 0.5 mile south of the intersection of State Highway 107 and Doolittle Road in Edinburg, Hidalgo County, Texas.

FLYING L PUBLIC UTILITY DISTRICT has applied for a minor amendment to TCEQ Permit No. WQ0001291001 to authorize a change in the requirement for disinfection from trace chlorine residual in the effluent at the point of irrigation application, to quarterly sampling and monitoring of E. coli at the sprinkler head. The existing permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 112,500 gallons per day via surface irrigation of 178 acres of public access golf course, which will remain the same. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located immediately west of Bottle Springs Road, approximately 1.75 miles southeast of the intersection of Farm-to-Market Road 689 and Farm-to-Market Road 1077 in Bandera County, Texas 78003.

CITY OF GOLDSMITH has applied for a minor amendment to the TCEQ permit No. WQ0011482001 to authorize building a new effluent storage pond in order to drain and fix the existing effluent storage pond. The existing permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 31,000 gallons per day via surface irrigation on 7 acres of non-public access landscape area at the plant site. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located immediately west of Farm-to-Market Road 866, approximately 3,500 feet south of State Highway 158 and south of the City of Goldsmith in Ector County, Texas 79741.

COMAL INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TCEQ Permit No. WQ0014295001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 27,000 gallons per day via public access subsurface drip irrigation system with a minimum area of 6.2 acres. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located at 14001 State Highway 46 West, Spring Branch, approximately 3.9 miles east of the intersection of State Highway 46 and U.S. Highway 281 in Comal County, Texas 78070.

THE NAVASOTA INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. WQ0014662001, 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 approximately 5.5 miles east of State Highway 6, one hundred (100) feet north of State Highway 105, and approximately 800 feet west of Loop 234 and County Road 309 in Grimes County, Texas 77386.

J.L. BATES, LP, which operates J.L. Bates Power Station, a steam electric power generation plant, has applied for a renewal of TPDES Permit No. WQ001254000, which authorizes the discharge of cooling tower blowdown commingled with low volume waste, storm water runoff, and previously monitored effluent (metal cleaning wastes via Outfall 101) at a daily average flow not to exceed 2,000,000 gallons per day via Outfall 001. The facility is located at 1708 Goodwin Road, Palmvieu, Texas, southwest of the intersection of Farm-to-Market Road 492 and U.S. Business 83 approximately four and one half miles west of the City of Mission, Hidalgo County, Texas 78572.

LOWER COLORADO RIVER AUTHORITY, which operates Thomas C. Ferguson Power Plant, has applied for a renewal of TPDES Permit No. WQ0001369000, which authorizes the discharge of once through cooling water, auxiliary cooling water, storm water and previously monitored effluents (low volume waste sources, bagged underdrain, storm water from diked storage area, and metal cleaning waste) at a daily average and maximum flow not to exceed 435,000,000 gallons per day via Outfall 001. The facility is located adjacent to Lake Lyndon B. Johnson, approximately 7 mi. west of the the City of Marble Falls, and approximately 1 mi. north of Ranch Road 2147, Llano County, Texas 78657.

MARKWEST JAVELINA COMPANY, which operates Javelina Facility, a petroleum gas liquid processing plant has applied for a renewal of TPDES Permit No. WQ0003137000, which authorizes the discharge of treated process wastewater, utility wastewater, reverse osmosis reject water and stormwater at a daily average flow not to exceed 478,000 gallons per day via Outfall 001. The facility is located at 53314 Interstate Highway 37, on the north side, between McBride Lane and Navigation Boulevard in the City of Corpus Christi, Nueces County, Texas 78407.

MARTIN OPERATING PARTNERSHIP L.P., which operates Stano-lind Cut Terminal, has applied for a major amendment without renewal to TPDES Permit No. WQ0004074000 to authorize the discharge of storm water runoff from the rail loading area via Outfall 001 and to revise the sampling location for Outfall 001 to be downstream of the new filtration unit. The current permit authorizes to discharge process wash water from the acid truck rack and acid cutter areas, non-contact cooling water, water softener wastewater, boiler blowdown, and storm water (from the tank containment area and acid rack) on an intermittent and flow variable basis via Outfall 001. The facility is located at Number 10 Sulfur Plant Road, 0.7 miles east of the interchange of State Highway 380 and U.S. Route 69, southeast of the City of Beaumont, Jefferson County, Texas 77701. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

BASTROP ENERGY PARTNERS, L.P., which operates Bastrop Energy Center, has applied for a renewal of TPDES Permit No.WQ0004211000, which authorizes the discharge of cooling tower blowdown, and low volume wastewater at a daily average flow not to exceed 2,000,000 gallons per day via Outfall 001. The facility is located at 125 Old Bastrop Road approximately two miles south/southwest of the intersection of Texas State Highway 71 and County Road 214, Bastrop County, Texas 78612.
NORTH ALAMO WATER SUPPLY CORPORATION, which operates Owassa Reverse Osmosis WTP 4, a reverse osmosis water treatment plant, has applied for a major amendment to TPDES Permit No. WQ004789000 to authorize a reduction in the effluent monitoring frequency for all parameters from daily to bi-weekly. The current permit authorizes the discharge of water treatment wastes at a daily average flow not to exceed 2,000,000 gallons per day via Outfall 001. The facility is located approximately 3.1 miles east of U.S. Highway 281 along Owassa Road, Hidalgo County, Texas 78539.

SPECIAL CAMPS FOR SPECIAL KIDS has applied for a major amendment to TPDES Permit No. WQ0013536001 to authorize the relocation of the point of discharge. The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 27,500 gallons per day. The facility is located approximately six miles east of Meridian and approximately thirteen miles north of Clifton in Bosque County, Texas.

MONARCH UTILITIES I, L.P. has applied for a major amendment to TPDES Permit No. WQ0013547001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 20,000 gallons per day to a daily average flow not to exceed 75,000 gallons per day. The facility is located at 133 Lakeside Loop, approximately 0.25 mile north of Farm-to-Market Road 356 and approximately 0.4 mile northwest of the intersection of Farm-to-Market Road 356 and Farm-to-Market Road 355 in Trinity County, Texas 75862.

J.A.C. INTERESTS, LTD. has applied for a renewal of TPDES Permit No. WQ0014585001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 250,000 gallons per day. The facility will be located approximately 0.35 mile east-northeast of the intersection of Mason Road and Farm-to-Market Road 1093, south of Barker Reservoir in Fort Bend County, Texas 77084.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-201001377
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: March 17, 2010

Proposal for Decision
The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on March 12, 2010, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Wilke Tire Service, Inc.; SOAH Docket No. 582-10-0280; TCEQ Docket No. 2009-0670-MSW-E. The commission will consider the Administrative Law Judge’s Proposal for Decision and Order regarding the enforcement action against Wilke Tire Service, Inc. on a date and time to be determined by the Office of the Chief Clerk in Room 2015 of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-201001380
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: March 17, 2010

Texas Ethics Commission

List of Late Filers
Listed below are the names of filers from the Texas Ethics Commission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Douglas at (512) 463-5800 or (800) 325-8506.

Deadline: Lobby Activities Report due January 11, 2010
Rodney Eugene Ahart, 2433 Ridgepoint Dr., Austin, Texas 78754
Michael Arpey, Eleven Madison Ave., Bsmt 1B, New York, New York 10010-3629
Kevin E. Bailey, 403 Sulky Trail, Houston, Texas 77060
Crispy Camacho Borskey, 9011 Lockleven Loop, Austin, Texas 78750
Billy J. Briscoe, 2000 Smith St., Houston, Texas 77021-8652
Neil J. Devroy, 1601 Elm Street, Ste. 2350, Dallas, Texas 75201
Alan R. Erwin, Erwin & Associates, 1210 San Antonio, Ste. 700, Austin Texas 78701-1834
Anthony Haley, 919 Congress Ave., Ste. 1130, Austin, Texas 78701
Ann E. Kitchen, Indigent Care Collaboration, 2101 IH-35 S., Ste. 500, Austin, Texas 78741
Jeffrey Knisley, 5926 Balcones Dr. #100, Austin, Texas 78731
Gerald W. Lee Jr., 8115 Datapoint, San Antonio, Texas 78229
Lan M. Luskey, 755 E. Mulberry Ave., Ste. 200, San Antonio, Texas 78212
Deadline: Semiannual Report due January 15, 2010 for Candidates and Officeholders

R. Christopher Bell, 3401 Louisiana St., Ste. 250, Houston, Texas 77002-9546

Anette J. Carlisle, 1216 S. Lamar St., Amarillo, Texas 79102-1321

John K. Courage, 1938 Broken Oak, San Antonio, Texas 78232

Alex J. Cresswell, 3638 Oceo St., Houston, Texas 77063-5448

James P. Dillon, P.O. Box 878, Liberty Hill, Texas 78642-0878

Richard D. Garza-Ray, P.O. Box 2252, Roma, Texas 78584-2252

Guadalupe A. Gonzalez, 2111 Dorado Dr., Mission, Texas 78573-8590

Phillip D. Greer, 501 Thicket Ln., Kyle, Texas 78640-4658

Terry E. Hockman, Jr., P.O. Box 60153, Midland, Texas 79711-0153

Jessica R. Hornsby, 6118 Cypress Point Dr., Garland, Texas 75043-5600

Jeffrey S. Joyner, 2301 Pebble Vale Dr., Apt. 525, Plano, Texas 75075-2562

Abel C. Limas, 1274 Sandy Hill Dr., Brownsville, Texas 78520-9204

Juan J. Maldonado, 500 E. Sioux Rd., San Juan, Texas 78589-3395

Borris Lee Miles, 5302 Almeda Rd., Houston, Texas 77004-7440

Joe A. Montemayor, P.O. Box 3462, Crosby, Texas 77532-2462

Rick W. Neudorff, 3800 Pebble Creek Ct., Apt. 219, Plano, Texas 75023-5945

Bruce Priddy, 329 E. Colorado Blvd., Apt. 501, Dallas, Texas 75203-1257

David C. Rankin, 3111 Skyline Dr., Nacogdoches, Texas 75965-3169

Kenneth Richardson, 3701 County Road 2620, Caddo Mills, Texas 75135-7333

Kathleen R. Robbins, P.O. Box 7049, Houston, Texas 77248-7049

John Roland Ross, 401 Molly Dr., Apt. 201, Caldwell, Texas 77836-1468

Gena N. Slaughter, 3109 Knox St. #313, Dallas, Texas 75205-4029

Vernard G. Solomon, 103 E. Houston St., Marshall, Texas 75670-4143

James M. Young, 300 Summit Loop, Wimberley, Texas 78676-5745

Deadline: Semiannual Report due January 15, 2010 for Committees

James S. Bowie, Citizens for Term Limitation, P.O. Box 16855, Houston, Texas 77222-6855

Noel Candelaria, Ysleta Educators PAC, 10935 Ben Crenshaw, Ste. 210, El Paso, Texas 79935

Chelsea R. Chapman, Houston Area Conservatives, 705 Main St. #303, Houston, Texas 77002

Lawrence Collins, Alliance Against Sexual Abuse, 919 Congress Ave., Ste. 1100, Austin, Texas 78701

Alonzo K. Craft, Baytown Municipal Police Association PAC, 3200 N. Main, Baytown, Texas 77521

Carlos A. Elizondo, Brownsville Firefighters for Responsible Government, 2994 Vanessa Dr., Brownsville, Texas 78526

Ricardo R. Godinez, South Texas Economic Alliance PAC, 520 Pecan, Ste. G, McAllen, Texas 78501

Myron J. Goins, Grass Roots Institute of Texas, 2201 Long Prairie Rd., Ste. 107-386, Flower Mound, Texas 75022

Kent D. Henry, Stonewall Democrats of Collin County, 3800 Double Oak Ln., Irving, Texas 75061-3938

James P. Ingle, Jr., Greater DFW Sign Association PAC, 7070 Rye Loop, Bryan, Texas 77807

June Perdue Jenkins, Texas Democratic Women of Collin County, 5421 Palace Dr., Richardson, Texas 75082

Robert E. Jones, Moving Wilco Forward, P.O. Box 134, Leander, Texas 78646

David E. Luevanos, Americans for Energy Independence, 12628 Tierra India Way, El Paso, Texas 79938

Steven M. Miller, Democratic Governors Trust PAC, 516 Dawson Rd. #107, Austin, Texas 78704

Jacqueline A. Patrick, Bandera County Republican Women’s Club PAC, 368 27th St. East, Lakehills, Texas 78063

Otilio Rene Perez Jr., Signs of Texas Liberty PAC, 1611 Reever St., Arlington, Texas 76010

Sarah W.Pribyl, Victoria Federation of Teachers Committee on Political Education, 1007 E. Airline, Ste. C, Victoria, Texas 77901

Sherri Riedel, PEIMS PAC, 2055 Bolton Rd., Marion, Texas 78124

April C. Seymour, Jefferson County Republican Executive Committee (CEC), P.O. Box 12246, Beaumont, Texas 77726-2246

Tracy A. Smith, Wise County Active Democrats, 1562 County Road 2625, Decatur, Texas 76234

Jon R. Thompson, Texans for Ron Booker, 3819 Sena Place, Sugar Land, Texas 77479

Mike Villarreal, Women’s Health Caucus, 603 W. 13th St., Ste. 1A-108, Austin, Texas 78701

Joe D. Webb, Richmondrail.org, 3701 Kirby Dr., Ste. 916, Houston, Texas 77098

Deadline: 30-Day Pre-Election Report due February 1, 2010 for Candidates and Officeholders

Damiana A. Curvev Banieh, 4606 FM 1960 Rd., Ste. 400, Houston, Texas 77069-4615

Susan Hawk, 3523 McKinney Ave. #458, Dallas, Texas 75204

Teresa J. Hawthorne, P.O. Box 670844, Dallas, Texas 75367

Gladys "Terri" Hodge, P.O. Box 710776, Dallas, Texas 75371

Marc Katz, 800 W. 5th #1109, Austin, Texas 78703

Borris Lee Miles, 5302 Almeda Rd., Houston, Texas 77004
Texas Facilities Commission

Request for Proposals #303-0-11271

The Texas Facilities Commission ("TFC") has identified a need for and anticipates providing lease warehouse and office space to meet the needs of the Health and Human Services Commission. TFC is soliciting offers for 5,719 square feet of office space in Tyler, Texas.

The deadline for questions is April 2, 2010, and the deadline for proposals is April 16, 2010, at 3:00 p.m. The target date for the award of the lease is June 16, 2010. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=87660.

TRD-201001290
Kay Molina
General Counsel
Texas Facilities Commission
Filed: March 12, 2010

Request for Proposals #303-0-11425

The Texas Facilities Commission (TFC), on behalf of the Office of the Attorney General, announces the issuance of Request for Proposals (RFP) #303-0-11425. TFC seeks a five (5) or ten (10) year lease of approximately 20,682 square feet of office space in Tyler, Texas.

The deadline for questions is April 5, 2010, and the deadline for proposals is April 14, 2010, at 3:00 p.m. The target award date is May 19, 2010. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at sandy.williams@tfc.state.tx.us. A copy of the RFP may be downloaded from the Electronic State Business Daily at http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=87739.

TRD-201001369
Kay Molina
General Counsel
Texas Facilities Commission
Filed: March 17, 2010

Texas Health and Human Services Commission

Notice of Public Hearing for Task Force on Strengthening Nonprofit Capacity

The Texas Health and Human Services Commission (HHSC), Task Force on Strengthening Nonprofit Capacity, will conduct a public hearing on March 29, 2010 from 10:00 a.m. to 12:00 p.m. at 50 Waugh Drive, Houston, Texas (Community Resource Center, Auditorium), Houston, Texas.

PUBLIC HEARING AGENDA
10:00 a.m. Call to Order and Opening Remarks
10:15 a.m. Presentation on Strengthening Nonprofit Capacity
10:30 a.m. Invited Testimony from the Public on Recommendations for Strengthening Nonprofit Capacity
12:00 p.m. Adjourn

This meeting is open to the general public. No reservations are required and there is no cost to attend this meeting.

People with disabilities who need auxiliary aids or services for this meeting are asked to call Michael Grisham at (512) 919-5742 at least 72 hours before the meeting.

Public Comment: Each member of the public will be allowed 5 minutes to submit comment to the task force. Written comments may be delivered in person at the public hearing or delivered via mail, e-mail, or fax until 5:00 p.m., April 20, 2010. Written comments should be addressed to:

Joanne Pierce
Health and Human Services Commission
Office of Community Collaboration
9013 Tuscany Way, Suite 100, Austin, TX 78754
E-mail: Joanne.Pierce@hhsc.state.tx.us
Fax: (512) 928-1828

TRD-201001335
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: March 16, 2010

Notice of Public Hearing for Task Force on Strengthening Nonprofit Capacity

The Texas Health and Human Services Commission (HHSC), Task Force on Strengthening Nonprofit Capacity, will conduct a public hearing on March 31, 2010 from 10:00 a.m. to 12:00 p.m. at 2900 Live Oak Street (Center for Community Cooperation, Oak Corner Meeting Facility), Dallas, Texas.

PUBLIC HEARING AGENDA
10:00 a.m. Call to Order and Opening Remarks
10:15 a.m. Presentation on Strengthening Nonprofit Capacity
10:30 a.m. Invited Testimony from the Public on Recommendations for Strengthening Nonprofit Capacity
12:00 p.m. Adjourn
This meeting is open to the general public. No reservations are required and there is no cost to attend this meeting.

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Public Comment: Each member of the public will be allowed 5 minutes to submit comment to the task force. Written comments may be delivered in person at the public hearing or delivered via mail, e-mail, or fax until 5:00 p.m., April 20, 2010. Written comments should be addressed to:

Joanne Pierce
Health and Human Services Commission
Office of Community Collaboration
9013 Tuscany Way, Suite 100, Austin, TX 78754
E-mail: Joanne.Pierce@hhsc.state.tx.us
Fax: (512) 928-1828

TRD-201001336
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: March 16, 2010

Public Notice

The Texas Health and Human Services Commission announce its intent to submit an amendment to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendment is effective April 1, 2010.

The amendment will modify the reimbursement methodology for clinical laboratory services in the Texas Medicaid State Plan as a result of Medicaid fee changes.

The proposed amendment is estimated to result in a reduced annual aggregate expenditure of $2,202,905 for the remainder of federal fiscal year (FFY) 2010, with approximately $1,556,793 in federal funds and $646,112 in state funds. For FFY 2011, the estimated reduced aggregate expenditure is $5,424,436, with approximately $3,447,771 in federal funds and $1,976,665 in state funds. For FFY 2012, the estimated reduced aggregate expenditure is $5,565,424, with approximately $3,370,421 in federal funds and $2,195,003 in state funds.

Interested parties may obtain copies of the proposed amendment by contacting Chris Dockal, Hospital Reimbursement, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1467; by facsimile at (512) 491-1998; or by e-mail at chris.dockal@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201001337
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: March 16, 2010

Texas Department of Housing and Community Affairs

Announcement of the Opening of the Public Comment Period for the Draft 2010 State of Texas Consolidated Plan Annual Performance Report - Reporting on Program Year 2009

The Texas Department of Housing and Community Affairs (the "Department") announces the opening of a 15-day public comment period for the State of Texas Draft 2010 Consolidated Plan Annual Performance Report - Reporting on Program Year 2009 (the Report) as required by the US Department of Housing and Urban Development (HUD). The Report is required as part of the overall requirements governing the State’s consolidated planning process. The Report is submitted in compliance with 24 CFR §91.520, Consolidated Plan Submissions for Community Planning and Development Programs. The 15-day public comment period begins April 2, 2010, and continues until 5:00 p.m. on April 16, 2010.

The Report gives the public an opportunity to evaluate the performance of the past program year for four HUD programs: the Community Development Block Grant Program administered by the Office of Rural Community Affairs, the Emergency Shelter Grants and HOME Investment Partnerships programs administered by the Department, and the Housing Opportunities for Persons with AIDS Program administered by the Texas Department of State Health Services. The following information is provided for each of the four programs covered in the Report: a summary of program resources and programmatic accomplishments; a series of narrative statements on program performance over the past year; a qualitative analysis of program actions and experiences; and a discussion of program successes in meeting program goals and objectives.

Beginning April 2, 2010, the Report will be available on the Department’s website at www.tdhca.state.tx.us. A hard copy can be requested by contacting the Housing Resource Center at P.O. Box 13941, Austin, TX 78711-3941 or by calling (512) 475-3976.

Written comment should be sent by mail to the Texas Department of Housing and Community Affairs, Housing Resource Center, P.O. Box 13941, Austin, TX 78711-3941, by email to info@tdhca.state.tx.us, or by fax to (512) 475-1672.

TRD-201001370
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: March 17, 2010

Texas Department of Housing and Community Affairs

I. Background and Purpose of the Neighborhood Stabilization Program

The Neighborhood Stabilization Program (NSP) is a HUD-funded program authorized by HR3221, the "Housing and Economic Recovery Act of 2008" (HERA), as a supplemental allocation to the Community Development Block Grant (CDBG) Program through an amendment to the existing State of Texas 2008 CDBG Action Plan. The purpose of the program is to redevelop into affordable housing, or acquire and hold, abandoned and foreclosed properties in areas that are documented to have the greatest need for arresting declining property values as a result of excessive foreclosures.

The NSP-R NOFA makes $4,391,560 available to units of local government and nonprofit organizations for the redevelopment of abandoned and foreclosed homes and residential properties. The funds will
be awarded based on a competitive process and on the results of the review of applications submitted in response to this NOFA.

II. Neighborhood Stabilization Program Recaptured Funds Notice of Funding Availability (NSP-R NOFA).

Initially the Department will accept applications in response to the NSP-R NOFA through Tuesday, April 20. Applications meeting threshold score criteria that are not awarded funds in the initial round will be retained for funding as additional funds become available. Applications will be accepted after the deadline, in an open application cycle, for additional funds that may become available.

III. NSP-R NOFA Qualifications.

Applicants responding to this NOFA must meet the qualifications of the NOFA and must be either a unit of general local government or a private or public non-profit organization.

IV. Minimum Amount of Request.

The minimum amount that can be requested is $500,000. There is no maximum request amount; however, the amount of the actual award is subject to the amount of funds available and the discretion of the Department.

V. Application Deadline and Availability.

The Neighborhood Stabilization Program Recaptured Funds NOFA will be posted on the Department’s website: http://www.tdhca.state.tx.us/nspr/index.htm and organizations on the Department’s list serve as well as current NSP subrecipients will receive an e-mail notification that the NOFA is available on the Department’s web-site.

Deadline for Receipt: Tuesday, April 20, 2010 by 5:00 p.m. CDT

Mailing Address:
Ms. Marni Holloway, NSP Program Administrator
Neighborhood Stabilization Program
Texas Department of Housing and Community Affairs
Post Office Box 13941
Austin, Texas 78711-3941
(All U.S. Postal Service including Express)

Courier Delivery:
221 East 11th Street, 1st Floor
Austin, Texas 78701
(FedEx, UPS, Overnight, etc.)

Hand Delivery: If you are hand delivering the application, contact Marni Holloway at (512) 475-3726 (marni.holloway@tdhca.state.tx.us) or Robb Stevenson at (512) 463-2179 (robb.steven- son@tdhca.state.tx.us) when you arrive at the lobby of our building for application acceptance.

NSP-R NOFA Application Workshop

The Department will present an application workshop in the form of a webinar on a date to be determined. Participation in the application workshop webinar is not mandatory and will not be a factor in awarding NSP funds.

Questions. Questions pertaining to the content of the Neighborhood Stabilization Program Recaptured Funds NOFA may be directed to Marni Holloway at (512) 475-3726 (marni.holloway@tdhca.state.tx.us).

Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: March 17, 2010

Notice of Public Hearing: Announcement of the Public Hearing for Comment on 10 TAC Chapter 54, Disaster Recovery Rules

The Texas Department of Housing and Community Affairs (TDHCA) announces a Public Hearing for Public Comment on 10 TAC Chapter 54, §54.3, Disaster Recovery Rules. The public comment period begins March 26, 2010 and comments are due on or before 5:00 p.m., April 26, 2010.

April 14, 2010 (Wednesday)
10:00 a.m.
Rusk Building
Conference Room 320
2080 East 10th Street
Austin, TX 78701

Public comment on the Disaster Recovery rules may be provided via e-mail to tdhcarulecomments@tdhca.state.tx.us, in writing to: TDHCA, P.O. Box 13941, Austin, TX 78711-3941 Attn: Disaster Recovery Division, or by Fax at (512) 469-9606.

Individuals who require auxiliary aids or services should contact Gina Esteves, ADA Responsible Employee, at least two days before the scheduled hearing, at (512) 475-3943, or Relay Texas at 1-800-735-2989, so that appropriate arrangements can be made.

Beginning March 26, 2010, the proposed new Chapter 54, §54.3 will be available on the Department’s website at http://www.tdhca.state.tx.us/cdbg/index.htm, as well as the February 5, 2010, and March 26, 2010, issues of the Texas Register.

TRD-2010001374
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: March 17, 2010


The Texas Department of Housing and Community Affairs (TDHCA) will hold a public hearing for public comment on 10 TAC Chapter 5 amendments to Subchapters A - D, G, and proposed new Subchapter I for the Community Affairs Program rules. The proposed amendments incorporate program changes, preexisting guidance and state and federal statutory requirements. The proposed new rule provides the process and criteria to be used for Weatherization Assistance Program Department of Energy American Recovery and Reinvestment Act (WAP ARRA) funds in deobligating and subsequently reobligating these funds. The public comment period begins March 26, 2010 and comments are due on or before 5:00 p.m., April 26, 2010.

April 9, 2010 (Friday)
2:00 p.m. - 5:00 p.m.
Individuals who require auxiliary aids or services should contact Ms. Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Non-English speaking individuals who require interpreters for this meeting should contact Cathy Collingsworth, (512) 475-3858 at least three (3) days before the meeting so that appropriate arrangements can be made.

Persons que hablan español y requieren un intérprete, favor de llamar a Jorge Reyes al siguiente número (512) 475-4577 por lo menos tres días antes de la junta para hacer los preparativos apropiados.

TRD-201001372
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: March 17, 2010


The Texas Department of Housing and Community Affairs (TDHCA) will hold a public hearing to receive comments on the draft 2010 Department of Energy (DOE) plan for the Weatherization Assistance Program (WAP). Upon conclusion of the public hearing for the 2010 draft DOE WAP plan, the Policy Advisory Council (PAC) will hold an open meeting to consider public comment. Texas anticipates receiving an allocation of $4,294,261 from the Texas allocation formula grant award. Funding to subrecipients will be based on the total number of grant allocation awards. The public comment period begins March 26, 2010 and comments are due on or before 5:00 p.m., April 26, 2010.

April 13, 2010 (Tuesday)
1:00 p.m. - 5:00 p.m.
Thomas Jefferson RUSK Building
Conference Room 320
200 East 10th Street
Austin, TX 78701

Local officials and citizens are encouraged to participate in the hearing process. Public comment on the proposed draft DOE plan may be provided via e-mail to tdhcaenergycomments@tdhca.state.tx.us, in writing to: TDHCA, Energy Assistance Section, P.O. Box 13941, Austin, Texas 78711-3941, Attn: Cathy Collingsworth, or by fax to (512) 475-3935. A copy of the proposed draft plan may be obtained after March 19, 2010 through TDHCA's website, http://www.tdhca.state.tx.us/ea/index.htm.

Texas Department of Insurance

Company Licensing

Application to change the name of UNION STANDARD INSURANCE COMPANY to BERKLEY NATIONAL INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Oklahoma City, Oklahoma.

Application to change the name of TRANSUNION NATIONAL TITLE INSURANCE COMPANY to WFG NATIONAL TITLE INSURANCE COMPANY, a foreign title company. The home office is in Columbia, South Carolina.

Application to change the name of GENWORTH SEGUROS MEXICO, S.A. DE C.V. to HDI SEGUROS, S.A. DE C.V., a Mexican casualty company. The home office is in Leon Guanajuato, Mexico.

Application to change the name of XL RE LIFE AMERICA INC. to SCOR GLOBAL LIFE REINSURANCE COMPANY OF AMERICA, a foreign life company. The home office is in Wilmington, Delaware.

Application to change the name of THE OHIO CASUALTY INSURANCE COMPANY to LIBERTY REGIONAL SHIELD INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Fairfield, Ohio.

Application to change the name of THE OHIO CASUALTY INSURANCE COMPANY to LIBERTY REGIONAL PROTECTION INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Fairfield, Ohio.

Application to change the name of THE OHIO CASUALTY INSURANCE COMPANY to LIBERTY REGIONAL COMMERCIAL INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Fairfield, Ohio.

Application to change the name of OHIO SECURITY INSURANCE COMPANY to LIBERTY REGIONAL SELECT INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Fairfield, Ohio.

Application to change the name of OHIO SECURITY INSURANCE COMPANY to LIBERTY REGIONAL ADVANTAGE INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Fairfield, Ohio.

Application to change the name of AMERICAN FIRE AND CASUALTY COMPANY to LIBERTY REGIONAL PREMIER INSURANCE COMPANY.
ANCE COMPANY, a foreign fire and casualty company. The home office is in Fairfield, Ohio.

Application to change the name of AMERICAN FIRE AND CASUALTY COMPANY to LIBERTY REGIONAL UNIVERSAL INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Fairfield, Ohio.

Application to change the name of WEST AMERICAN INSURANCE COMPANY to LIBERTY REGIONAL CHOICE INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Indianapolis, Indiana.

Application to change the name of WEST AMERICAN INSURANCE COMPANY to LIBERTY REGIONAL UNITED INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Indianapolis, Indiana.

Application to change the name of ACE INDEMNITY INSURANCE COMPANY to WESTCHESTER FIRE INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Philadelphia, Pennsylvania.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the Texas Register publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-201001358
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: March 17, 2010

Texas Lottery Commission
Instant Game Number 1243 "24 Karat Cash"

1.0 Name and Style of Game.
A. The name of Instant Game No. 1243 is "24 KARAT CASH". The play style is "other".

1.1 Price of Instant Ticket.
A. Tickets for Instant Game No. 1243 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 1243.
A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.
B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.
C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: CENTS SYMBOL, CHEST SYMBOL, COIN SYMBOL, CROWN SYMBOL, DIAMOND SYMBOL, EMERALD SYMBOL, FISTFUL SYMBOL, GOLD BAR SYMBOL, KEY SYMBOL, MONEY BAG SYMBOL, NECKLACE SYMBOL, PIGGY BANK SYMBOL, POT OF GOLD SYMBOL, RING SYMBOL, ROLL OF BILLS SYMBOL, SAFE SYMBOL, WALLET SYMBOL, WIN $50 SYMBOL, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $1,000 and $20,000.
D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

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 of HCH ADMINISTRATION, INC., a foreign third party administrator. The home office is URBANA, ILLINOIS.

Application of COADVANTAGE INSURANCE SERVICES, INC., a foreign third party administrator. The home office is ORLANDO, FLORIDA.

Any objections must be filed within 20 days after this notice is published in the Texas Register; addressed to the attention of David Moskowitz, MC 305-2E, 333 Guadalupe, Austin, Texas 78701.
Figure 1: GAME NO. 1243 - 1.2D

<table>
<thead>
<tr>
<th>PLAY SYMBOL</th>
<th>CAPTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>CENTS SYMBOL</td>
<td>CENTS</td>
</tr>
<tr>
<td>CHEST SYMBOL</td>
<td>CHEST</td>
</tr>
<tr>
<td>COIN SYMBOL</td>
<td>COIN</td>
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<tr>
<td>CROWN SYMBOL</td>
<td>CROWN</td>
</tr>
<tr>
<td>DIAMOND SYMBOL</td>
<td>DIMND</td>
</tr>
<tr>
<td>EMERALD SYMBOL</td>
<td>EMRLD</td>
</tr>
<tr>
<td>FISTFUL SYMBOL</td>
<td>FISTFUL</td>
</tr>
<tr>
<td>GOLD BAR SYMBOL</td>
<td>GLDBAR</td>
</tr>
<tr>
<td>KEY SYMBOL</td>
<td>KEY</td>
</tr>
<tr>
<td>MONEY BAG SYMBOL</td>
<td>MNBAG</td>
</tr>
<tr>
<td>NECKLACE SYMBOL</td>
<td>NKLACE</td>
</tr>
<tr>
<td>PIGGY BANK SYMBOL</td>
<td>PIGBNK</td>
</tr>
<tr>
<td>POT OF GOLD SYMBOL</td>
<td>PTGOLD</td>
</tr>
<tr>
<td>RING SYMBOL</td>
<td>RING</td>
</tr>
<tr>
<td>ROLL OF BILLS SYMBOL</td>
<td>ROLL</td>
</tr>
<tr>
<td>SAFE SYMBOL</td>
<td>SAFE</td>
</tr>
<tr>
<td>WALLET SYMBOL</td>
<td>WALLET</td>
</tr>
<tr>
<td>WIN $50 SYMBOL</td>
<td>WIN$50</td>
</tr>
<tr>
<td>$2.00</td>
<td>TWO$</td>
</tr>
<tr>
<td>$4.00</td>
<td>FOUR$</td>
</tr>
<tr>
<td>$5.00</td>
<td>FIVE$</td>
</tr>
<tr>
<td>$10.00</td>
<td>TEN$</td>
</tr>
<tr>
<td>$20.00</td>
<td>TWENTY</td>
</tr>
<tr>
<td>$50.00</td>
<td>FIFTY</td>
</tr>
<tr>
<td>$100.00</td>
<td>ONE HUND</td>
</tr>
<tr>
<td>$1,000.00</td>
<td>ONE THOU</td>
</tr>
<tr>
<td>$20,000.00</td>
<td>20 THOU</td>
</tr>
</tbody>
</table>

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00 and $100.

H. High-Tier Prize - A prize of $1,000 and $20,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1243), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1243-0000001-001.

K. Pack - A pack of "24 KARAT CASH" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). One ticket will be folded over to expose a front and back of one ticket on each pack. Please note the books will be in an A, B, C and D configuration.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "24 KARAT CASH" Instant Game No. 1243 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket.
A prize winner in the "24 KARAT CASH" Instant Game is determined once the latex on the ticket is scratched off to expose 20 (twenty) Play Symbols. The player must scratch the play area. If a player reveals a "GOLD BAR" play symbol, the player wins the PRIZE shown for that symbol. If a player reveals a "DOLLAR SIGN" play symbol, the player wins $50 instantly. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.
A. To be a valid Instant Game ticket, all of the following requirements must be met:
1. Exactly 20 (twenty) Play Symbols must appear under the latex overprint on the front portion of the ticket;
2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;
3. Each of the Play Symbols must be present in its entirety and be fully legible;
4. Each of the Play Symbols must be printed in black ink except for dual image games;
5. The ticket shall be intact;
6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;
7. The Serial Number must correspond, using the Texas Lottery’s codes, to the Play Symbols on the ticket;
8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;
9. The ticket must not be counterfeit in whole or in part;
10. The ticket must have been issued by the Texas Lottery in an authorized manner;
11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;
12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;
13. The ticket must be complete and not miscut, and have exactly 20 (twenty) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;
14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery’s Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;
15. The ticket must not be blank or partially blank, defective or printed or produced in error;
16. Each of the 20 (twenty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;
17. Each of the 20 (twenty) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;
18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and
19. The ticket must have been received by the Texas Lottery by applicable deadlines.
B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery’s Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.
C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director’s discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director’s discretion.

2.2 Programmed Game Parameters.
A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.
B. No more than two (2) matching non-winning prize symbols will appear on a ticket.
C. No duplicate non-winning play symbols on a ticket.
D. Non-winning prize symbols will never be the same as the winning prize symbol(s).
E. The "DOLLAR SIGN" ($50 auto win) play symbol will always appear with the $50 prize symbol.
F. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.
A. To claim a "24 KARAT CASH" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $20.00, $50.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $50.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.
B. To claim a "24 KARAT CASH" Instant Game prize of $1,000 or $20,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery’s Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.
C. As an alternative method of claiming a "24 KARAT CASH" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;  

B. if there is any question regarding the identity of the claimant;  

C. if there is any question regarding the validity of the ticket presented for payment; or  

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "24 KARAT CASH" Instant Game, the Texas Lottery shall deliver to an adult member of the minor’s family or the minor’s guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "24 KARAT CASH" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor’s family or the minor’s guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 8,040,000 tickets in the Instant Game No. 1243. The approximate number and value of prizes in the game are as follows:
A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1243 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1243, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201001344
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: March 16, 2010

Instant Game Number 1244 "Royal 7's"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1244 is "ROYAL 7'S". The play style is "key number match with multiplier".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1244 shall be $7.00 per ticket.

1.2 Definitions in Instant Game No. 1244.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 7 SYMBOL, $7.00, $10.00, $15.00, $20.00, $40.00, $50.00, $100, $500, $2,000 and $77,777. The possible blue play symbols are: 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 7 SYMBOL and CROWN SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

---

**Table:**

<table>
<thead>
<tr>
<th>Prize Amount</th>
<th>Approximate Number of Winners*</th>
<th>Approximate Odds are 1 in**</th>
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</thead>
<tbody>
<tr>
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<td>$20,000</td>
<td>8</td>
<td>1,005,000.00</td>
</tr>
</tbody>
</table>

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.73. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

---

'The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.'

**The overall odds of winning a prize are 1 in 4.73. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.'
<table>
<thead>
<tr>
<th>PLAY SYMBOL</th>
<th>CAPTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 (black)</td>
<td>ONE</td>
</tr>
<tr>
<td>2 (black)</td>
<td>TWO</td>
</tr>
<tr>
<td>3 (black)</td>
<td>THR</td>
</tr>
<tr>
<td>4 (black)</td>
<td>FOR</td>
</tr>
<tr>
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<td>TRNI</td>
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<tr>
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</tr>
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</table>

| 7 SYMBOL (blue) | TRIPLER |
| CROWN SYMBOL (blue) | WINALL |
| $7.00 (black) | SEVEN$ |
| $10.00 (black) | TEN$ |
| $15.00 (black) | FIFTN |
| $20.00 (black) | TWENTY |
| $40.00 (black) | FORTY |
| $50.00 (black) | FIFTY |
| $100 (black) | ONE HUND |
| $500 (black) | FIV HUND |
| $2,000 (black) | TWO THOU |
| $77,777 (black) | 77THO777 |

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $7.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100 or $500.

H. High-Tier Prize - A prize of $2,000 or $77,777.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1244), a seven (7) digit pack number, and
a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1244-0000001-001.

K Pack - A pack of "ROYAL 7'S" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "ROYAL 7'S" Instant Game No. 1244 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "ROYAL 7'S" Instant Game is determined once the latex on the ticket is scratched off to expose 44 (forty-four) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any of the WINNING NUMBERS play symbols, the player wins the PRIZE shown for that number. If a player reveals a "BLACK 7" symbol, the player wins the PRIZE shown for that symbol. If a player reveals a "BLUE 7" symbol, the player wins TRIPLE the PRIZE shown for that symbol. If a player reveals a "BLUE CROWN" symbol, the player WINS ALL 20 prizes instantly! No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 44 (forty-four) Play Symbols must appear under the latex overprint on the front portion of the ticket;
2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;
3. Each of the Play Symbols must be present in its entirety and be fully legible;
4. Each of the Play Symbols must be printed in black ink except for dual image games;
5. The ticket shall be intact;
6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;
7. The Serial Number must correspond, using the Texas Lottery’s codes, to the Play Symbols on the ticket;
8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;
9. The ticket must not be counterfeit in whole or in part;
10. The ticket must have been issued by the Texas Lottery in an authorized manner;
11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;
12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;
13. The ticket must be complete and not miscut, and have exactly 44 (forty-four) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;
14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery’s Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;
15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;
16. Each of the 44 (forty-four) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;
17. Each of the 44 (forty-four) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;
18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and
19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery’s Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director’s discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director’s discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. The "BLUE 7" (tripler) play symbol will only appear as dictated by the prize structure.

C. The "BLACK 7" (auto win) play symbol will never appear more than once on winning tickets.

D. The "BLUE CROWN" (win all) play symbol will only appear as dictated by the prize structure.

E. When the "BLUE CROWN" (win all) play symbol appears, there will be no occurrence of any YOUR NUMBERS play symbols matching to any of the WINNING NUMBERS play symbols.

F. There will be a minimum of 4 and a maximum of 12 blue play symbols on every ticket unless otherwise restricted by the prize structure.

G. No more than four (4) matching non-winning prize symbols will appear on a ticket.
H. No duplicate non-winning YOUR NUMBERS play symbols on a ticket regardless of color.
I. No duplicate WINNING NUMBERS play symbols on a ticket.
J. Non-winning prize symbols will never be the same as the winning prize symbol(s).
K. YOUR NUMBER play symbols matching WINNING NUMBER play symbols will be a win, regardless of color.
L. No prize amount in a non-winning spot will correspond with the play symbol (i.e. 20 and $20).
M. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.
A. To claim a "ROYAL 7’S" Instant Game prize of $7.00, $10.00, $15.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.
B. To claim a "ROYAL 7’S" Instant Game prize of $2,000 or $77,777, the claimant must sign the winning ticket and present it at one of the Texas Lottery’s Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.
C. As an alternative method of claiming a "ROYAL 7’S" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.
D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:
1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;
2. delinquent in making child support payments administered or collected by the Attorney General;
3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;
4. in default on a loan made under Chapter 52, Education Code; or
5. in default on a loan guaranteed under Chapter 57, Education Code.
E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.
2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:
A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;
B. if there is any question regarding the identity of the claimant;
C. if there is any question regarding the validity of the ticket presented for payment; or
D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.
2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "ROYAL 7’S" Instant Game, the Texas Lottery shall deliver to an adult member of the minor’s family or the minor’s guardian a check or warrant in the amount of the prize payable to the order of the minor.
2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "ROYAL 7’S" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor’s family or the minor’s guardian serving as custodian for the minor.
2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.
2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.
3.0 Instant Ticket Ownership.
A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.
B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.
4.0 Number and Value of Instant Prizes. There will be approximately 5,040,000 tickets in the Instant Game No. 1244. The approximate number and value of prizes in the game are as follows:

<table>
<thead>
<tr>
<th>Prize Amount</th>
<th>Approximate Number of Winners*</th>
<th>Approximate Odds are 1 in**</th>
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<tr>
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<tr>
<td>$77,777</td>
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<td>1,008,000.00</td>
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</table>

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.56. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1244 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1244, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201001345
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: March 16, 2010

Instant Game Number 1245 "Bank Loot"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1245 is "BANK LOOT". The play style is "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1245 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1245.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, COIN SYMBOL, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00, $100 and $1,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:
### Figure 1: GAME NO. 1245 - 1.2D

<table>
<thead>
<tr>
<th>PLAY SYMBOL</th>
<th>CAPTION</th>
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<td>1</td>
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<table>
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<tr>
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<td>$1.00</td>
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</tr>
<tr>
<td>$100</td>
<td>ONE HUND</td>
</tr>
<tr>
<td>$1,000</td>
<td>ONE THOU</td>
</tr>
</tbody>
</table>

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $1.00, $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $40.00 or $100.

H. High-Tier Prize - A prize of $1,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1245), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1245-0000001-001.

K. Pack - A pack of "BANK LOOT" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "BANK LOOT" Instant Game No. 1245 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "BANK LOOT" Instant Game is determined once the latex on the ticket is scratched off to expose 11 (eleven) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to the WINNING NUMBER play symbol, the player wins the PRIZE shown for that number. If the player reveals a "COIN" play symbol, the player wins the PRIZE shown for that symbol instantly. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:
1. Exactly 11 (eleven) Play Symbols must appear under the latex overprint on the front portion of the ticket;
2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;
3. Each of the Play Symbols must be present in its entirety and be fully legible;
4. Each of the Play Symbols must be printed in black ink except for dual image games;
5. The ticket shall be intact;
6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;
7. The Serial Number must correspond, using the Texas Lottery’s codes, to the Play Symbols on the ticket;
8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;
9. The ticket must not be counterfeit in whole or in part;
10. The ticket must have been issued by the Texas Lottery in an authorized manner;
11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;
12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;
13. The ticket must be complete and not miscut, and have exactly 11 (eleven) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;
14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery’s Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;
15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;
16. Each of the 11 (eleven) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;
17. Each of the 11 (eleven) Play Symbols on the ticket must be printed in the symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;
18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and
19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery’s Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.
C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director’s discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director’s discretion.

2.2 Programmed Game Parameters.
A. Consecutive non-winning tickets will not have identical play data, spot for spot.
B. No duplicate non-winning prize symbols on a ticket.
C. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.
D. Non-winning prize symbols will never be the same as the winning prize symbol(s).
E. The "COIN" (auto win) play symbol will never appear more than once on a ticket.
F. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).
G. The top prize will appear on every ticket unless otherwise restricted by the prize structure.

2.3 Procedure for Claiming Prizes.
A. To claim a "BANK LOOT" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $40.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.
B. To claim a "BANK LOOT" Instant Game prize of $1,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery’s Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.
C. As an alternative method of claiming a "BANK LOOT" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.
D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:
1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "BANK LOOT" Instant Game, the Texas Lottery shall deliver to an adult member of the minor’s family or the minor’s guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "BANK LOOT" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor’s family or the minor’s guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereunto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 8,160,000 tickets in the Instant Game No. 1245. The approximate number and value of prizes in the game are as follows:
A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1245 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1245, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201001346
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: March 16, 2010

Instant Game Number 1247 "Flying Aces"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1247 is "FLYING ACES". The play style is "beat score with doubler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1247 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 1247.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 2 CARD SYMBOL, 3 CARD SYMBOL, 4 CARD SYMBOL, 5 CARD SYMBOL, 6 CARD SYMBOL, 7 CARD SYMBOL, 8 CARD SYMBOL, 9 CARD SYMBOL, 10 CARD SYMBOL, J CARD SYMBOL, Q CARD SYMBOL, K CARD SYMBOL, A CARD SYMBOL, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $200, $1,000 and $20,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:
E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100 or $200.

H. High-Tier Prize - A prize of $1,000, $2,000 or $20,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1247), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1247-0000001-001.

K. Pack - A pack of "FLYING ACES" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). One ticket will be folded over to expose a front and back of one ticket on each pack. Please note the books will be in an A, B, C and D configuration.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "FLYING ACES" Instant Game No. 1247 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "FLYING ACES" Instant Game is determined once the latex on the ticket is scratched off to expose 30 (thirty) Play Symbols. If the player’s YOUR CARD play symbol beats the DEALER’S CARD play symbol within a HAND, the player wins the PRIZE shown for that HAND. If a player reveals an "A CARD SYMBOL," the player wins DOUBLE the PRIZE shown for that HAND. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.
A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 30 (thirty) Play Symbols must appear under the latex overprint on the front portion of the ticket;
2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;
3. Each of the Play Symbols must be present in its entirety and be fully legible;
4. Each of the Play Symbols must be printed in black ink except for dual image games;
5. The ticket shall be intact;
6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;
7. The Serial Number must correspond, using the Texas Lottery’s codes, to the Play Symbols on the ticket;
8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;
9. The ticket must not be counterfeit in whole or in part;
10. The ticket must have been issued by the Texas Lottery in an authorized manner;
11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;
12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;
13. The ticket must be complete and not miscut, and have exactly 30 (thirty) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;
14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery’s Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;
15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;
16. Each of the 30 (thirty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;
17. Each of the 30 (thirty) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;
18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and
19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery’s Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director’s discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another un-played ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director’s discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.
B. The "ACE" (doubler) play symbol will only appear on intended winning tickets and only as dictated by the prize structure.
C. No ties between the YOUR CARD play symbol and DEALER’S CARD play symbol within a HAND.
D. No more than two (2) matching non-winning prize symbols will appear on a ticket.
E. Non-winning prize symbols will never be the same as the winning prize symbol(s).
F. The top prize symbol will appear on every ticket unless otherwise restricted.
G. No duplicate non-winning HANDS on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "FLYING ACES" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100 or $200, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $100 or $200 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "FLYING ACES" Instant Game prize of $1,000, $2,000 or $20,000 the claimant must sign the winning ticket and present it at one of the Texas Lottery’s Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "FLYING ACES" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is
not validated by the Texas Lottery, the claim shall be denied and the
claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery
shall deduct a sufficient amount from the winnings of a person who has
been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the
Comptroller, the Texas Workforce Commission, or Texas Alcoholic
Beverage Commission;

2. delinquent in making child support payments administered or col-
lected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services
Commission for a benefit granted in error under the food stamp pro-
gram or the program of financial assistance under Chapter 31, Human
Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other
than those specified in the preceding paragraph, the winnings of a per-
son shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay
payment of the prize pending a final determination by the Executive
Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur,
regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented
for payment; or

D. if the claim is subject to any deduction from the payment otherwise
due, as described in Section 2.3.D of these Game Procedures. No lia-
bility for interest for any delay shall accrue to the benefit of the claimant
pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of
18 years is entitled to a cash prize of less than $600 from the "FLYING
ACES" Instant Game, the Texas Lottery shall deliver to an adult mem-
ber of the minor’s family or the minor’s guardian a check or warrant in
the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize
of more than $600 from the "FLYING ACES" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank
account, with an adult member of the minor’s family or the minor’s
guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be
claimed within 180 days following the end of the Instant Game or
within the applicable time period for certain eligible military person-
nel as set forth in Texas Government Code §466.408. Any prize not
claimed within that period, and in the manner specified in these Game
Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based
on the number of tickets ordered. The number of actual prizes available
in a game may vary based on number of tickets manufactured, testing,
distribution, sales and number of prizes claimed. An Instant Game
ticket may continue to be sold even when all the top prizes have been
claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an
Instant Game ticket in the space designated, a ticket shall be owned by
the physical possessor of said ticket. When a signature is placed on the
back of the ticket in the space designated, the player whose signature
appears in that area shall be the owner of the ticket and shall be entitled
to any prize attributable thereto. Notwithstanding any name or names
submitted on a claim form, the Executive Director shall make payment
to the player whose signature appears on the back of the ticket in the
space designated. If more than one name appears on the back of the
ticket, the Executive Director will require that one of those players
whose name appears thereon be designated by such players to receive
payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant
Game tickets and shall not be required to pay on a lost or stolen Instant
Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately
7,080,000 tickets in the Instant Game No. 1247. The approximate
number and value of prizes in the game are as follows:
**Figure 2: GAME NO. 1247 - 4.0**

<table>
<thead>
<tr>
<th>Prize Amount</th>
<th>Approximate Number of Winners*</th>
<th>Approximate Odds are 1 in**</th>
</tr>
</thead>
<tbody>
<tr>
<td>$2</td>
<td>736,320</td>
<td>9.62</td>
</tr>
<tr>
<td>$4</td>
<td>566,400</td>
<td>12.50</td>
</tr>
<tr>
<td>$5</td>
<td>84,960</td>
<td>83.33</td>
</tr>
<tr>
<td>$10</td>
<td>99,120</td>
<td>71.43</td>
</tr>
<tr>
<td>$20</td>
<td>42,480</td>
<td>166.67</td>
</tr>
<tr>
<td>$50</td>
<td>38,232</td>
<td>185.19</td>
</tr>
<tr>
<td>$100</td>
<td>4,130</td>
<td>1,714.29</td>
</tr>
<tr>
<td>$200</td>
<td>3,481</td>
<td>2,033.90</td>
</tr>
<tr>
<td>$1,000</td>
<td>30</td>
<td>236,000.00</td>
</tr>
<tr>
<td>$2,000</td>
<td>5</td>
<td>1,416,000.00</td>
</tr>
<tr>
<td>$20,000</td>
<td>7</td>
<td>1,011,428.57</td>
</tr>
</tbody>
</table>

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.**

**The overall odds of winning a prize are 1 in 4.49. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.**

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1247 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1247, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201001347
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: March 16, 2010

Instant Game Number 1266 "Loteria® Texas"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1266 is "LOTERIA® TEXAS". The play style is "coordinate with prize legend".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1266 shall be $3.00 per ticket.

1.2 Definitions in Instant Game No. 1266.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.


D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:
E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $3.00, $4.00, $7.00, $10.00, $17.00 or $20.00.

G. Mid-Tier Prize - A prize of $30.00, $33.00, $50.00, $80.00 or $300.

H. High-Tier Prize - A prize of $3,000 or $33,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1266), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1266-0000001-001.

K. Pack - A pack of "LOTERIA® TEXAS" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). There will be 2 fanfold configurations for this game. Configuration A will show the front of ticket 001 and the back of ticket 125. Configuration B will show the back of ticket 001 and the front of ticket 125.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.
M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "LOTERIA® TEXAS" Instant Game No. 1266 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "LOTERIA® TEXAS" Instant Game is determined once the latex on the ticket is scratched off to expose 30 (thirty) play symbols. The player scratches off the CALLER’S CARD area to reveal 14 symbols. The player scratches only the symbols on the LOTERIA® CARD that match the symbols revealed on the CALLER’S CARD to reveal a bean. The player reveals 4 beans in any complete horizontal or vertical line in the LOTERIA® CARD to win the prize shown for that line. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 30 (thirty) Play Symbols must appear under the latex overprint on the front portion of the ticket;
2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;
3. Each of the Play Symbols must be present in its entirety and be fully legible;
4. Each of the Play Symbols must be printed in black ink except for dual image games;
5. The ticket shall be intact;
6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;
7. The Serial Number must correspond, using the Texas Lottery’s codes, to the Play Symbols on the ticket;
8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;
9. The ticket must not be counterfeit in whole or in part;
10. The ticket must have been issued by the Texas Lottery in an authorized manner;
11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;
12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;
13. The ticket must be complete and not miscut, and have exactly 30 (thirty) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;
14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery’s Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;
15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;
16. Each of the 30 (thirty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 30 (thirty) Play Symbols on the ticket must be printed in the symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;
18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and
19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery’s Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director’s discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director’s discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.
B. A ticket may win up to three (3) times per the prize structure.
C. No adjacent tickets will contain identical CALLER’S CARD play symbols in exactly the same locations.
D. No duplicate play symbols in the CALLER’S CARD play area.
E. On non-winning tickets, there will be at least one near win. A near win is defined as matching 3 of the 4 symbols to the CALLER’S CARD for a given row or column.
F. There will be no occurrence of all 4 symbols in either diagonal matching the CALLER’S CARD symbols.
G. At least 8, but no more than 12, CALLER’S CARD play symbols will match a symbol on the LOTERIA® CARD on a ticket.
H. No duplicate play symbols on a LOTERIA® CARD as indicated in the artwork section.
I. Each LOTERIA® CARD will have an occurrence of the rooster symbol as indicated in the artwork section.

2.3 Procedure for Claiming Prizes.

A. To claim a "LOTERIA® TEXAS" Instant Game prize of $3.00, $4.00, $7.00, $10.00, $17.00, $20.00, $30.00, $33.00, $50.00, $80.00, or $300, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $30.00, $33.00, $50.00, $80.00, or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim
is validated by the Texas Lottery, a check shall be forwarded to the
claimant in the amount due. In the event the claim is not validated, the
claim shall be denied and the claimant shall be notified promptly. A
claimant may also claim any of the above prizes under the procedure
described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "LOTERIA® TEXAS" Instant Game prize of $3,000 or
$33,000, the claimant must sign the winning ticket and present it at
one of the Texas Lottery’s Claim Centers. If the claim is validated by
the Texas Lottery, payment will be made to the bearer of the validated
winning ticket for that prize upon presentation of proper identification.
When paying a prize of $600 or more, the Texas Lottery shall file the
appropriate income reporting form with the Internal Revenue Service
(IRS) and shall withhold federal income tax at a rate set by the IRS
if required. In the event that the claim is not validated by the Texas
Lottery, the claim shall be denied and the claimant shall be notified
promptly.

C. As an alternative method of claiming a "LOTERIA® TEXAS" In-
stant Game prize, the claimant must sign the winning ticket, thoroughly
complete a claim form, and mail both to: Texas Lottery Commission,
Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending
a ticket remains with the claimant. In the event that the claim is
not validated by the Texas Lottery, the claim shall be denied and the
claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery
shall deduct a sufficient amount from the winnings of a person who has
been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the
Comptroller, the Texas Workforce Commission, or Texas Alcoholic
BeVERAGE Commission;
2. delinquent in making child support payments administered or col-
lected by the Attorney General; or
3. delinquent in reimbursing the Texas Health and Human Services
Commission for a benefit granted in error under the food stamp pro-
gram or the program of financial assistance under Chapter 31, Human
Resources Code;
4. in default on a loan made under Chapter 52, Education Code; or
5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other
than those specified in the preceding paragraph, the winnings of a per-
son shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay
payment of the prize pending a final determination by the Executive
Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur,
regarding the prize;
B. if there is any question regarding the identity of the claimant;
C. if there is any question regarding the validity of the ticket presented
for payment; or
D. if the claim is subject to any deduction from the payment otherwise
due, as described in Section 2.3.D of these Game Procedures. No lia-
bility for interest for any delay shall accrue to the benefit of the claimant
pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age
of 18 years is entitled to a cash prize of less than $600 from the "LO-
TERIA® TEXAS" Instant Game, the Texas Lottery shall deliver to an
adult member of the minor’s family or the minor’s guardian a check or
warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize
of more than $600 from the "LOTERIA® TEXAS" Instant Game, the
Texas Lottery shall deposit the amount of the prize in a custodial bank
account, with an adult member of the minor’s family or the minor’s
guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be
claimed within 180 days following the end of the Instant Game or
within the applicable time period for certain eligible military personnel
as set forth in Texas Government Code §466.408. Any prize not claimed
within that period, and in the manner specified in these Game
Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based
on the number of tickets ordered. The number of actual prizes available
in a game may vary based on number of tickets manufactured, testing,
distribution, sales and number of prizes claimed. An Instant Game
ticket may continue to be sold even when all the top prizes have been
claimed.

3.0 Instant Ticket Ownership.
A. Until such time as a signature is placed upon the back portion of an
Instant Game ticket in the space designated, a ticket shall be owned by
the physical possessor of said ticket. When a signature is placed on the
back of the ticket in the space designated, the player whose signature
appears in that area shall be the owner of the ticket and shall be entitled
to any prize attributable thereto. Notwithstanding any name or names
submitted on a claim form, the Executive Director shall make payment
to the player whose signature appears on the back of the ticket in the
space designated. If more than one name appears on the back of the
ticket, the Executive Director will require that one of those players
whose name appears thereon be designated by such players to receive
payment.
B. The Texas Lottery shall not be responsible for lost or stolen Instant
Game tickets and shall not be required to pay on a lost or stolen Instant
Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately
15,000,000 tickets in the Instant Game No. 1266. The approximate
number and value of prizes in the game are as follows:

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35 TexReg 2678  March 26, 2010  Texas Register
Figure 2: GAME NO. 1266 - 4.0

<table>
<thead>
<tr>
<th>Prize Amount</th>
<th>Approximate Number of Winners*</th>
<th>Approximate Odds are 1 in**</th>
</tr>
</thead>
<tbody>
<tr>
<td>$3</td>
<td>2,160,000</td>
<td>6.94</td>
</tr>
<tr>
<td>$4</td>
<td>480,000</td>
<td>31.25</td>
</tr>
<tr>
<td>$7</td>
<td>420,000</td>
<td>35.71</td>
</tr>
<tr>
<td>$10</td>
<td>270,000</td>
<td>55.56</td>
</tr>
<tr>
<td>$17</td>
<td>240,000</td>
<td>62.50</td>
</tr>
<tr>
<td>$20</td>
<td>240,000</td>
<td>62.50</td>
</tr>
<tr>
<td>$30</td>
<td>22,750</td>
<td>659.34</td>
</tr>
<tr>
<td>$33</td>
<td>15,625</td>
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<tr>
<td>$50</td>
<td>12,750</td>
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</tr>
<tr>
<td>$80</td>
<td>12,500</td>
<td>1,200.00</td>
</tr>
<tr>
<td>$300</td>
<td>7,625</td>
<td>1,967.21</td>
</tr>
<tr>
<td>$3,000</td>
<td>152</td>
<td>98,684.21</td>
</tr>
<tr>
<td>$33,000</td>
<td>20</td>
<td>750,000.00</td>
</tr>
</tbody>
</table>

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.86. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1266 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1266, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201001348
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: March 16, 2010

Notice of Public Comment Hearing

A public hearing to receive public comments regarding proposed new 16 TAC §402.514 relating to Electronic Funds Transfer Record-keeping, proposed amendments to 16 TAC §402.506 relating to Disbursement Records Requirements, proposed amendments to 16 TAC §402.600 relating to Bingo Reports, proposed new 16 TAC §402.450 relating to Requests for Waiver, proposed new 16 TAC §402.451 relating to Operating Capital, proposed new 16 TAC §402.452 relating to Net Proceeds, proposed new 16 TAC §402.453 relating to Request for Operating Capital Increase, and proposed amendments to 16 TAC §402.101 relating to Advisory Opinions will be held on Wednesday, April 14, 2010, at 10:00 a.m. at 611 E. 6th Street, Austin, Texas 78701. Persons requiring any accommodation for a disability should notify Michelle Guerrero, Executive Assistant to the General Counsel, and Texas Lottery Commission at (512) 344-5113 at least 72 hours prior to the public hearing.

TRD-201001302
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: March 15, 2010

Texas Public Finance Authority

Notice of Public Hearing - Cosmos Foundation, Inc. Education Revenue Bonds, Series 2010A

Notice is hereby given of a public hearing to be held on behalf of the Texas Public Finance Authority Charter School Finance Corporation on Friday, April 9, 2010, at 10:00 a.m. in the Conference Room, Suite 411 at the Texas Public Finance Authority, William P. Clements State Office Building, 300 W. 15th St., Austin, Texas 78701 with respect to the captioned Bonds (the Bonds) to be issued in a principal amount not to exceed $90,000,000 by the Texas Public Finance Authority Charter School Finance Corporation. The proceeds of the Bonds will be loaned to Cosmos Foundation, Inc., a Texas non-profit corporation.
(the School) for the following purposes (items 1 through 34 below are herein referred to as the (Project):

(1) financing certain costs for site improvements, design, construction, renovation, and/or equipment of educational facilities, including the construction of an approximately 14,000 square foot building, all located at Harmony Science Academy-Bryan/College Station, 2031 S. Texas Ave., Bryan, Texas 77802;

(2) financing certain costs for site improvements, design, construction, renovation and/or equipment of educational facilities, including the construction of an approximately 42,000 square foot building, all located at the Harmony School of Nature, corner of Camp Wisdom Road and Eagle Ford Drive, Dallas, Texas 75249;

(3) financing certain costs for site improvements, design, construction, renovation, and/or equipment of educational facilities, including the construction of an approximately 73,395 square foot building, all located at the Harmony School of Fine Arts, 9185 Kirby Dr., Houston, Texas 77054;

(4) financing certain costs for site improvements, design, construction, renovation and/or equipment of educational facilities, including the construction of an approximately 10,000 square foot building, all located at the Harmony Science Academy-Lubbock, 1516 33rd Street, Lubbock, Texas 79412;

(5) financing certain costs for site improvements, design, construction, renovation and/or equipment of educational facilities, including the construction of an approximately 74,700 square foot building, all located at the Harmony School of Excellence-San Antonio, Northwest corner of Montgomery Drive and Glen Mont, approximately 0.5 miles West of Farm-to-Market Road 1976, Bexar County, Texas;

(6) financing certain costs for the acquisition of land and the design, construction, renovation, and/or equipment of educational facilities, including the construction of an approximately 67,352 square foot building, all located at the Harmony School of Science NW, 3100 North Sam Houston Parkway West, Houston, Texas 77038;

(7) financing certain costs for site improvements, design, construction, renovation and/or equipment of educational facilities, including the construction of an approximately 59,500 square foot building, all located at the Harmony School of Innovation, 9317 W. Sam Houston Pkwy., Houston, Texas 77099;

(8) financing certain costs for site improvements, design, construction and renovation and/or equipment of educational facilities, including the construction of an approximately 13,000 square foot building, all located at the Harmony School of Ingenuity, 10555 Stella Link Road, Houston, Texas 77025;

(9) financing certain costs for the acquisition of land and the design, construction, renovation and/or equipment of educational facilities, including the construction of an approximately 65,000 square foot building, all located at the Harmony School of Political Sciences and Communication, 13175 Research Blvd. (Hwy. 183 North) - frontage on Hwy. 183 between Hunters Chase Road and Anderson Mill Road, Austin, Texas;

(10) financing certain costs for site improvements, design, construction, renovation and/or equipment of educational facilities, including the construction of an approximately 65,000 square foot building, all located at the Harmony School of Advancement-Houston, corner of NE W. Airport Blvd. and Eldridge, Sugar Land, Texas 77478;

(11) financing and reimbursing certain costs for the acquisition of an existing building, site improvements, design, construction, renovation, and/or equipment of educational facilities, all located at the Harmony Science Academy - Houston, 5435 S. Braeswood Blvd., Houston, Texas 77096;

(12) financing and reimbursing certain costs for the acquisition of an existing building, site improvements, design, construction, renovation, and/or equipment of educational facilities, all located at the Harmony Science Academy - Austin, 930 E. Rundberg Lane, Austin, Texas 78753;

(13) financing and reimbursing certain costs for the construction, renovation and/or equipment of educational facilities, all located at the Harmony School of Excellence - Austin, 2100 E. St. Elmo Rd., Austin, Texas 78744;

(14) financing and reimbursing certain costs for the construction, renovation and/or equipment of educational facilities, all located at the Harmony Science Academy - North Austin, 1421 Wells Branch Pkwy., Suite 200, Pflugerville, Texas 78660;

(15) financing and reimbursing certain costs for the construction, renovation and/or equipment of educational facilities, all located at the Harmony School of Innovation - Dallas, 1024 Rosemeade Pkwy, Carrollton, Texas 75007;

(16) financing and reimbursing certain costs for the construction, renovation and/or equipment of educational facilities, all located at the Harmony School of Innovation - El Paso, 5210 Fairbanks Dr., El Paso, Texas 79924;

(17) financing and reimbursing certain costs for the construction, renovation, and/or equipment of educational facilities, all located at the Harmony Science Academy - Dallas, 11995 Forestgate Drive, Suite 100, Dallas, Texas 75243;

(18) financing and reimbursing certain costs for the construction, renovation, and/or equipment of educational facilities, all located at the Harmony School of Discovery - Houston, 6270 Barker Cypress Road, Houston, Texas 77084;

(19) financing certain costs for the acquisition of land and the design, construction, renovation, and/or equipment of educational facilities, including the construction of an approximately 55,000 square foot building, all located at the Harmony Science Academy - Garland, 2302 Firewheel Pkwy., Garland, Texas 75040;

(20) financing and reimbursing certain costs for the construction, renovation and/or equipment of educational facilities, all located at the Harmony Science Academy - Northwest, 16200 Tomball Pkwy., Houston, Texas 77086;

(21) financing and reimbursing certain costs for the construction, renovation and/or equipment of educational facilities, all located at the Harmony School of Excellence, 7340 N. Gessner Dr., Houston, Texas 77040;

(22) financing and reimbursing certain costs for the construction, renovation and/or equipment of educational facilities, all located at the Harmony School of Excellence - Endeavor, 5668 West Little York Road, Houston, Texas 77091;

(23) financing and reimbursing certain costs for the construction, renovation and/or equipment of educational facilities, all located at the Harmony School of Science - Houston, 13415 West Bellaire, Sugar Land, Texas 77478;

(24) financing and reimbursing certain costs for the construction, renovation and/or equipment of educational facilities, all located at the Harmony School of Science - Austin, 11800 Stonehollow Dr., Austin, Texas 78758;
(25) financing and reimbursing certain costs for the construction, renovation and/or equipment of educational facilities, all located at the Harmony Science Academy - Fort Worth, 5651 Westcreek Dr., Fort Worth, Texas 76133;

(26) financing and reimbursing certain costs for the construction, renovation and/or equipment of educational facilities, all located at the Harmony Science Academy - Grand Prairie, 1102 NW 7th Street, Grand Prairie, Texas 75050;

(27) financing and reimbursing certain costs for the construction, renovation and/or equipment of educational facilities, all located at the Harmony Science Academy - Euless, 701 S. Industrial Blvd., Euless, Texas 76040;

(28) financing and reimbursing certain costs for the construction, renovation and/or equipment of educational facilities, all located at the Harmony Science Academy - El Paso, 9405 Betel Dr., El Paso, Texas 79907;

(29) financing and reimbursing certain costs for the construction, renovation and/or equipment of educational facilities, all located at the Harmony Science Academy - San Antonio, 8505 Lakeside Parkway, San Antonio, Texas 78245;

(30) financing and reimbursing certain costs for the construction, renovation and/or equipment of educational facilities, all located at the Harmony Science Academy - Beaumont, 4055 Calder Avenue, Beaumont, Texas 77706;

(31) financing and reimbursing certain costs for the construction, renovation and/or equipment of educational facilities, all located at the Harmony Science Academy - Waco, 1900 North Valley Mills Drive, Waco, Texas 76710;

(32) financing and reimbursing certain costs for the construction, renovation and/or equipment of educational facilities, all located at the Harmony Science Academy - Brownsville, 1124 Central Blvd., Brownsville, Texas 78520;

(33) financing and reimbursing certain costs for the construction, renovation and/or equipment of educational facilities, all located at the Harmony Science Academy - Laredo, 4401 San Francisco Ave., Laredo, Texas 78041;

(34) financing and reimbursing certain costs for the construction, renovation and/or equipment of educational facilities, all located at the Harmony School of Political Sciences and Communication, corner of Rural Route 620 and Lake Creek Parkway, Williamson County, Texas;

(35) funding a debt service reserve fund or the purchase of a Reserve Fund Surety Policy and capitalized interest; and

(36) paying a portion of the costs of issuance of the Bonds.

The initial and exclusive operator of the Project and the educational facilities is and will be the School.

The public hearing will be conducted by Susan Durso, General Counsel of the Texas Public Finance Authority, or her designee (the Hearing Officer). All interested persons are invited to attend such public hearing to express their views with respect to the above-described project and the Bonds. Questions or requests for additional information may be directed to Janet Vaughan Robertson, Esq., (telephone: (713) 758-2797). Any interested persons unable to attend the hearing may submit their views in writing to the Hearing Officer prior to the date scheduled for the hearing at fax number (713) 615-5797. This notice is published and the hearing is to be held in satisfaction of the requirements of §147(f) of the Internal Revenue Code of 1986, as amended.

TRD-201001364

Susan K. Durso
General Counsel
Texas Public Finance Authority
Filed: March 17, 2010

Request for Applications to Serve on the Charter School Finance Corporation Board of Directors

Filing Authority: Texas Public Finance Authority Charter School Finance Corporation

The Texas Public Finance Authority (TPFA) is seeking qualified individuals to serve on its Charter School Finance Corporation Board of Directors (CSFC Board). There are two vacancies on the five-member CSFC Board. The CSFC Board is composed of five members who serve two year staggered terms. The CSFC Board typically meets only once per year in January; although the occasion has arisen that an additional meeting during the year was necessary. Applicants should have some knowledge of public finance issues and/or knowledge of open enrollment charter schools. Furthermore, applicants should have no conflicts of interest that would interfere with their consideration of applications for financing submitted by an open enrollment charter holder. Applicants should submit a resume with a brief cover letter explaining their interest in serving, their education or experience in public finance or charter school public education issues, and a description of any relationships that may create a conflict of interest in serving on the board, or an affirmative statement that no such relationships are known to exist. Submit the required information electronically to paula.hatfield@tpfa.state.tx.us or by mail or delivery to the Texas Public Finance Authority c/o CSFC Board, 300 W. 15th St., Room 411, Austin, Texas 78701, by 5:00 p.m. on April 22, 2010.

For more information about the Charter School Finance Corporation, please visit http://www.tpfa.state.tx.us/csfc/.

Contact John Hernandez at (512) 463-3101 for inquiries.

TRD-201001237

Susan K. Durso
General Counsel
Texas Public Finance Authority
Filed: March 11, 2010

Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on March 11, 2010, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Marcus Cable Associates, LLC d/b/a Charter Communications for an Amendment to a State-Issued Certificate of Franchise Authority Pursuant to P.U.C. Substantive Rule §28.6, Project Number 38044 before the Public Utility Commission of Texas.

The requested amendment is to expand the service area footprint to include certain areas within the municipal boundaries of Red Oak, Texas, as shown on the service area map attached to the application.

Information on the application may be obtained by contacting 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 (888) 782-8477. Hearing and speech-impaired individuals with text tele-
phone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 38044.

TRD-201001353  
Adriana A. Gonzales  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: March 17, 2010

Notice of Application for Designation as an Eligible Telecommunications Carrier

Notice is given to the public of an application filed with the Public Utility Commission of Texas on March 15, 2010, for designation as an eligible telecommunications carrier (ETC) for the limited purpose of offering Lifeline Services pursuant to P.U.C. Substantive Rule §26.418.

Docket Title and Number: Application of Virgin Mobile USA, L.P. for Designation as an Eligible Telecommunications Carrier in the State of Texas for the Limited Purpose of Offering Lifeline Services, Docket Number 38056.

The Application: Virgin Mobile seeks ETC designation only for the limited purpose of participation in the Universal Service Fund’s (USF) Lifeline program as a prepaid wireless carrier. Virgin Mobile is not seeking authority to offer services in high-cost areas under the Federal Universal Service Fund (FUSF) or the Texas Universal Service Fund (TUSF). Pursuant to 47 U.S.C. §214(e), the commission, either upon its own motion or upon request, shall designate qualifying common carriers as ETCs for service areas set forth by the commission. Virgin Mobile seeks ETC designation in the non-rural areas served by AT&T Texas and Verizon Southwest as shown on the maps attached to the application as Exhibit 2, and for the non-rural wire centers in Texas in which the company’s spectrum covers an entire wire center, as listed in Exhibit 3 of the application.

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 (888) 782-8477. The deadline for intervention in this proceeding is April 9, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All comments should reference Docket Number 38056.

TRD-201001354  
Adriana A. Gonzales  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: March 17, 2010

Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on March 16, 2010, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of 321 Communications, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 38059.

Applicant intends to provide facilities-based/UNE, and resold telecommunications services.

Applicant’s requested SPCOA geographic area includes the entire State of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than April 9, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 38059.

TRD-201001375  
Adriana A. Gonzales  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: March 17, 2010

Notice of Application for Waiver of Denial of Numbering Resources

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on March 11, 2010, for waiver of denial by the Pooling Administrator (PA) of Southwestern Bell Telephone Company d/b/a AT&T Texas’ (AT&T Texas) request for assignment of one (1) thousand-blocks in the Marshall rate center.

Docket Title and Number: Petition of Southwestern Bell Telephone Company d/b/a AT&T Texas for Waiver of Denial of Numbering Resources, Docket Number 38046.

The Application: AT&T Texas submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because AT&T Texas did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477 no later than April 2, 2010. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at (800) 735-2989. All comments should reference Docket Number 38046.

TRD-201001316  
Adriana A. Gonzales  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: March 15, 2010

Notice of Application to Amend Certificated Service Area Boundaries

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on March 10, 2010, for an amendment to certificated service area boundaries within Travis County, Texas.

Docket Style and Number: Joint Application of Bluebonnet Electric Cooperative, Inc. and the City of Austin d/b/a Austin Energy to amend a Certificate of Convenience and Necessity for Service Area Boundaries within Travis County. Docket Number 38041.
The Application: Bluebonnet Electric Cooperative, Inc. (BEC) and the City of Austin d/b/a Austin Energy (Austin Energy) filed with the Public Utility Commission of Texas (commission) an application for multiple service area boundary changes to which BEC and Austin Energy have agreed.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas no later than April 2, 2010 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 38041.

TRD-201001315
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: March 15, 2010

Notice of Application Under Public Utility Regulatory Act §39.158


The Application: NRG Energy, Inc. (Applicant) has filed an application for approval of the proposed purchase by NRG of 100% of the ownership interests in South Trent Wind LLC (Transaction). South Trent Wind LLC owns the South Trent Wind Project, a 101.2 MW wind generating facility located in Nolan and Taylor Counties, Texas (South Trent Wind Project) within the ERCOT power region. As a result of the proposed Transaction, South Trent Wind LLC will become a wholly owned, indirect subsidiary of NRG. The Applicant is required to obtain commission approval before closing the Transaction if the electricity to be offered for sale in a power region will exceed one percent of the total electricity for sale in the power region if the application is approved. Under §39.154, a power generation company may not own and control more than 20% of the installed generation capacity located in, or capable of delivering electricity to a power region in Texas.

South Trent Wind LLC owns no other generation facilities in ERCOT. The combined, direct and indirectly owned generation owned and controlled by NRG following the acquisition of South Trent Wind LLC will exceed one percent of the installed generation capacity in ERCOT. However, the Application indicates that the Transaction will not result in a violation of the installed capacity share limitations set forth in PURA §39.154.

Persons who wish to intervene in the proceeding or comment upon the action sought should file with the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, a request to intervene or comment no later than April 19, 2010, or call the commission’s Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Docket Number 38029.

TRD-201001352

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: March 17, 2010

Texas Department of Transportation

Aviation Division - Request for Proposal for Aviation Engineering Services

The Aviation Division of the Texas Department of Transportation (TxDOT) is soliciting proposals from engineering firms pursuant to Government Code, Chapter 2254, Subchapter A, for the design and location of fueling systems for a five year contract period.

TxDOT CSJ No.10AVNFUEL

Project Description and Work to be performed:

TxDOT Aviation Division intends to enter into a contract with a prime provider for engineering design services for certain components of Avgas and/or Jet A fueling systems at various general aviation airports across the state. The selected provider may be responsible for the site selection and design of containment facility and associated fueling appurtenances needed for each airport. Work will require frequent contact with the sponsor representative of each airport and the TxDOT Aviation project manager. The actual construction and installation of the fueling system will be performed under a separate construction manager-at-risk (CMR) contract. The selected engineer will work in consultation with the CMR in an effort to reduce fueling facility costs and ensure timely completion of each project. The proposing firm should demonstrate a familiarity with designing general aviation fueling systems.

Interested firms shall utilize the latest version of Form AVN-550, titled “Aviation Engineering Services Proposal”. The form may be requested from TxDOT Aviation Division, 125 East 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 at http://www.txdot.gov/business/projects/aviation.htm. The form may not be altered in any way. FIRM SHOULD NOT COMPLETE PAGE 5 “PROJECT DESIGN SCHEDULE” OF THE FORM AVN-550. THE WORK SCHEDULE WILL BE NEGOTIATED WITH THE SELECTED PROVIDER PER PROJECT AS ASSIGNED. FIRM SHOULD SIMPLY OMIT THIS PAGE. 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 six pages of data plus two optional pages consisting of an illustration page and a proposal summary page. A prime provider may only submit one proposal. If a prime provider submits more than one proposal, that provider will be disqualified. 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 AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-550 must be received by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than April 20, 2010, 4:00
p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Edie Stimach.

The consultant selection committee will be composed of Aviation Division staff members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. Below are the criteria for evaluating engineering proposals for fueling systems. 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. If interviews are conducted, selection will be made following interviews.

If there are any procedural questions, please contact Amy Slaughter, Grant Manager at 1-800-68-PILOT at extension 4519. For technical questions, please contact Bijan Jamalabad at 1-800-68-PILOT at extension 4529.

CRITERIA FOR EVALUATING ENGINEERING PROPOSALS FOR FUELING SYSTEM

1. Recent experience of the project team with comparable airport projects within the past five years. (25 points)

   Does the proposal indicate that the project team has recent direct experience on other general aviation airports designing similar improvements to those proposed? [Sources of information: Aviation Project Design Team Form, Recent Relevant Airport Experience Form, and possibly the Proposal Summary.]

2. Proposed technical approach. (25 points)

   Does the engineer provide evidence of understanding of the project; and any unique engineering aspects associated with the proposed project and how to address them? [Sources of information: Proposed Technical Approach to Project, and possibly the Proposal Summary.]

3. Ability to meet schedules and deadlines. (25 points)

   Does the proposed design team have sufficient time to work on this project? Has the firm demonstrated an ability to meet design schedules in the past? [Sources of information: Aviation Project Design Team Form, Recent Relevant Airport Experience Form, and possibly the Proposal Summary.]

4. General aviation fueling system experience. (25 points)

   Optimum experience will indicate that the project team has recent experience on general aviation airports with similar improvements to those proposed. Prior experience should include contact reference information for a minimum of three (3) previously completed fueling system projects, and the year in which each was constructed. [Source of information: Relevant Airport Experience form; proposed Technical Approach to Project; and possibly the Proposal Summary]

TRD-2010001261
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: March 12, 2010

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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.

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 35 (2010) is cited as follows: 35 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 “35 TexReg 2 issue date,” while on the opposite page, page 3, in the lower-right-hand corner, would be written “issue date 35 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 at: 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 website information, call the Texas Register at (512) 463-5561.

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 and Parts (using Arabic 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 (800-356-6548), and West Publishing Company (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 Index of Rules. The Index of Rules is published cumulatively in the blue-cover quarterly indexes to the Texas Register. If a rule has changed during the time period covered by the table, the rule’s TAC number will be printed with the Texas Register page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

**TITLE 1. ADMINISTRATION**

**Part 4. Office of the Secretary of State**

**Chapter 91. Texas Register**

40 TAC §3.704.................................................950 (P)